New York State Bar Association
Dispute Resolution Section

February 7, 2014

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re Proposed Creation of a Pilot Mandatory Mediation Program
In the Commercial Division of the Supreme Court, New York County

Dear Mr. McConnell:

I am writing to you as Chair of the Dispute Resolution Section ("DRS") of the New York State Bar Association. The DRS strongly supports the proposed creation of a pilot mandatory mediation program ("Pilot Program") as set forth in Section IV of the June 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century.

By automatically directing every fifth newly assigned New York County Commercial Division case to mediation, the Pilot Program will increase the use of mediation which has thus far been underutilized in the Commercial Division. Until now, some judges have not taken the initiative to use their authority to direct the parties to mediation, of if they did, they waited until the parties had completed discovery. Even though over 90% of litigations settle before a final judicial determination, an effective mediator can help the parties settle earlier in the process by serving as a discovery master in helping the parties evaluate their case more efficiently than through overly broad litigation type discovery and depositions.

We also support the Pilot Program's requirement that the parties first be given an opportunity to agree on the selection of a mediator. If they cannot agree, the ADR Coordinator will identify three prospective mediators from the Court's roster who are then available to serve, and the parties will have an opportunity to rank the candidates in order of preference. The ADR Coordinator will then select the candidate with the lowest number on their combined rankings. We believe that this method of mediator selection is preferable to the present method by which the ADR Coordinator selects the mediator unless the parties agree to override that selection. Affording the parties more choice in the mediator selection process should improve the Commercial Division's current settlement rate and thus result in greater party satisfaction.

The DRS urges the adoption of the Pilot Program and, through its ADR in the Courts Committee, is available to assist the New York County Commercial Division in the implementation of the program, including by providing ongoing training for the mediators on the Court's roster.

Your's truly,

John Wilkinson, Chair
Dispute Resolution Section

NEW YORK STATE BAR ASSOCIATION
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January 27, 2014

VIA E-MAIL and MAIL

John W. McConnell, Esq., Counsel
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Re: Proposed New Rules of the Commercial Division

Dear Mr. McConnell:

Enclosed for consideration by the Commercial Division Advisory Council are comments from the New York State Bar Association Commercial and Federal Litigation Section on proposed new rules relating to (i) accelerated adjudication procedures, (ii) interrogatories, (iii) a preliminary conference form, and (iv) a pilot mandatory mediation program. We hope that these comments will be helpful.

If you have any questions about the Section's comments, do not hesitate to contact me.

Respectfully yours,

Gregory K. Arenson
Chair

cc: CFLS Officers (via e-mail)

To: Office of Court Administration

From: New York State Bar Association Commercial and Federal Litigation Section

Re: Comments on Four Proposals from the Commercial Division Advisory Council[1]

Date: January 22, 2014

This memo comments on four proposals for procedural innovations in the Commercial Division concerning accelerated adjudication, interrogatories, a uniform Preliminary Conference Order and a pilot mediation program.

Chief Judge Lippman created a permanent Commercial Division Advisory Council in March 2013 to assist in the implementation of recommendations contained in the 2012 report from the Task Force on Commercial Litigation in the 21st Century.

The Commercial Division Advisory Council recently made four recommendations concerning procedures in the Commercial Division, and counsel to the New York State Unified Court System has published those proposals for comment. Those proposals concern:

1) A proposed new rule relating to an optional accelerated adjudication process in the Commercial Division;

2) A proposed new rule relating to the number and scope of interrogatories allowed in Commercial Division practice;

3) A proposed uniform Preliminary Conference Order; and

4) A pilot mandatory mediation program for implementation in New York County's Commercial Division.

We describe the four proposals below, along with our recommended comments.

Accelerated Adjudication

The Commercial Division Advisory Council recommends adoption of a new rule concerning "Accelerated Adjudication Actions" for inclusion in the Rules of the Commercial Division of the Supreme Court. The rule sets forth a group of restrictions upon the complexity of any action falling within its purview, such that all parties to such actions would be deemed to have

[1] Opinions expressed are those of the Section preparing this report and do not represent opinions of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

irrevocably waived certain procedural rights. The purpose of the rule is to allow parties to **elect** a simpler, faster mode of litigation—including through specific election in pre-dispute contract negotiation. (That is, rather than a mandatory arbitration clause, contracting parties could consent in advance to "Accelerated Adjudication" treatment of any dispute arising from their contract.)

The rule states in general terms that all cases governed by it should be ready for trial by no later than nine months after filing of an RJI, and then sets forth certain specific aspects of litigation under its auspices:

- Conclusive waiver of jurisdictional defenses and the doctrine of *forum non conveniens*;
- No jury trials;
- No punitive damages;
- No interlocutory appeals;
- Discovery limitations (for each side):
    - No more than 7 interrogatories;
    - No more than 5 RFAs;
    - No more than 7 depositions of 7 hours each;
    - Document requests limited to documents "relevant" to a claim or defense and generally to be "restricted in terms of time frame, subject matter and persons or entities to which the requests pertain;"
    - Electronic discovery to be done with "narrowly tailored" descriptions of custodians whose documents are to be searched, and subject to court order requiring that requesting party advance costs of e-discovery in the event that the costs and burdens of same "are disproportionate to the nature of the dispute or the amount in controversy," subject to the allocation of costs in the final judgment.

* * *

We believe these simplified procedures are a potentially powerful tool for the simplification of litigation in the Commercial Division. We note, however, that without a specific enforcement mechanism, the nine-month deadline for trial-readiness is more aspirational than realistic.

The only substantive recommendations that the Section makes are the following:

1. In Section (i) under the heading of "Concerning electronic discovery," the Section recommends that the term "on the basis of generally available technology" be omitted.

The term "generally available technology" is confusing, will change in unknown ways over time, and may be subject to inconsistent interpretations. By omitting this language, Section (i) will be, as follows: "the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents."

2. We note that it is unclear what will happen in the event that parties agree to the Accelerated Adjudication procedures, but the case is not otherwise eligible for assignment to the Commercial Division (*e.g.*, because the case does not meet the monetary threshold in a particular county or because the case does not meet the subject matter criteria). Will the Commercial Division nonetheless accept the case? Will the Accelerated Adjudication provisions be applied by other IAS parts in the event that the case is not heard by the Commercial Division? Or, notwithstanding the agreement of the parties, will the parties otherwise be required to comply with all of the provisions of the CPLR if the case is not assigned to the Commercial Division and Rule 9 does not apply to the action? The Section urges the OCA to clarify this ambiguity so that (a) the Commercial Division will only be handling cases appropriate for Commercial Division adjudication and (b) parties have clarity when contractual provisions providing for Accelerated Adjudication will be applied by the courts.

