

The Underutilization of Mediation in New York and What Should Be Done About It?

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History certainly shows us that mediation, arbitration, and other forms of dispute resolution have been with us from time immemorial. Many recognize the significant benefits to mediation such as party autonomy, reduced costs, confidentiality, preservation of business and family relationships, as well as agreements that can provide speedier relief and offer some remedies that would not be available in court. At the same time, people have also recognized that there are some limitations to the process of mediation: it is not appropriate for all types of cases; it does not always result in settlement; it lacks the procedural and constitutional protections guaranteed in the federal and state courts; legal precedents cannot be set in mediation, and it often lacks a formal discovery process. However, in many cases where the advantages of mediation outweigh the disadvantages, the mediation process is either not explored at all or underutilized. With all the benefits in cases where mediation is appropriate and would provide overwhelming benefits to parties as well as to the civil justice system, why is it underutilized in New York both in court-annexed programs and among ADR provider organizations.¹ Or it may be more appropriate to ask, given the success of many (but not all) of the mediation pilot programs in New York, is it time to ensure a more comprehensive approach to ADR in New York and admit that perhaps the time may be ripe (in cases where mediation is appropriate) to move to a post-pilot era?

It is critical that we are asking this question now and it is particularly appropriate now as judges, such as Victor Marrero of the Southern District of New York, have raised alarms and concerns about the litigious, costly and time-consuming nature of modern day litigation.² Judge Marrero notes that, in 1938, when the Federal Rules of Civil Procedure (the Rules) became effective, a promise was made of a new federal system “to secure just, speedy and inexpensive determinations of every action and proceeding.”³ He posits that the original intent of the Rules is not being realized in modern practice, pointing to surveys in which practicing attorneys strongly object to the expansive discovery as too costly and identify abuse by lawyers as a major reason for the cost and motion practice which exacts a high economic and social price borne by everyone who relies on the justice system. Indeed, the American College of Trial Lawyers has joined the chorus seeking reforms, acknowledging the abuses of the trial system. All of this suggests that grand opportunities are available for the growing number of lawyers,

young and old, including former federal and state court judges, who are entering the field of problem solving through the tools and processes of ADR, the most popular of which, and widely used throughout the country, is mediation.

It is also appropriate at this time that we address ADR in a more comprehensive fashion across the state and federal courts in New York, two years after the passing of former Chief Judge Judith S. Kaye, who was a true pioneer and leader for promoting the expansion of ADR pilot programs.⁴ Judge Kaye would be pleased to know that the current Chief Judges both in the state and federal courts, those who administer the ADR court-annexed programs as well as leaders of the New York Bar Association and ADR provider organizations, seem motivated to take mediation to a new level in New York.

It is also important to recognize that much of the infrastructure to expand mediation programs already exists. In the past 10 years, courts and private companies focused on the collection of ADR data,⁵ particularly those centered in New York, have carefully kept data covering many issues from type of cases, to settlement rates, to time elapsed from the filing of a complaint to a mediation, to help us determine whether these pilot programs have been successful. Keeping data is critical because if a problem cannot be measured then it cannot be managed or improved. The key data from these programs leads to the overwhelming conclusion that given the success of these programs—in unclogging dockets and in giving litigants access to justice while minimizing the cost of pursuing it—requires that we think critically about how to continue to expand mediation programs. We hope to suggest some measures that can allow New York to be a leader in innovative measures to increase the utilization of mediation

I. The Historical and Comparative Perspective for Increasing the Use of Mediation

In the 1970s, courts were increasingly jammed by backlogs and protracted litigation. Harvard Law Professor Frank Sander, a pioneer in the field of ADR, was struck by the contrast between litigation and labor arbitrations, in which disputes were resolved quickly, inexpensively and effectively outside the courts. He delivered a paper at the Pound Conference advocating for a “multi-door courthouse” where a court official would assess the nature of each new dispute during intake and decide on an optimal

dispute resolution process (such as litigation, mediation, arbitration, conciliation, etc.).⁶ In a 1990 published debate, Sanders argued “[if] our mission is to help clients find the best way to handle their disputes . . . why shouldn’t it be part of our explicit professional obligation to canvass those options with clients? How would we feel about a doctor who suggested surgery without exploring other choices?”⁷

The Alternative Dispute Resolution Act of 1998 authorized federal courts to compel parties to participate in certain ADR processes, including mediation. 28 U.S.C. § 652(a) (2006). Although the federal district courts started designing and testing ADR procedures as early as the 1970s, the biggest growth in ADR came in response to the Civil Justice Reform Act of 1990 (CJRA).⁸ The CJRA required the federal district courts to develop cost and delay reduction plans including the adoption of six case management principles, the sixth of which was alternative dispute resolution.⁹ Many of the 94 district courts developed ADR procedures in response to this statute.¹⁰ With regard to the federal courts generally, 25 districts, or a little more than a quarter of the courts, provide only general authorization to use ADR, authorize settlement conferences only, or authorize both.¹¹

It is noteworthy that the Second Circuit was the first federal appellate court to implement a mediation program, doing so in 1974, well before other circuits.¹² Moreover, the Southern District was among the first courts to pilot an ADR program in the 1980s, initially offering a small arbitration program in collaboration with the American Arbitration Association (AAA).¹³ In response to the CJRA, the Southern District gathered an advisory group of judges and members of the bar and recommended a mediation pilot as the best option for compliance with the CJRA.

