Committee on Federal Courts
Association of the Bar of the City of New York

COURT-ANNEXED MEDIATION PROGRAMS IN THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK: THE JUDGES' PERSPECTIVE

August 2004

Introduction

The Committee on Federal Courts has been studying the court-annexed mediation programs in the Southern and Eastern Districts of New York. As a first step in this examination, the Committee ascertained the views of the courts' judges, who suggest, recommend and order cases to mediation. This report summarizes the results of our interviews and sets forth recommendations suggested by those interviews.[1]

The Committee plans to examine further the Southern and Eastern Districts' mediation programs, working with the Association's Committee on Alternative Dispute Resolution, by considering them from the perspective of mediators and those who use the programs.

Alternative Dispute Resolution ("ADR") dates back to the colonies. In 1635, the participants in a Boston town meeting ordered that no inhabitant could sue another at law until an arbitration panel had heard the dispute. Quaker settlers relied on negotiation and arbitration while Dutch colonists in New York relied on a "Board of Nine Men" to resolve controversies by means of conciliation, mediation, and arbitration.[2] In 1786, the New York Chamber of Commerce

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[2] *See* M. Elizabeth Medaglia, *Alternative Dispute Resolution: An Overview*. Available at http://www.jackscamp.com/pubs.htm.

established the first private tribunal in America for the settlement of commercial disputes.

Almost 200 years later, in 1976, the "Pound Conference" convened to generate a national discussion on the status of the American judicial system and triggered such discussion on the topic of ADR. Thereafter, the ABA created a Special Committee on Dispute Resolution and the Pound Follow-Up Task Force, which in 1976 and 1977 submitted recommendations for improving the administration of justice through ADR.

In 1981, the New York State legislature established the Office of Court Administration Community Dispute Resolution Program, which provided dispute centers in all counties of New York. Although this was not a mandatory program, it proved to be quite successful.[3]

In 1991, through its Civil Justice Expense and Delay Plan, the Eastern District of New York introduced programs for court-annexed mediation and early neutral evaluation to be administered by an ADR coordinator. Additionally, all matters involving damages of $100,000 or less were referred to a pre-existing program of court-annexed arbitration. Unlike court-annexed arbitration, which was mandatory, court-annexed mediation could only be ordered on consent of the parties. The same year, the Southern District of New York established a two-year program of court-annexed mediation for all expedited cases as well as a sampling

[3] *See* Peter S. Chantilis, *Mediation USA*, 26 U. Mem. L. Rev. 1031, 1068 (1996)

of other civil cases, and designated a civil case manager to supervise the mediation process.[4] In one form or another, the Southern District has had mediation ever since.

Enacted in October 1998, the Alternative Dispute Resolution Act (28 USCA §§651-658) required each federal district court to develop procedures for using alternative dispute resolution in all civil actions. Under the Act, each court is required to designate a knowledgeable employee or judicial officer to implement the ADR program, to require litigants in all civil cases to consider the use of an ADR process, and to give litigants a choice of ADR processes. One of these processes is mediation.

The local rules describe mediation as a confidential ADR process in which a disinterested third party directs settlement discussions but does not evaluate the merits of either side's case, make decisions for the parties, or render any judgments. The mediator may, but does not necessarily, have substantive subject-area expertise. The mediator facilitates communication between the parties and assists them in probing the strengths and weaknesses of their cases, identifying areas of agreement, and generating options for resolution outside the courtroom. By exploring party needs and interests that may exist outside the scope of traditional litigation, mediation provides a broader array of potential resolutions than traditional judicial action or even arbitration.

[4] See Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systematic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 St. John's L. Rev. 721, 753 (1993).

Pursuant to Eastern District Local Civil Rule 83.11, district judges and magistrate judges may send civil cases to court-annexed mediation without the consent of the parties. Alternatively, the parties may stipulate to participation in the mediation program. Any court-ordered mediation may contain a deadline not to exceed six months from the date of the order's entry on the docket, but this deadline may be extended by the court.

Parties whose cases have been assigned to mediation have the option of: (a) using a mediator from the court's panel, (b) selecting a mediator of their own, or (c) seeking the assistance of a neutral ADR organization to assist in the selection of the mediator. If the parties opt to use a mediator from the court's panel, there is no charge. If they select their own mediator from outside the court's panel, they will be subject to that mediator's fees. The first mediation session is to be held within thirty days of the date the mediator was appointed, and the order designating a case for mediation may contain a deadline for completing the mediation not to exceed six months. At least seven days before the first mediation session, all parties must submit to the mediator a statement outlining the pertinent facts and legal issues in the case. This statement must also include a summary of the motions filed and any other information that might be helpful in resolving the dispute.

The mediator will first meet with all parties to the dispute in a joint session. In the Eastern District, the mediation may occur at the mediator's office, at the

court, or at any other mutually agreeable location. After this initial meeting, the mediator will typically meet individually with each party to permit them to "vent" and to get a better sense of their needs and interests, followed by additional joint and private sessions as he or she sees fit. The mediator may make settlement suggestions or may simply attempt to generate settlement ideas from the parties themselves.

The mediation concludes when the parties reach an agreement or at such other time as the parties or the mediator may determine. The mediator has no power to impose settlement, and the mediation process remains confidential whether or not a settlement is reached. If a settlement is reached, it is put in writing. If not, the Clerk is notified and the case proceeds through the normal litigation process.

Court-annexed mediation in the Southern District, pursuant to Local Civil Rule 83.12, is very similar to court-annexed mediation in the Eastern District, but there are four significant differences. The first is that the Southern District does not impose the Eastern District's time limitations. There is no requirement that the mediation begin or conclude by a certain date.

The second difference is that the Southern District requires that all mediation sessions take place at the "ADR Center" in the federal courthouses in Manhattan or White Plains, as designated, whereas the Eastern District allows the sessions to take place at any mutually agreeable location.

The third difference is that while the Eastern District rules contain provisions allowing parties to select their mediator from the court's panel, the Southern District rules direct Staff Counsel to assign a mediator from the individuals certified and then to notify the mediator and the parties of the assignment.

