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### Ethical Compass: Celebration

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## ETHICAL COMPASS

# Ethical Compass: Celebration<sup>1</sup>

By Professor Elayne E. Greenberg

### Introduction

Let's raise our glasses to toast our esteemed Chief Judge, the Honorable Janet DiFiore, for making Presumptive ADR a central part of the New York Office of Court Administration's civil case management. In her February 26, 2019 State of the Judiciary Address, Chief Judge Janet DiFiore announced that the New York Office of Court Administration is formally adopting Presumptive ADR. Although all ADR processes such as settlement conferences, negotiations, arbitration and early neutral evaluation may be used to help settle cases, a focus will be on mediation. Presumptive ADR will apply to almost all civil cases filed in New York Supreme, Civil and Surrogate Courts or NYC Civil Court.

Presumptive ADR recognizes several realities of legal practice, all realities that members of the NYSBA Dispute Resolution Section have worked tirelessly to bring to the forefront. Even though most cases eventually settle, it is preferable if cases settle earlier. When parties settle their cases earlier, they are less likely to waste money on litigation, less likely to entrench themselves in positions, and more likely to accept realistic settlements that they honor. For the past 30 years, court-annexed ADR programs have become a favored process to help settle cases. The Presumptive ADR initiative will build on and expand existing court-annexed ADR programs, making it a preferential approach for civil case management.

Plans are already underway to implement Presumptive ADR. Each judicial district in New York has already submitted its ADR plan for the chief judge's approval. These plans are currently being reviewed, and some are already being implemented. The chief judge has also convened the ADR Advisory Committee chaired by John Kiernan, of which I am a member, to help serve as a resource. Our Dispute Resolution Section has established a Presumptive ADR Task Force. Finally, there is a coordinated effort to educate members of the judiciary and bar about how they can advance the goals of Presumptive ADR.

As with any celebration noting the achievement of a long-sought professional advancement, our celebration of Presumptive ADR is an opportunity for us to reflect on how far we've come in promoting ADR and congratulate all those who helped advance this desired goal. It is also an opportunity for us to roll up our sleeves and begin to help actualize this new settlement-centric reality.

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The challenge of Presumptive ADR is how to institutionalize procedures and practices for the expanded volume of cases that are to be directed to ADR so that quality and integrity of each ADR process is maintained. Implementing Presumptive ADR also challenges us to rethink best practices for each ADR process, revisit what are the appropriate training and qualifications of neutrals and reconcile the competing views about the answers to these questions.

To meet this challenge, Presumptive ADR requires a large number of trained and committed lawyers and neutrals to help with both implementation and quality control. How can you help implement the Presumptive ADR initiative? This discussion will continue in two parts. First, I will discuss the ethical obligations lawyers, mediators and neutrals have to help advance the goals of Presumptive ADR. Given these ethical mandates, I will identify affirmative steps lawyers and neutrals can take to support New York's case management shift to a settlement-centric practice.

### The Ethical Codes That Guide Our Obligation to Advance Presumptive ADR

The N.Y. Rules of Professional Conduct,<sup>2</sup> the ABA Model Standards of Conduct for Mediators,<sup>3</sup> and the ABA Code of Ethics for Arbitrators in Commercial Disputes<sup>4</sup> offer some ethical guidance about how lawyers, mediators and arbitrators may contribute to advancing Presumptive ADR. The N.Y. Rules of Professional Conduct for lawyers and the ABA Code of Ethics for Arbitrators in Commercial

Disputes provide that the ethical mandate to support such initiatives such as Presumptive ADR is a “responsibility.” Distinguishably, the ABA Model Standards of Conduct for Mediators clarifies what actions mediators should take to advance mediation practice. It explicitly provides that mediators *should*, inter alia, foster diversity, help make mediation economically accessible, educate the public about mediation, and mentor new mediators. The relevant parts of the three ethical codes are as follows:

The Preamble of the New York Rules of Professional Conduct, provides in relevant part:

A LAWYER’S RESPONSIBILITIES [1]” A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with **special responsibility for the quality of justice**. . . As an officer of the legal system, each lawyer has a duty to **seek improvement of the law; and to promote access to the legal system and the administration of justice**. . .” (emphasis added)<sup>5</sup>

The ABA Code of Ethics for Arbitrators in Commercial Disputes:

CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS. A. **An arbitrator has a responsibility** not only to the parties but also to **the process of arbitration itself**, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator **should recognize a responsibility to the public**, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.<sup>6</sup>

The ABA Model Standards of Conduct for Mediators explicitly provides that mediators have an ethical obligation to advance mediation practice:

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE: A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following: 1. **Fostering diversity** within the field of mediation. 2. Striving to **make mediation accessible** to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate. 3.

Participating in research when given the opportunity, including **obtaining participant feedback when appropriate**. 4. **Participating in outreach and education efforts** to assist the public in developing an improved understanding of, and appreciation for, mediation. 5. Assisting newer mediators through **training, mentoring and networking**. B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and **work together with other mediators to improve the profession** and better serve people in conflict.<sup>7</sup>

Given these ethical mandates, I suggest in the next section how you might do your part to advance Presumptive ADR.

### What You Can Do to Advance the Goals of Presumptive ADR:

**Help diversify the profession.** Litigants should be able to have neutrals who are like them. Mentor diverse neutrals. Take affirmative steps to select and recommend diverse neutrals for your cases and those of your colleagues.

**Get trained.** If you are not yet an arbitrator, mediator or neutral evaluation, consider taking training and becoming one. Presumptive ADR is expected to generate an overabundance of cases. More neutrals will be needed. In addition, the culture will change to include a settlement or mediation opportunity in all cases, mediation training will help you distinguish yourself as an advocate.