Other countries and states seem to have fashioned more comprehensive mediation programs by creating automatic referral programs, often structured with certain exclusions and opt-outs, resolving most cases without need for court intervention. A survey of countries where mediation is often automatic and resolves a significant number of cases found that countries such as Italy¹⁴ and Turkey are at the forefront of using mediation as a primary method of resolving disputes.¹⁵ A recent empirical study from researchers at the Singapore Management University has identified three crucial factors that influence the likelihood of a case being settled through mediation: timing of the referral, the stage of the litigation, and the level of contentiousness between the disputants when deciding whether to refer a case to mediation.¹⁶ Surveys conducted in connection with the recent Global Pound Conference found that Asia Pacific voters indicated that the stakeholder with the greatest responsibility to effect change in dispute resolution policy is governments or ministries of justice.¹⁷ Most surveys of courts in the United States point to California 2,932 cases referred in

District Court for the Central District of California, success rate of 50 percent, and 3,828 cases referred in District Court for the Northern District of California, success rate of 55 percent),¹⁸ state courts in Florida (over 100,000 cases diverted to mandatory mediation programs)¹⁹ and state courts in Texas as being at the forefront of expanding automatic referrals programs or expanding the types of cases that are subject to mediation,²⁰ ranging from mortgage foreclosures to patent matters.²¹ While number of cases and success rates are not the only measure of success, post mediation surveys in all of these jurisdictions reflect satisfaction rates often exceeding 85 percent.²²

A snapshot of dispute resolution in 2018 would show mediation gaining in popularity, especially as clients get discouraged as the price of arbitration at times can look like the price of a protracted litigation, although efforts are being made to address this issue. This all points to an increasing need for our ADR provider organizations and our courts to be ready to meet the challenge with mediation programs, whether automatic or within a judges’ discretion, covering a range of suitable cases. Mandatory mediation should no longer be considered an oxymoron.²³

II. New York Federal District Courts

In 2006, the Western District of New York under the leadership of Judge William Skretny became the first federal court in New York to establish automatic mediation programs as the initial default process to be followed in almost all civil cases (with “opt-out provisions”²⁴ and exclusions for limited matters such as habeas corpus, extraordinary writs, bankruptcy and social security appeals-cases that predominately implicate issues of public policy). The pilot was initially limited to the caseload of Judge Skretny, who pioneered the program. As he has recounted, he did not see much of an alternative because civil cases going through a litigation process in the district took 67 months from the initial filing to completion. The mediation pilot became a permanent program in 2010 due to its success of resolving nearly 78 percent of cases without court involvement.²⁵ The Northern District adopted a similar mandatory program.²⁶ Although statistics in the Northern District were considerably lower because only cases that settled at the mediation were counted, if the measure included cases which settled within 60 days of the mediation, then the success rate would likely mimic that of the Western District.²⁷ The success of automatic mediation in these districts of New York necessitate that we examine expansion of mediation programs in the Southern and Eastern Districts of New York as well as in state courts.

A significant expansion of the Southern District mediation program took place in 2011.²⁸ The program has progressed and expanded each year in a number of ways: by creating new automatic pilots in terms of the types of cases; establishing mediation discovery protocols tailored to piloted programs; instituting the establishment

of mediator advisory panels; focusing on efforts to increase diversity,²⁹ and assessing the quality of mediators through surveys and required observations of mediations prior to being an active member of the court's panel.³⁰ The Southern District of New York's mediation program is narrower than the Western or Northern District in that the only cases that are automatically sent to mediation are counseled employment discrimination cases, certain Fair Labor Standards Act (FLSA) cases³¹ which a designated group of judges are piloting, and certain 1983 police misconduct cases. The Southern District program relies on volunteer mediators (currently 315) who are assigned by the court. Taking a leadership role in ensuring a more successful and even-handed mediation, the former Chief Judge, Loretta Preska, issued specific discovery protocols outlining information to be exchanged in advance of a scheduled mediation session in employment cases in order to level the playing field and increase the likelihood of a successful mediation (Admin. Order M10-468). Following the success of the employment discovery protocol³² and recognizing the importance in creating a systemic initial exchange of information, in 2018 a new discovery protocol was established for FLSA matters.³³

Another protocol for Americans with Disabilities Act cases modeled on a local rule in the Northern District of California requiring a meet-and-confer at the site and an exchange of information on attorneys' fees prior to a mediation is expected to be released by Chief Judge Coleen McMahon shortly. It is likely that a new discovery protocol might also be considered for personal injury matters. It is worth considering whether the discovery protocols established for employment and now FLSA cases should have an impact beyond these types of cases either by adopting them for novel areas or simply by educating the bar on how to approach early stages of discovery in mediations. In recognizing the importance of discovery protocols to improve mediation programs, the Southern District of New York has taken an important leadership role that others are likely to consider.

Court administrators of ADR programs have been active partners with judges in seeking to expand mediation programs. The data carefully cultivated over the years and publicly available should be quite convincing that pilot programs should expand and most have become permanent programs after years of success.³⁴ For example, the Southern District's 2016 Annual Report demonstrates an impressive settlement rate as well as a fairly short period from the time of referral to conclusion of the mediation. The data shows rates of settlement as follows: 48 percent for pro se employment; 50 percent for other employment cases that are under the automatic referral program, whereas judge-referred employment was 78 percent; FLSA cases (whether judge-referred or part of the automatic pilot program) was 65 percent. Limited sampling for other matters still showed promise—contracts, 55 percent; personal injury and products liability, 75 percent; copyright, 78 percent, and property cases, 83

percent. On average, the time from case referral to mediation was 92 days, compared with 11 months if the case is closed by a court action or decision.

In 1991, through its Civil Justice Expense and Delay Plan, the Eastern District of New York introduced programs for court-annexed mediation and early neutral evaluation (ENE). The program is not automatic but referrals take place when a judge or magistrate decides to refer a case. In addition, all matters involving damages of \$100,000 or less were referred to a pre-existing program of court-annexed arbitration. Unlike court-annexed arbitration, which was mandatory, court-annexed mediation can only be ordered on consent of the parties. The parties in cases filed in the Eastern District program pay their mediators and may choose from the panel of mediators on court roster or select a neutral outside of the roster. The settlement rate of 67 percent is similar to other federal courts in New York.

What is particularly interesting about the statistics of both the Eastern and Southern Districts, showing great promise for the future course of mediation in New York, is how the numbers of cases that were handled through the mediation programs have grown over the course of a relatively short time span. For example, the annual reports show that in the Eastern District (which is only automatic for FLSA cases) there was a 38 percent increase in discretionary referrals.³⁵ Nevertheless, the number of cases were still modest by comparison to jurisdictions outside of New York. The statistics for 2016, the most recent year, show a total number of referrals of 306 cases (nearly half of which were FLSA) compared to the oldest available statistics from 2000 of 180 referrals.³⁶ More optimism can be found in the statistics from the Southern District, which show that in 2016, a total of 1,072 cases were referred to mediation (340 of which were non-automatic) compared to the oldest statistics available on the court website from 2011 showing a total of 567 cases. Over five years, the Southern District mediation program has nearly doubled the number of cases and nearly half were cases outside of the court's automatic program.