Therefore, subject to the two recommendations set forth above, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a significant step towards more efficient resolution of those cases for which accelerated procedures are appropriate. We assume that the OCA will keep statistics with regard to the use of this procedure and its effect on case dispositions. The Section recommends that the proposed rule be adopted subject to the two recommendations set forth above.

Interrogatories

The Commercial Division Advisory Council recommends, in essence, that the Commercial Division adopt limitations on number and scope of interrogatories that closely parallel those in place in the Southern District. Under the proposal, each party would be limited to 25 interrogatories (without subparts). At the outset of discovery, interrogatories would be limited to those seeking witness identities, general logistical information about documents and physical evidence, and damages calculations. Contention interrogatories would be allowed at the conclusion of discovery. Other interrogatories would be permitted only by consent or by court order. The proposed text of the new rule follows:

> (a) Interrogatories are limited to 25 in number, without subparts, unless another limit is specified in the preliminary conference order. This limit applies to consolidated actions as well.

(b) Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.

(c) During discovery, interrogatories other than those seeking information described in paragraph (b) above may only be served (1) if the parties consent, or (2) if ordered by the court for good cause shown.

(d) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise.

The only material difference between the proposal and the analogous Southern District rule is that the proposed rule requires either consent or court order for any interrogatories outside the normal scope, whereas the Southern District rule nominally allows such interrogatories "if they are a more practical method of obtaining the information sought than a request for production or a deposition." We believe the proposal represents an improvement over the Southern District rule, which frequently gives rise to disputes between parties as to which discovery method is "more practical"—disputes that generally require court resolution in any case.

For reference, here is the text of the Southern District's Local Civil Rule 33.3:

(a) Unless otherwise ordered by the Court, at the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a) above may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the Court.

(c) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

* * *

We believe this proposal is a helpful incremental step in limiting the expense and burden of litigation in the commercial division, and we therefore recommend that this Committee endorse the proposal.

Therefore, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a meaningful step towards greater efficiency of litigation in the Commercial Division.

Uniform Preliminary Conference Order

The Commercial Division Advisory Council has recommended the use of a uniform Preliminary Conference ("PC") Order for all Commercial Division matters. Rule 8 of the Uniform Rules for the Commercial Division specifies a range of issues to be discussed prior to the Preliminary Conference. Moreover, the Rules contemplate that the preliminary conference will serve as the forum where counsel – with the Court's guidance and direction – will actively plan the litigation and address, at an initial stage, certain of the complications in discovery and motion practice the parties anticipate. However, because many of the standard PC Order forms used in Commercial Division parts around the state cover only a few of the topics specified in Rule 8, the level of active management of cases can vary from court to court and case to case.

The proposed uniform Preliminary Conference Order is designed to help the parties and the Court make sure that the key components of typical commercial litigation are addressed at the outset – much as a FRCP 26(f) discovery plan and FRCP 16 scheduling order gives structure to business litigation in the federal courts. Among the topics included in the proposed PC Order are:

(1) A section concerning confidentiality forms typically used in business cases;

(2) A section requiring the parties to summarize their key claims and defenses;

(3) A section certifying that the parties have met concerning e-discovery and addressed document preservation, search terms, issues relating to privilege logs and claw back provisions for inadvertent disclosure;[2] and

(4) A section concerning expert disclosure in light of new Rule 13(c).

* * *

[2] We have been advised that although the proposed PC Order requests that parties identify search terms and custodians, the Commercial Division Advisory Council is considering proposing that the language be modified to require only that the parties inform the Court that they have taken the step of identifying custodians and search terms. The Section agrees with the proposed modification; there is no need for a publicly filed Order to list the individual custodians in each case or all of the search terms the parties intend to use. So long as the parties confirm that they have undertaken the exercise of identifying this information, the essential planning/case management function will be achieved.

Although not all commercial cases statewide will require the level of detail in planning the proposed Preliminary Conference Order requires, we believe this proposal will generally help the preliminary conference achieve its important case management function.

The Section, however, does have two proposed modifications concerning the provisions on "Electronic Discovery":

Section 7(b) of the proposed Preliminary Conference Order requires counsel to certify their competence as to matters relating to their clients' technological systems or have brought someone to the conference who can address these issues. While the Section certainly agrees that counsel should be knowledgeable about e-discovery issues and the technological systems at issue in the particular case, the Section opposes a requirement that counsel make a certification. In the Section's view, competence is an issue of professional responsibility, not an item that requires certification in the Preliminary Conference Order. Moreover, the Section is concerned that a certification requirement in the Order could embolden parties to seek contempt sanctions and unnecessarily increase motion practice.

The Section, therefore, recommends changing the second sentence of Section 7(b) from:

"Counsel hereby certify to the extent they believe this case is reasonably likely to include electronic discovery, they are sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery or have brought someone to address these issues on their behalf."

to:

"Counsel are reminded that, if this case is reasonably likely to include electronic discovery, they should be familiar with their clients' technological systems so as to discuss competently *all* issues relating to electronic discovery or bring someone to address these issues on their behalf."

Section 7(c)(ii) [Production] asks the parties to identify relevant search terms and the general cut-off date of the discovery. Technology is constantly evolving and "search terms" may not be used in cases that employ Technologically Assisted Review (TAR), such as predictive coding. As an alternative, the Section recommends that the language require that the parties confirm they have discussed the "means, parameters, custodians, protocol and technology to be used for the culling and production of relevant electronically stored information and the dates by which production shall be made." The general cut-off date of discovery is confusing. If it relates only to electronically stored information, it is encompassed by the Section's recommended language. If it relates to all discovery, it should be subsumed in Section 8 for the cut-off of fact disclosure.

Therefore, subject to a minor modification to clarify that custodians and search terms will not be set forth in the proposed Preliminary Conference Order and the recommendations concerning Sections 7(b) and 7(c)(ii) of the proposed Preliminary Conference Order set forth above,, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a meaningful step towards greater efficiency of litigation in the Commercial Division.

Pilot Mediation Program

The Commercial Division Advisory Council has recommended the adoption of a pilot program in the New York County Commercial Division, to sunset after eighteen months unless renewed, under which one out of every five newly filed cases in the Commercial Division would be referred for mandatory mediation. Parties would be required to complete mediation within 180 days of assignment to an individual justice (i.e. normally upon filing of an RJI). Parties could opt out if all sides so stipulate, and any party would be permitted to apply for exclusion from the program on the basis that mediation would be ineffective or unjust.

