# Automatic Court Annexed Mediation in New York's Federal District Courts

## An Overview

Gary Shaffer

On the surface, it might seem that a court automatically sending cases to mediation is an oxymoron. Self-determination - including deciding whether to mediate – is often thought of as an essential aspect of the mediation process. However, it turns out that, at least for the mediation programs operated by New York's Federal District Courts, automatically sending cases to mediation, or in one instance arbitration, is quite successful in resolving large numbers of cases with little court input or oversight. This article will provide an overview of the court annexed mediation programs in the four federal district courts of New York: The Western, Northern, Southern, and Eastern Districts. It will also provide some data relating to the program outcomes.

## Western District of New York

In 2006 the Western District of New York in Buffalo became the first court in New York to establish mediation as the initial default process to be followed in almost all civil cases. As Section 2.1 of the Court's ADR Plan states, "All civil cases filed on or after the Effective Date of the ADR Plan shall be referred automatically to ADR."[1] The section also sets forth some limited exceptions to the rule, such as Habeas Corpus and extraordinary writs, Bankruptcy and Social Security appeals, cases implicating issues of public policy, exclusively or predominantly, etc.[2] The Plan has an opt-out provision, though it stresses that motions to opt-out will only be granted for good cause shown. "Inconvenience, travel costs, attorney fees, or other costs shall not constitute 'good cause' and a movant to opt out must explain why ADR "has no reasonable chance of being productive."[3] The use of the word "productive" establishes an interesting

criteria. The rule does not refer to chance of settlement and for good reason. As many attorneys and litigants who have participated in a mediation know, mediations can narrow issues, work through discovery, and begin the foundation for settlement talks even if the case does not settle at a mediation session.

The Western District program was initially established as a pilot program and renewed each year until, due to its clear success, was made permanent in 2010. In 2012 the Court expanded the program's reach so it included those cases in the Western District's Rochester courthouse.

How successful is the program? Of the 3,011 cases that entered the program through 2014, 2,360 were settled either before the mediation, at the mediation, or within 60 days following the mediation. In other words, 78% of the cases that went to the program were resolved with almost no court involvement.[4]

**Northern District of New York**

Recognizing the enormous success of the Western District's program, the Northern District of New York implemented an almost identical pilot program beginning January 1, 2014.[5] That program too was so successful that it was made permanent through General Order No. 47 issued on May 23, 2016. On the surface, the Northern District's success rate does not appear as high as that of the Western District's. In the Northern District, 36% of the cases were settled at mediation.[6] However, the Northern District "success rate" includes only those cases that settle at a mediation session. It does include those cases that settle either before a mediation or within 60 days thereafter. While it is unknown what the success rate would be if those figures were included, there is every reason to think the percentage would be at least in the 50% range.

One subtle but interesting aspect of the Northern District program is that it is entitled "Mandatory Mediation Program." There has been understandable caution in the ADR world to use the word 'mandatory' when referring to mediation. It smacks of coercion rather than self-determination. However, the Northern District seems to have taken the bull by the horns and been direct about its approach. The important thing to remember is that mandatory mediation does not mean mandatory settlement, and a case that does not settle in mediation can continue in court.

**Southern District of New York**

The Southern District program is narrower than either the Western or Northern District programs. In 2011, the Southern District program began automatically sending to mediation counseled employment discrimination and cases against the City of New York, or its employees, alleging the use of excessive force, false arrest, or malicious prosecution by employees of the NYPD in violation of 42 U.S.C. § 1983.[7] On October 15, 2015, Chief Judge Loretta Presca issued Administrative Order M10-468, which set forth Discovery Protocols to be followed in the employment matters.[8] On October 3, 2016, the Southern District expanded the automatic mediation program so that it included police related § 1983 actions brought against police departments in Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan counties.[9] The recent expansion also set forth procedures relating to mandatory discovery, demands and offers, and standard forms for the release of medical and police records.[10]

The Southern District program was then further expanded to include pro se employment cases with the Southern District's Mediation Office securing legal representation for purposes of the mediation.