Between 2009 and today, Superstorm Sandy became the impetus for an insurance mediation program both at the AAA and in the Eastern District of New York, which offers a "lesson plan" that might help increase the use of mediation in New York. The key to success in these programs included the fact that (1) the courts and AAA understood the need to educate mediators about insurance claims (in effect to provide subject area expertise)—this was done by requiring continuing legal education on insurance law even for those lawyers who had some expertise in insurance matters; and (2) the mediators were paid but at a below market rate, which was a compromise between mediators serving on a pro bono basis and an industry stepping up to address the crisis (it helped that Governor Cuomo paved the way for these programs). One of the noteworthy lessons of the mediation programs

that were created in the wake of Storm Sandy was the importance of partnership efforts and collaboration that took place between an ADR organization and the federal courts, which “stepped into the void” to address the multitude of insurance claims. During this same period, another crisis brought on by the Great Recession resulted in New York state and its bankruptcy courts responding with the creation of new mediation programs when a pressing need developed for a sudden increase in new categories of cases, such as the mortgage foreclosures that began to overwhelm the court dockets.³⁷ For example, in 2011 the Bankruptcy Court for the Southern District of New York began a “Loss Mitigation” mediation program, which achieved loan modifications in 56 percent of the matters that were mediated.³⁸ The Eastern District and the AAA Storm Sandy mediation programs provide a critical lesson of how mediation programs can provide justice to individuals without costly litigation. Over 6,000 claims were resolved at a 65 percent settlement rate at the AAA and over 201 claims were resolved in the Eastern District with a similar settlement rate.³⁹ In fact, the success of the Storm Sandy mediation in the Eastern District was the impetus for the creation of an automatic FLSA mediation program. The automatic referral programs need not be limited to mass disaster claims or to an influx of cases that suddenly overwhelm the courts such as recent FLSA cases or real estate matters resulting from the economic pain caused by the Great Recession.⁴⁰ These pilots have been fashioned as a reactive response to a need. The Eastern District demonstrated great creativity in establishing the Sandy and FLSA automatic mediation programs; however, the fact that the 2016 Report shows that 92 percent of referrals are from Magistrate Judges indicates that there should be substantial room for growth. A more proactive method might be considered in growing the mediation programs even further and learning from unsuccessful pilots.

III. New York State Courts

As the former chair of the City Bar ADR Committee, Chris Stern Hyman has recently noted, “requiring mediation in civil cases in New York state courts has been less successful than similar efforts in the federal district courts, so I think addressing impediments in New York state courts is a priority and in particular the need for data about what works.”⁴¹

The New York State Unified Court System (NYSUCS) offers parties access to free or reduced-fee mediation in family law, general civil and commercial law disputes with services that are available in many courthouses and in the Community Dispute Resolution Centers (CDRC) located in almost all of New York State’s counties. Disputes such as neighbor disagreements, custody and visitation arrangements, and landlord-tenant issues are well suited to mediation. Any New Yorker, regardless of whether he or she has a case pending in court, may use CDRC services in their local area. Over 1,000 profession-

ally trained mediators volunteer their services for matters referred for arbitration and mediation including consumer-merchant disputes, matrimonial property division issues and automobile Lemon Law cases.⁴² Reduced-fee collaborative divorce and mediation services may also be available to eligible couples through the court-sponsored Collaborative Family Law Center (CFLC).⁴³

A two-year pilot that began in the summer of 2014 in the First Judicial District provided that each week, every fifth Commercial Division case in which a Request for Judicial Intervention (RJI) was filed was referred to a Mandatory Mediation Pilot Project.⁴⁴ The statistics from the 2014 Commercial Pilot have not been published publicly but that pilot did not meet expectations for a variety of reasons.⁴⁵ In 2017, a new pilot project (“the Non-Division Pilot Project”) was established in which certain commercial cases not assigned to Commercial Division justices are automatically referred to mandatory mediation. The cases in the Non-Division Pilot Project are newly filed commercial cases (excluding pro se matters) assigned to a Justice outside the Division and in which the filer of the RJI designated the matter as a “contract” case and sought a preliminary conference. In adopting the 2017 mandatory mediation pilot project, the task force indicated that it was inspired by the positive track records of courts that had already required parties to mediate, noting similar programs were piloted in Florida, Texas, California and New Jersey.⁴⁶ In designing the new Non-Division Pilot, program administrators applied the lessons learned from the earlier pilot. Rather than randomly assigning every fifth case to mediation, the pilot limits the universe of eligible cases to contract disputes where the RJI sought a preliminary conference. Cases with dispositive motions already pending are excepted from inclusion in the program. The pilot created an upfront preliminary conference parts designed for cases within the program to exempt inappropriate cases. For cases within the program, discovery targets would be set with counsel. The lessons learned from the earlier pilot provided parameters for a new pilot that has already met with more success.⁴⁷ Pilots were also initiated in Surrogate’s Court in New York and are in development in Westchester County. In addition, pilots are also in development in Housing Court in Kings County. Pilots are also in development in the matrimonial parts of the Supreme Court in Suffolk and Kings Counties and in New York City Family Court and Ithaca Family Court.⁴⁸

As recently as April 20, 2018, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks announced a plan to revitalize the court system’s commitment to ADR by building upon the court’s existing statewide programs and promoting the goals of the Chief Judge’s Excellence Initiative to enhance the quality of justice⁴⁹ and by forming an Advisory Committee led by John S. Kiernan, the outgoing president of the New York City Bar Association. It is expected that this initiative will be considering the expansion of presumptive ADR programs

in the Supreme Court, lower civil courts, Family Court and Surrogate's Courts.