The recommendation by the Commercial Division Advisory Council is based largely upon the recommendation of the ADR Committee of the Commercial and Federal Litigation Section, and is premised on the view that mediation is underutilized in Commercial Division matters and upon the experience of other courts to have implemented such systems, including the Western District of New York, which reports that 70% of cases that go to mediation there are settled.

Of course, the Supreme Court already maintains a panel of mediators; free mediation is available in all Commercial Division cases. However, the pilot program's proponents believe that mediation remains underutilized. We agree, and recognize that (in the words of the Faster-Cheaper-Smarter Working Group of the Commercial and Federal Litigation Section, which made a similar proposal in June 2012) "[m]ediation will often succeed despite the skepticism of counsel and parties." We also note the observation ADR Committee's observation that their members who are in-house counsel were particularly vocal in urging adoption of this proposal.

The ADR Committee has indicated that it will monitor the implementation and results of the pilot program; we believe this is wise, and also that it might be logical for a representative of this Committee to liaise with the ADR Committee in that connection.

* * *

We believe this proposal may be helpful in achieving more optimal use of mediation to resolve Commercial Division cases at an early stage, and we think that this Committee could serve a potentially helpful role in evaluating the success of the proposal as it is implemented.

Therefore, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposed pilot program as a meaningful step towards the maximizing the early resolution of Commercial Division matters through mediation, where possible.

NEW YORK
CITY BAR

Comments on Proposed Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County

The Committee on Alternative Dispute Resolution of the New York City Bar Association (ADR Committee) has considered the Proposal of the ADR Committee of the Commercial Division Advisory Council to Implement the Task Force Report's Proposal for a Pilot Mandatory Mediation Program and the Statement of the Administrative Judge Regarding Implementation of a Rule of the Commercial Division. The ADR Committee appreciates the opportunity to comment on the proposal and strongly endorses the proposed pilot mandatory mediation program.

The original proposal for this initiative by the Chief Judge's Task Force on Commercial Litigation in the 21st Century was based on findings that mediation expedites good results for parties and counsel and frees judges to do the unique parts of their job in applying and developing the law. The Committee of the Advisory Council's report shows the extensive consideration it gave to other ways of implementing a mandatory mediation program. Even if there is disagreement with some of the choices made, their choices are well-supported and the proposal is an excellent contribution to the goal of increasing successful and efficient case management and dispute resolution.

The benefits of a pilot mandatory program directing every fifth newly assigned case to mediation include the increased use of mediation and the ability to gather data about the process. To date, mediation in the Commercial Division has been underutilized. Even though the vast majority of cases in litigation settle before a final judicial determination, parties often have difficulty efficiently evaluating the strengths and weaknesses of their case. An effective mediator can help the parties resolve cases earlier in the process.

Data gathered from the 18 month pilot program will provide information addressing details concerning limited discovery needed for mediation; the amount of time needed to select a mediator and complete a mediation; satisfaction with the process, as well as other components necessary for successful implementation of a permanent mediation program.

The ADR Committee of the New York City Bar Association urges adoption of the Proposed Pilot Mandatory Mediation Program in the Commercial Division, New York County and offers our assistance in implementing the program.

Committee on Alternative Dispute Resolution
Chris Stern Hyman, Chair

February 4, 2014

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Pamela L. Gallagher
Co-Chair
Brian D. Graifman
Co-Chair
Supreme Court Committee

January 23, 2014

Proposed Adoption of a Mandatory Pilot Mediation Program in the Commercial Division of the Supreme Court, New York County

The Supreme Court Committee[1] of the New York County Lawyers' Association reviewed the Office of Court Administration ("OCA") proposal regarding the adoption of a mandatory pilot mediation program in the Commercial Division of the Supreme Court, New York County. In the pilot program, every fifth case assigned to the Commercial Division in New York County would be required to participate in mediation, subject to the parties' ability to opt out by consent or by a party's good cause showing that mediation would be ineffective or unjust.

A majority of members of the Supreme Court Committee voted in favor of the proposal following a presentation by the Commercial Division Advisory Council, which also recommended adoption of the pilot program.

The Committee agreed with the conclusion of the June 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century that "mediation is substantially underutilized in New York." The Committee also observed that the Commercial Division Rule 3 already allows the court to direct the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation.

[1] The views expressed are those of the Supreme Court Committee only, have not been approved by the New York County Lawyers' Association Board of Directors, and do not necessarily represent the views of the Board.

February 11, 2014

John W. McConnell Esq.
Counsel Office of Court Administration
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Re: Comment on Commercial Mediation Pilot

Dear Mr. McConnell,

My letter is in response to the invitation to comment on the Commercial Mediation Pilot. My remarks are informed by my twenty year involvement as a supporter and developer of ADR in New York State in different capacities: as a developer and director of multiple court-annexed mediation programs; chair of the New York State Bar Committee on ADR; board member of ADR organizations; part 146 approved mediation trainer; advisory board member for the development of court-annexed mediation programs; and now, as Assistant Dean of Dispute Resolution at St. John's University School of Law.

I do not support the recommendation that one in five commercial cases be referred to mediation. First, the randomness of the referral undermines the importance of referring appropriate cases to the appropriate ADR process and diminishes the likelihood that the mediation referral will be a meaningful one. Second, such a referral process does not address the real reasons judges and attorneys are not using the commercial mediation program with greater frequency.

As I wrote in the attached column, New York State has to date encouraged the development of ADR by supporting voluntary ADR development initiatives. If New York Office of Court Administration is now considering adopting a mandatory approach to mediation, I would hope that such a shift would include programmatic supports to ensure that mediation referrals are appropriate and a meaningful opportunity for all. Although there has been education for judges, attorneys and litigants about the appropriate use of mediation, more needs to be done. While many have become sophisticated about mediation's value, I remain amazed at the number of judges and attorneys who still have misinformation about how to effectively use mediation as part of a case management approach.

Thank you for the opportunity to offer my comments on this proposal.

With my regards,

Elayne E. Greenberg
Assistant Dean for Dispute Resolution Programs
Professor of Legal Practice
Director, Hugh L. Carey Center for Dispute Resolution
St. John's University School of Law

The Ethical Compass

Should There Be a Rule Compelling ADR? Follow the Road Where a Thousand Flowers May Grow

By Elayne E. Greenberg

"One day Alice came to a fork in the road and saw a Cheshire cat in a tree.' Which road do I take? 'she asked. 'Where do you want to go?' 'I don't know,' Alice answered. 'Then,' said the cat,' it doesn't matter.'"[1] So too, in 1994 NYS reached the proverbial fork in road as our state continued its foray into dispute resolution.[2] Which road should New York State proceed down to promote the development of ADR in our state? Should New York State adopt a mandatory rule compelling ADR or should New York State embrace a more voluntary approach to ADR use? Expectedly, an individual reader's initial preference for one approach or the other may be based on whether she is an ADR enthusiast or naysayer. Yet, New York State's decision to support a voluntary approach rather than a mandatory approach to ADR is actually a nuanced one that respects New York's court culture and adheres to conflict resolution system design principles.[3] First, I explore the rationale for, and gains made under, New York's chosen path, an evolutionary approach to ADR development. Then, I contemplate the lost opportunities on the road not taken, mandatory ADR. Finally, at our current fork in the road, I invite you to consider which path we should take as we continue to advance the responsible development of ADR use in New York State.