The fourth difference is that in the Eastern District any civil case may be designated for mediation, while the Southern District excludes social security, tax, prisoner civil rights, and *pro se* matters.

To learn the views of the judges with regard to the programs, we endeavored to interview every district judge and magistrate judge in the Southern and Eastern Districts of New York.[5] We were successful in obtaining interviews with thirty-five of the forty-four Southern District Judges[6] and twelve of the thirteen Southern District magistrate judges. In the Eastern District, we interviewed twelve of the nineteen district judges and all thirteen of the magistrate judges. In the interviews, we asked the judges to comment on various aspects of the courts' mediation programs. Since not all judges provided comments on all aspects of the program, the results of our study are not quantitative. However, we

[5] We recognize that there are many ways to evaluate the programs' success. Settlement statistics are one and questioning the lawyers and/or parties who use the programs is another. (Cite to the study/studies that were done with questionnaires to lawyers in the EDNY; also mention the EDNY on-line Q and A.) However, we decided that the present project would be confined to questioning the judges who have the power to order cases to mediation and, short of that, may or may not encourage parties to avail themselves of the courts' mediation programs.

[6] Our interviews in the Southern District took place during the period September 2003 through June 2004.

believe that the responses we received allow us to provide readers with a general idea as to the consensus – or lack thereof – on a particular question. Often, we obtained an interesting variety of viewpoints on a given question. We believe that the areas of disagreement as well as the ideas that were commonly shared will be helpful to the judges in deciding how best to use and improve the use of their mediation programs.

In the Southern District ("SDNY"), magistrate judges use the program less frequently than do district judges. Many of the SDNY magistrate judges expressed the view that since they themselves are assigned cases by district judges – often for settlement – they think it inappropriate to delegate this assignment to yet another neutral. Four SDNY magistrate judges said that they never use the court's mediation program, three said that they rarely use it, and three more said that they use it only when the parties request it.

The reverse is true in the Eastern District ("EDNY"), where cases are assigned upon filing to magistrate judges for all pretrial purposes save dispositive motions. Since a case typically does not reach the district judge until the dispositive motion or trial stage, the magistrate judges are the ones who most frequently refer cases to mediation.

Conclusions and Recommendations

The broad range of views culled from our interviews makes it difficult to draw many conclusions. The subject about which there was the most agreement is the value of any mediation, whether or not it leads directly to a settlement. Our

committee believes that the wide support for this proposition should lead our courts to invest whatever resources are at their disposal in order to nurture and strengthen their mediation programs. It seems to us that a first step toward improving an already valuable court program should be simply to increase the intra and inter-court discussions about mediation so that judges can benefit from the experiences and viewpoints of their colleagues. We believe that such increased discussion of the court-annexed mediation programs would lead to more interest in, understanding of, improvements to and use of the programs.

Following through on comments from some judges about the lack of information given to them and to the bar, we have several recommendations. To address the lack of uniform knowledge in the SDNY and EDNY about aspects of the program, and following up on one judge's suggestion, we recommend periodic meetings between the judges and the court's ADR administrator. The value of such meetings would lie not just in the information the judges would receive from the court official who is immersed in the program on a daily basis, but would also serve as an opportunity for the judges to share with each other their ideas about mediation, which were incisive and thought-provoking.

In order to address what we found to be a lack of uniform knowledge about the mediation process itself, we recommend that judges be given the opportunity to attend a brief training session which would provide greater insight into how mediation, as contrasted with settlement conferencing, works.

We also agree with the comment by two SDNY magistrate judges that the bar needs to be better informed about mediation generally and the courts' programs in particular. Perhaps the ADR administrators could participate with more frequency in bar association activities that would generate more attention for their programs. We believe that lawyers would be more likely to agree to and even request mediation if they knew, for instance, that the mediator is obligated not to communicate with the judge assigned to the case, in sharp contrast to the communication that often occurs between district judges and magistrate judges handling the same case.

Another recommendation our Committee has, in order to generate more interest on the part of attorneys, is for judges, as some already do, to raise the subject of mediation at the very first conference and at each conference thereafter. This not only encourages the lawyers (and, it is hoped, their clients) to think about mediation early on, but it provides a graceful way for attorneys to agree to mediate when they might be hesitant to ask for it, fearing that it will be perceived by their adversaries as a sign of weakness.

We also believe that the SDNY's web site should have a link for mediation, as does the EDNY's, which would display information such as the content of Local Rule 83.12, statistics tracking the cases that are mediated in the Southern District, and general information about how the program works. We also think that the SDNY might want to consider implementing the electronic case filing

system improvements underway in the EDNY, which will allow judges to learn about the status of a given mediation.

Another way to make mediation more attractive to both judges and attorneys is for the process to move more quickly. The pace seems to be a particular problem in the Southern District. The informal statistics provided by the SDNY(*see* note 7, below) indicate that a finding a mediator who can accept the case sometimes takes an inordinate amount of time.

In response to the comments heard from judges, particularly in the EDNY, about the quality of the mediators on the court's panel, we recommend that the Eastern District seek funding for a training program such as that used in the Southern District. (At present, the EDNY relies on mediators having obtained sixteen hours of mediation training in another forum.)

I. Criticisms of the Program

Most of the judges whom we interviewed expressed strong approval of their court's mediation program and appreciation for the lawyers who serve as volunteer mediators. As pleased as most of the interviewed judges were to have volunteer mediators assist with the resolution of the court's caseload, there were criticisms of the programs' operation.

A. Level of Information Provided

Of the thirty-five SDNY district judges interviewed, twelve expressed the view that they did not get enough information about the program. Some of these twelve judges felt that they had not been given enough information about the

program, generally; some felt that they are not given enough information about the status of a mediation as it progresses; some wanted periodic statistics about the program's results and information such as when in a litigation mediation is most successful; and some wanted all of the above.