IV. Online Dispute Resolution in New York

A few years ago, some academics noted that online dispute resolution (ODR) "has not come into its own and would not manifest fully until videoconferencing became more ubiquitous."⁵⁰ Technology changes rapidly, yet perhaps at a slower pace in the public court systems. With regard to ODR, Europe and Canada seem to be on the cutting edge when it comes to integrating ODR in many types of cases, including housing and divorce.⁵¹ The first players in the field of ODR were big online retailers.⁵² The Ministry of British Columbia created the Civil Resolution Tribunal, which is considered the most forward-thinking court of ODR in the world (handling 14,000 cases in its first seven months of operations). In 2013 the European Commission launched a website for ADR of consumer disputes concerning goods and services purchased online, and in 2016 due to the importance of introducing the ODR mechanism the UNCITRAL adopted the Technical Notes on Online Dispute Resolution.⁵³ In the United States, the National Center for Technology & Dispute Resolution was founded in 1998 at the University of Massachusetts by professors Ethan Katsh and Janet Rifkin, who are considered leading promoters in the United States for ODR.⁵⁴ Michigan, Ohio and Utah have been recognized as states that have successfully piloted ODR.⁵⁵

New York is lagging behind in ODR and is still considered to be in the exploratory stages. In practice, in the Second Circuit Court Appeals Mediation Program (CAMP) technology tools are utilized, allowing for private and virtual joint sessions mediated by telephone because parties and their counsel are often located far from Manhattan. By contrast, computer-based mediations are conducted through applications that are especially designed to analyze the data entered by each participant and to suggest compromise solutions to the parties' disputes. This latter type of ODR does not appear to be used in New York although programs have begun to explore it.

Blueprint for Increasing Utilization of Mediation In New York: Review of Past Surveys

Two reports provide a blueprint to begin to explore what has changed over the past 15 years and what can be done to increase the utilization of mediation in New York. One report is from the New York State Bar Association (NYSBA) Mediation Committee "Mediation Through the Eyes of New York Litigators" dated 2011 (NYSBA Report). The other report is from the Committee on Federal Courts Association of the Bar of the City of New York, "Court Annexed Mediation Programs in the Southern and Eastern Districts of New York: The Judges Perspectives," dated August 2004 (Judicial Perspective Report).

The NYSBA Report asked: why more cases are not mediated? Data showed that 90 percent of attorneys believed mediation is underutilized because of unfamiliarity or lack of knowledge of the process, resistance from lawyers and clients and concerns about the process, while 10 percent said mediation is not encouraged by lawyers and judges. Several lawyers expressed a concern that suggesting mediation would be seen as a sign of weakness. Fifteen percent expressed concerns about mediator quality, the belief that the outcome of mediation is not binding, and concern about an adversary's good faith or that a mediator may simply get parties to "split the difference."⁵⁶

"Others who were skeptical about mediation mentioned shortcomings, such as unskilled mediators, cost, the delay in litigation it sometimes causes, and expectation that money will be paid even for non-meritorious cases. In deciding whether to mediate a particular case, the principal factors the litigators consider are timing, cost, strengths and weaknesses of each case, both sides' willingness to mediate in good faith, the benefit of hearing an impartial assessment of the case and its risks and the likelihood of success."⁵⁷

"The survey suggests that some of the familiar sources of resistance to mediation are losing force and 85 percent of the litigators interviewed reported suggesting mediation only received negative responses less than 9 percent of the time."⁵⁸

Mandatory mediation programs eliminate this psychological fear factor of appearing weak by eliminating the requirement that one party raise the suggestion to mediate and legends in the personal injury Bar confirm that the barrier is a real one. It appears that past concerns of the threat to lawyers' income seems to have lost ground. Most litigators understand that mediation often is in their clients' best interests and "a happy client who refers other clients."⁵⁹ Some suggested that businesses be introduced to mediation and its benefits through presentations and mock mediations before groups like the Chamber of Commerce and at industry conferences, through informative websites and television programs.⁶⁰ More than 86 percent believed that mediation delivered real benefits even when it did not yield a settlement on the spot: exchanging information without formal discovery; assessing the strengths and weaknesses of each side's position; narrowing and clarifying issues; improving attorney communication; obtaining an impartial assessment of the case; encouraging adversaries to consider the others' needs and interests; and, quite often, beginning a process that leads later to settlement.

Similarly, the Judicial Perspective Report offers some interesting suggestions by judges nearly 15 years ago

covering a variety of issues such as the level of information provided to judges; the pace of the process; the quality and expertise of mediators, compensation; types of cases; the decision whether to refer matters to mediators or magistrates, the choice by some district judges to act as settlement neutrals, at whose initiative and at what time should the referral be made, whether the litigation should be stayed and whether there is value in a “failed” mediation.

With regard to type of cases most suited to mediation, some judges, paraphrasing Justice Stewart, said that they know a case likely to benefit from mediation when they see it. Sophisticated commercial cases were mentioned by many judges as good candidates for mediation while one judge, however, said that she does not like to refer “mega” commercial cases because she is “flying blind” without knowing the identity of the mediator.²¹ Employment cases also headed the list of cases most likely to settle, particularly pro se employment cases as well as § 1983 cases, intellectual property, personal injury, securities, business disputes or other contract matters, particularly where there is the potential for an ongoing business relationship. Numerous judges said that they refer large, complex commercial cases to private mediators. Apart from subject areas, judges identified case characteristics such as where the money at issue is not significant compared to the potential cost of the litigation. These cases were recently singled out by Judge Marrero in the *Cardozo Law Review* as “disproportionate litigation,”⁶¹ which he said should be promptly referred at the parties’ choice either to a magistrate, court panel mediator or to a private mediator.

Another interesting issue related to whether mediators should be paid. While mediators get paid in the Eastern, Northern, Western Districts, the issue of payment seems to be a “loaded issue” where there was substantial disagreement and even some ambivalence reflected in the survey. In the Southern District, one quarter of judges disfavored compensation, believing the program works well and volunteer mediators derive prestige and professional satisfaction from this pro bono work. Judges felt reluctant to burden parties with additional court costs. Other judges favored the payment of mediators, noting that payment would cause the parties to take the process more seriously. Another judge said that the parties should pay the mediator if they wish to choose him or her. Some judges (including two who generally disfavor paying mediators) believed that mediators should be paid in large, complex cases because parties are likely to be wellable to afford to pay the mediator and the amount at stake usually will justify the expenditure.