In 1996, New York's beloved former Chief Judge Judith Kaye decided that New York State should proceed down a voluntary, experimental ADR course. This decision was informed by the recommendations of Chief Judge Kaye's New York State Alternative Dispute Resolution Project Task Force that the Chief Judge had formed in 1994. This Task Force was aptly lead by co-chairs Fern Schair and Margaret Shaw who guided the Task Force through two rounds of statewide public hearings, a survey of existing New York ADR programs, an analysis of other States' incorporation of ADR, an Interim Report, a Proposed Final Report, all culminating in the Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project.[4] In relevant part, the Final Report advised that New York should first embark on an experimental phase of ADR in which judicial districts throughout New York State would try out different forms of ADR for different types of cases. [5]

New York State's decision to proceed with a voluntary instead of mandatory approach was a well-reasoned determination. It recognized that the New York court culture is conservative, and that court reform proceeds at glacial speed. It respected that any discussion about ADR evoked a vibrancy of opinions and provoked the strength of personalities that make New Yorkers New Yorkers. And, it was consistent with the ADR's core values of voluntariness and self-determination.[6]

Our then Chief Administrative Judge Jonathan Lippman aptly characterized this evolutionary approach as one in which the New York State Office of Court Administration "let(s) a thousand flowers bloom."[7] Evidence abounds that this policy of encouragement, rather than coercion, has, in fact, led to the proliferation of successful ADR advancements, excited an increasing groundswell of ADR supporters, and shifted our legal culture from a litigation-centric to a settlement-focused culture. The New York Office of ADR, stewarded by the ever-positive Dan Weitz, serves as a stimulus and invaluable resource for ADR innovation and development in court-connected and community dispute resolution ADR programs and standards. During this time, some of our courts have shifted from tentative experimentation to a meaningful integration of ADR in their case management.[8] For example, our New York State Supreme Court Commercial Division has a mediation program.[9] In another noteworthy example, our New York State problem–solving courts have designed dispute resolution systems to address such challenging issues as mental health, domestic violence, and child permanency planning.[10] And, the "let a thousand flowers bloom" approach has encouraged mediation programs to selectively choose from a range of mediation ideologies including transformative, understanding-based, facilitative and evaluative, recognizing that each ideology has its own value and contribution.

Continuing, lawyer-initiated ADR activism plays a significant role in contributing to NYS ADR advancements. How different the legal community's reaction to ADR is today from fifteen years ago, when many New York lawyers were debating whether ADR was actually the death knell or the elixir to the practice of law. In 2010, increasing numbers of lawyers are seeking training in ADR, clamoring to get on ADR rosters, and more regularly using ADR in their case management. In another example, lawyers are actively experimenting with new

types of ADR lawyering such as collaborative law and encouraging other colleagues to jump on the bandwagon. One further illustration, the formation of our Dispute Resolution Section and the increasing numbers of New York State Bar Association Substantive Sections that also have ADR subcommittees, evidence the growing interest in ADR in New York.

Yet, many ADR enthusiasts still favor a mandatory approach. Some have remained hopeful that the Office of Court Administration would enact a mandatory ADR rule once courts and consumers of ADR realized its benefits. Hope springs eternal. Courts and consumers are increasingly realizing the benefits of ADR. However, there is still no mandatory rule. Supporters of a mandatory ADR rule point to states such as Florida, Texas and California who have mandatory ADR rules[11] and question if New York should follow suit. Yes, New York judges have discretion to order parties to mediation,[12] but discretion is not enough to sustain consistent use of ADR. Proponents of mandatory ADR point to the inconsistency and underutilization of ADR services in New York State that they believe would be remedied by a rule mandating ADR. A mandatory rule would serve as a proclamation that dispute resolution is how we resolve cases, rather than merely a good idea that might be considered at the discretion of the judges and lawyers.

And, dear reader, we have arrived at another crossroad in our travels. Looking back, we can be proud how far we've come and applaud the ADR evolution that many of you are a part of. Going forward, we need to decide whether New York should continue down its road where we "let a thousand flowers bloom," or take a different road and adopt a mandatory ADR Rule. As the Cheshire cat advised, "It depends where you want to go."

Where does New York want to go? For some, the answer is based on whether we value encouragement or compulsion, mandates or choices. Still others question whether a mandatory rule might stifle the richness of the New York ADR culture and encourage compliance at the expense of meaningful participation. For others, an alternative query to consider is whether New York has evolved into such an ADR receptive culture that a mandatory ADR rule would just be reinforcing what is already good practice. Ours answers will determine the road we should take. Any road, without making an informed determination, won't do. New York, unlike Alice in Wonderland, needs to be clear about where we want to go with the continued development of ADR in New York because ADR in New York State matters.

Endnotes

1. Lewis Carroll, Alice's Adventures in Wonderland (MacMillan and Co. 1865).
2. Kathryn C. Sammon, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice in New York*, 23 St. John's J. Legal Comment. 923 (Fall 2008). Chief Judge Judith Kaye appointed a task force, co-chaired by Margaret Shaw and Fern Schair, to review the state of ADR in NYS and the country and make recommendations about how to proceed. *See* Ctr. for Ct. Innovation, *A Decade of Change: The First 10 Years of the Center for Court Innovation* (2006), *available at* http://www.courtinnovation.org/_uploads/documents/10th_Anniversary1.pdf.
3. Amy J. Cohen, *Dispute System Design, Neoliberalism, and the Problem of Scale*, 14 Harv. Negot. L. Rev. 51 (2009).
4. Schair, Fern and Shaw, Margaret, *"Court-Referred ADR in New York State: Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project,"* (May, 1996).
5. *Id.* at 8.
6. Chief Administrative Judge Jonathan Lippman, *Remarks from the Inaugural Fordham Dispute Resolution Symposium, "ADR As A Tool for Achieving Social Justice": Achieving Better Outcomes of Litigants in New York State Courts*, 34 Fordham Urb. L. J. 813 (2007) [hereinafter Judge Lippman Lecture].
7. *Id.* This is a frequently heard response by Chief Judge Lippman when asked if ADR would be mandatory, including at the NYSBA Committee on ADR Annual Meeting, "Shall We Dance," on January 29, 2004. This is a common paraphrasing from Chairman Mao Zedong's quote, "Letting a hundred flowers bloom and a hundred schools of thought contend is the policy for promoting progress in the arts and the sciences and a flourishing socialist culture in our land."
8. *See* New York State Unified Court System, Alternative Dispute Resolution *available at* http://www.nycourts.gov/ip/adr/ (last visited Feb. 10, 2010).
9. *See* New York State Unified Court System, Commercial Division *available at* http://www.nycourts.gov/courts/comdiv/ (last visited Feb. 10, 2010) [hereinafter Commercial Division].
10. *See* Judge Lippman Lecture, *supra* note 6.
11. *See* Craig A. McEwen, Nancy H. Rogers & Richard Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 9 Minn. L. Rev. 1317 (1995); *see also* Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 7 U.S.F. L. Rev. 1031 (2003).
12. *See* Commercial Division, *supra* note 9.

