In the Courts

Making the Most of Automatic Mediation

By Rebecca Price

I have been assured by some illustrious members of the bar that if I tell you in this first sentence that approximately 60 percent of cases referred to mediation in the U.S. District Court for the Southern District of New York settle you will keep reading this article. How about the oft-cited statistic that fewer than two percent of federal civil cases go to trial? Might that also inspire you to think of mediation – early mediation in particular – as a useful adjunct to litigation?

The Southern District has had a mediation program for over 30 years. Judges may refer any civil case (except tax, Social Security, and habeas) to mediation at any point in the litigation process. Starting in 2011, the court instituted two programs of early automatic referral to mediation – one in counseled employment discrimination cases and the other for counseled 42 U.S.C. § 1983 misconduct cases against the New York City Police Department.

The automatic programs recently have been expanded to include counseled Section 1983 police cases in the White Plains courthouse, and Fair Labor Standards Act cases assigned to seven of the court's judges, two in White Plains and five in Manhattan.

There are a number of principles driving the court's adoption and expansion of automatic mediation referrals. A substantial number of cases may be settled at an early stage, particularly with limited pre-mediation disclosures and the assistance of a trained neutral. (In 2015, our lowest rate of settlement was in counseled employment discrimination cases, approximately 50 percent of which settled through mediation.) A cornerstone of mediation is that it serve the needs of mediation participants. Although the early automatic referral programs come with discovery and other protocols, mediators and participants may modify the process and/or seek judicial relief to insure that a particular process is applicable and useful in each specific case.

Even when cases do not settle, early mediation is likely to streamline the next stages of the litigation process by narrowing and focusing the issues in dispute, clarifying differences in views of the facts and legal postures, and by setting the stage for effective communication between and among counsel and clients. A deep dive at the start can be a constructive way to get to the facts early and assess how best to advise a client over the long term. Of course, reaping these benefits depends upon active engagement, collaboration, and feedback between litigants and mediators.

No process is universally appreciated, and the Southern District's mediation program is no exception. The primary concern I have heard is with the quality of mediators on the court's panel. Quality, for most litigants, typically refers to knowledge of substantive law and, secondarily, to mediation process skills. Everyone – the court, the mediation program, the mediators, and surely the lawyers and parties – wants every mediation to be of the highest quality. We have undertaken a number of initiatives to support that goal. The mediator evaluation program, developed in collaboration with the New York City Bar Association Committee on Alternative Dispute Resolution, sends specially trained evaluators (themselves mediators) to observe and assess their peers as they mediate actual cases. The feedback provided by the evaluators enables panel mediators to reflect upon and improve their mediation skills and enables the mediation program to provide training and support and, where necessary, to remove mediators who demonstrate significant deficiencies. New applicants to the mediation panel must have had mediation skills training and meet live observation and co-mediation requirements before being assigned matters. Since last year, the court also has hosted practice groups where mediators meet every other month to discuss and strategize about mediation challenges in Southern District cases. In the last three years we have offered mediator trainings in a number of areas including employment discrimination, Section 1983, mediation skills, and implicit bias.

I also must say that although the court's programs for mediator

education and training are an asset, the mediator panel itself includes a large number of extraordinarily talented people, all of whom serve as volunteers. Although the mediation program assigns a mediator based on the nature of the case, litigants may contact the program with specific requests or needs for a mediator. These requests might include areas of legal experience or knowledge, or other traits such as an ability to work with high conflict parties, or comfort with family disputes, or a sensitivity to ethnic or cultural issues. With a panel of over 300 mediators, chances are high that we can satisfy your requests.

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Some members of the bar may be reluctant or outright refuse to engage in mediation, particularly when the referral comes early in a case. This opposition comes with many messages: a case can only be assessed once discovery is complete; an openness to mediation is a sign of weakness (to one's adversary or one's client); or early settlement means a change in anticipated revenue. There is no question that, along with the advent of electronic discovery and the reduction in civil trials, the integration of mediation and other means of alternative dispute resolution into the civil litigation process creates pressures to change the way many of us practice law. I would encourage those who have these concerns to express them, and then to make the most of the mediation process if you find yourself in it. The right mediator will assist you in developing clarity about the best path forward in any given case. In some situations, that path could include an application to the presiding judge to be removed from mediation if that is necessary and appropriate.

A final request, if I may. If you are in mediation in the Southern District of New York and the assigned mediator or the mediation process do not meet your expectations, please let us know. The court sends post-mediation surveys to counsel of record on every mediated case. The mediation program also welcomes comments by phone, e-mail, fax, or regular mail. There is nothing more disheartening than hearing anecdotally that someone has had a bad experience, without any means for us to investigate and improve. We are a public program, a service of the court, and we are (continually) a work in progress.

Editor's Note: Rebecca Price is director of the ADR program in the Southern District of New York.

Decisions

Ballot Selfies

By Charles C. Platt

In a tumultuous election process that has included everything from the offensive use of social media to claims of "rigged" election outcomes, a new (albeit smaller) battleground has emerged: "ballot selfies." These are photographs that are taken by voters with a mobile device in a voting booth, often show the voters with their marked ballots, and are published widely across the internet.

Proponents of ballot selfies argue that such photographs are more than just the narcissistic