MEDIATING WITH MUNICIPALITIES: EFFECTIVE USE OF ADR TO RESOLVE EMPLOYMENT AND PUBLIC POLICY DISPUTES

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I. The Vanishing Trial and The Emergence of ADR

In December 2003, the American Bar Association noted that the percentage of filed civil cases going to trial had fallen from 11% in 1962 to 1.8% in 2002. In state court, the number of jury trials has declined by more than 25%, with less than 1% of such cases filed actually being tried over a 25 year period. With these figures in mind, it is important to understand that many of these litigated cases, including claims against municipalities, are being settled through various forms of alternative dispute resolution ("ADR"), such as negotiation, mediation and arbitration. ADR has not only reduced our reliance on trials to resolve civil disputes, it also has served to address a broader category of disputes. In the municipal context, these include inter-municipal and public policy disagreements. Private litigants are turning to ADR for a straightforward reason: the process saves time and money and results in forms of settlement that are not available in litigation.

In Westchester County, the County tax levy increased by 4.5% for 2006. Of that total budget, the County's line item for litigation expense alone is $696,678. In the City of Yonkers, the line item for litigation expense is $1,217,412. By comparison, the much smaller Towns of North Castle and New Castle each have line items for litigation of $80,000. Of course, none of these figures reflect the time and energy of either salaried employees or elected officials in dealing with formal disputes. These expenditures of time and money are a significant drain on municipal resources that increased use of ADR will dramatically reduce. Accordingly, because of its cost-saving potential alone, municipalities should look for opportunities to utilize ADR.

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II. Description of ADR Techniques

ADR is a term that covers a range of methods that are designed to resolve disputes short of trial. Of course, ADR does not replace the trial system. Some cases will always need to be tried to a jury or before a court. ADR both supplements and complements the court system by making other processes available to resolve disputes in a cost effective and time efficient manner, and without the "I win, you lose" outcome of litigation.

As previously mentioned, a number of methods of ADR are available. Most familiar is negotiation. Negotiation, however, is only the first step in attempting to resolve a dispute. The process of negotiation encompasses all of the efforts by the parties to settle their differences without the intervention of a neutral third-party and is voluntary and nonbinding.

Arbitration is more like litigation; it involves a decision by a neutral party by which the disputants agree to be bound. Often it will involve some form of discovery and testimony by witnesses at the arbitration hearing.

Mediation lies between negotiation and arbitration. Like arbitration, it involves an impartial and neutral third-party. The mediator, however, will assist the parties in attempting to reach a voluntary agreement to the dispute. The mediator is not a judge; therefore, he or she will not find for one side or the other. Rather, the mediator listens to both sides and tries to find common ground between the parties. The mediator does not assess blame or dictate a settlement; he or she has no authority to render binding decisions. The parties retain control over the process and make their own decisions about what type of settlement will be reached, if any.

In "facilitative" mediation, the mediator usually deals with the parties or their attorneys either jointly or in separate "caucuses." In facilitative mediation, the mediator generally does not express an opinion on the merits of the case or its settlement value. Rather he or she helps the parties define the issues, overcome barriers to communication, and explore alternative methods of resolving their disputes. In "evaluative" mediation, by contrast, the mediator may recommend a specific settlement or a particular resolution of the dispute.

The advantages of mediation include: (i) mediation is relatively inexpensive as compared to litigating a case to its conclusion; (ii) the mediation proceeding is generally confidential; (iii) mediation reduces the emotional barriers to communication and helps parties focus on their interests; (iv) the parties control the process and decide the outcome, as opposed to having the decision rendered for them by a court or other trier of fact; and, as a result, (v) mediation is more likely than litigation to result in a solution satisfactory to both parties.

The disadvantages of mediation may include: (i) in the absence of Court direction, the attendance and participation of parties cannot be compelled; thus the parties must agree to participate; (ii) the results are not binding and must be effectuated by a written settlement agreement; and, (iii) whether mediation succeeds may depend on the skill of the mediator.