In addition, the Southern District is expanding the automatic mediation program to include cases filed under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., ("FLSA"). Here are the most recent results from the Southern District program: In 2015, a total of 1,094 cases were referred into the SDNY Mediation Program. As of July 28, 2016 (the date of the most recent Annual Report) 1,030 of the cases were closed with the following rates of settlement:[11]

Automatic Employment: 46%
*Pro Se* Employment: 66%
Judge-referred (non-*pro se* employment): 63%
Local Civil Rule 83.10 (the § 1983 Plan): 64%

The SDNY data include only those cases resolved after a mediator is assigned, even if it settles before an initial in person session. However, they do not include cases settled at any time after the final mediator report is docketed.[12]

**Eastern District of New York**

The Eastern District of New York has both a court annexed mediation program and a court annexed arbitration program. However, only the arbitration program is compulsory. Mediations take place when referred by a judge or magistrate. The EDNY Alternative Dispute Resolution Report for the period July 1, 2015 – June 30, 2016 reports the following results:[13]

During the period of July 1, 2015 to June 30, 2016, 221 cases were referred to the mediation program. Of those, mediation was completed in 149 cases. Of the cases where mediation was completed, 67% were settled as a result of mediation. (This settlement rate does not reflect cases that were resolved after litigation resumed.) Of the remaining 72 cases where mediation did not occur, 24 cases settled prior to mediation, and 10 cases did not proceed to

mediation due to a stay of proceedings or other motion. 38 cases referred to the mediation program are still pending.

If we eliminate the 38 cases still pending, and the 10 that did not proceed to mediation due to a stay of proceedings or some other motion, and include the 24 cases that settled prior to mediation, the "success rate" of the cases sent to mediation is a little over 71%.

Unique among the four federal district courts in New York, the Eastern District has a Compulsory Arbitration program pursuant to Local Civil Rule 83.7. With a few limited exceptions, the rule requires that the clerk of the court "shall designate and process for compulsory arbitration all civil cases… wherein money damages only are being sought in an amount not in excess of $150,000.00 exclusive of interest and costs."[14]

According to the EDNY's Alternative Dispute Resolution Report for the period July 1, 2015 to June 30, 2016, 129 cases were referred to the EDNY Court compulsory arbitration program. Of the cases where an arbitration hearing was scheduled, 65% were voluntarily dismissed prior to a hearing. As of publication of the annual report, 33% of the cases were still pending and 2% actually proceeded to a hearing.[15] Note also that the EDNY's compulsory arbitration program does not leave a loser at the arbitration precluded from thereafter using the court process. Section 83.7(h) of the Court Rules permits any party, within 30 days after an arbitration award has been docketed, to demand in writing a trial de novo in the District Court.

**What Makes an Automatic Program Successful?**

The data from the automatic court annexed programs in New York's federal courts are remarkable to say the least. They indicate that it is realistic to expect roughly half, and sometime more, of all cases directly sent to mediation will be resolved with little court involvement.

Anecdotal evidence also supports the idea that these programs can have an enormously positive effect on court case loads and backlogs.[16]

Below are some features that seem to underlie successful program.

**Well Trained Mediators**

Providing well trained mediators is an essential aspect of a successful court annexed program. Each of the four District Court programs provide for training and program mediators are vetted before entering the program. New mediators observe mediations before they handle any and are observed once they have moved on to mediating cases on their own. Parties submit evaluation forms after the mediation, where they can comment on the quality of the mediation and the mediator.

The programs bring mediators together on a regular basis to discuss cases, new procedures, and new law, and to exchange ideas about mediation practice. This helps mediators sharpen their skills and stay abreast of developments.

**Data Collection**

The Districts have made data collection an important aspect of their programs, though it is always a work in progress. Programs expand or are modified, or additional data is deemed worth collecting. However, overall data collection is not too difficult with some initial planning. Court systems are already computerized, and entering mediation dates and whether and when a case was successfully resolved can be entered into the court database. This can make information easily accessible and shed light on program performance. Keeping good data is essential to know if a program is working well. One result of the Western District's data

collection was that the program was proven to be so successful that the Northern District of New York adopted almost the exact same broad based automatic program.

## Mediator Roles

### Discovery

Mediators in these programs are given wide latitude in handling cases and often act as de facto magistrates. Since cases are typically sent to mediation before discovery, the mediator and the parties typically figure out what discovery is needed before a mediation session can be held. As a practical matter, the amount of discovery that might normally take place during a full litigation is significantly reduced. In addition, addressing discovery matters with the parties is often the start of an informal working relationship between the parties and the mediator.

