The Hard Peace: Mediation in New York's Med-NJ Program

By Michele Kern-Rappy and Adam J. Halper

The story begins with a decision. The decision is to try to settle a dispute. Lawyers advise their clients to go to mediation for two reasons. First, the case is at an early stage and settlement looks advantageous in light of costly litigation. Second, one or both sides have already spent enough time and money in litigation to know that they want it to end. The decision leads to a chain of predictable events. On the day of the mediation, counsel and parties convene briefly in a joint session. This is followed by separate "caucus" sessions. Each side spends long stretches of the day waiting to hear what the other is offering and how far they will move. The negotiation is binary. Resolution is driven by assessment of continued cost and a subjective risk analysis of the case. In this format, there is no resolution to either the underlying conflict or the legal conflict. Rather, the question is whether one side has offered enough money for the other side to drop their claims. Often,resolution is made without real opportunity for parties to take advantage of mediation's strongest attribute—self-determination.

What if this story read differently? New York's Med-NJ Program (Mediation Non-Jury) is trying to answer this question. The Med-NJ Program, composed of one mediator and law student interns, is housed in New York County guided by Deputy Chief Administrative Judge for the City of New York, Deborah Kaplan. Med-NJ accepts multi-party commercial and construction matters, co-op/condo disputes and matrimonial cases, along with any other civil litigation. The Med-NJ Program operates with a mission statement of a sort—R.A.I.S.E. to a higher ground. The acronym stands for Recognition, Active listening and Acknowledgement, Insight, Solutions and End with Agreement. Although lofty, in practice these words are the operating instructions for how mediations at Med-NJ are conducted. The words represent the milestones counsel and parties need to reach, however briefly, to find a resolution through self-determination.

It starts from the opening page. The Med-NJ Program requires pre-mediation statements from counsel that address: Client needs and goals, as opposed to positions; economic and non-economic interests; and how the parties will manage financial risk, maintain relationships and what each side considers to be a fair ending to the dispute. Further, each side must describe the dispute and their weaknesses, as viewed from the perspective of their adversary. Regurgitating the pleadings and positions in one's submission is not acceptable. Rather, from the very beginning, Med-NJ requests that counsel acknowledge the totality of the conflict and the many shades of gray within it.

Rapport and Recognition: The first in-person meeting is an attorneys-only session with the mediator. The goal of the first session is for the mediator to remind counsel that if they broaden their view of the case, they will likely agree on many elements. For example, the mediator will ask counsel to assume each other's position and discuss the case. This is not a mock trial or argument. It is done by design to have counsel engage in a different kind of evaluation of the case in its entirety. Standing in the shoes of the other side, one's evaluation no matter how

firmly held, simply changes. Notably and often, this is counsel's favorite part of the meeting. It plays to their fundamental strengths as attorneys. Finally, the mediator advises counsel on how they should prepare their clients for the joint session. At the end of this discussion, a date is chosen for the full mediation.

Active Listening and Acknowledgement: At the second session the mediator begins by caucusing briefly with both sides. Venting and recitation of positions is largely discouraged. Instead, the mediator advises for the upcoming joint session that parties and counsel listen for themes common to both sides. What are we worried about that they are worried about too? Listen without reacting. Maintain a civil tone. Be ready to say why you came today as well as why you think they came. The mediator instructs counsel and their clients to be ready to discuss the conflict instead of merely arguing it.

After this caucus, there is a joint session and it is not optional. Many of Med-NJ's mediations are cases that have been in civil litigation for years. Still, parties have not had a meaningful chance to hear each other during any of that time. For this reason, the joint session is led by the parties and the results can be surprising. For example, in a wrongful death case, the plaintiff/spouse's initial demand was for several million dollars. After both doctor and widower listened to each other for an hour, the doctor agreed to create a foundation connected to the deceased wife's illness and to provide start-up funding for it. The case was resolved for more, but this offer was a significant piece of the settlement. A few hours earlier, neither had wanted to be in the same room with the other.

Remarkably, the chapters of this kind of resolution are drafted using the essential and first tool of any mediator—active listening. The mediator asks questions of both parties, reflects understanding and asks that the parties listen to each other's answers and reflect back on what they have heard. Although this is a common technique in other mediation venues, doing it in a joint session is practically unheard of outside of family, matrimonial and community dispute cases. Attorneys and their clients think of this kind of exchange as too great a risk. However, positions change when both sides are asked to engage in other than a positional manner. The defendant's insurance adjuster makes a different recommendation after listening to the plaintiff describe their pain post-accident and the effect it has had on his family. Restaurant workers listen to customers who allege discrimination based on non-service. After discussion, the restaurant agrees to implement diversity and bias training for their employees. Without active listening and acknowledgement,there is only the wide delta of money that separates these sides. Listening is the bridge.

Insight and Solutions: At the end of the joint session, the mediator caucuses with each side again. However, now the focus is on brainstorming solutions. Not unlike the joint session, these caucuses are very different at Med-NJ. Rarely does the mediator carry numbers back and forth. Rather, the mediator transmits (with approval) any and all ideas on how to resolve the case as well as ranges for the settlement of monetary damages. Because of what has come before, brainstorming and problem solving solutions are easier to discuss. Attorneys tend to craft

messages and proposals that reflect the hoped-for-results of both sides. They move forward differently because they have also moved out of purely position-based bargaining.

End in Resolution: After a short time, the mediator convenes a second joint session. By this point, counsel and parties have likely proposed several ideas for resolution. Without attribution, recent noteworthy settlement proposals include, a company and a former employee accused of violating a non-compete clause, will now become joint venturers. The former employee will pay a percentage of earnings to the former company. In return, the company helps the former employee begin their business. In a breach of contract case, former friends who had been united in their vision of a new business, each blame the other for the subsequent failure of the enterprise. Instead of focusing endlessly on the interpretation of six lines of contract, the mediator asks the parties why the business failed. Both sides admit fear of public embarrassment led to issues of mistrust and to both sides prematurely quitting on each other with their money and effort. They settled a short time later—based largely on the exchanged currency of truth. Through an affirmative request for all sides to think differently about the conflict and collaborate on a resolution, their perspectives are transformed.

A common piece of feedback regarding the Med-NJ Program is that it operates more like an unfolding story rather than a mediation. The common elements of any story, broadly, are characters, setting, plot, conflict and resolution. Traditionally, mediations are only concerned with the last two of these elements. The Med-NJ Program asks parties and counsel to enumerate every element of what a conflict really is—a narrative of dispute, loss, frustration and how to move beyond those feelings to arrive at a result other than protracted litigation. At the end of a long day, the result is not a binary choice of settling or not. The result is agency. The result is self-determination.

Michele Kern-Rappy, the Senior Settlement Coordinator and Mediator for Supreme Court, New York County, Civil Division, is a seasoned ADR professional for the Unified Court System with over 33 years of experience. Ms. Kern-Rappy is responsible for creating the rules and procedures for the Mediation-Non Jury Part , and facilitating the settlement of numerous complex cases and matters from 2014 to the present.

Adam J. Halper is a mediator and attorney. His practice focuses on representing and mediating with those engaged in family, matrimonial, employment and trusts and estates disputes. He has represented clients in a variety of litigation and transactional areas. Currently, in addition to his private practice, he is on the roster of neutrals for the American Arbitration Association and for several state and federal courts.