Seven of the magistrate judges expressed the desire to receive more information from the mediation office. Of these seven, three said that they would like to know more about success rates and mediators' training; one of these magistrate judges said that he would like more information about what types of cases most frequently settle as a result of mediation and suggested that the judges have periodic meetings with the mediation program's director. In a related comment, two SDNY magistrate judges expressed the view that the bar needs to be better educated about the program. Another said that he would like to be made aware when a case he refers to the program is scheduled for mediation and when the mediation has occurred. And one of the SDNY magistrate judges said that he would like to be permitted to speak with the mediator about the progress of a mediation (but not its substance) in order to better evaluate requests to extend the discovery deadline.

In the Eastern District, there was a greater level of satisfaction with the amount of information the judges receive from the ADR office. Only three of the twelve district judges and three of the thirteen magistrate judges interviewed said that they would like to receive more information, primarily statistical data such as

settlement rates, broken down by type of case.[7] Several of the Eastern District judges noted that they receive e-mails from the court's ADR administrator advising them of the results of concluded mediations.

B. Pace of the Process

Eleven SDNY district judges complained that the program was too slow in processing cases and four of those judges cited delays as the reason why they used the program only rarely. Many of the judges complaining about the length of time mediations took compared the process unfavorably to a referral to a magistrate judge, which is accomplished and addressed almost immediately.[8]

Seven of the thirteen SDNY magistrate judges complained about the length of time mediations take when the court's program is used. At least two of these magistrate judges cited the slowness of the process as one reason for not using or rarely using the program. Two other SDNY magistrate judges, however, expressed the view that the length of time taken by mediations as contrasted with

[7] Settlement statistics, broken down by type of case are in fact available on the EDNY's website, as are, *inter alia*, Local Rule 83.11, a list of the EDNY mediators, and a frequently-asked questions sheet.

[8] As contrasted with a magistrate judge referral, the mediation process is a cumbersome one. It begins with the mediator, once he or she is tentatively selected by the mediation office, performing a conflicts check. Court statistics kept informally (and therefore without any assurance of precision) and provided to the Committee by Judge Baer, the SDNY program's Supervising Judicial Officer, for the period July 1, 2002 through June 30, 2003 show that, for the 147 cases mediated during that period, the time between receipt of the order by the court's mediation office and the mediator's acceptance of the assignment was three days in three cases, four days in two case, five days in five cases, six days in two cases, seven days in five cases, eight days in two cases, nine days in two cases, ten days in two cases, eleven days in five cases, twelve to fourteen days in seventeen cases, fifteen days in eight cases, sixteen to seventeen days in nine cases, eighteen days in seven cases, nineteen to twenty days in ten cases, twenty-one days in seven cases, twenty-two to twenty-three days in ten cases, twenty-four to twenty-five days in five cases, twenty-seven to twenty-nine days in nine cases, thirty to thirty-one days in eight cases, thirty-two to thirty-four days in four cases, thirty-five days in seven cases, thirty-six to thirty-eight days in six cases, forty to forty-two days in three cases, forty-six to forty-nine days in four cases, fifty-three days in one case, fifty-nine days in one case, ninety-six days in one case, and one hundred and five days in one case.

settlement discussions held by magistrate judges also reflects the qualitative differences between the two processes and that mediators take more time to examine the merits of a case and to allow the parties to "vent." We think it important to note that although the judges were not directly questioned about the quality of the mediators, seven SDNY district judges told us that they had received positive feedback about mediators' performance and believed the quality of the court's panel of mediators to be high.[9]

In the Eastern District there was less dissatisfaction with the pace of the mediation process. Only one district judge and two magistrate judges said that they thought the process moved too slowly.

C. Quality of the Mediators

Seven SDNY district judges complained about the uneven quality of the panel's mediators. One judge suggested that parties should be permitted to choose their mediator.[10] Two of the SDNY's thirteen magistrate judges complained about the uneven quality of mediators. One of these magistrate judges, who does not use the program and instead sends his cases to other magistrate judges for settlement or mediation, said that he would be more inclined to use the program if he could select the mediator himself.

[9] The Southern District provides sixteen hours of training by outside mediation experts and requires its mediators to have this training or training deemed to be its equivalent. The Eastern District also requires, but does not provide, training.

[10] This is now permitted in the EDNY, which, as noted above, lists its *pro bono* mediators on the court's website and allows the parties to select their own mediator

Two EDNY district judges had somewhat negative comments about the caliber of the panel's mediators. One judge said that he was concerned that parties using the services of the court's volunteer mediators might be "getting what they pay for." A second said that while he does not have information that would support criticism of the court's panel of mediators, he is "sensitive to the importance of attracting and retaining good mediators." Two of the EDNY's magistrate judges said that they had heard complaints from lawyers about the quality of some of the panel's mediators.

II. Subject Matter Expertise

Eight SDNY district judges said that, as a general rule, subject matter expertise is important. Several of the SDNY district judges said that the mediation office is effective at matching a case with a mediator who has knowledge in the relevant subject area. Four said that they thought subject matter expertise has at least some value and eight said that subject matter expertise is important only in technical areas such as intellectual property. Two of those eight judges said that they opposed a requirement of expertise because it increases the chance of a conflict of interests and therefore delays the assignment of a mediator. Five SDNY district judges expressed the view that subject matter expertise is not important and that good mediation skills were the most important attribute of a mediator.

The SDNY magistrate judges were fairly evenly split on this issue. Five expressed the view that subject matter expertise is important; six said that in most

cases it is not important and one of the latter five opined that in certain types of cases, such as securities and employment, subject matter expertise is often useful.

In the Eastern District, only one of the district judges expressed the view that subject matter expertise is generally important. Six more district judges said that they valued subject matter expertise as having moderate value or as important only in certain types of cases. Five district judges noted that good mediation process technique is the most important skill a mediator can have.

The EDNY magistrate judges tended to place more importance on a mediator's subject matter expertise. Six of the magistrate judges said that as a general rule they value it; one of these magistrate judges went so far as to say that there is no value in a mediation unless the mediator possesses this expertise because it is critical to a good understanding of verdict ranges. Five other magistrate judges in the EDNY said that subject matter expertise is important in certain types of cases. Each of these magistrate judges had a different notion as to the type of case meriting a mediator's subject area expertise; the categories of cases mentioned were: patent, unemployment, ERISA, complex cases and commercial cases. Echoing the view expressed by five of the district judges, one of these magistrate judges expressed the belief that a good mediator can mediate any type of case.