Mediation should be considered in almost any situation where negotiations have reached a stalemate. For effective mediation, the parties need to have sufficient information on which to base their discussions, and a good faith desire, incentive and authority to resolve the dispute.

A mediator is sometimes able to break an impasse by proposing settlement options.

Disputing parties may be more receptive to a neutral's proposals than to proposals from the other party. Thus, each party can explore the neutral's proposal without compromising prior positions.

Mediation is also helpful when there is a likelihood that the parties will continue to deal with each other in the future. This can include disputes between employees and employers, landlord and tenant, customers and suppliers, neighborhood disputes, and issues between insurers and insureds. In these types of cases, the parties have an incentive to address their underlying problems and come to mutual decisions. This is more constructive to foster an ongoing relationship than the hostility that may result from litigation.

III. Statutory Support of ADR

A. Federal Support of ADR

The federal government supports ADR in civil disputes through statutes and administrative guidelines. For example, the Administrative Dispute Resolution Act of 1996 (the "ADRA") authorizes federal agencies to use ADR in a number of types of disputes, and exempts mediation from disclosure under the Freedom of Information Act. Under the ADRA, federal agencies must adopt a policy for implementing ADR. *See* 5 U.S.C. §574(a), (b).

The Alternative Dispute Resolution Act of 1998 requires each federal district court to develop ADR procedures for use in civil actions. While this Act encourages use of all forms of ADR, it does not mandate procedures. Instead, district courts are free to fashion their own programs. *See* 28 U.S.C. §651. Here in New York, both the Eastern and Southern Districts have established ADR programs. Recently, the Western District has implemented a pilot program that will operate from January 1, 2006, to December 31, 2006.

Presidential Executive Order 12998 requires government litigation counsel to be trained in ADR techniques and encourages these techniques to be used in civil disputes to which any federal agency is a party. 61 Fed. Reg. 4729 §1(c)(2).

The Department of Justice has also implemented policies for using ADR. The methods include arbitration, mediation, early neutral evaluation, neutral expert evaluation, mini-trials and summary jury trials. *See* 61 Fed. Reg. 36896. The Internal Revenue Service Restructuring and Reform Act of 1998, 26 USC §7123, directs the IRS to make both arbitration and mediation more widely available. The procedures include fast track mediation to help taxpayers resolve disputes involving audits, trust fund recovery penalties, and other collection actions. *See* IRS Pub. 3605 (Rev. 12-2001).

B. New York State Support of ADR

New York courts have a number of court-annexed mediation programs, including rules for those programs. For example, the Commercial Division for Supreme Court, New York County, has authorized Justices to direct parties to participate in ADR. Under the Commercial Division Rules (Guide To The Alternative Dispute Resolution Program for Supreme Court, Civil Branch New York County Commercial Division, dated February 1999), the Justices direct ADR (usually mediation) at the earliest practical moment. Generally speaking, the Order of Reference will stay all proceedings, including discovery and motions, for a period of 45 days from the date the identity of the neutral is confirmed.

The confirmation date usually commences a 30 day time period in which the mandatory mediation is conducted. Further mediation sessions can be conducted after the initial session, so long as they are within the 45 day period. These sessions must be personally attended by the party, or, in the case of a corporation, by a representative possessing all pertinent facts and authority to settle without consultation, which may involve more than one person. The Rules provide for complete confidentiality. The mediators serve on a pro bono panel.

The Commercial Division for the Supreme Court of Westchester County has recently instituted a pilot ADR program (Rules of The Alternative Dispute Resolution Program, Supreme Court of the State of New York Commercial Division-County of Westchester, dated December 2005). Under the Rules, the Court encourages the resolution of disputes and early settlement of claims. Like New York County's program, the first session must be conducted within 30 days of the confirmation date, and court proceedings are stayed for a period of 45 days. The Rules also require complete confidentiality. Any person designated to serve as a neutral shall be immune from suit. The neutrals in the ADR program receive fees.