**Join court rosters.** Trained mediators, arbitrators and early neutral evaluators: let your administrative judge know you are available to serve as a neutral to help resolve court-connected cases.

**Volunteer to serve as a pro bono neutral.** Generously agree to provide pro bono neutral services.

**Mentor.** Serve as a mentor to newly trained neutrals.

**Get past “no.”** Use your ADR skills to engage with ADR-resistant colleagues who insist “Not for my cases” or “I tried it once and it doesn’t work.” Have conversations of understanding.

**Unbundle your legal services by volunteering to represent unrepresented parties in arbitration, mediation or early neutral evaluation.**

**Improve existing ADR programs.** Re-think how the existing ADR programs might be further strengthened and made more effective.

*Review the ethical codes prior to each case.* The ethical codes are necessary anchors to help you deliver good quality practice to the ADR process.

Support Presumptive ADR by seeing how it applies to *your own cases*. Which of your cases will benefit from early settlement and what can you do to make that happen? If one ADR process doesn't work, what can you do differently? Try others.

*Educate* your clients about Presumptive ADR and explain how it might help for their case.

*Law schools* can rethink the learning opportunities Presumptive ADR offers your students.

*Collaborate with courts and bar associations* that are offering CLE and public education programs about Presumptive ADR.

*There are no monolithic views on what constitutes good practice for each ADR process.* The Presumptive ADR initiative compels us to rethink ideas such as confidentiality parameters, qualifications for neutrals, what constitutes conflicts of interest and the acceptable way for each ADR process to be conducted. Now is the time for us to have conversations of understanding to reconcile different points of view.

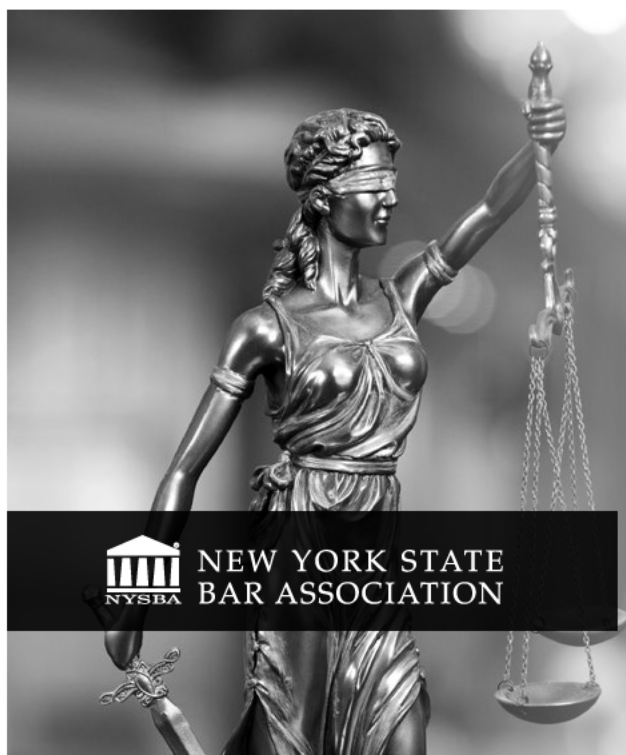
## Going Forward

In our celebratory mode, we must also be mindful of how we each can contribute to making Presumptive ADR a meaningful reality. Of course, we can pontificate more about what we can each do. For now, the better strategy is to "Just do it!"

## Endnotes

1. Kool & the Gang, "Celebration" (De-Lite Records 1980).
2. NY CLS Rules Prof. Conduct (2009) (amended 2018).
3. Model Standards of Conduct for Mediators (Am. Arbitration Ass'n, Am. Bar Ass'n, Ass'n for Conflict Resol. 2005).
4. *Code of Ethics for Arbitrators in Commercial Dispute*, Am. Bar Ass'n (2014) [https://www.americanbar.org/groups/dispute\\_resolution/resources/Ethics/Code\\_Ethics\\_Com\\_Arb\\_An](https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_An)
5. Model Standards of Conduct for Mediators at 3.
6. *Code of Ethics for Arbitrators in Commercial Dispute*, Am. Bar Ass'n (2014) [https://www.americanbar.org/groups/dispute\\_resolution/resources/Ethics/Code\\_Ethics\\_Com\\_Arb\\_Ann/](https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_Ann/).
7. Model Standards of Conduct for Mediators at 9.

For more information about the Dispute Resolution Section of NYSBA, please visit [www.nysba.org/committees/dispute-resolution-section](http://www.nysba.org/committees/dispute-resolution-section).



## COMMITTEE ON PROFESSIONAL ETHICS ETHICS OPINIONS

The Committee on Professional Ethics has issued over 1100 opinions since 1964. It provides opinions to attorneys concerning questions of an attorney's own proposed ethical conduct under the New York Rules of Professional Conduct. It cannot provide opinions concerning conduct that has already taken place or the conduct of another attorney. When an inquiry is submitted, it will be researched to determine whether an existing opinion is responsive to the question. If no opinions exist, the inquiry will be forwarded to the committee for preparation of an opinion.

Inquiries submitted to the committee are confidential, and no identifying information is included in the opinion.

If you have a question about your own proposed conduct, send your inquiry to the committee by **email to [ethics@nysba.org](mailto:ethics@nysba.org)**; by **fax to (518) 487-5564**; or by **mail to One Elk Street, Albany, NY 12207**. Please include in all inquiries your name, mailing address, telephone and email address.

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