III. Mediators vs. Magistrate Judges

When asked to compare the settlement efforts of magistrate judges to those of mediators, only seven SDNY district judges discussed the fact that mediation

and settlement discussions are two different processes. One of those seven, expressing a preference for mediators, commented on the fact that parties can rely on confidentiality in what they tell to mediators whereas lawyers correctly assume that magistrate judges and district judges discuss shared cases. Another of the seven who distinguished between the two processes noted that some lawyers prefer a mediator because the magistrate judge assigned to the case may already have taken a position adverse to their client in the context of a discovery dispute. And one SDNY district judge said that lawyers may prefer the mediation process because it is less formal than settlement discussions conducted by a magistrate judge.

Three of the seven SDNY district judges who focused on the differences in the two processes expressed their preference for magistrate judges based on their ability to discuss the case with the magistrate judge to whom the case is assigned. Six judges said that magistrate judges are more effective at settlement than mediators are. The reasons for this varied. Some district judges expressed the view that the authority that magistrate judges have is an advantage; one said that magistrate judges are perceived as more neutral because they will not be advocating one of the positions at issue at some future date; and one said that some mediators are not as reliable as magistrate judges because some of them tend to worry about their win/loss record. Another view expressed was that mediators are not as experienced as magistrate judges. One district judge said that he would be more inclined to send a case to mediation if he knew that the case would be

going to an experienced mediator. One of the SDNY district judges who expressed a preference for magistrate judges noted, however, that cases referred to a magistrate judge for settlement are usually further along in the litigation process than they are when they are referred to mediation, and therefore more ripe for settlement.

An additional seven SDNY district judges said that they prefer magistrate judges for the simple reason that the settlement discussion process is faster.

Three SDNY district judges, for reasons discussed above, believe that mediators are more effective than magistrate judges. Seven SDNY district judges expressed the view that the effectiveness of the neutral depends wholly on the skills of the individual. This response is, perhaps, a variant on the response from five SDNY district judges that they had no opinion as to which category of neutral is more effective. Four of those said that they take into consideration the identity of the magistrate judge when deciding whether to send a case to mediation or to a magistrate judge.[11]

It is perhaps not surprising that no SDNY magistrate judge believed that mediators were superior to magistrate judges as settlement neutrals. Six of the SDNY magistrate judges said that magistrate judges are superior to mediators. The reasons given to support this view were: magistrate judges have greater authoritativeness because they are judges; they are better able to evaluate cases

[11] The identity of the magistrate judge is known in advance, whereas Local Civil Rule 83.12 provides that the identity of the mediator is not disclosed to the district judge

both because they can offer better predictions about how the district judge will rule and because they are more likely to have familiarity with the case; they have more leverage because of their ability to impose deadlines and in some cases trial dates; and they are faster. Two more SDNY magistrate judges, while not expressing the view that magistrate judges are more effective than mediators as settlement neutrals, noted that with certain parties there is an advantage to wearing a robe. Four of the SDNY magistrate judges said that they have no view on this question.

In the Eastern District, three of the district judges expressed a preference for magistrate judges as settlement neutrals. Two of these judges mentioned the heightened authority that a judicial officer carries, one cited the fact that a magistrate judge knows the case better,[12] and one, echoing a sentiment expressed in the Southern District, said that settlement conferencing by a magistrate judge will be completed more quickly than a mediation.

Four other district judges pointed to the advantages of mediation. One said that a mediator may have more credibility than a magistrate judge who might be perceived as caring only about getting a case off his or her calendar. Another district judge said that a magistrate judge's neutrality might be questioned by a party who has already been ruled against by that judge. A third district judge pointed out the advantage of mediators who have subject matter expertise whereas

[12] Of course, this is much more likely to be true in the EDNY, where the magistrate judge is assigned to the case as soon as it is filed.

magistrate judges are generalists, and a fourth noted that magistrate judges do not have as much time as mediators will devote to settling a case.

Three EDNY district judges, when asked whether magistrate judges or mediators were more effective settlement neutrals, said that there is no blanket answer; it depends on the skills of the individual settlement neutral. Yet another district judge said that he had no opinion on the subject.

The EDNY magistrate judges also demonstrated a broad array of views on this subject. Eight pointed to the advantages of magistrate judges: four noted that judicial officers have additional clout that is often helpful; one mentioned the fact that the magistrate judge has greater familiarity with the case; another said that magistrate judges have greater credibility because they have a better feel for verdicts; and one of the four who cited the magistrate judges' additional clout also mentioned the uneven quality of the panel's mediators.

Eight EDNY magistrate judges cited various advantages of mediation. Six mentioned the fact that mediators devote more time to a mediation than magistrate judges can; two cited the advantage of allowing the magistrate judge to avoid compromising his or her perceived neutrality by indicating views about the case, especially if the attempt at settlement takes place early in the litigation;[13] and one pointed to the fact that mediation helped to conserve judicial resources.

[13] Like one of the SDNY district judges interviewed, one of these two EDNY magistrate judges said that when he conducts settlement conferences, he does so without having the parties present. The reason he gave for this was his concern that a lay person

When asked who was more effective as a settlement neutral, two of the EDNY magistrate judges said that it depends on the type of case; one said that it depends on the skills of the individual neutrals; one said that it depends on the stage of the litigation, noting that a mediator might be more effective after failed settlement discussions conducted by a magistrate judge and after the case has ripened a bit; and one said that he is not in a position to opine on the topic because he has never observed a mediator at work.

