



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #20

REQUESTED ACTION: Approval of a request from the Dispute Resolution Section to submit proposed rules on court-annexed mediation to the Office of Court Administration.

Attached is a report from the Dispute Resolution Section recommending the adoption of court rules with respect to a court-annexed mediation program. As set forth in the report, mediation provides a number of benefits, including reducing costs if used early in litigation; in addition, it would help courts alleviate reduced resources and case backlog. The proposed court rules would direct each civil court in New York to adopt a suitable court-annexed mediation program.

This proposal initially was presented to you at the January 30, 2014 meeting. The section was asked to amend the proposal to make clear that parties' participation in mediation would be voluntary and that parties could not be required to incur costs as a result of participating in mediation.

The report will be presented at the April 4 meeting by Section vice-chair David C. Singer and Stephen A. Hochman, co-chair of the Section's Committee on ADR in the Courts.

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DISPUTE RESOLUTION SECTION
NEW YORK STATE BAR ASSOCIATION

RECOMMENDATIONS FOR THE
ADOPTION OF COURT-ANNEXED
MEDIATION THROUGHOUT THE
COURTS OF NEW YORK STATE (CIVIL)

I. INTRODUCTION

Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. Litigation can become a lengthy, stressful and expensive proposition. As some disputes will invariably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution as an alternative to traditional litigation. Mediation is often responsive to party needs in a way that is not possible in a court proceeding.

Mediation has applicability in a variety of substantive practice areas of law. It has become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation is routinely incorporated into contract dispute resolution clauses as a method of choice for resolving disputes that may arise in the future. Even in the absence of such clauses, mediation is routinely used after problems arise and the parties are seeking an appropriate means to resolve their disputes.

Some judges have the authority to order the parties to mediation, such as New York judges in the Matrimonial Parts and Commercial Divisions of the Supreme Court of New York County and other counties. In addition, many judges who recognize how the parties can benefit from the early settlement of cases will suggest that the parties try mediation even in the absence of a court rule authorizing the judges to order mediation.

A court-annexed mediation program provides an invaluable resource for courts, helping alleviate the burden of reduced resources and the backlog of cases. Some courts in New York State have already adopted court-annexed mediation programs, and those courts are listed in the New York State Court System website.

The recommendations set forth herein include that each New York State Court (Civil) adopt an appropriate court-annexed mediation program available to litigants on a voluntary basis. Such programs may be adopted at no cost and, therefore, no additional funding would be required.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, and expenses, and waste of time." Abraham Lincoln (circa 1850)

II. THE BENEFITS OF MEDIATION

Mediation Works. Mediation is a confidential process in which the parties engage a neutral third person to work with them to resolve their dispute. The growth of mediation over the past twenty years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their own solutions in a less confrontational setting that can preserve relationships and result in a win/win instead of a win/lose. Any case that can be settled can be mediated, and there are many reasons why mediation works after direct settlement negotiations have failed.

Although over 90% of lawsuits are settled even without the benefits of mediation, the settlements are often not reached until late in the litigation process, sometimes not until the eve or middle of trial. Mediation is most effective in reducing costs if used early in the litigation.

A mediator can assist the parties and their attorneys in obtaining the information they need in order to evaluate their case more quickly and efficiently than by formal discovery. With sufficient information in hand, the mediator can help establish the most conducive framework for facilitating settlement.

Confidential Process and Result. Mediation is conducted in private -- only the mediator, the parties and their representatives participate. The mediator is generally bound not to divulge any information disclosed in the mediation. Confidentiality agreements are often entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved. Mediation can enable parties to avoid the publicity that may accompany a trial that is open to the public.

The Mediator plays a crucial role. The mediator's goal is to help the parties settle their differences in a manner that meets their needs and interests and is preferable to trial. An experienced mediator can serve as a sounding board, help identify and frame the relevant issues, help the parties make an objective risk/reward and cost/benefit analysis between settling their dispute or proceeding to trial, foster creative solutions, and assist in removing impediments to settlement. A mediator can help generate solutions not previously considered by the parties that may reach beyond the scope of the remedies available in court. The mediator can also provide the patience and persistence that is often necessary to help parties reach resolution.