On December 29, 2005, the Commercial Division Rules in New York, Part 202 of the Uniform Civil Rules of the Supreme and County, were amended (§ 202.70) to provide that, in Westchester County, certain actions with a monetary threshold of over $100,000 will be heard in the Commercial Division. Among others, these will include actions involving breach of contract arising out of business dealings, employment agreements not including claims involving principally alleged discriminatory practices, environmental insurance coverage, commercial insurance, U.C.C. cases, and transactions with commercial banks and other financial institutions. The Commercial Division Rules became effective on January 17, 2006. Hence, these types of suits involving municipalities should be subject to the Commercial Division's Pilot ADR Program.

Appellate Court Programs in New York have also been instituted. The First Department uses a "Pre-Argument Conference Program." I participated as counsel in a mediation where a First Department's Special Master reached out to invite non-parties to the appeal. The Second Department has instituted a Civil Action Management Program.

The New York State Legislature has passed legislation to enable the creation of Community Dispute Resolution Centers ("CDRCs") to resolve neighborhood and interpersonal disputes. The goal is to offer a "quick, inexpensive and voluntary resolution of disagreements, while at the same time serving the overall public interest by permitting the criminal justice community to concentrate its resources on more serious criminal matters." McKinney's Session Laws of New York at 2630. In Westchester County, the CDRC is Westchester Mediation Center ("WMC"). WMC is principally involved with local neighborhood disputes. It has established mediation programs in a number of Westchester Town and City Courts.

Finally, although not applicable to municipalities, the recently issued Matrimonial Commission Report to Chief Judge Kaye recommended a number of sweeping changes to the disposition of matrimonial cases in New York. The Report concludes that ADR, particularly mediation, should be expanded in matrimonial cases, particularly those involving children.

IV. Types of Municipal Disputes In Which To Use ADR

The principal form of ADR used by municipalities is mediation. As mentioned, mediation is helpful in disputes involving ongoing relationships, which is often the case with municipalities. Since mediation encourages parties to work together, it is conducive to maintaining relationships rather than destroying them.

Municipal employment cases, including discrimination and sexual harassment cases, are particularly well-suited for mediation. In such emotionally charged cases, emotions can be defused in the conciliatory atmosphere of mediation. Creative solutions may also be devised that are not available in litigation, such as rehiring, reassignment, or rescission of termination, so that a new job may be easier to procure. Alternatively, the claimant may be willing to settle for a letter of reference, or a public apology by the alleged harasser – something no jury will ever award. As noted above, the Commercial Division Rules will require employment cases to be heard in the Commercial Division, unless they principally involve discrimination. Hence, the garden-variety employment case against a municipality will be subject to the Court's ADR Program.

Municipal suits involving breach of contract for goods or services, suppliers, vendors, environmental and commercial insurance, and dealings with financial institutions are suitable for mediation. These suits would also be subject to Westchester Supreme Court's Commercial ADR Program.

Mediation is also a good way to bring non-monetary solutions to the settlement table in certain categories of cases. For example, in defamation cases an apology or retraction from the opposing party will often facilitate settlement. Other common municipal claims include § 1983 claims, claims of false arrest, personal injury claims and other business disputes.

Mediation has been widely used in labor relations, including labor grievances, workplace disputes and wrongful termination claims. It also can be useful in resolving disputes with multiple parties and issues, such as environmental, land use and community disputes. Creative and flexible ways to address these interests can be explored in constructively. As discussed more fully below, the mediation of public policy disputes, including land use disputes, is a subject unto itself and may also present mediation opportunities for a municipality.

V. Confidentiality of Mediation Communications

Section 849-a(6) of the New York Judiciary Law, which established CDRCs, provides, in pertinent part, as follows:

> "Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication."

In the CDRC Program, the statutory confidentiality provisions of Judiciary Law section 849-a (6) cannot be waived by the parties. The leading case in this area is *People*

v. *Snyder*, 129 Misc.2d 1137, 492 N.Y.S. 2d 890 (Sup. Ct. Erie Cty. 1985). In this case, the District Attorney subpoenaed all records pertaining to a mediation in which a defendant in a criminal trial had participated. The Court found that the grant of the subpoena would subvert the Legislature's clear intention to guarantee the confidentiality of CRDC records. The Court noted that the statute as drafted did not permit waiver of confidentiality.