IV. District Judges as Settlement Neutrals

Seven SDNY district judges brought up the fact that they tend to conduct settlement discussions themselves. Reasons for this varied. Some judges expressed the view that cases assigned to them were solely their responsibility. Others spoke with considerable enthusiasm about their enjoyment of and perceived skill at the settlement process and the sense of satisfaction achieved when they help the parties to resolve a dispute. One district judge who conducts settlement discussions herself (although she often refers cases to magistrate judges and to the mediation program), points to a sharp difference between her own settlement discussions and the mediation process in saying that she conducts settlement discussions only with counsel, never the parties, because she is concerned about the perceived duress that a party might feel from discussing settlement with the trial judge.[14] Another district judge expressed his reluctance to conduct settlement discussions at all because he fears creating a perception of bias.

[14] By contrast, parties are present for and participate in mediations

Presumably for similar reasons, another judge said that he never discusses the merits when he conducts settlement talks.[15] Other SDNY district judges simply find it too time-consuming to conduct settlement discussions.

As noted in the Introduction, EDNY district judges do not generally become involved in a litigation until it has reached the dispositive motion or trial stage. Although several of them mentioned attempts to settle cases at pre-motion conferences or just prior to trial, they did not discuss in any detail their role as settlement neutrals.

V. At Whose Initiative?

Ten of the thirty-five SDNY district judges interviewed said that they raise the subject of mediation with counsel and often encourage it, but will not order it; eight judges said that they order it only when the parties request it. Only one judge said that she will order a case to mediation if one party wants it but another party resists it; and another judge, unaware of her power to require mediation, said that she would order it if she could.[16] Some of the judges who raise the subject with counsel do so because they believe that many lawyers, though open to and perhaps desirous of mediation, are reluctant to raise the subject for fear of appearing to betray a sense of weakness about their case.

Some of the judges who do not offer mediation unless a party requests it cited their dissatisfaction with the slowness of the process. One such judge said

[15] By contrast, mediation typically involves detailed discussion of, *inter alia*, the merits.

[16] All civil cases but the following are eligible in the SDNY: social security, tax, prisoner civil rights and *pro se* matters. SDNY Local Civil Rule 83.12 (e).

that she attempts to steer lawyers to a magistrate judge for settlement discussions even when counsel has expressed an interest in using the court's mediation program.

As for the SDNY magistrate judges, four said that they raise the subject with parties but do not refer a case to mediation without the parties' consent; one said that he often suggests mediation and that attorneys rarely do; and three, as noted above, said that they refer cases to mediation only when the parties request it.

All of the three EDNY district judges who addressed this issue said that lawyers rarely bring up the subject of mediation. One of the three pointed out that this is not surprising given the fact that the parties appearing before the district judge are in dispositive motion or trial stance. The EDNY magistrate judges had varying experiences. One said that lawyers make the suggestion 40% of the time; another said that lawyers do so 20-25% of the time; two said that lawyers usually raise the subject; and one said that lawyers rarely raise the subject .

VI. <u>At What Point in the Litigation Process?</u>

Eight of the SDNY district judges interviewed said that they attempt to send cases to mediation as early in the process as possible. (One judge quoted *Macbeth*, saying "[i]f it were done when 'tis done, then 'twere well it were done quickly.") At least one SDNY district judge refers to mediation in his pretrial scheduling order and several said that they raise it at the initial Rule 16 conference. The reason for sending a case to mediation sooner rather than later is

that resolving a case quickly saves the parties money and eases the burden on judicial resources. This is particularly true, several judges noted, in cases not involving a great deal of money. One judge commented that in many cases, such as employment cases, where a fee-shifting statute exists, the longer the case drags on, the more difficult settlement is because attorneys' fees have mounted.

Only one SDNY district judge said that mediation should not take place early in a litigation because the parties will not yet have had an opportunity to "feel each other out." Seven SDNY district judges said that the end of discovery is the most propitious time for mediation, although at least a few of these judges recognized that discovery and its attendant litigation can be very expensive. Eight judges said that the right time to mediate is case-specific. Two of these judges noted that settlement is difficult to achieve when one party intends to make a dispositive motion and feels confident about its outcome. Several other SDNY district judges expressed the view that the time for mediation is ripe when both sides believe that they know the critical facts in their case and that this may not occur until discovery has taken place.

Of the SDNY magistrate judges who addressed this subject, three said that it is preferable to refer a case to mediation early (though one said that he will defer to the parties if they think that they need some discovery first); three said that the best time for mediation is after discovery; and four said that the time for such a referral is case-specific, noting that it is necessary in each case to balance the need for discovery against the expenditure of excess funds in discovery litigation.

In the EDNY, six district judges said that they favored mediation as early in the litigation as possible, although one of them noted that sometimes parties need some discovery first. One district judge had the reverse view, believing that mediation should usually not take place until after discovery is completed. Three said that they could not generalize; that the timing depends on the facts and dynamics of the particular case.

The EDNY magistrate judges also had divergent views. Four thought that mediation should occur as early as possible; two said that after initial discovery was the best time; and five said that the answer to the question is case-specific. One of the five said, however, that it in virtually every case the magistrate judge should begin talking about mediation at the first conference so that the parties begin thinking about it. He added that the magistrate judge should raise the subject at every conference thereafter and manage the case with mediation in mind.

Four magistrate judges said that they will sometimes refer a case to mediation after their own efforts have failed to result in a settlement. Sometimes there has been additional discovery which, along with the mere passage of time, might make settlement more feasible. Sometimes, one of the magistrate judges said, she senses at the settlement conference that the parties may need an opportunity to vent in order to facilitate settlement, in which case she refers the case to mediation.

VII. To Stay or not to Stay

Only four of the SDNY district judges interviewed generally favored staying discovery once a case has been referred to the mediation program. These judges' position was based on the concern that parties not be forced to spend money that could be used in fashioning a settlement. Eight judges, concerned about undue delays, generally disfavor staying discovery during mediation. Four disfavor it unless both parties consent.[17] Nine other SDNY district judges said that the decision to stay or not stay should be made on a case-by-case basis.