Elayne E. Greenberg is Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law and Chair of the Ethics Committee of the NYSBA Section of Dispute Resolution. She can be reached at greenbee@stjohns.edu.

A special thank you to Elizabeth Filardi 2010 for her assistance.

CommDivMedPilot - New York Mediation Program

From: Laura Kaster <laura.kaster@gmail.com>
To: <CommDivMedPilot@nycourts.gov>
Date: 1/28/2014 10:54 AM
Subject: New York Mediation Program
Attachments: Kaster Dickey NJ Mediation3.18.13.pdf

John W. McConnell, Esq.,
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York 10004.

Dear Mr. McConnell:

I am immediate past Chair of the NJSBA Dispute Resolution Section and Co-Editor in Chief of the Journal of the NYSBA Dispute Resolution Section, NY Dispute Resolution Lawyer. I am also on the panel of mediators for NY's Commercial Division program. I am writing entirely in my personal capacity.

I hope that the New York is aware of the early mandatory mediation program in New Jersey. It has been in operation for more than a decade and can provide New York with excellent information and focus. In addition, there are studies which demonstrate that early mediation can save the courts and the parties significant costs associated with the pendancy of litigated cases and discovery. Court-ordered mediation provides a settlement opportunity that does not call for either party to blink. It has been found to be an important addition to the justice system and to engender a high level of satisfaction. Critical to any such program is a very high level of training and expectation for the mediators. I attach a recent article on the New Jersey experience and would be happy to provide any additional information that might assist your Committee.

Very truly yours,

Laura A. Kaster

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IN PRACTICE

ALTERNATIVE DISPUTE RESOLUTION

Progress on the N.J. Mediation Front

Maximizing the benefits to the judiciary, litigants and attorneys

By Laura A. Kaster and N. Janine Dickey

The Civil Presumptive Mediation Program, part of the New Jersey court-annexed Complementary Dispute Resolution program (CDR), has been the subject of re-examination and rule change and hopefully renewal in 2013. It is still under scrutiny by the Supreme Court, but the CDR Committee of the Administrative Office of the Courts (AOC) obtained an extension of the review through mid-2013, and its prospects are looking up. It is a good time to pause, reflect and plan for an even better future for this important program that has served to change the legal culture, expand alternatives for litigants, and reduce costs to both the parties and the courts during these fiscally challenging times.

Both authors are on the N.J. Civil Mediation Roster. Kaster is chair of the NJSBA Dispute Resolution Section, an ex-officio member of the CDR Committee of the N.J. Supreme Court and a full-time mediator and arbitrator. www.AppropriateDisputeSolutions.com. Dickey is secretary of the NJSBA Dispute Resolution Section, an active lecturer/trainer and a Certified Mediator with the U.S. Federal District Court of N.J. www.civil-mediator.com.

The Beginnings

The New Jersey program — the envy of many other states — grew out of a prestigious Supreme Court task force led by Justice Marie L. Garibaldi, which held public hearings and issued a final report in 1990.

In evaluating the CDR program today, it is important to keep in mind the goals that gave it life. Among the stated goals was the desire that "litigants should have available at all levels of their court system a full set of options for the resolution of disputes ...." To this end, a CDR program would have to "[e]ncourage the confidence and respect of disputants and the general public in the fairness, integrity, and justness" and "be as efficient as possible in terms of the cost and time required of both the system and the disputants."

Concerns: Addressed and Resolved

Starting in 2010, there was a groundswell of concern among court administrators that the program was an inordinate burden on their and the judges' time because, among other things, it required periodic reporting, set a very early date for the mediation that sometimes was inappropriate, and allowed the mediators to seek unpaid mediation fees by way of an order to show cause. The CDR Committee addressed these issues and very promptly made changes to Rule 1:40, including: eliminating reporting except at the completion of the mediation; extending the time for mediation; permitting mediators to assist the court in case-management; and eliminating the order to show cause. Extensive FAQs were made available on the judicial website. And the NJSBA Dispute Resolution Section developed checklists correlated to the Amended Rule and FAQs for mediators and advocates. These efforts have been very well-received and seem to have met the articulated concerns.

Evaluating the Program

However, the focus on the burden to the court personnel was, at best, only one side of an equation. To measure the real success of the program, even on a purely monetary basis, we would have to weigh and compare the time and money saved by the court system and the parties who were the focus of the Task Force's goals.

Those who disfavor the program argue that the vast majority of cases do settle before trial — 97 to 98 percent nationwide — concluding that mediation doesn't add much. But there is a time value of resolving a case much earlier in the process before the court has to rule on multiple motions and before the parties incur significant expenses on the costliest aspect of litigation — discovery.

Unfortunately, cost has limited the ability to undertake a New Jersey study. But California did fund a very careful study of an *early* mediation pilot program, very similar to New Jersey's, that assigned a value to the time saved by the court system by resolving cases early. California found that early mediation programs help courts save judicial time and money. In its Evaluation of the Early Mediation Pilot Programs, AOC (California), Feb. 27, 2004, a scientific study assigned a monetary value to both court time expended and court time saved by the programs. It found that, in San Diego, 479 judge days were saved by the program. That was a monetized savings of $1.4 million per year. In Los Angeles (a more limited program), 132 judge days were saved, equating to $400,000. Litigants' costs were reduced 61-68 percent, and attorney hours saved were 57-62 percent. The savings continued after mediation because there were fewer post-disposition compliance issues. Mediation increased litigant satisfaction and was important to the ultimate settlement in 74 percent of the cases.