While § 849-a(6) applies only to CDRCs, the rule of confidentiality has been expanded into other areas and situations. For example, in *Bauerle v. Baulere*, 206 AD.2d 937 616 N.Y.S.2d 275 (4th Dep't 1994), the Appellate Division held that a lawyer who undertakes to act as mediator may not thereafter act as counsel for one of the parties to the dispute, even though the mediation was not pursued after the initial meeting. The Court held that "disclosures that are relevant to the subject of mediation or litigation made in the context of mediation are deemed confidential even though the adversary party is present." Similarly, in *Bernard v. Galen Group, Inc.*, 901 F.Supp. 778 (S.D.N.Y. 1995), the Court sanctioned counsel for disclosing the dollar amounts of settlement offers made at a Court-ordered mediation. The mediation involved a copyright case referred to mediation under the Southern District's ADR program.

Aside from Section 849-a(6), no other statutory privilege exists to protect confidentiality in mediation within the jurisdiction of New York State. Interestingly, however, the Matrimonial Commission Report also recommended a court rule or statutory amendment to provide for confidentiality in mediation in all cases except for abuse cases. Furthermore, it should be noted that mediators generally require the parties to execute a mediation agreement which usually will require confidentiality.

VI. Helpful Tips For Mediating The Litigated Case

As attorneys, we are all aware of what factors contribute to a good result at trial and what makes a good or great trial attorney. In view of its continued growth, the same understanding must now be gained as to mediation. When should a municipality seek mediation? What can municipalities do to achieve the best result possible? What makes for a better mediation? What role should the Town Manager play in the mediation process? With these questions in mind, set forth below are some tips for participating in a successful mediation.

A. Mediate Early

Often, mediation does not take place until after costly and time-consuming discovery in a civil action. If mediation does not take place early, it may be a lost opportunity. Municipalities should consider pre-action mediation, including an early and detailed exchange of views on any dispute and an early, overall resolution to avoid litigation costs. Where agreeable, parties should exchange mediation briefs that detail liability and damages. Information sharing and information gathering is key to identifying common ground amongst the parties.

One issue is the nature of the lawyer's obligation to discuss or suggest mediation to the client. A number of jurisdictions require a lawyer to discuss ADR with the client. For example, in Texas "counsel shall discuss the appropriateness of ADR in the litigation with their clients and with opposing counsel." S.D. Tex. L.R. 20(A)(1). California requires that

counsel "shall advise" clients regarding the availability of ADR options. *See* Sacremento Super. & Municipal Ct. L.R. App. A.

New York's Commercial Division Rules were amended to provide that counsel "shall consult" about the use of ADR prior to the preliminary or compliance conference. These Rules went into effect on January 17, 2006. In a commercial action, all parties "shall be obligated to attempt in good faith to achieve early resolution of their dispute by use of appropriate forms of non-binding Alternative Dispute Resolution."

B. Mediator Selection

It is always important to ask for the mediator's qualifications, experience and training. While one party may prefer the appointment of a retired judge, it may be useful to consider use of other ADR professionals. It is true that, to settle a claim, one party may only need to hear the settlement value of a claim as estimated by a retired judge. In some cases, however, it may be appropriate to consider a mediator with subject matter expertise. A mediator with knowledge of a particular subject matter and training in the process may be helpful in assisting the parties to achieve a resolution.

C. Prepare for Mediation as Though it is Trial

It is just as important to prepare for mediation as it is to prepare for trial. Careful review of the facts is key. No stone should be left unturned. The municipality should know jury verdicts in similar cases, court decisions and other objective criteria by which to evaluate damages and settlement possibilities. It is equally important to prepare the municipality /client for the mediation. Counsel should consider what may be the best and worst case alternatives to a negotiated settlement so that a reasonable settlement can be determined.