Thirteen Principles to Increase the Use of Mediation in New York

1. Never Let a Serious Crisis Go to Waste

A quote often attributed to Mayor Rahm Emanuel seems appropriate here; “You never let a serious crisis

go to waste; and I mean by that it’s an opportunity to do things you think you could not do before.” This quote has applicability both from our courts’ experience with the claims arising out of Superstorm Sandy but even more so with regard to the systemic crisis that Judge Marrero has recently highlighted in the *Cardozo Law Review*.⁶² The lessons of Sandy and similar mass disaster claims seem to suggest that we consider expanding the mediation programs. Individuals should not see the choice as a binary process between litigation or mediation, but rather an important tool in the process to resolve claims

2. Educate Transactional Lawyers of the Importance of Incorporating Mediation Clauses

The first step that might be considered is reaching out to transactional lawyers to educate them on the benefits of mediation and the importance of incorporating a multi-step approach to dispute resolution. Increasingly, agreements, particularly in the international context⁶³ and often domestically in joint venture agreements, are using a multi-step approach, alternatively referred to as an escalation clause, a multi-tiered dispute resolution or “water-fall” clause (negotiation, mediation, litigation), in underlying contracts, be it a simple vendor contract or a global, highly technical research and development agreement.⁶⁴ The clauses, as part of a dispute avoidance mechanism, require that disputes be referred to negotiations between senior management and lay down a number of steps that parties need to undertake sequentially, prior to instituting either an arbitration or litigation. Arbitration grew exponentially because corporations and transactional lawyers began to incorporate arbitration clauses into transactional documents.

3. Adopt the UMA in New York

Although many states have adopted the Uniform Mediation Act (UMA), New York has not yet done so and confidentiality is critical for mediation.⁶⁵ Although many federal court-annexed programs have a standard form that all parties to the mediation are required to sign, it would be helpful to adopt legislation that makes clear the importance of confidentiality in mediation proceedings.

4. Consider New Survey to Judges About Improvements to Current Mediation Programs

Consider a new survey to get updated judicial input on additional types of cases to include in new automatic mediation programs, or judges willing to act as trailblazers for a group of new case types (similar to the prototype of the current Southern District FLSA programs), or taking an even bigger step to determine which judges might be willing to spearhead pilot automatic mediation programs like the prototype of the Western and Northern Districts. A new survey might determine whether there is a consensus among judges as to whether to explore a combination of these options and whether attitudes have changed for compensation of mediators or the assignment or selection process.

5. Consider Addition of Mini-Trials, Early Neutral Evaluations as Alternatives to Mediation

Other jurisdictions, notably the Northern District of California, the District of Vermont as well as the Superior Court of Orange County, California make ENE a significant part of their ADR programs. Rule 4.1 of the Western District of New York refers to other ADR interventions providing “it is expected that cases referred to ADR will proceed to mediation. However, the following options are also available upon the stipulation of all parties: Neutral Evaluation; Mini Summary Trial: Arbitration (Binding and Non- Binding); Case Evaluation and Settlement Week, when scheduled by the court.” A co-author of this article was referred a matter scheduled for a six-month trial in New Jersey and asked if he would act as a chair in a seven-day mini-trial. He was then asked to put his thoughts on the strength of case in an envelope. A few weeks later the parties reported a settlement and that the mini-trial had a substantial impact on the decision. Nassau County seems to have a successful ENE⁶⁶ program that could be a model for others.

6. Engage Counsel to Continue to Explore Mediation

A recent amendment effective January 1, 2018 adds language to Commercial Division Rule 10 requiring counsel to certify at various stages the exploration of ADR. We would suggest in cases where there is not an automatic referral, adding additional question to each litigant/counsel, “Are you open to the use of mediation? If so, call or respond by email to the court clerk.” Neither side needs to know the other side’s response. Analogous to a mediator’s proposal if only one side responds affirmatively the clerk merely advises both that there is no agreement. If both respond affirmatively, the case gets referred to mediation. There has also been discussion of revisiting the issue of whether there should be revisions to the “Client Bill of Rights” so as to incorporate a provision concerning ADR.

7. Continue to Collect Transparent Data, Support the Quality of Mediators and Engage in Public Relations to Promote the Success of Mediation

We are indebted to court administrators and ADR organizations for their diligent efforts to collect and analyze data that forms the basis for expanding programs. Court administrators might consider uniform criteria to measure the data. Earlier surveys identified the need to better publicize to judges, lawyers and clients the benefits of mediation. The NYSBA recently created a new short video entitled “Understanding Mediation.” Infrastructure systems already in place provide quality assurance that future expansion will be professionally handled by educated and neutral mediators. Quality assurance pursuant to Part 146 of the Rules of the Chief Administrative Judge has been established by guidelines for qualifications and training of neutrals and a Media-

tor Ethics Advisory Committee (MEAC). A comparable Mediation Advisory Committee exists in the Southern District and recently in the Eastern District.

8. Consider Issues of Diversity and Compensation as Mediation Programs Expand

As this article is going to print, ABA Resolution 105 and its accompanying report promoting diversity unanimously passed the House of Delegates.⁶⁷ As mediation programs expand, consideration of corollary issues of increasing diversity and compensation of neutrals might be reviewed. Many courts in other states and in certain federal courts in New York currently do compensate mediators, while others such as the Southern District of New York, the D.C. Circuit and the Western District of Pennsylvania do not.⁶⁸ The issue of compensation for neutrals has been raised in NYSBA reports where 18 years ago it was noted, “the Committee is concerned about the court system’s heavy reliance of pro bono service. In order for court ADR programs to be expanded and provide quality ADR services to the public, it will be necessary to pay neutrals ... paying neutrals for court annexed mediation needs to be considered seriously if court annexed ADR is to move to the next level in New York.”⁶⁹ Under the Storm Sandy Model, mediators were paid at a reduced hourly rate, in New York Supreme Court mediators provide the first three hours of mediation at no charge and then may bill at \$400 per hour, at those District Courts where mediators are currently unpaid, it may be appropriate to revisit the issue of compensation especially where Fortune 500 companies are litigants.

