

HISTORY, PROCESS, AND A ROLE FOR JUDGES IN MEDIATING THEIR OWN CASES

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Alternative Dispute Resolution (“ADR”) is not new. It has been with us in the United States in one form or another for centuries.¹ George Washington used an arbitration clause in his will² and from its birth in 1768, and indeed as part of its *raison d’être*, the New York Chamber of Commerce also used dispute resolution.³ In fact, 90 percent of lawsuits have for years been settled out of court, often at settlement conferences, themselves a form of alternative dispute resolution.⁴ Many of these settlement conferences involved a neutral mediator, such as a judge.⁵

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1. Early American settlers and the immigrants who followed soon after distrusted a court system with which they were unfamiliar. *See generally* KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 11 (2000) (“Sharing a suspicion of law and lawyers, they developed patterns of conflict resolution . . .”). Therefore, they looked towards their community to resolve conflicts. *See id.* Some groups that shared techniques for dispute resolution were the founders of Dedham, a seventeenth-century utopian community in Massachusetts, and the Quaker elders of Philadelphia. *Id.*

2. LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 5 (2d ed. 1994).

3. The early merchants involved in the maritime, silk, and fur industries looked to private channels to resolve their conflicts. *Id.* The New York Chamber of Commerce was created to resolve such conflicts. *Id.* Dispute resolution has existed in other nations as well. The People’s Republic of China has relied on *tiaojie* (mediation) to resolve disputes since ancient times. Michael T. Colatrella, Jr., “Court-Performed” Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs, 15 OHIO ST. J. ON DISP. RESOL. 391, 395–96 (2000). The basis for this reliance on mediation is a combination of Confucian philosophy, which, due to China’s underdeveloped court system, directed its practitioners to settle disputes within the community, family, or guilds, and Maoist thought. *Id.* at 396. Under *tiaojie*, a judge presides, meets individually with each party, and assesses the parties’ claims. *Id.* at 405–06. She may then suggest a particular settlement option. *Id.* at 406. *Tiaojie* is still one of the most popular methods of dispute resolution in China. *Id.* at 399.

4. This number is based on an analysis of my docket both as a state supreme court justice and as a federal district judge.

5. As a judge, I have participated in such conferences.

The way we think of ADR today, however, at least ADR in the court system, is of a much more recent vintage. It began to a great extent with the 1976 Pound Conference,⁶ organized primarily to discuss ways to alleviate the ever-growing caseloads facing the courts.⁷ This Article will look briefly at the last twenty-five years of ADR since the Pound Conference. It will focus mainly on mediation in our courts and will attempt to provide a road map of the mediation process. It will then examine the more controversial role of the judge in mediating his own cases.

I.

HISTORY OF ADR IN THE FEDERAL COURTS

The emergence of Rule 16 of the Federal Rules of Civil Procedure ("FRCP"), even before the Pound Conference, initially allowed judges to envision the potential for better case management⁸ in that the rule requires judges to order a pre-trial conference to discuss a variety of issues and focuses on moving the case through the process.⁹ Judge-assisted settlements can take place pursuant to this rule, as well.¹⁰

With FRCP 16 as its jumping-off point, the Pound Conference hoped, through the use of ADR—especially arbitration and mediation—to advance possibilities for better judicial case management even further. For example, Professor Sander, one of the Pound

6. The Roscoe E. Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in 1976, focused on finding ways to improve the administration of justice. SINGER, *supra* note 2, at 6–7. Chief Justice Warren E. Burger gathered together a wide range of legal professionals to participate in the conference. These participants included public interest lawyers, participants in the civil rights movement, and academics concerned with various issues, such as the recent rise in litigation volume, lack of access to the legal system, and various other complicated scientific or social problems. *Id.* at 7. The conference was the genesis of the development of modern ADR techniques. *See id.*

7. *Id.*

8. Then-Chief Judge Robert Peckham of the Northern District of California described judges' roles as going beyond just "dispensers of justice." Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 819 (1988). Judge Harold Medina stated: "The development of pre-trial procedure and formulation of Rule 16 . . . represents one of the great twentieth century contributions to the improvement of judicial administration and the furtherance of effective, timely justice." *Id.*

9. *See id.* at 823; *see also* discussion of Rule 16 of the Federal Rules of Civil Procedure *infra* text accompanying notes 75–78.