The client should be advised that the purpose of mediation is not fact-finding, but a mechanism to assist the parties in finding a joint solution. The mediator is not a judge and he or she will not find in favor of one side or the other. It is also important to set aside sufficient time for the mediation. In a complex case, this means at least one day. This will allow the mediator and the parties to focus their entire attention on resolving the dispute.

D. Presentation at Mediation

The presenting party, usually represented counsel, must have total command of the facts and law. Counsel should be prepared to educate the other side and must display a complete, clear understanding of the applicable legal principles. This will enhance credibility with the mediator, as well as with the opposing side. No exaggerations of fact or overstatements should be made lest credibility be lost during the negotiation process. Use experts to assist the mediator in understanding the technical issues in a case. These experts can include accountants or other damages experts who should clearly set forth in detail the position on damages. In certain cases, counsel should consider bringing the client to the mediation. This could be the Town Administrator or Town Manager. The client may be helpful in explaining the position to the mediator. Finally, confidentiality should be reviewed throughout the mediation in terms of what information disclosed to the mediator can be revealed to the other side.

It is useful for a representative of the municipality's insurance carrier to attend the mediation. In some jurisdictions other than New York, such attendance may be required. In instances where an insurance representative does not attend, counsel should have the requisite authority and the representative should be available by telephone. Where insurance coverage issues are involved, the mediation may be of a nature where those coverage issues as well as the principle settlement are negotiated. The mediation will proceed more smoothly if those coverage issues are discussed and addressed in advance. An open dialogue with the insurance carrier should always be pursued because its funds are often involved in false arrest, malicious prosecution, wrongful termination and other garden-variety personal injury claims against municipalities.

E. Finalization of Mediated Settlement

The success of a mediation is measured by whether the parties have reached common ground and effectuated their settlement. Where a settlement is reached, it is incumbent that it be properly documented immediately. Therefore, it is good practice to prepare a Memorandum of Understanding at the conclusion of a successful mediation, which should be executed by the authorized parties. Those parties must either be present at the mediation or available by facsimile. Only then can one be sure that the effort undertaken to settle will be fully binding and not subject to second-guessing or reevaluation.

VII. Mediating The Public Policy Dispute

A. Consensus Building Defined

The utilization of mediation to resolve disputes or "solve problems" of public policy is an interesting concept. Many dispute resolution specialists, both theorists and practitioners, postulate that improvements must be made to our system of representative democracy. The ADR community has offered methods to "improve" the ways in which to resolve these public disputes. The principal method has been characterized as "negotiated approaches to consensus building."

Consensus building calls for informed, face to face interaction among representatives chosen to act for all stakeholders (or interested parties) with the assistance of a mediator in an effort to reach consensus on a particular issue or problem. The process, implemented after an initial assessment at which stakeholder interests are identified, calls for agreed upon ground rules and a work plan. The mediator then works with the stakeholders to invent options with a view to crafting a solution agreed to by the parties. While the intent is to achieve complete unanimity, the reality may only be unanimity of a large majority of stakeholders. At bottom, the process is intended to save municipal time and money, enhance confidence in local government and provide better solutions to problems.

Consensus building, like the mediation of litigated disputes, is a supplement, complement or adjunct to conventional decision-making. It does not replace the traditional method of decision-making. In a consensus building scenario, elected officials retain their ultimate decision making authority. Since the intent of the process is to achieve as complete a consensus as possible, elected officials may find a mediated agreement politically advantageous. They actually may have more control over the process than they otherwise

might have by keeping all stakeholders involved in the process.

B. Examples of Consensus Building in Westchester County and Elsewhere

The concept of "consensus building" is easier to define than to put in practice. A few examples are useful for review. One often cited case is former Governor Mario Cuomo's involvement in the New York City Housing Authority's announcement to build seven large low-income apartment buildings in Forest Hills in the 1970's. When violence was threatened in 1972, Mayor John Lindsay appointed Mario Cuomo to act as a "fact finder" and to recommend a solution. Although he rejected being called a mediator, Cuomo was in fact a mediator of the "evaluative" kind. He gathered the facts, explored options, and then recommended his own compromise which included smaller buildings and ownership by low-income residents.