The Department of Justice has also studied the administrative cost to it versus the administrative savings of mediation and found that the savings far outweigh the costs. It found year over year increases in the savings, and also found that the vast majority of cases benefit *even when mediation does not result in immediate settlement*. www.justice.gov/olp/adr/doj-statistics.htm.

These studies confirm the benefits envisioned by the New Jersey Task Force. So how can we help CDR flourish in New Jersey?

Expanded Rule Change Benefits

Rule 1:40 originally contemplated that all mediations would be conducted within 90 days from the filing of defendant's answer. Some attorneys objected to being "pushed" into early mediation. The September 2011 rule changes cured this problem, giving mediators greater leeway to schedule the mediation at any point prior to the discovery end date. This scheduling flexibility should permit mediators to tailor mediation schedules.

Permitting later mediation when appropriate also provides greater opportunity for mediators to assist with case management. With judges overburdened, litigants and attorneys can benefit from the assistance of a mediator acting as neutral discovery facilitator, identifying critical discovery to exchange prior to mediation, timing the exchange of documents and expert reports, sequencing depositions, etc. Case-management training is now part of the continuing training requirements under the Sept. 2011 Rule 1:40 amendments.

Trusting the competence of a mediator is an important factor that enables the parties and counsel to use the full range of a mediator's skills and services. The amended Rule 1:40-6(b) encourages attorneys to "party-select" a roster mediator of within 14 days after entry of the Mediation Referral Order *without* foregoing entitlement to two free hours of mediation services. The "court designated" mediator becomes the mediator of record only if no "party selected" mediator is named. Given the overburdened judicial calendar and vacancies that significantly delay both disposition of discovery motions and trial dates, mediation may shave months or even years off the time to obtain a final disposition from the court.

Earning Respect: Mediator Quality and Professionalism

The legal community's reaction to the court-sponsored mediation program currently varies from passionate support to push-back at required participation. Why the discrepancy and how can it be addressed?

The key to encouraging confidence and respect in the "fairness, integrity and justness" of the program lies in assuring that roster mediators are committed to treating mediation as a profession. Better experiences and greater respect by disputants, attorneys and the judiciary will, in turn, foster cooperation for creative and expanded uses and benefits of mediation.

New Jersey's court-mandated mediation program serves as a gateway and an education in mediation for all the parties and counsel that participate. The initial experience with the mediation program — positive or negative — is likely to significantly impact the participants' respect for the mediation process, and will influence their future voluntary participation in mediation outside the court-ordered program.

So how can we move closer to this goal? The ABA's Model Standards of Conduct for Mediators, Standard IV, Competence states:

> A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties .... A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

The programs that are most successful in other states impose greater training demands and require practice as a mediator, shadowing other mediators, mediating smaller cases and ongoing work as a mediator. Studies have also shown a direct correlation between a mediator's actual case experience and higher settlement rates.

The roster mediators often introduce parties and sometimes attorneys to the mediation process. They should be committed and able mediators. Therefore, continued roster membership should require ongoing learning and ongoing practice. But New Jersey's large pool of 620 roster mediators means each roster mediator may be assigned only one or two cases annually and is unlikely to gain significant actual mediation experience solely from the court program. A commitment to do one or two mediations a year is not sufficient to achieve mastery.

To create and sustain the quality needed to lift the system and allow it to enhance the promise of mediation acceptance, every roster mediator needs to undertake that role as a committed professional. Continual training and practice are critical. Advanced skill training, apprenticeship programs and opportunities to conduct mediations are widely available. Both the Dispute Resolution Section of the NJSBA and the New Jersey

Association for Professional Mediators provide collegiality and a wide variety of opportunities to improve and enhance mediation skills.

Conclusion

Perhaps it would change the performance of roster mediators and the perception of lawyers, litigants and judges, if each roster mediator pledged as follows:

> Recognizing the duty under the Model Standards of Conduct for Mediators that: "A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties," I pledge to undertake the ongoing training and practice necessary to assure a professional level of commitment and accomplishment as a mediator. ■

From: bruce_j_hector <bhector1@optonline.net>
To: <CommDivMedPilot@nycourts.gov>
Date: 2/10/2014 6:09 PM
Subject: Mediation Proposal

Dear Mr. McConnell,

I just wanted to offer some brief comments on the Commercial Division"s mediation pilot program proposal, which are as follows:

1. Before I retired 3 years ago, I was the Chief Litigation Counsel at a Fortune 500 company, so I know firsthand the impact of litigation costs on a business. From my days as a civil litigator, I am very familiar with the trial attorney's desire to be satisfied that no stone has been unturned before proceeding to trial. Therefore, it is no surprise that, with the advent of technology, discovery costs have escalated. In addition, many litigators are reluctant to mediate until they have had discovery for fear of missing the "smoking gun", so discovery can represent the bulk of legal expenses up to trial.

But here's the dilemma. We all know that 98% of civil cases will settle eventually. So if one goal of mediation is to save legal expenses, if we wait until the conclusion of discovery to mediate, that horse is already out of the barn. The pilot program, as currently drafted, has created a framework in which there can be meaningful savings by going to mediation earlier, and, in addition, removes the factor of parties not wanting to appear "weak" by suggesting mediation. In other words, I think the Court's proposal is a good one both for litigants and for the Court itself.

2. Another comment, on a more selfish note. I am on the Court's mediator roster, and have had the privilege of mediating 4 cases so far. Given the Court's requirements to qualify for the roster (10 years minimum experience in the field, etc.), I believe you have assembled a very professional pool for litigants to work with. Given that professionalism, I think that the 4 free hours of mediation time is excessive for the level of attorneys who serve as mediators. I am also a mediator in the New Jersey courts, and their specification is 2 free hours of which one hour is applied to prep time. With respect, I don't think it takes parties 4 hours to decide whether or not they are satisfied with the mediator. The time period can be reduced without impacting the prerogative of the parties to stop the mediation before the meter begins to run if they are not satisfied with the mediator. Personally, I always remind the parties when the 4 hours are about to expire, and no one has yet exercised their option to stop.

3. A recent article has opposed the pilot program on the grounds that it would add unnecessarily to litigation costs; I think that is ridiculous. As a former consumer of legal services in the millions of dollars per year, I know that the costs of one day of mediation in a substantial lawsuit wouldn't even amount to a rounding error, when compared to the other expenses in the case! With our hourly rate capped at $300.00, (and I am not suggesting that be changed, by the way) we mediators are the lowest paid lawyers in the room.

All that being said, I think it is a great proposal which takes an important step in furthering the interests of the litigants and the Court alike. Thank you for the opportunity to comment.