9. Continue Expanding Pilot Programs and Build on the Successes and Failures

Much can be learned from an exchange of ideas based on existing mediation pilot programs. Many of the federal courts programs have been overwhelmingly successful. Some state pilots, on the other hand, did not meet expectations but analysis of unsuccessful pilots allows for the creation of improved models. There are programs that are automatic with exclusions and opt-outs, others which are entirely discretionary with judges, and yet others that are hybrids. One interesting model that is worthy of consideration is the Western District of Missouri’s⁷⁰ Mediation and Assessment Program (MAP), which for all no-excluded cases are randomly assigned for mediation to one of three options: United States Magistrate, the MAP Director, or an outside mediator. Others, such as the CAMP, rely on court administrators to actively screen cases for mediation, and CAMP appears to be a quite successful model. Some continue to believe in expanding automatic pilots incrementally, one dose at a time. Others are believers in the concept that all programs should be automatic because trying to forecast the types of cases that may benefit from mediation is like trying to read a crystal ball. Perhaps, the Southern and Eastern Districts are moving methodically in extending automatic pilots, and it’s unclear whether those districts will ever adopt an across-the-board au-

tomatic mediation program. The Southern and Eastern Districts have taken a more conservative approach than the Western and Northern Districts through a strategic process of careful assessments, comparative studies, adaptation, consensus building and implementation. There may come a time to move in a more comprehensive manner given the problems identified by Judge Marrero.

10. Expand Use of Online Mediation

Countries outside of the United States have increased the use of ODR. The ABA and the Center for Innovation⁷¹ are involved with supporting ODR programs and every effort should be considered to explore programs where mediation is appropriate.

11. Expand Mediation Programs in Law Schools' Clinics to Partner with Courts

Clinical ADR programs should expand so that law students understand the fundamental value of problem-solving processes. Fordham Law School has been a pioneer in court mediation programs since 1985 in Small Claims Court. Other law schools have made and are continuing to make important contributions as well, including, Cardozo Law School and New York Law School, and Seton Hall Law School in New Jersey by assisting Judge Preska with an innovative program since 2011 representing pro se parties in mediation.

12. Expand Mentoring Programs to Support the Courts' Expansion Efforts

Whether it be in the effort to diversify neutrals or to support the expansion of new pilot mediation programs, there is a need to improve mentoring programs in the field of ADR. All stakeholders should consider a collaboration of mentoring programs and apprenticeships to reach more diverse candidates.

13. Facilitate an Increase in the Use of Mediation by Convening Stakeholders

Some law schools have incorporated new courses aimed at teaching lawyers how to be leaders by developing courses on Facilitation for Lawyers. A symposium such as the one organized by the NYSBA, held at Fordham University this past spring⁷² can be the first step in a facilitation to bring all the stakeholders together. Some of the ideas presented here were developed after hearing suggestions from judges, ADR coordinators, and ADR provider organizations supportive of expanding mediation. For the past 18 years, New York has taken a leadership role by gathering ADR stakeholders for an annual Mediation Settlement Day to discuss moving the needle forward on increasing the quality and use of mediation⁷³ and by supporting and assisting the ADR Inclusion Network, an initiative to bring all ADR stakeholders together to focus on measures to increase diversity.⁷⁴ Perhaps it may be worthwhile for the Second Circuit Judicial Conference to consider ADR and the issues raised by Judge Marrero in its annual

conference. Both Mediation Settlement Day and the ADR Inclusion Network are New York initiatives (not found elsewhere in the country) likely to have an impact beyond the state's borders.

Conclusion

State and federal court mediation programs across the United States have acted as petri dishes piloting a variety of programs. Successful programs share a combination of factors including: (1) freedom to choose mediators, at least as an initial step; (2) a mediation grievance system and post mediation surveys available to monitor mediators; (3) court-ordered discovery protocols; and (4) exclusions and opt-out provisions. In other words, automatic mediation programs should be tempered by other ways of increasing party autonomy. New York courts took an early leadership role in developing ADR programs. The data shows us the overwhelming success of the current programs. In order for New York to reassume its leadership role in a continuation of facilitated discussions among judges, administrators and the experience of ADR provider organizations will act as the North Star pointing the direction in which new mediation pilot programs can expand. Yet consideration must be given to whether the time has come to move beyond mediation pilots toward a more comprehensive automatic mediation program in additional subject areas that offer exclusions and opt-out provisions accompanied by a degree of party autonomy in the selection of neutrals, while still offering diverse mediators opportunities to flourish. New York dockets eclipse by far those outside of our state—so any growth in ADR will have enormous implications outside the state.

As we have experienced in our own bar work, the profession works slowly in areas that change practices and cultures, whether the legal profession of New York is willing to embrace a potentially transformative ADR comprehensive initiative is uncertain, but without the leadership of judges and the state courts it seems unlikely. Change does come because of a particular leader such as Chief Judge Judith Kaye and her community courts, jury reform and mandatory continuing education for lawyers; by Chief Judge Jonathan Lippman and his pro bono agenda for new lawyers seeking admission; and by the organized bar and its leaders such as Seymour James with regard to voting rights reform, and the late Steve Krane with regard to the ABA Model Rules of Professional Conduct. Chief Judge DiFiore's Excellence Initiative that embraces ADR and addresses other features of the justice system offers another opportunity for enhancement and advancement.