10. Charles E. Patterson & Bruce A. Ericson, *Settlements*, in WEST GROUP & AM. BAR ASS'N, 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 28.6(b), at 767 (Robert L. Haig, ed. 1998).

Conference participants, suggested the concept of a “multi-door” courthouse wherein a party could find a number of dispute resolution services.¹¹ For the most part, his vision has become a reality. Currently, court ADR programs are devoted to binding arbitration, non-binding arbitration, and mediation.¹² It is worth noting, however, that ADR is comprised of more sophisticated modalities as well; they include early mini-trials, summary jury trials, and neutral evaluation.¹³

Congress has expressed its support for continued expansion of ADR in the federal judiciary (and presumably hopes to inspire such expansion in the state court system as well) through its 1990 pas-

11. Professor Frank E. Sander originated the idea of the “multi-door” courthouse as a single place to which an aggrieved party could go to seek out a number of alternative dispute methods to resolve his conflict. Evan R. Seamone, M.P.P., *Bringing a Smile to Mediation’s Two Faces: How Aspiring Mediators Might Jump-Start Careers Immediately Following Law School*, at <http://www.uiowa.edu/~cyberlaw/elp00/Evan/mediation/origin.html> (last visited Jan. 23, 2002).

12. The distinction between arbitration and mediation lies in the goals and methods of each. See STONE, *supra* note 1, at 5–8 (quoting the Nat’l Inst. for Dispute Resolution, *Report of the Ad Hoc Panel on Dispute Resolution and Public Policy* app. 2 (1983)). Arbitration is focused on the judicial settlement of a case and involves one or more arbitrators who hear evidence and hand down a decision. *Id.* at 5–6. The arbitrator’s decision is usually in written form, brief, and enforceable once reduced to judgment in court. *Id.* at 6. Enforceability is not, of course, a component of a non-binding arbitration. Mediation, in contrast, is focused on assisting the parties, themselves, to reach a negotiated accord. *Id.* at 7. The mediator, usually an impartial third party, does not write a decision and the results of the mediation are not binding unless closure is reached. *Id.*; SINGER, *supra* note 2, at 19–21. Mediation is the most favored ADR method in the courts. A main reason for its popularity is its adaptability to a variety of disputes and its ability to allow the parties to resolve their disputes in a mutually beneficial manner. See Colatrella, *supra* note 3, at 392–93.

13. A mini-trial is a common alternative to corporate litigation and may include limited discovery and presentations by attorneys authorized to settle the dispute. STONE, *supra* note 1, at 7. A neutral advisor, either a retired judge or a lawyer, manages the settlement and may, if requested to do so by the parties, issue an opinion on how a court might decide the matter. *Id.* A summary jury trial, in contrast, is usually a one day proceeding in which the parties present summarized versions of their cases to a jury. The jury then issues an advisory opinion on the probable outcome, were the case to go to trial. Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 370 (2001). Finally, early-neutral evaluation involves the two parties presenting their cases to a neutral third-party, who then evaluates the merits of each side and issues a non-binding assessment. See Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1776 n.39, 1790 n.120 (2001). This assessment provides the parties and their lawyers with an opportunity to better understand the case and to facilitate settlement. See *id.* at 1788–89.

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sage of both the Administrative Dispute Resolution Act ("ADRA")¹⁴ and the Civil Justice Reform Act ("CJRA").¹⁵ The ADRA was designed to encourage the use of consensual ADR in governmental agencies.¹⁶ It requires federal agencies to incorporate ADR into their policies, to appoint agency ADR specialists, and to provide ADR training for employees.¹⁷ Seemingly as a result of this legislation, a number of federal agencies have increased their use of ADR programs to resolve disputes amongst one another.¹⁸

The CJRA requires the courts to utilize ADR programs to reduce litigation costs and to alleviate congestion and delay in the court system.¹⁹ A direct result of the CJRA was the adoption of some form of ADR in almost all of the ninety-four federal district courts.²⁰ Most recently, Congress passed the Alternative Dispute Resolution Act of 1998 ("1998 ADRA"),²¹ which mandates that all federal courts implement ADR programs,²² make improvements to existing programs,²³ and appoint judicial officers to supervise ADR procedures in the courts.²⁴ The requirements of the statute are flexible, however, in that each district court has discretion to decide the extent and type of ADR program(s) it will initiate.²⁵ The au-

14. 5 U.S.C. §§ 571-581, 583 (2000).