### Facilitator

The most obvious role of the mediator is facilitating discussions between the parties. It is beyond the purview of this article to discuss what makes a good facilitator, but the Federal District Courts in New York have made vetting, training, and ongoing interaction with mediators an important part of their programs.

### Follow Up: Nudge in Chief

While many cases will get resolved in a single session mediation, others will not. The ability of mediators to contact parties after initial sessions to question and cajole after the initial session is often what enables a case to settle. Mediators can also continue their caucusing with parties between sessions through follow up phone calls that keep the parties communicating and developing new approaches to a resolution.

## Compensation

Lawyers and judges expect to be paid for their work. Both the Western and Northern District rules require that mediators be paid, though they also require pro bono work so parties who cannot afford to pay can also participate. The Eastern District program provides for limited compensation. The Southern District program has no compensation and all mediators participating in the program work for free. This should change. The experience of the Western and Northern District programs is that lawyers and litigants quickly come to appreciate the benefits of the automatic court annexed referrals to mediation. Mediator costs, typically split between parties, is rarely a significant cost of the process. Given the amount of prep work, mediation work, and often follow up work required for a successful mediation, the courts should ensure that mediators in their programs are properly compensated.

## Conclusion

Cultural shifts typically start slowly and gain momentum. For a long time ADR, and in particular mediation, has been the new next best thing. Change always seemed just around the corner. But its use is now quickly accelerating. The bold 2006 Western District pilot program that sent almost all incoming civil cases directly to mediation was the initiative of Chief Judge William Skretny. Clearly his finger was on the pulse. The program kept working and four years later it was made permanent. The Northern District picked up the same program, started a pilot, and in only two years it became permanent. In 2011, the Southern District began sending to mediation some §1983 and counseled employment cases (except those under the FLSA) filed in its Manhattan courthouse. Pro se employment cases were then added. In 2016 the program expanded to include the six "upstate" counties covered by the White Plains courthouse. Now the FLSA cases are being added. The Eastern District now seems poised to follow.

There seems little reason why automatic mediation programs could not be successfully implemented in the state courts, especially in (though certainly not limited to) the commercial parts. Since cases sent to mediation ab initio require less court involvement, reduce motion practice, and caseloads, they can be administered with little, if any, additional administrative staffing. Pilot programs have been completed and been successful, the rules have been created, revised, and are now in place. The direction is clear. If you build it, they will come.

---

[1] ADR Plan, Western District of New York, found at http://www.nywd.uscourts.gov/sites/default/files/ADRPlanRevisedJune242011.pdf.
[2] Id.
[3] Id., Section 2.2C
[4] Information supplied by Barry Radlin, ADR Program Administrator for the Western District of New York
[5] General Order No. 47 can be found at http://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO47_9.pdf.
[6] NYND Mediation Program Statistics can be found at http://www.nynd.uscourts.gov/pilot-mandatory-mediation-program-statistics.
[7] See Local Rule 83.10 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York. The Rules can be found at http://www.nysd.uscourts.gov/rules/rules.pdf.
[8] The Order can be found at http://nysd.uscourts.gov/docs/mediation/2015%20-%20Second%20Amended%20Standing%20Admin%20Order%20-%20Counseled%20Employment.pdf.
[9] See, Plan for Certain §1983 Cases Against Police Department in Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan Counties, located at http://www.nysd.uscourts.gov/docs/mediation/1983%20Plan%20Whitxxxxxxx`e%20Plains%20Final.pdf.
[10] Id.
[11] Data contained in the Annual Report of the Southern District of New York Mediation Program for calendar year 2015, dated July 28, 2016. The report can be found at http://www.nysd.uscourts.gov/docs/mediation/Annual_Reports/2015/Annual%20Report.2015.pdf.
[12] Email from Rebecca Price, SDNY ADR Program Director, December 19, 2016.
[13] All data relating to the Eastern District of New York are taken from the Alternative Dispute Resolution Report, July 1, 2015 – June 30, 2016, Eastern District of New York. The Report can be found at https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.
[14] Local Rule 83.7(d)(1). The rule can be found at https://img.nyed.uscourts.gov/files/local_rules/localrules.pdf.
[15] The Report can be found at https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf.
[16] See, Petro, Michael, "Special Report: Alternative Dispute Resolution, Federal ADR Chips Away at Court Docket," Buffalo Law Journal, Vol. 87, No. 1, June 22, 2015. The article can be found at http://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2015/06/federal-adr-chips-away-at-court-docket.html.