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Trials and TRIBULATIONS

Mediation: the alternative dispute resolution that every party should consider

While most lawyers agree there are both benefits and potential pitfalls to certain types of alternative dispute resolution (ADR) such as arbitration, most would argue there is really no downside to engaging in mediation at the outset of a lawsuit. This fact has been recognized in the practices of federal courts (and some state courts) throughout the country (including the U.S. District Courts for the Western, Northern, Southern and Eastern Districts of New York).

While the benefits for ADR and mediation in particular have been widely accepted for a long time, only recently have courts recognized that mandating some form at the beginning of a lawsuit can greatly increase the likelihood the parties will settle early on in the litigation process. Studies have shown that of the civil disputes that go to litigation, approximately 95 percent of the cases end up settling before trial. While the cases differ greatly with regard to how far the litigation progresses before settling, and the terms of settlement reached, it is clear there is a far greater chance that a case will settle rather than proceed to trial. Other benefits of mediation include narrowing issues, identifying strengths and weaknesses of each side, and evaluating the amount of damages at issue.

The U.S. District Court for the Western District of New York (WDNY) recognized these benefits when implementing its pilot



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date of May 11, 2018, requires all new cases to be automatically referred to ADR, and permits District or Magistrate Judges to refer any pending civil case to ADR at any time *sua sponte*. In fact, last November the Western District of New York held a settlement week wherein the judges selected numerous cases from their dockets (many of which had been around for five or more years) to attend a mandatory mediation session. The court indicated that out of the 89 cases that went to mediation that week, 19 cases were resolved.

Mandatory mediation was also implemented in the Northern District of New York (NDNY) beginning on Jan. 1, 2014, and this was made permanent in May 2016. Statistics gathered by the court determined that 36 percent of the cases referred to mediation were settled (not including cases settled after the final mediation session was completed).

The ADR program in the Southern District of New York (SDNY) began in 2011, and automatically sent cases to mediation,

ADR Plan on Jan. 1, 2006, which became a permanent program in 2010. The current plan, which was amended with the effective

date of May 11, 2018, requires all new cases to be automatically referred to ADR, and permits District or Magistrate Judges to refer any pending civil case to ADR at any time *sua sponte*. In fact, last November the Western District of New York held a settlement week wherein the judges selected numerous cases from their dockets (many of which had been around for five or more years) to attend a mandatory mediation session. The court indicated that out of the 89 cases that went to mediation that week, 19 cases were resolved.

which involved employment discrimination against the City of New York or claims for excess force, false arrest or malicious prosecution by employees of the New York Police department pursuant to 40 U.S.C. §1983. Recently, the program has expanded to include virtually all civil cases, and provides for specialized protocol for cases involving Fair Labor Standards Act (FLSA), discrimination, and 40 U.S.C. §1983 claims. Statistics available on the SDNY ADR program have established that as of 2016, the rates of settlement resulting from mandatory mediation were close to 50 percent.

The Eastern District of New York (EDNY) currently has no compulsory ADR or mediation program, but there is a voluntary program, which shows similar promise. The Alternative Dispute Resolution Report for the period from July 1, 2015 through June 30, 2016 reported that in the EDNY cases where mediation was completed, 67 percent of them were resolved as a result of mediation.

Recently, national and state bar associations and legal organizations — as well as academics — have focused on the value offered by mandatory mediation. The New York State Bar has supported increased education on the benefits of mediation and training for aspiring mediators. New York County's Manhattan Mediation Pilot Program, which has focused on contract disputes

of less than \$500,000, has also been successful. Between May 2017 and January 2018, out of 99 cases that completed mediation, 59 were successfully resolved.

Despite the fact that mediation in any form is not binding on the parties, the statistics described above confirm that the significant likelihood of settlement makes participating in the mediation process worthwhile. Additionally, even if cases do not initially settle, advantages to mediating include receiving a neutral third party's opinion regarding the strengths and weaknesses of each side and neutral assessment of the monetary value of the parties' claims. It also assists the parties in sharpening and focusing the issues involved in the dispute, ultimately streamlining litigation in the event the mediation fails.

Any attorney who is either required to participate in the federal ADR program, or recommends mediation to their client, should take great care in selecting their mediator and ensuring they have the proper expertise to handle the type of litigation they are facing. The WDNY ADR Program offers an up-to-date list of mediators who have been approved by the court based on their training and relevant experience, which may be a good starting point.

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