Thanks & Best Regards,
Bruce

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Mediation services in NY & NJ state and Federal Courts

CommDivMedPilot - expanded mediation program

From: "Irene C Warshauer" <icw@irenewarshauer.com>
To: <CommDivMedPilot@nycourts.gov>
Date: 2/10/2014 10:07 AM
Subject: expanded mediation program
CC: <icw@irenewarshauer.com>

I am a supporter of mediation and a mediator. In my experience, not all cases are suited for mediation, although most can receive some benefit. There should be an opt out provision, with reasons for which opting out is permitted.
I also believe that it is unfair to ask the mediators to serve for free for 4 hours. It undervalues the benefits of mediation and is a financial burden on the mediators. Some court programs provide for one free hour of mediation time and others provide a basic rate for the first several hours and then the mediator's normal rate for any additional time. Irene

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CommDivMedPilot - Comment

From: Jeff Thompson <mediator.jeff@gmail.com>
To: <CommDivMedPilot@nycourts.gov>
Date: 2/10/2014 9:30 AM
Subject: Comment

Hello,

I would like to share my comment that I do not agree with nor do I understand why the first four hours of a mediator's session should be provided for free.

If mediator's are providing a service:

1) why should it be provided free of charge
2) why should the Court dictate a mediator's billing method
3) how was this decided? I would be interested in hearing more about the perspective behind it.

Thank you for allowing me the opportunity to share my opinion and I hope it will be considered.

-jeff

--
Jeff Thompson
Mediator, Conflict Resolution & Communication Specialist *(New York City, USA)*
Research Fellow | Columbia University Law School
PhD Candidate- Griffith University Law School ***(Queensland, Australia)***
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ALPERT MEDIATION

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February 5, 2014

John W. McConnell, Esq.
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Office of Court Administration
25 Beaver Street
11th Fl.
New York, NY 10004

Re: Proposed Creation of a pilot mandatory mediation program in the *Commercial Division of the Supreme* Court, New York County

Dear Mr. McConnell:

I am writing to comment on the draft "Statement of the Administrative Judge Regarding Implementation of a Rule of the Commercial Division, proposing creation of a pilot mandatory mediation program for every one out of five newly assigned cases in the Commercial Division of the Supreme Court, New York County. My comments relate to each of the two paragraphs in the Statement, and are set forth below.

(a) First Paragraph

I applaud the concept of sending more cases to mediation. However, sending only one out of every five cases to mediation seems unduly limiting, especially over the 18 month period of the pilot program. Perhaps a better percentage would be to send one out of five in the first six months, one out of every four cases in the next six months, and one out of every three cases in the last six months of the pilot program. This would provide sufficient cases to evaluate the effectiveness of the program. Furthermore, since the parties can stipulate away the duty to mediate, and can avoid mediation by a "good cause" showing, the number of cases actually approved for mediation may be quite small.

(b) Second Paragraph

1. First Sentence

It is not clear that this sentence covers only matters under the pilot program. To clarify the wording of the first sentence in this paragraph, I suggest adding the words "and to the pilot program" to the first sentence so that it reads as follows: "By no later than 90 days after assignment of the case to a Commercial Division Justice and to the pilot program, the parties shall jointly inform the ADR Administrator that they either (a) have engaged a mediator or (b) request assignment of a mediator." This makes it clear that only those cases in the pilot program are subject to this 90 day limit of either agreeing upon or requesting assignment of a mediator.

2. Second Sentence

Although the ADR Administrator is tasked with the duty of identifying five possible mediators from the list of ADR Neutrals, this Statement provides no time limit stating when the ADR Administrator must supply that list to the parties. In Rule 4(a) of the Court's ADR Rules, the ADR Program Coordinator must supply the name of the designated neutral to the parties "within five business days from the date on which the Order of Reference reaches the Coordinator." I suggest that the same time limit apply here. Therefore, I suggest the addition of the following sentence: "After receiving the request for mediator assignment, the ADR Administrator shall supply the parties with the list of five mediators within five business days."

3. Third Sentence

The third sentence requires the parties to advise the ADR Administrator of their neutral selection and/or ranking of neutrals with seven days. First, it is not clear whether this means seven business days or seven calendar days, and this should be clarified. Furthermore, I believe the parties should have more time to research the neutrals on the list and/or to contact a neutral not on the list to handle the matter. It could well take more than seven days to find a neutral willing and able to serve and/or to research the various skill sets and experiences of the mediators on the provided list. Therefore, I suggest that the sentence be reworded as follows: "Within fourteen business days of receiving the list of neutrals, the parties shall either advise the ADR Administrator that they have agreed upon a neutral or provide the ADR Administrator of their rankings of the ADR Neutrals."

4. Fourth Sentence

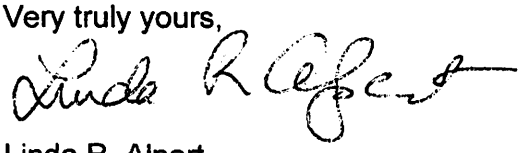
I have no comments on the fourth sentence as it is self-explanatory.

5. Fifth Sentence

I suggest that this sentence be re-worded to clarify that the highest-ranked mediator on both parties' rankings be selected. Using the phrase "lowest number" is unclear. Therefore, I suggest this sentence be reworded as follows: "The ADR Administrator will select the mediator who is highest ranked on the parties' combined list of preferences."

Thank you for allowing me the opportunity to comment on the proposed rules.

Very truly yours,



Linda R. Alpert

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January 29, 2014

John W. McConnell, Esq.
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New York, NY 10004

In re: Proposed Rule 3 (Alternative Dispute Resolution)

Dear Mr. McConnell:

Thank you for the opportunity to comment on Proposed Rule 3 (Alternative Dispute Resolution). I'm writing in opposition. The proposed rule is unnecessary and is likely to increase, not cut, the cost of litigation, I'm also writing to propose a more constructive alternative.

To place my comments into context, please know that I am an independent commercial mediator with a nationwide practice, and have worked with many, many New York lawyers over my 18-year career as a full-time mediator. I graduated from college at Berkeley and from law school at Harvard – both with honors. I have also been honored as California Lawyer Attorney of the year in ADR, and support and belong to many of the same professional organizations as you do (including the International Institute for Conflict Prevention and Resolution, and the American Law Institute). Of course, the views I express are entirely and only my own.

The proposed rule is unnecessary. It rests on faulty assumptions. The Commission believes that "Mediation is substantially underutilized in New York" because of "the inherent adversarial nature of the (sic) litigation and the broad disparity in the degree to which judges refer matters to mediation." In fact, the rate at which mediation is utilized in New York is just fine. That rate perfectly reflects the desires of willing providers and consumers of mediation services making voluntary agreements. In a free market economy, that is cause to celebrate, not complain. Moreover, if these causes of "underutilization" were true, then there would be no mediations at all, save those referred by the more aggressive judges. Yet lots of voluntary mediations take place.