Endnotes

1. It is beyond the scope of this article to address in any detail the underutilization of mediation across the spectrum of various ADR provider organizations because published statistics on mediation are generally not available. However, from the information

- available and at a recent conference held at Fordham Law School in New York on May 8, 2018, “The Litigative DNA—the Underutilization of Mediation IN New York and What Can Be Done About It? (the Litigative DNA Conference), it is clear that the number of arbitrations handled by ADR providers far eclipse mediations. NYSBA, The Litigative DNA, full course materials, available at www.nysba.org/LitigativeDNAMaterials. Yet, FINRA statistics for the January 2018 reflect the ratio of arbitration matters to mediations were 384 compared to 36, at page 96.
2. Marrero, Victor, *The Cost of Rules, the Rules of Cost*, 337 *Cardozo L. Rev.* 1599 (2016).
 3. *Id.*
 4. See *Court Referred ADR in New York State: Final Report of the Chief Judge’s New York State Alternative Dispute Resolution Project* (May 1, 1996) (Kaye Report); New York State Bar Association Committee on Dispute Resolution: *Bringing ADR into the New Millennium—Report on the Current Status and Future Direction of ADR In New York* (February, 1999) (ADR into the New Millennium) www.nysba.org/LitigativeDNAMaterials.
 5. See <http://www.disputeresolutiondata.com>.
 6. In Memoriam: Frank E.A. Sander ‘52, a pioneer in the field of ADR (1927-2018), <https://today.law.harvard.edu/memoriam-frank-e-sander-52-pioneer-field-alternative-dispute-resolution-1927-2018/>.
 7. Shestowsky, Donna, *When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, *Harv. Negotiation Law Rev.* Vol. 22:189 Spring 2017, citing Frank E. A. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be A Duty to Advise of ADR Options?* 76 *A.B.A. J.* 50,50 (1990).
 8. ADR in the Federal District Courts: An Initial Report—2011, <https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf>.
 9. 28 USCA section 471. The six principles that must be included in the plan are (1) systemic, differential treatment of complex and simple cases (2) early and ongoing control of the pretrial process by setting early firm trial dates, controlling the extent of discovery and deadlines for motion practice (3) careful and deliberate monitoring of complex cases (4) encouragement of cost effective discovery and voluntary exchange of information; (5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by certifications of good faith efforts, and (6) authorization to refer appropriate cases to available ADR programs.
 10. *Id.*
 11. ADR in the Federal District Courts: An Initial Report-2011, <https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf>. *Id.* at 6.
 12. See Niemic, Robert J, *Mediation & Conference Programs in the Federal Court of Appeals* (2006).
 13. For a discussion of the evolution of the Southern District mediation program see Price, Rebecca, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York* (2014), Volume 6, *Yearbook on Arbitration and Mediation*, <http://elibrary.law.psu.edu/arbitrationlawreview>.
 14. D’Urso, Leonardo, *Italy’s Required Initial Mediation Session: Bridging the Gap Between Mandatory and Voluntary Mediation, Alternatives* (April 2018).
 15. See Masucci, Deborah, 2016 International Mediation & ADR Survey, *Census of Conflict Management Stakeholders and Trends, Professional Mediation Worldwide: Promoting Consensus and Access to Justice*, Fordham Law Dispute Resolution Society 11th Annual Symposium International Commercial Mediation: *How Culture and Regulation are Affecting Business Practice, Mediation* (November 2017), www.Fordham.edu.
 16. Anderson, Dorcas Quek; Chua; Eunice & Ngo Tra My, *How Should the Courts Know Whether a Dispute Is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts’ Referral of Civil Disputes to Mediation*, 23 *Harv. Negotiation L. Rev.* 268 (Spring 2018).
 17. See Phillips, Anita, *Asia-Pacific GPC Participants Want Enforceable Decisions and Efficient Processes*, *Dispute Resolution Magazine* (Spring 2018).
 18. See Schaffer, Gary, *Court Annexed Mediation by the Numbers*, (2018), www.nysba.org/LitigativeDNAMaterials.
 19. See Quek, Dorcas, *Mandatory Mediation: An Oxymoron: Examining Feasibility of Implementing Court Mediation*, *Cardozo Journal of Conflict Resolution* (2010), <https://cardozo.jcr.com>; Jakabovics, Andrew & Cohn, Alon, *It’s Time We Talked: Mandatory Mediation in the Foreclosure Process*, <https://www.americanprogress.org>, (2009).
 20. See ADR—Federal Courts—District by District Summaries, Department of Justice, www.justice.gov/pdf, (gathering data on whether program is voluntary or automatic, payment of neutrals, attendance requirements, whether sanctions are available and confidentiality).
 21. See Lavene, Lionel M., Snabria, Cecilia, McIntyre, Krisi & Bluda, Brandon, *Alternative Dispute Resolution of Patent Cases: Eastern District of Texas, Northern District of California*, *Intellectual Property & Technology Law Journal* (July 2015).
 22. See Schaffer, Gary, *Court Annexed Mediation by the Numbers*, *supra* note 18.
 23. See Quek, Dorcas, *supra* note 19.
 24. Barry Radin, ADR Program Coordinator for the Western District of New York stated at a recent conference that motions for “opt-outs” are rarely granted. The Litigative DNA Conference.
 25. See Shaffer, Gary, *Automatic Court Annexed Mediation in New York’s Federal Courts: Sometimes Numbers Don’t Lie* (2018), www.nysba.org/LitigativeDNAMaterials.
 26. See General Order No. 47, <http://www.nynd.uscourts.gov/sites/nynd/files/general-orders/GO47.9.pdf>; NYND Mediation Program Statistics, <http://www.ndny.uscourts.gov/pilot-mandatory-mediation-program-statistics>.
 27. See Shaffer, Gary, *supra*, note 18 at 3.
 28. For a discussion of the evolution of the Southern District mediation program see Price, Rebecca, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York* (2014), Volume 6, *Yearbook on Arbitration and Mediation*, <http://elibrary.law.psu.edu/arbitrationlawreview>.
 29. See www.newyorklawjournal (October 17, 2017), Professional Excellence Awards, Rebecca Price, Administrator of the mediation program for the Southern District for her diversity efforts.
 30. See Report of New York City Bar, *Not on Trees, but Mediators Grow: Assuring Best Practices in Court Annexed Mediation*, (August 2015) (<http://ww2nycbar.org>).
 31. See Mediation Referral Order dated August 31, 2016 for cases that include claims under the Fair Labor Standards Act 29, U.S.C. §§ 201.
 32. See Emery G. Lee III & Cantone, Jason A. *Report on Pilot Project Regarding Initial Discovery Protocol for Employment Cases Alleging Adverse Action*, (October 2015).
 33. See Initial Discovery Protocol for Fair Labor Standard Act Cases Not Plead as Collective Actions (January 2018), www.fjc.gov/sites/default/files/materials/12.
 34. See Price, Rebecca, *U.S. District Court S.D.N.Y. Mediation Program Annual Report, January 1, 2016—December 31, 2016* 2016 Annual Report.
 35. See Annual Report for Eastern District of New York dated July 1, 2016-June 30, 2017, http://img.nyed.uscourts.gov/files/local_rules2016mediationreport.