15. 28 U.S.C. §§ 471-482 (1994).

16. *See* Administrative Dispute Resolution Act ("ADRA"), Pub. L. No. 101-552, §§ 2-3, 104 Stat. 2736-37 (1990) (codified as amended at 5 U.S.C. §§ 571-583 (2000)).

17. § 3(a)-(c).

18. Both the Federal Deposit Insurance Company ("FDIC") and the Resolution Trust Corporation ("RTC") have increased their use of ADR programs. SINGER, *supra* note 2, at 142. Any disputes between the agencies must be resolved by some form of ADR. In practice, mediation is the most frequently used technique. *Id.*

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19. Civil Justice Reform Act of 1990, Pub. L. No. 101-160, §§ 102, 103, 104 Stat. 5089-96 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1994)).

20. Colatrella, *supra* note 3, at 410. The Southern District of New York provides one example of increased ADR use in the federal courts. In that district, volunteer lawyers, meeting an average of three sessions per case, settled nearly 80% of all cases assigned to mediation. SINGER, *supra* note 2, at 165.

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21. Pub. L. No. 105-315, 112 Stat. 2993 (1998) (codified as amended at 28 U.S.C. §§ 651-658 (Supp. V 1999)).

22. 28 U.S.C. § 651(b).

23. § 651(c).

24. § 651(d).

25. Streeter-Schaefer, *supra* note 13, at 373. By the time the courts began to expand their use of mediation and other ADR modalities, the private sector had already awakened to the prospects of ADR as a profit-making venture. By the 1980s and 1990s, private ADR entities began to open offices across the country. Currently, fees in such fora can range from \$200 to \$500, or more, per hour. *See generally* ELIZABETH PLAPINGER & DONNA STIENSTRA, FED. JUDICIAL CTR. & CPR INST.

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thor of this Article is the judicial officer for the Southern District of New York.

Finally, two recent Supreme Court cases provide us with insight into the current, if tumultuous, status of ADR in the courthouse today. While *Circuit City Stores, Inc. v. Adams* broadened the reach of the Federal Arbitration Act (“FAA”) to cover all employment contracts (except for transportation worker contracts, which are a specifically exempted group),²⁶ the more recent case, *EEOC v. Waffle House*, held that an arbitration clause that covered allegations of employment discrimination would not prevent the EEOC from pursuing such claims in the courthouse.²⁷ While a complicated issue, the escalation of legal fees in the litigation context, coupled with the unpredictability of jury verdicts once a case goes to trial, leads one to presume that ADR will continue to grow.

II. PROCESS

This section discusses the methods by which judges and other “neutrals” carry out mediation. Generally, mediation progresses via two different approaches—evaluative and facilitative.²⁸ The exter-

FOR DISPUTE RESOLUTION, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 29–35 tbl.3 (1996). In addition, businesses have also begun to see ADR as a time and money saver. The business executive, seeing spiraling litigation costs and long delays, has turned to ADR to settle employee claims. More and more corporations are employing mandatory arbitration clauses in their employment contracts, so much so that the period from 1987 to 1991 witnessed a 30% drop in the number of federal lawsuits brought for alleged breach of contract, discrimination complaints, etc. SINGER, *supra* note 2, at 8 (citing the findings of a study by Joel Rogers and Terence Dunworth cited in Milo Geyelin, *Suits by Firms Exceed Those by Individuals*, WALL ST. J., Dec. 3, 1993, at B1). More and more public agencies and local business are also employing arbitration or mediation clauses in their employment contracts. Further, neighborhood justice centers, numbering about 350 throughout the United States, have also been successful. *Id.* at 9. In fact, in New York City, over 14,000 disputes, including neighborhood disputes, landlord-tenant conflicts, and family problems, are mediated each year. *Id.*

26. 532 U.S. 105 (2001).

27. 122 S.Ct. 754 (2002) (although precluding the EEOC from seeking “victim-specific relief” in court).