Mediators can help parties communicate constructively and overcome hostilities that may interfere with making a rational assessment of settlement compared to the costs and uncertainties of trial. Mediators can also serve as unbiased “agents of reality” who help the parties objectively assess their litigation alternatives. Attorney advocates may have advocacy bias, whereby they tend to believe in and overvalue the strength of their client’s case. A mediator without any stake in the outcome can be effective in helping the parties be realistic as to the likely outcome at trial.

By meeting privately in confidential sessions with each party and counsel, participants can speak with total candor. The mediator can help the parties ascertain their real interests and concerns and objectively assess the weaknesses as well as the strengths of their case. This process typically leads to a mutually agreeable settlement.

Opportunity to Listen and be Heard. Parties to mediation have the opportunity to air their views and positions in the presence of their adversaries. The process can thus provide a catharsis for the parties that can engender a willingness to resolve differences between them. Moreover, since they are heard in the presence of a neutral mediator, the parties often feel that they have had their “day in court.”

More creative and long-lasting solutions. A mediator has no authority to make or impose any resolution on the parties. Any resolution through mediation is solely voluntary and at the discretion of the parties. Parties develop and create their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular lifestyle and business interests rather than being limited by the remedies available in court. Because the parties are involved in crafting their own solutions, the solutions reached are more likely to be lasting ones, adhered to by the parties.

Lessens the Emotional Burden. Since mediation can be conducted sooner, more quickly, less expensively and in a less adversarial manner than in court, there can be less of an emotional burden on the individuals involved than if they were to proceed to trial. Furthermore, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing unfavorable business conduct which gave rise to the dispute. This is avoided in mediation.

Mediation Can Save An Existing Relationship. The litigation process can be stressful, time consuming, costly and personally painful. In the end, the parties are often unable to continue or restart any relationship. In contrast, in mediation, disputes -- such as those between an employer and employee or partners in a partnership -- can be resolved in manner that saves business and personal relationships that, ultimately, the parties would prefer to preserve.

Avoiding the Uncertainty of Trial. Resolution through mediation avoids the inherently uncertain outcome of a trial and enables the parties to control the outcome. Moreover, since resolution during mediation is completely voluntary, the option to proceed to trial is not lost in the event the mediation is not successful in resolving all issues.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often -- in 24% of cases -- they suffered a greater cost -- an average of \$1.1 million -- when they did make the wrong decision.¹

III. PROPOSALS FOR COURT-ANNEXED MEDIATION IN NEW YORK COURTS

We recommend that the Administrative Board of the New York State Courts adopt Rules relating to court-annexed mediation, as follows:

1. Each civil court of New York shall adopt a suitable court-annexed mediation program.
2. When implementing their respective programs under this Rule, courts shall not direct that mediation be conducted against a party's wishes in circumstances where the party would be obligated to incur fees to the mediator or in cases involving allegations of domestic violence.
3. Nothing in this Rule shall confer authority on a judge to require, as opposed to encourage, mediation in circumstances where a judge does not otherwise have such authority.

Some courts may wish to adopt a court-annexed mediation program at no cost so that no additional funding would be required. Attached hereto as Exhibit A is a sample mediation program template that could be adopted at no additional cost to the court.

Some courts may wish to adopt an administered court-annexed mediation program even if it requires additional funding. For such courts, we refer to the court-annexed mediation programs that have been adopted by the Commercial Division of the N.Y.S. Supreme Court, New York County, and the U.S. District Court for the Eastern District of New York. It should be noted that, under these and other programs, qualified

¹ Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, (Springer Science + Business Media LLC New York publ.) (2010)

mediators have been willing to serve on a reduced fee or even pro bono basis for at least a portion of their time.

The Dispute Resolution Section of the New York State Bar Association is available to assist in the development of court-annexed mediation programs. Members of the Dispute Resolution Section are also available to provide training and other support regarding court-annexed mediation.

