NEW YORK
CITY BAR

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April 12, 2012

The Honorable Loretta A. Preska
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Preska,

I am the Chair of the New York City Bar Association Labor and Employment Law Committee (the "Committee"). The Committee is comprised of lawyers who practice in both traditional labor law and employment law representing both management and employees. We write to share some of our thoughts and experiences concerning the Southern District of New York's mandatory mediation program for employment cases (the "Mediation Program"), which we hope will be constructive and useful in connection with any review and update of the Mediation Program.

On January 3, 2011, Your Honor signed a Standing Administrative Order regarding "Cases Assigned to Mediation by Automatic Referral." That Order provided that all employment discrimination cases, other than cases involving violations of the Fair Labor Standards Act, will be automatically referred to mediation.

While the Committee is in favor of the program, the experience of practitioners who have had to navigate the new program thus far has been mixed. Practitioners find that it can take a month or more for a mediator to be assigned to a case. One of the members of the Committee represents a party in a case in which two months passed before a mediator was assigned.

The Committee believes the manner in which mediators are assigned to cases may contribute to this delay. It is our understanding that, under the current system, cases are assigned mediators from a computer database. Mediators so assigned then have seventy-two hours to respond to whether they are willing to mediate the case. If the mediator has not

responded in seventy-two hours, then the case is assigned to another mediator and the process repeats. If this is the process, then over two dozen mediators rejected the case described above before it was assigned a mediator.

It is our understanding that part of the reason for high rejection rates is the fact that mediators are required only to mediate three cases per year, but that mediators who have mediated three cases are not taken out of the computer database. As a result, volunteer mediators who have already fulfilled their obligations to the Mediation Program, and who may be unable to take new cases, are being assigned new cases – which they may then reject. It is also our understanding that the program is fully automated, and that an administrator from the Court cannot currently intervene to save cases from repeated futile mediator assignments.

The members of our Committee wonder if it is possible for mediators who have already mediated three cases to be given the option of having their names taken out of the database or flagged somehow in the computer program so that they are skipped until others who have not served in three cases are selected first. It might also be helpful if a Court Administrator was permitted to assist litigants in cases that have not been taken by a mediator within two weeks of the cases' referral to the Mediation Program. We appreciate that this suggestion might impact the Court's budget, but believe such a change could enhance the experience of litigants referred to the program.

The members of our Committee also respectfully request that the rule regarding the location of mediations be reviewed. Currently, the Court requires that the first day of all mediations be conducted in Southern District of New York offices – regardless of the wishes of the parties. There appear, however, to be too few offices for the number of mediations that are now being conducted. Attorneys have thus had the experience of having to wait to schedule a meeting until a date when a room is available. Some cases have even been limited to half day mediations because of a lack of available space. The Mediation Program's space issues could be ameliorated if the Court permitted parties and mediators to conduct mediations in their private offices, provided that the parties consent to do so.

Another issue that practitioners have noticed deals with the types of cases that are referred to the Mediation Program. Practitioners have found that employment discrimination cases with secondary causes of action (other than those under the Fair Labor Standards Act) are not automatically referred to the Mediation Program. Thus, for example, employment discrimination cases with secondary tort claims are not automatically referred to the Mediation Program.

A further concern raised by Committee members is that non-employment law practitioners are often assigned to mediate employment law cases. It is difficult to engage in a meaningful mediation when a mediator does not have the knowledge or experience necessary to make a preliminary assessment of the issues in a case or the damages that may be recovered in a case. That lack of experience can result in a mediator spending a significant amount of time trying to achieve an outcome that does not make sense to experienced practitioners. When a mediation "runs off the rails" in this way, it can confuse litigants and make it more difficult for two sides to come to a resolution. The Committee would welcome the opportunity to provide free mediator training on employment law if the Court thinks this would be constructive.

In a similar vein, a mediator's lack of mediation experience, and/or lack of good judgment, can hinder the settlement process. For example, in one recent case involving parties represented by very experienced litigators, the mediator spent over an hour discussing the merits of mediation and that that different parties may have different views of the facts of the case. The mediator attempted to have the parties and their lawyers engage in a Rorschach test in a joint session to prove his point. In the joint session, the mediator further asked counsel for the parties to "imagine" that they had lost their case at trial. The mediator asked counsel to tell everyone in the joint session how counsel would explain the loss to their clients – essentially asking counsel to list the weaknesses in their case to opposing counsel. The mediator then spent several hours with the parties discussing non-monetary issues in the case. He did not begin discussing settlement numbers with the parties until late in the day. No movement toward resolution was made during that mediation. Obviously, the Mediation Program might not be able to anticipate mediator performance in advance, but the Program would benefit if practitioners were routinely asked to comment on mediator effectiveness following a mediation.

This sort of problem might also be ameliorated if the parties had the ability to assist in the selection of a mediator. For example, the Court might make available on the Court's website the names of the mediators on the Court's panel, including their relevant biographical data and experience. The Court might then give the parties 5 or 10 days to attempt to voluntarily agree on a mediator. If the parties were unable to do so, the Mediation Program could assign a mediator. It is our understanding that the Commercial Division of the New York Supreme Court in New York County has a similar system and that parties are able to agree on mediators in a high percentage of the cases ordered to mediation, thus avoiding the need for a Court Administrator to make the mediator selections.

Permitting parties to attempt to select their own mediators would also help in resolving another problem experienced by practitioners: identification and disclosure of potential conflicts between mediators and litigants. While it is our understanding that potential mediators are asked to state whether any potential conflicts exist in a given case, we have learned that has not always happened. In one recent case, the parties were surprised to learn, after an initial mediation session had taken place, that the mediator had been a plaintiff in a case against one of the parties. The Committee suggests that additional safeguards be considered to guard against such conflicts of interest.

Finally, some parties have been required to participate in the Mediation Program even though they have engaged in, are presently engaged in, or have scheduled, private mediation. Such a duplication of effort seems counterproductive, and perhaps not the best use of the Court's limited resources. The Committee respectfully suggests that the Court consider a rule that would exempt cases from the program if the parties are engaged in private mediation.

We thank you for your consideration of this letter and the Committee's comments and input. Members of our Committee would be happy to provide the Court with additional information or comments if the Court so desires.

Very truly yours,

Katharine Parker

Katharine H. Parker

cc: Samuel W. Seymour
Alan Rothstein ✓