The proposed rule will make litigation more expensive, not less. Cases will be coerced into mediation regardless of whether anyone involved (except maybe the judge) thinks the time is right. These mediations will be a burden to everyone involved (except maybe the judge). How big a "burden" is it for a court to order people to mediate against their will? The burden can be substantial. In a good mediation, people generally don't just "show up and see what happens." For mediation to be effective,

people generally need to prepare. The preparation can be compared to the preparation for a deposition. It takes time and money. Lawyers need to write briefs for the mediator. They need to meet with the client and work out strategy and tactics in advance. They need to take a day to attend the mediation. People sometimes need to travel great distances to attend mediations, especially if courts order "all decision makers" (or some such) to be present, on pain of sanctions or contempt. It all adds up! Contingent fee lawyers, in my experience, particularly resent being ordered to attend mediations when there is no good reason to think anything positive will result. Hourly fee lawyers tend to be less resentful, but their clients don't appreciate having to foot the bill.

The timing of mediation – and, indeed, the decision whether to mediate at all – is best left to the lawyers. They uniquely know whether and when they need a skilled mediator to help them overcome the barriers to settlement they face in a particular case. Many of those barriers are psychological and personal. When lawyers need a hand in helping their clients balance emotion and reason, in accepting the limits of the benefits litigation can provide, and in encouraging their clients to put a matter behind them and move on, a skilled mediator can help. These are sensitive and subtle aspects of the relationships and communications between lawyers and clients. Where would judges get the information necessary to assess such things? What wisdom does a one-in-five wheel have to share?

Mediator selection under the proposed rule presents further curiosities. If the parties cannot agree on a mediator, an administrator picks five candidates for the parties to rank and choose. How is this administrator supposed to know which mediators are best suited to meet the (undisclosed and private) challenges the parties face in their efforts to settle? What safeguards will prevent cronyism from being this administrator's North Star? Again, it's all burden and expense to the parties, not well-designed to meet their true needs.

If parties wish to be excused from these coerced mediations, the rule provides that all parties can so stipulate (it is unclear whether such a stipulation requires court approval), or any party can "make a showing of 'good cause' as to why mediation would be ineffective or otherwise unjust."

The "stipulation" requirement is at best cumbersome and at worst ineffective. Under any circumstance, it requires attorney time and effort (at client expense). If it requires court approval, one might ask: What is the incentive for a judge to excuse parties from a process which does not impose expense on the court, and has a greater-than-zero (even if minuscule) chance of lightening that judge's workload? The same question applies to a judge's incentive to find "good cause" to excuse parties from this coercive process. Worse, to show truly persuasive "good cause," parties might well have to reveal matters either highly sensitive (about a lawyer's relationship with or views of her own client), or highly inflammatory (a lawyer's unflattering views of the other side). Neither should be required.

So, what's the better alternative? Trust the lawyers. Lawyers have an obligation to use independent professional judgment on behalf of their clients. The ultra-sophisticated New York litigation bar, like lawyers everywhere, have been inundated for years with advertisements, articles and interviews about the benefits of mediation. The memo has gotten around! Mediation has been part of the landscape for so long that suggesting it is no longer much of a sign of weakness, if it is any such sign at all. Courts should trust lawyers to mediate when the time is right, in the responsible exercise of their independent professional judgment. Cases will get mediated, and settled, when they are ready.

In-house counsel, according to the ADR Committee, strongly support the concept of mandatory mediation. But they hardly need the heavy hand of government to make mediations happen. In-house counsel measure, evaluate, score – and scare – outside counsel on a wide variety of scales. If they want their outside counsel to take their cases to mediation, why is it not enough for them simply to say so – or else?

And, if a little boost is needed, courts can help in far less coercive ways.

First, courts can catalyze settlements the old-fashioned way: by setting firm trial dates. Now as before, nothing focuses people's minds on the true value of their claims and defenses as sharply as the prospect of having to explain themselves to those 12 impatient strangers.

Next, courts can order parties to meet and confer regarding the advisability of mediation, and report back to the court. This does not coerce anyone to do anything other than have a phone call. But it accomplishes much more. It gives lawyers an opportunity to talk to clients about mediation in the context of the court's suggestion that people think seriously about it. It allows people to agree to mediate with zero fear of that agreement being construed as a sign of weakness. After all, it wasn't "our" idea, it was the court's idea. It will allow lawyers to bring recalcitrant clients around to an agreement to mediate in some cases where that would not otherwise be possible. If there is no agreement to mediate, there will be no fear of retribution from the court so long as the court rules prohibit the parties from telling the court which of them said "no."

Thus courts can see more cases mediated and settled sooner, while still respecting the autonomy and independent professional judgment of parties and their lawyers.

John W. McConnell, Esq.
January 29, 2014

Thank you for your kind consideration of these points. Please let me know what else I can do to help you in your work.

Sincerely,

Jeff Kichaven

JK:abm

CommDivMedPilot - Commercial Division Mediataion Pilot = Happy to assist if Animal Related conflicts are involved

From: <dhamilton@hamiltonlawandmediation.com>
To: <CommDivMedPilot@nycourts.gov>
Date: 1/23/2014 11:40 AM
Subject: Commercial Division Mediataion Pilot = Happy to assist if Animal Related conflicts are involved

John,

Happy to help in the pilot mediation program for disputes involving people about animals.
It is a small niche but I am the only mediator who focuses their entire meditation practice on resolving these kinds of emotional conflicts.
If I can help you in any way please keep me in mind.

Kind Regards,

Debra Vey Voda-Hamilton
Hamilton Law & Mediation, PLLC
"Trailblazing a New Way to Address Conflicts Between People Involving Animals "
Author of the forthcoming book, ***"7 Secrets to Resolving Conflicts Involving Animals."***

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CommDivMedPilot

From: Christopher Bogart <cbogart@burfordcapital.com>
To: "CommDivMedPilot@nycourts.gov" <CommDivMedPilot@nycourts.gov>
Date: 1/17/2014 9:09 AM

I'm pleased to comment on the proposed mediation approach.

We are firm believers in mediation. Thus, we would encourage not only this approach, but indeed mandatory mediation for every commercial case.

However, the reality is that mediation works better later in the process, after the parties have litigated for a while and after they have had some sense of judicial reaction to the claims. Doing mediation too early, as I suspect this pilot is, will likely not show impressive results. I'd instead suggest 100% mandatory mediation conducted 120 days before trial.

Christopher P. Bogart
Chief Executive Officer
BURFORD CAPITAL
www.burfordcapital.com