Respectfully submitted,

DISPUTE RESOLUTION SECTION
NEW YORK STATE BAR ASSOCIATION

Subcommittee for the
Adoption of Court-Annexed
Mediation in the Courts of New York State (Civil)

Stephen A. Hochman, Co-Chair
David C. Singer, Co-Chair
Linda Dardis
Gail Davis
Julian S. Millstein
Jacqueline W. Silbermann
Robert Steele
Irene C. Warshauer

Instructions to Counsel

1. Please complete the attached Case Information Sheet and return it to the Clerk of the Court within ____ (__) days from the date hereof. The Case Information Sheet should be agreed to and signed by all counsel. Any disputes or questions with respect to the Case Information Sheet should be addressed to the Clerk of the Court.
2. Counsel shall have an opportunity, prior to the due date for the return of the Case Information Sheet, to agree on the selection of a mediator (who may, but need not, be listed on any available court roster of mediators or the NYSBA mediation registry). If counsel can agree to the selection of a mediator who is willing to accept the assignment, counsel shall indicate that fact in paragraph 1 of the attached Report to the Court and sign and return the Report to the Court together with the Case Information Sheet.
3. If all counsel have not agreed on the selection of a mediator who is willing and available to serve by the due date of the Case Information Sheet pursuant to paragraph 2 above, then the following shall apply:
 - a. If the judicial district has an ADR administrator (*e.g.*, in its Commercial Division), then the Court will deliver the Case Information Sheet to the ADR administrator, in which case the Report to the Court should be signed by all counsel and returned to the Court together with the Case Information Sheet. The ADR administrator will then follow his or her normal procedure for the selection of a mediator. All parties shall comply with the applicable mediation rules as specified by the ADR administrator.
 - b. If the judicial district does not have an ADR administrator, each counsel shall be entitled to nominate a maximum of three mediators who are willing and available to serve, and a list of all nominees, together with their bios or resumes, shall be attached to the Report to the Court, without identifying the counsel that has nominated each of the nominees listed. The Report to the Court, together with the list of nominees and attached bios or resumes, should be signed by all counsel and returned to the Court within ____ (__) days after the due date for the return of the Case Information Sheet, and the Court will select the mediator from the list of nominees. Unless the Clerk of the Court directs otherwise, all parties shall comply with the mediation rules of the Commercial Division, Supreme Court, New York County, which are available at www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf.
4. Within ____ (__) days after the selection of the mediator pursuant to one of the above procedures, counsel shall contact the mediator to schedule the mediation as promptly as possible. Unless the Court or the parties agree otherwise, the litigation shall not be stayed during the pendency of the mediation

Case Information Sheet

NAME OF CASE

(Plaintiff(s))

Index No.:

(Defendant(s))

Counsel for Plaintiff(s)

Name:
Address:
Phone No.:
E-mail:

Counsel for
Defendant(s)

Third-Party Plaintiff(s)

Name(s):

Third-Party
Defendant(s)

Counsel for Third-Party Plaintiff(s)

Name:
Address:
Phone No.:
E-mail:

Counsel for Third-Party
Defendant(s)

Description of the Case:

(Briefly describe the nature of the claim(s), including the ad damnum clause)

Report to the Court

1. If all counsel have agreed on the selection of a mediator as per paragraph 2 of the Instructions to Counsel, please check this box. []

2. By your signatures below, you have agreed to notify the Clerk of the Court of the date that each of the following has occurred:

a. The date that counsel for all parties has had at least one preliminary conference with the mediator;

b. The date that all parties, their respective counsel and the mediator have agreed will be the date for the commencement of the mediation.

c. The date that the mediation has been completed.

3. By your signature below, each of you has agreed to abide by the provisions contained in the Instructions to Counsel.

Counsel for Plaintiff(s)

Date:_____

Counsel for Defendant(s)

Date:_____

Counsel for Third-Party Plaintiff(s)

Date:_____

Counsel for Third-Party Defendant(s)

Date:_____