36. See Report of Cases Referred in Eastern District from 2000, <http://img.nyed.uscourts.gov/files/local>.
37. See State and Local Foreclosure Mediation Program Update and New Development (January 2010), www.nclc.org; see also White, Alan, CUNY School of Law, Georgia State University Law Review Vol. 33 (2016-2017) readingroom.lawgsu.edu/gslr.
38. See <http://www.uscourts.gov.nyb.lossmitigation.pdf>; Gill, Daniel, Bankruptcy—Court’s Mortgage Modification Program—A Success (February 24, 2017), www.bna.com.
39. Statistics from the AAA supplied by Jeffrey Zaino, Vice President of AAA; Statistics from the Eastern District available through the program’s website, U.S. District Court E.D.N.Y. Mediation Program Annual Report, https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.
40. See Leibouts, Gerald & Hidalgo, Lucero Ramirez, *ADR In Real Estate Matters: The New York Experience* (2010), www.cardozojcr.com.
41. See Memorandum to Panel Members from Chris Stern Hyman, February 1, 2018, addressing the Conference on Underutilization of Mediation in the Courts, www.nysba.org/LitigativeDNAMaterials.
42. During 2016, CDRCs served 67,118 people in 27,012 total cases. Family matters, including child custody, visitation and support, accounted for 24 percent of these cases.
43. http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml#WhatisADR; Cases mediated through the CFLC have a 91 percent success rate, www.nysba.org/LitigativeDNAMaterials.
44. *Id.*
45. First, cases randomly selected for mandatory mediation could either be substantively or procedurally inappropriate; second, the Pilot deadlines allowed too much leeway, providing a 120-day period from the date of referral to select a mediator. As the Pilot drew to a close nearly 30 percent of the cases that were referred to the program were exempted either by stipulation or by the assigned judge (conversations with John F. Werner, Chief Clerk—Supreme Court Civil Branch, New York County).
46. See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgeTaskForceOnCommercialLitigationInThe21stpdf> at 25, 26.
47. For cases that moved on to mediation from the conference part as of the end of January 2018 the statistics indicate that 145 cases were referred to mediation, 99 cases completed mediation and 59 of those cases settled in mediation. (Conversation on August 16, 2018 with Lisa M. Courtney, Statewide ADR Coordinator, NYS Unified System).
48. *Id.*
49. See Press Release dated April 20, 2018, *New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice*, www.nycourts.gov/press.
50. See *Online Mediation: Has Its Time Come?* 15 Ohio St. L. J. on Disp. Resol. 735 (2000).
51. See Einhorn, Marcy, *Online Dispute Resolution: The New Normal* (Spring 2018), http://www.nyb.org/NY_Litigator.
52. See Larson, David Allen, *Artificial Intelligence: Robots, Avatars and the Demise of the Human Mediator*, 25 Ohio St. J. on Dispute Resolution, 105,111 (2010).
53. See UNICTRAL 2016 report, http://www.unictr.org/pdf/English/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf.
54. See <http://www.odr.info>.
55. See Joint Technology Committee Report Online Dispute Resolution in the Courts (November 2016), <https://www.ncsc.org>.
56. Report of the Mediation Committee of the New York State Bar Association Dispute Resolution Section 2011, https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Through_the_Eyes_of_New_York_Litigators.html at 14.
57. *Id.*
58. *Mediation in a Litigation Culture*, Disp. Resol. Mag. at 8, 9–10 (Summer 2011).
59. *Id.* at 8-10.
60. *Mediation in a Litigation Culture*, *supra* note 58.
61. See Marrero, *supra*. Cardozo Law Rev at 1682.
62. See Marrero, *supra* note 2.
63. Multi-tiered Dispute Resolution Clauses, IBA Litigation Committee (October 1, 2015), www.ibanet.org.
64. See *ADR in Business Practice and Issues Across Countries and Cultures*, Ingen-Housz, Goldsmith, Jean-Claude, and Pointon, Gerald, page 285 (Kluwer 2006); Keynote Address at the IBA Conference by Mr. Wesley Wong, S.C., Solicitor General of Hong Kong SAR on *Mediation v. Arbitration: Best Friends or Best Enemies? A View from Asia*, 1 December 2016, <https://www.doj.gov.hk-pdf>.
65. See, Weil, Richard, *Is Mediation Confidential in New York?* N.Y.L.J. (October 25, 2012).
66. In Supreme Court, Nassau County volunteer mediator-neutral evaluators are available for civil cases after a preliminary conference or when referred by a judge and the Matrimonial Center operates a Special Master Neutral Evaluator Program (approximately 35-40 cases referred a year to a roster). Statistics supplied by Lisa M. Courtney, Statewide ADR Coordinator
67. See American Bar Association Section of Dispute Resolution Report to the House of Delegates Resolution 105 www.americanbar.org..
68. See Kaster, Laura & Dickney, Janine, *Progress on the New Jersey’s Mediation Front*, N.J.L.J. (March 14, 2013) available at <https://www.njlawjournal.com/id1202592121978/Progress-on-the-NJ-Mediation-Front>.
69. New York State Bar Association Committee on Dispute Resolution: *Bringing ADR into the New Millennium—Report on the Current Status and Future Direction of ADR In New York* (February, 1999), at pages 20, 82 (ADR into the New Millennium), www.nysba.org/LitigativeDNAMaterials.
70. <http://www.mow.uscourts.gov/district/map>.
71. The website www.abacenterforinn-ovation.org.
72. NYSBA, *The Litigative DNA*, *supra* note 1, full course materials available at www.nysba.org/LitigativeDNAMaterials.
73. See www.nycourts.gov/adr/MSD.
74. See www.adrdiversity.org.

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