Three of the SDNY magistrate judges opposed staying discovery while mediation is ongoing and eight said that they are opposed to a rigid rule either for or against stays.[18]

There was a similar divergence of opinion in the EDNY. Three of the twelve EDNY district judges interviewed favored staying discovery during mediation. One commented that "it can be constructive to put the brakes on the litigation mode for a short time." Five district judges said that they generally disfavor stays while mediation is ongoing. Two said that it depends on the case and one of these judges says that when she does stay discovery, she stays only that discovery that is not needed to enhance the mediation's chance of success.

[17] One of these judges suggested that in cases where both parties consent to a stay of discovery, it should be the mediator who makes the decision.

[18] The New York County Commercial Division of the New York Supreme Court, which also has a court-annexed mediation program, presumes a 45-day stay of discovery for cases referred to mediation. Rules of the Alternate Dispute Resolution Program, Commercial Division, Supreme Court, New York County, Rule 8. However, the form order used in that court has a box for the judge to check off if s/he does not wish discovery to be stayed.

Of the EDNY magistrate judges, only two favored staying discovery while a mediation is pending and five expressed their general disfavor. (One of the five said that she is particularly hesitant to stay a case during mediation because she receives no information about the status of the mediation.)[19] Two magistrate judges said that they will stay only depositions. Six EDNY magistrate judges said that they need to assess the advisability of a stay for mediation on a case-by-case basis.

VIII. Mediation Deadlines

The SDNY's Local Rule (83.12) does not provide for a time frame within which a mediation should commence or be concluded. Six of the SDNY district judges expressed the view that deadlines would be helpful; most of these judges said that any rule imposing a deadline should allow that deadline to be extended.[20] For three of these judges, a deadline by which the mediation would begin was of particular importance. Ten judges were opposed to a deadline rule and four opined that separate deadlines for mediations were unnecessary given the requirements of the judges' own scheduling orders and/or the judges' ability to refuse to stay discovery. Of the SDNY magistrate judges, four favored deadlines,

[19] This concern is to be addressed shortly in the Eastern District. Magistrate Judge Levy, who is the program's Supervising Judicial Officer in the EDNY, has advised the Committee that the EDNY's electronic case filing system is undergoing technical improvements which will allow judges to track the status of every mediation, showing such detail as whether or not a mediation date has been set and whether or not mediation statements have been filed. Judges' ability to obtain up-to-date information was recently enhanced in the EDNY, where mediators now have access to the electronic case filing data regarding cases they mediate, so that they can make docket entries

[20] Two judges thought that the mediator should have the authority to extend deadlines and one judge thought that this call should be made by either the mediator or the mediation office.

two opposed them and three expressed mixed views, noting that deadlines help to focus the parties on concluding the process but that rigidity is not constructive.

In the EDNY, where the local rule imposes a thirty-day deadline (from the time of the mediator's appointment) for the commencement of the mediation and a six-month deadline for it to conclude, seven of the twelve district judges interviewed expressed support for the rule and only one said that she thinks the six-month deadline too long. Of the magistrate judges, three liked the rule and one said that the deadline should not be rigidly enforced. As noted above (n. 17), Magistrate Judge Levy, the program's Supervising Judicial Officer, has explained that judges will soon have the ability, once the electronic tracking system is updated, to track a mediation's status. He opined that this ability will ease concerns about deadlines.

IX. The Types of Cases Best Suited for Mediation

Employment cases comprised the category most often mentioned by the SDNY district judges interviewed. Twelve judges cited this category as the best or among the best suited for mediation. Three of those judges singled out *pro se* employment cases, for which the Southern District has a special *pro bono* program in which attorneys volunteer to handle an employment case solely for purposes of the mediation. Since this is the *pro se* plaintiff's only opportunity to avail him or herself of free counsel, it is thought that mediation in this context is particularly beneficial. The contrarians view was expressed by two judges who said that

plaintiffs in employment cases have a particular need to speak with a judge rather than a mediator in order for settlement to be facilitated.

Sophisticated commercial cases were mentioned by seven SDNY district judges as good candidates for mediation. Another judge, however, said that she does not like to refer "mega" commercial cases to mediation because she is "flying blind" without knowing the identity of the mediator.[21] Four judges mentioned intellectual property cases as particularly appropriate for mediation (although a fifth judge said that mediation will not work in patent cases); three judges cited contract cases; three mentioned tort cases; two judges singled out admiralty cases; another mentioned "commercial matrimonial" cases; one mentioned small labor cases; and yet another singled out ERISA cases in which it is clear that the employer has some liability.

Employment cases also headed the SDNY magistrate judges' list of cases most likely to settle as a result of mediation; eight of them singled out this category of cases and four of those made particular mention of *pro se* employment cases. One magistrate judge, however, took the view that employment cases, and other cases in which emotion plays a significant role, are not good candidates for mediation. Other categories of cases mentioned were: § 1983; personal injury; securities; business dispute or other contract matter, particularly where there is the potential for an ongoing business relationship; law firm dissolution and admiralty.

[21] A total of eight judges said that they refer large, complex commercial cases to private mediators. (*See* Payment of Mediators, Section X below.)

Apart from subject areas, SDNY district judges identified other characteristics which render a case particularly appropriate for mediation. Four district judges said that mediation is helpful in cases not involving a great deal of money because continuing to litigate will result in whatever money is available for settlement being lost to attorneys' fees. One judge said that cases in which the parties need to vent their emotions are good candidates for mediation, while another judge said that cases involving strong emotions are difficult to mediate. Two judges said that mediation can be helpful in any case primarily about money. Another judge said that mediation is most likely to be successful for parties who are in the same industry because they each have a stake in appearing reasonable within their professional community. One judge identified cases in which the lawyers do not get along as particularly appropriate for mediation. Another judge said that mediation works well where there was no discussion between the parties before the lawsuit was filed. Two judges said that any case in which the parties want to settle is a good case to send to mediation and four judges, paraphrasing Justice Stewart, said that they know a case that is likely to benefit from mediation when they see it.

SDNY magistrate judges also had ideas about case characteristics or dynamics that may make a case likely to settle in mediation. Four of the SDNY magistrate judges said that any case which the parties desire to settle and/or where they ask for mediation is a good mediation candidate. Other characteristics mentioned were cases in which expertise would be helpful, and, in direct

disagreement with one of the SDNY district judges, a case in which the parties attempted to settle before litigating.