28. Honorable Harold Baer, Jr., *Alternative Dispute Resolution*, in WEST GROUP & AM. BAR ASS’N, 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(1), at 491 (Robert L. Haig ed., 1998); see Deborah R. Hensler, *In Search of “Good” Mediation: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231, 233–34 (Joseph Sanders & V. Lee Hamilton eds., 2001) [hereinafter *In Search of “Good” Mediation*]. Much of the process is the same, however,

nal hallmarks of both are the same. That is, the parties, along with their lawyers, are present and invited to participate.²⁹

Evaluative mediation finds the neutral listening to both sides, usually, although not necessarily, and then caucusing first with the plaintiff and then with the defendant.³⁰ This *ex parte* communication with each side eventually provides the mediator with a view as to an appropriate resolution of the case.³¹ This is the hallmark of the evaluative method. While there may be many caucuses and meetings with both sides, the evaluative method usually leads to the neutral mediator professing his view of both the range of possible resolutions as well as his most preferred resolution within that range.³² Facilitative mediation, in contrast, differs in that the mediator's role is to encourage the parties to reach a resolution on their

whether it is conducted privately, through a court program, by the judge on whose docket the case appears, or by the magistrate judge assigned to the case.

29. The Court Program for the Southern District of New York ("Court Program"), as codified in S.D.N.Y. LOCAL CIV. R. 83.12(j), provides: "The attorney primarily responsible for each party's case shall personally attend the first mediation session and shall be fully authorized to resolve the matter and prepared to discuss all liability issues, damage issues, and the party's settlement position in detail and in good faith." Occasionally, only the lawyers are present, but then only when they have full authority to come to closure for their clients. In this instance, the S.D.N.Y. LOCAL CIV. R. 83.12(j), provides: "At the discretion of the mediator, the party, if an individual, or a representative of the party, if a corporation, partnership or governmental entity, with knowledge of the facts and full settlement authority, may be required to attend." Client presence is mandated not only by the S.D.N.Y.'s Court Program, but by my own rules as well. In my Pretrial Scheduling Order ("PTSO"), I note that "[i]n the case of a mediation to be conducted by the Court, all parties must bring their respective clients to the mediation." Client absence rarely occurs in practice, however, because it tends to prevent closure. When counsel does come alone—no matter how clear I make the point that counsel should not come to the mediation session without authority to come to closure—closure seems to require attorney-client phone calls, which take time and often delay a good result. Only this year, for the first time, did lawyers authorized to come alone to the mediation (because their clients were at different ends of the world, both literally and figuratively) actually resolve a lawsuit. *Kevlcat Power Boats v. M/V Royal Cooler*, No. 01-CV-4747 (S.D.N.Y. June 1, 2001).

30. Baer, *supra* note 28, § 42.4(c)(1), at 491.

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31. S.D.N.Y. LOCAL CIV. R. 83.12(a) defines 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 position or render any judgments. By holding meetings, defining issues, diffusing emotions, and suggesting possibilities of resolution, the mediator assists the parties in reaching their own negotiated settlement.

See also Baer, *supra* note 28, § 42.4(c)(1), at 491.

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32. *See* Baer, *supra* note 28, § 42.4(c)(1), at 491.

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own.³³ One commentator defines facilitative mediation in relation to its evaluative counterpart, as follows:

Evaluative mediators focus on obtaining a negotiated outcome of a legal dispute within the “shadow of the law.” Such outcomes are usually distributive in nature, as are the outcomes delivered by adjudication. Facilitative mediators focus on helping parties obtain solutions to problems that maximize joint gains. Such outcomes are likely to include a mix of money and other agreements that could not be imposed by a judge.³⁴

Facilitative mediation does not, however, exclude the neutral from adopting a view expressed in a caucus and making an effort to sell it to the other side.³⁵ Facilitative mediation is the method generally employed by the courts,³⁶ while pro bono lawyers who act as mediators in a court program use whichever approach they believe to be the more productive.³⁷

With these two approaches in mind, let’s look at the process itself—how mediation works today, whether in a court program with a volunteer mediator or in a judge’s chambers. Although the model is my own, it varies little from mediation in a state or federal court program utilizing pro bono mediators or even from mediation at a private ADR firm.³⁸

The first step in the mediation process requires the parties to agree that mediation might be helpful in resolving their dispute. Under the judge as mediator model, one or more of the lawyers calls chambers, talks to the law clerk assigned to the case, and

33. *Id.*

34. *In Search of “Good” Mediation*, *supra* note 28, at 259.

35. *See* Baer, *supra* note 28, § 42.4(c)(1), at 491.

