

# ADR IN THE SOUTHERN DISTRICT OF NEW YORK: QUALITY IS KEY

CHIEF JUDGE COLLEEN MCMAHON

**T**he Southern District of New York is very proud of its highly successful mediation program, which has allowed us to resolve 2,506 individual lawsuits over the past five years without putting the parties through the rigors of full discovery and the expense of motion practice and trial.

But we are always eager to make our program even better. So in recent years we focused on assessing and enhancing the quality of our panel mediators.

Why is quality control so important? Well, for many lawyers and parties, their first exposure to mediation may well be through our court, so we have a unique opportunity to educate parties and counsel about the mediation process. We understand that when mediation works, it leaves litigants not only with a settlement, but also with tools that will enable them to approach future disputes in an effective manner short of coming to court. Satisfied consumers of mediation use more mediation; the opposite is also true. So we want the experience of mediation in our court to be a positive one.

Quality control starts at the very beginning, so applicants who wish to join the court's panel participate in a process through which they are educated about mediation in the Southern District. As part of the formal application process, aspiring mediators, regardless of their prior mediation training or experience, must observe a minimum of three mediations conducted by one of our SDNY panel mediators. They then conduct a "mentor mediation" in which they are paired with an experienced co-mediator/mentor who makes a recommendation as to their readiness to mediate independently. We take this much care before adding new members to our panel because no amount of mediation training guarantees that a person will be a competent and effective mediator in this particular forum.

Quality control continues after someone joins the panel. In 2016, SDNY became the first and only federal district court to implement a protocol for ongoing peer-to-peer evaluation of our panel mediators. This protocol enables us to offer real-time suggestions/corrections to mediators, together with remediation and targeted training when necessary. It also allows us to identify mediators whose practice no longer fits with the court's program and to remove them.

When evaluating mediators, we are careful to respect the confidentiality that is the hallmark of mediation because confidentiality is what allows mediation participants to be able to speak freely in order to resolve their disputes. But we also understand that confidentiality can shield the mediator from scrutiny, especially in states like New York that do not have a uniform mechanism for exploring and resolving complaints about mediators. The SDNY mediator evaluation protocol, along with post-mediation surveys, allows us to "check under the hood" periodically, so that we can confidently endorse the mediators on our panel to the litigants who arrive at our courthouse.

In addition to our efforts to assess and enhance practice for individual mediators, we use our mediator evaluation protocol to identify areas where continuing mediator education would be appropriate. We offer periodic training for all panel mediators on substantive areas of law and mediation practice. We also convene mediator practice groups facilitated by mediation program staff. These practice groups are critically important since they give our panel mediators the opportunity to meet and discuss com-

mon challenges, to share strategies, and to learn from one another.

Finally, we understand that you can't be a good mediator unless you actually conduct mediations. Since 2011, the SDNY has made it a priority to ensure that all panel mediators have opportunities to mediate. That way, the work is not funneled to any particular individual or group of people. And because we assign panel mediators to cases based on subject-matter expertise, we are able to offer our litigants access to people who really understand their disputes and to ensure our mediators work in areas with which they already have substantive familiarity. This assignment model has implications for mediators' development and promotional opportunities—and, as we have learned, it increases our utilization of women and diverse mediators.

These changes and initiatives are all occurring in a court in which the use of mediation is on the rise. In 2011 the court initiated automatic referrals to mediation for counseled employment cases and some § 1983 police misconduct claims in New York City. In 2016, we expanded automatic referrals of certain police claims to White Plains, N.Y., and added automatic referral of cases filed under the Fair Labor Standards Act that are assigned to seven of the court's judges. Since 2012, referrals to mediation of employment cases filed by pro se parties have doubled, and referrals of nonautomatic cases by individual judges have increased by 157 percent since 2012. Our mediators have been particularly successful in helping parties resolve cases in the areas of contracts, wage and hour, copyright, and personal injury.

The effectiveness of the court's mediation program is only possible because we have invested in the program and in its staffing. None of these initiatives can operate at a consistently high level without ongoing oversight, statistical and program analysis, and support for panel mediators. We are exceedingly fortunate to have Rebecca Price running our program; her professionalism is much remarked on by both mediators and lawyers who are involved in the mediation process, and her unflagging enthusiasm for ADR is the engine that drives the program's success. ☺



*Hon. Colleen McMahon is Chief Judge of the United States District Court for the Southern District of New York, where she has served as chief judge since 2016 after having been nominated by President Bill Clinton in 1998. Prior to joining the court, Judge McMahon was a New York Court of Claims Judge for the New York Supreme Court from 1995 to 1998. She was the first female litigation partner at the distinguished law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP.*