In the EDNY, there was also great variety in the types of cases thought to be good candidates for mediation. Employment cases again were a popular category, mentioned by four district judges and six magistrate judges. Commercial cases was a category mentioned by three district judges, two of whom noted that business people are likely to be sensitive to the costs of protracted litigation, and two magistrate judges. One district judge and one magistrate judge singled out commercial cases in which parties might have an ongoing business relationship. Another district judge and two magistrate judges named complex cases or cases involving arcane areas of the law as good candidates for mediation, particularly when a mediator with subject matter expertise can be assigned to the matter. Similar considerations appear to have gone into the thinking of the two district judges and three magistrate judges who listed cases requiring technical expertise, such as intellectual property cases, as cases for which mediation is particularly appropriate. Four magistrate judges said that mediation in negligence cases is likely to be successful. One district judge and one magistrate judge, apparently the EDNY's most ardent believers in mediation, said that virtually any case, other than habeas and social security cases (the latter of which is excluded from mediation-eligible cases in the SDNY's local rule) is, in theory, a good candidate for mediation. The magistrate judge who espoused this view noted that in California even prison cases are mediated with success. Two magistrate judges

recommended that *pro se* cases (another category excluded from mediation in the SDNY) be sent to mediation on occasion in order to assist the *pro se* plaintiff in obtaining a neutral perspective on the case.

Although one EDNY magistrate judge said that she viewed civil rights/wrongful death cases as good candidates for mediation, three magistrate judges listed such cases as poor candidates because municipal defendants often take a "no pay" position making settlement particularly difficult.

With respect to other characteristics of cases that are likely to benefit from mediation, the opinions voiced in the EDNY were similar to those expressed in the SDNY. Cases with a substantial emotional component were viewed to be good mediation candidates by one EDNY district judge and poor candidates by one EDNY magistrate judge. One district judge and one magistrate judge said that any case in which there is the likelihood of an ongoing relationship is likely to benefit from mediation. Three district judges and one magistrate judge said that they are optimistic about mediation for any case in which the attorneys want it. Another district judge identified the absence of factual disputes as a good mediation candidate. One magistrate judge will refer to mediation cases in which one party has a view of their own case that is exalted and at odds with their own attorney's view.

In comments that are somewhat related, one district judge said that mediation is a good idea for cases in which there is a personal clash between the magistrate judge and a party; one magistrate judge said that he will refer a case to

mediation rather than attempt to settle it himself if his effectiveness as a neutral may have been compromised by prior rulings in the case. This magistrate judge said that he will refer to mediation cases that are complex or have multiple parties and which would take him in the range of six to eight hours to conference. In a similar vein, another magistrate judge said that she will refer to mediation a case that requires a great deal of time or which she has not been able to settle herself. A third magistrate judge took a different view, identifying simple cases as those most appropriate for mediation. Yet another magistrate judge echoed the view of the SDNY district judge who, like Justice Stewart, knows it when he sees it, explaining that judges develop a feel for situations and a great deal depends on the personal dynamics between the attorneys.

X. Payment of Mediators

There was substantial disagreement and even some ambivalence on this issue. In the SDNY, nine of the thirty-five district judges interviewed disfavored the idea of asking parties to compensate a mediator who was a member of the court's panel. The reasons for this position were: the program works well as it is; volunteer mediators derive prestige and professional satisfaction from this *pro bono* work; lawyers should perform public service; the parties can go outside the court's program if they want to pay a mediator; and parties should not be required to pay more than they already do for their attorneys and court costs. Five SDNY district judges favored the payment of mediators, generally. In support of that position, judges noted that: payment would cause the parties to take the process

more seriously than some do when given the service for free; payment would probably result in the parties selecting the mediator rather than having one assigned by the mediation office; paid mediators would be more likely to schedule the mediation promptly; and people should get paid for the work they do.[22] Another judge said that the parties should pay the mediator if they wish to choose him or her, noting that the parties have a greater commitment to the process when they choose their own mediator.

Eight SDNY district judges (including two who generally disfavor paying mediators) believe that mediators should be paid in large, complex cases. In such cases, judges said, parties are likely to be well-able to afford to pay the mediator and the amount at stake usually will justify the expenditure. It was noted that these cases often require a substantial time commitment, making it unfair to ask such a commitment of a *pro bono* mediator. By having the parties pay a private mediator, the judge (or the parties or a combination of the two)[23] has the ability to select the neutral, who will be able to devote to the matter the requisite amount of time without undue sacrifice.

[22] Many districts provide for payment of mediators. *See, e.g.*, ND Ala. ADR Plan, ¶ 12 (b), www. alnd.uscourts.gov/court info/adr plan (mediator compensated at a "reasonable rate" agreed to by the parties or set by the court); ND Ind. Local Rule 16.6 (parties and mediator negotiate fee; indigents may apply to court for modification of fee); D. NJ Local Civil Rule 301.1 (mediator compensated at hourly rate of $250 after six free hours); D. Neb. Mediation Reference Order, ¶ 7, www.ned.courts.gov/mediation (mediator paid at rate s/he sets).

[23] Some judges ask the parties to produce several names from which the judge can choose.

Three of the eight SDNY district judges generally opposed to paying mediators on the court's panel said they thought that it might be appropriate to pay mediators in cases where subject matter expertise was important.

Three of the thirty-five SDNY district judges interviewed said that they had no view on this subject. Another judge said that payment might attract more experienced mediators but expressed concern that requiring payment might cause the parties to resist entering into the process.