Budgetary issues have also been the subject of mediation. In Westchester County, the Town of Greenburgh is mediating a dispute with six of its incorporated villages over the allocation of taxes and revenues. The Town is comprised of unincorporated Greenburgh and the residents of the incorporated villages of Ardsley, Hastings-on-Hudson, Dobbs Ferry, Elmsford, Irvington and Tarrytown. The dispute arises out of the manner in which the Town Budget allocates funds between the Town wide "A Budget" (applicable to both unincorporated and village taxpayers) and the unincorporated area "B Budget" (applicable to only unincorporated taxpayers). A resident of the unincorporated area brought suit against the Town regarding the allocation of funds for the acquisition of Taxter Ridge, a 200 acre parcel. About 183 acres are located in the unincorporated area of East Irvington; about 17 acres are located in Tarrytown, one of the incorporated villages. The Town sought to finance the acquisition and maintenance of Taxter Ridge solely by taxing the citizens of the unincorporated area.

The suit resulted in a lower court ruling that the payment for parkland must be imposed on all taxpayers Town wide, which will require reallocation of taxes. The matter is on appeal to the Second Department, and the budgetary implications are enormous. For example, how will Greenburgh now allocate its mortgage tax? What about the allocation of charges for Town-acquired ambulances? The Town of Greenburgh has asked retired Supreme Court Justice Samuel G. Fredman to mediate. It can only be hoped that the parties arrive at a solution.

In 2005, the Town of New Castle had its first contested election in ten years, largely the result of controversy over the adoption of the Chappaqua Hamlet Plan. One aspect of the Hamlet Plan called for the reconfiguration of the Village Green from what is now a "Y" intersection into a "T" intersection. Traffic lights were called for in the Hamlet Plan. The Town Board has formed committees to study the design and may retain the services of a professional facilitator or mediator in order to achieve community consensus.

In 1980, Russell Train, mediated the dispute over whether Consolidated Edison Company should construct a hydroelectric plant at Storm King Mountain near the Hudson River. The dispute had been in litigation for about fifteen years. Working in full session and in small committees, the mediation lasted about a year and a half. Through mediation, the parties were able to accomplish what they could not in litigation: an end to their dispute. Consolidated Edison agreed to abandon the project. In exchange, environmental groups agreed to drop their claims that utility companies construct costly cooling towers at other sites.

One need go no further than the *Journal News* to learn about other costly and acrimonious "border wars" that have been waged here in Westchester County. These border wars are damaging to the local economy both in terms of waste of time and resources, and in the credibility of local government. New Rochelle's litigation with Mamaroneck is only one example. That battle over the placement of IKEA near the border with Mamaroneck resulted in costly litigation including the applicability of the due process and equal protection clauses to claims between municipalities. IKEA eventually abandoned the project. Port Chester's dispute with Rye over the approval of Home Depot is another example. Greenburgh's dispute with Yonkers over the approval of Stew Leonard's is still another. Some form of inter-municipal consensus building, particularly at an early stage, would have saved taxpayer dollars and resources and resulted in a better outcome.

CONCLUSION

Municipalities should avail themselves of opportunities to resolve disputes in both litigated cases and in the area of public policy disputes. In particular, mediation of the litigated case is an effective, cost-saving measure and should be considered in all cases. Where appropriate, municipalities should give consideration to mediating public policy disputes as well.

The Legislature can do more to enhance the development of ADR in general and mediation in particular. The Legislature should consider amending the CPLR to provide for confidentiality in mediation of all litigated cases, not just CDRC cases, in a manner consistent with case law. This will provide further incentive for parties to mediate. The Legislature could also require attorneys to discuss ADR options with their clients or, at the very least, with opposing counsel before a preliminary court conference. Finally, the practicing bar should be leaders in fostering cooperation and establishing mechanisms to allow mediation to flourish in New York.