Of the SDNY magistrate judges, four expressed opposition to paying mediators in the court's program, for reasons expressed by district judges of the same view. Five of the magistrate judges expressed qualified support for or noted advantages to having the parties pay mediators in certain circumstances. The advantages noted were the parties' greater commitment to a process for which they pay, and the likelihood that a paid mediator will take the time necessary to allow parties to vent, thereby increasing the likelihood of settlement.[24]

This was also a controversial issue in the EDNY. Six district judges opposed payment of mediators, relying on the same reasoning as that given in the SDNY: the court's services should be free and parties who want to pay for mediation can turn to outside mediators. One of these judges, however, said that he will refer large, complex cases, to outside mediators because the process is

[24] Committee members who serve as *pro bono* mediators note that they provide time adequate for venting – and indeed for anything else reasonably required by parties to a mediation – despite the absence of compensation. The Committee believes that most *pro bono* mediators who also mediate privately commit to providing the same quality of service in a *pro bono* mediation as they do in a paid mediation.

likely to be prolonged and because he wants to entrust the case to someone he knows. Three district judges supported the idea of paying mediators. One said that they should be paid by the court system, just as arbitrators are.[25] This judge and another district judge who favored payment of mediators both expressed concern that failure to pay mediators would result in an inability to retain qualified mediators on the court's panel. A third district judge said that there is no reason for mediators not to be paid in cases where the parties have significant resources, particularly if they want a mediator with special expertise.

The EDNY magistrate judges who addressed this issue were evenly split. Five opposed it, for the same reasons given by the district judges who took this position. One of these magistrate judges, however, acknowledged that parties tend to work harder at reaching a resolution when they are paying for the mediator's services. Five other magistrate judges favored having mediators paid for their services. The reasons given were: the parties' greater commitment to the process when they pay, the sense that the quality of mediators would be uniformly better if they were paid, and basic fairness when the parties are moneyed. Indeed, one magistrate judge says that he urges parties having substantial resources to use an outside, paid mediator. In doing so, this judge says that he appeals to the parties' sense of fairness and suggests that it is a form of exploitation for moneyed parties to take advantage of the court's program.

[25] The EDNY, but not the SDNY, has an arbitration program in which the arbitrators receive nominal compensation. The mediation programs in EDNY and SDNY Bankruptcy Courts require mediators to be compensated at hourly rates agreed upon with the parties.

Two magistrate judges gave a mixed response. One said that there is no reason to change the system if it is functioning with unpaid mediators, but that parties may take the process more seriously if they have to pay for it. The other magistrate judge said that paying mediators might be appropriate in cases that are particularly time-consuming.

XI. The Site of the Mediation

The SDNY district judges were fairly evenly split on the question of whether court-annexed mediations should be conducted in the courthouse. Six said yes and seven said no. Two other judges said that the mediation should be held at the courthouse at the discretion of the mediator. Another judge said that mediations should be required to be held in the courthouse only in *pro se* cases. Among SDNY magistrate judges; five said that the mediations should be held in the courthouse and three said that this was not necessary.

In most cases, the rationale for requiring the courthouse to be used was to imbue the mediator with greater authority, impress the parties and encourage them to take the process seriously. The primary argument against the requirement was to accommodate the mediator, for whom it might be more convenient to conduct the mediation in his or her office.

In the EDNY, where the rule does not require the mediation to take place in the courthouse, the two district judges and two magistrate judges who favored courthouse mediations gave the same reason as were given in the SDNY: the atmosphere of seriousness and dignity that is provided. Five district judges and

seven magistrate judges in the Eastern District said that it does not matter where mediations are held, or that they have no view on this subject. However, one of the magistrate judges qualified her response with the proviso that the mediation should not be held in the office of one of the parties' attorney. Two of the magistrate judges made the point that the mediators, working *pro bono*, should be permitted the convenience of conducting mediations in their offices.

XII. The Value of "Failed" Mediations

It is not unusual for a mediation not to result directly and immediately in a settlement but nevertheless to pave the way for an eventual settlement. For this reason, many believe that there is no such thing as a "failed" mediation. The value of mediations, regardless of their immediate outcomes, was the topic on which we found the most agreement among the judges who addressed this question. In the SDNY, fourteen of the district judges expressed the belief that a mediation will have value even if it does not produce an immediate settlement. One judge said that when settlement occurs some time after the mediation concludes, he assumes that the mediation played some role in the parties' ability eventually to settle. Another judge added that "no amount of time spent trying to settle a case is wasted." Two other judges, while less confident that a mediation will necessarily help ease the way to settlement, said that they believed that a "failed" mediation may have this impact. Another two judges said that they felt unable to answer the question because they are not privy to what transpires during mediations.

Of the SDNY magistrate judges, only two expressed the view that a mediation not directly resulting in a settlement has no value or negative value. One of these magistrate judges said that an unsuccessful mediation makes her settlement conference of the case more difficult.[26] Eight discussed the benefits of any mediation, which they said tends to result in a "delayed effect" that can contribute to an eventual settlement. One SDNY magistrate judge opined that it is beneficial for the parties to obtain a "taste of the pain" of litigation. Others commented that even an apparently unsuccessful mediation will assist the parties in focusing on the important issues and in evaluating the strengths and weaknesses of their cases.

Similar near-unanimity was found in the Eastern District. All of the six district judges who addressed this question spoke of the value to be found in any mediation. One said that even a failed mediation has the tendency to work as a "mini Rule 56 motion," eliminating certain issues or claims. Other district judges spoke of the foundation that the "failed" mediation will lay for eventual settlement by helping lawyers to assess the strengths and weaknesses of their cases, "softening the parties up," and providing an opportunity for the airing of grievances that is ultimately constructive.

Nine of the ten magistrate judges who addressed this question agreed with the district judges. Their reasoning was the same. One magistrate judge summed up the views of most of his EDNY colleagues when he said that a mediation not

[26] Of course, there may be no causation at work in this instance. It is possible that a case that does not resolve in mediation or in a subsequent settlement conference is

directly resulting in settlement is "absolutely" of value. He went on to say that such a mediation can result in narrowing the issues and establishing a settlement floor and ceiling so that the parties have a better sense of what they can hope to achieve in continuing the litigation. Only one EDNY magistrate judge did not clearly share the view of his colleagues. He did not however, reject their view; he said only that he is not sure of the value that may be provided by a "failed" mediation.

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The Committee extends its deep gratitude to the judges who took time from their busy schedules to talk to us about mediation in their courts.

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