36. *In Search of “Good” Mediation*, *supra* note 28, at 260 n.5 (citing “[a] recent sourcebook on alternative dispute resolution in the federal courts, jointly published by the Federal Judicial Center and the Center for Public Resources”); *see also* S.D.N.Y. LOCAL CIV. R. 83.12(a).

37. *See generally* Deborah R. Hensler, *Our Courts, Ourselves: The Transformation of the Justice System in the United States* nn.49 & 63 (2001) [hereinafter *Our Courts, Ourselves*] (unpublished manuscript, on file with author) (noting that some jurisdictions use pro bono lawyers as mediators).

38. Keep in mind that not all disputes are appropriate for mediation. Disputes that are inappropriate include cases whose holdings would serve as legal precedents to allow or to avoid a myriad of future similar lawsuits and strike suits. In such cases, e.g., cases where a legal precedent is essential or where the plaintiff has made it clear that he or she has no intention of ever settling, either for spite or for publicity, mediation is inappropriate. Beyond these, other kinds of lawsuits are specifically excluded from the Court Program for various reasons, some more apparent than others. Examples include social security, tax, prisoner civil rights, and pro se matters. S.D.N.Y. LOCAL CIV. R. 83.12(e).

schedules the mediation. The Court Program is more formal and requires an order from a judge to start the process.³⁹

My pre-trial scheduling order ("PTSO"), filled out at or before the first pre-trial conference ("PTC") and discussed at that conference, includes a paragraph on the availability of mediation either with me or in the Court Program.⁴⁰ Each side receives a blank PTSO in advance and has an obligation to consult with the other side before filling it out and attending the PTC. This is intended to alleviate the problem of determining which side will make the call to chambers evidencing an interest in mediation. In a sense, it is an invitation from the court.⁴¹ In private ADR firms, if one side to a lawsuit wants mediation, that side may call an administrator both to arrange the mediation with the ADR firm and to contact the other side.⁴² Use of an administrator shields, to some extent at least, those lawyers who believe that initiating the mediation process is a sign of weakness or that it betrays a reticence to go to trial.⁴³ While not generally true, my invitation in the PTSO helps avoid that perception. That is, clients and lawyers may view any mediation discussion as my doing, as opposed to being the suggestion of one of the parties.

Once a mediation is scheduled, at the PTC or soon thereafter, the entire process can usually be completed within two to three weeks; significantly faster than in the Court Program, which depends in part on the calendars of busy lawyers who serve as pro

39. *Id.* ("The assigned Judge or Magistrate Judge may determine that a case is appropriate for mediation and may order that case to mediation with or without the consent of the parties.")

40. Paragraph 8 of my PTSO (on file with author) reads as follows: "Upon request to Chambers by either side, the Court will schedule and conduct a settlement conference and/or mediation. The Court will also, upon request, facilitate mediation under the Court Mediation program or a settlement conference before your Magistrate Judge."

41. See generally Martin A. Frey, *Symposium: Alternative Dispute Resolution in the Twenty-First Century*, 36 TULSA L.J. 727, 745 (2001).

42. Harold Baer, Jr., *Mediation—Now Is the Time*, LITIG., Summer 1995, at 5, 63 [hereinafter *Mediation-Now Is the Time*].

43. Baer, *supra* note 28, § 42.4(c)(1), at 492 ("[L]awyers are sometimes hesitant to broach mediation for fear of appearing weak or being the first party to blink."); see Michael L. Shakman et al., *Mediation of Business Disputes*, in 2 ILL. INST. FOR CONTINUING LEGAL EDUC., ALTERNATIVE DISPUTE RESOLUTION § 24.16 (Anne V. Swanson & Susan M. Yates eds., 2001) ("Proposing mediation . . . can generate the perception that the proponent's position is weak or that the proponent has little confidence in his or her position."). For a cost benefit analysis of why mediation is preferable to going to trial, see Frey, *supra* note 41, at 744.

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bono neutrals.⁴⁴ The parties are asked to submit a brief summary of the facts, usually in letter form, and not more than three pages in length.⁴⁵ Each side forwards its statement to me *ex parte*—again a concept agreed to by all before mediation is scheduled. As mentioned above, I insist on the clients’ presence⁴⁶—unless the client is out of the country, or has another compelling reason, and full authority has been given to counsel to reach closure. If a client is present, I encourage him or her to do most of the talking.⁴⁷ Once the actual mediation gets underway, I generally allocate two hours, although I frequently schedule it for the end of the day so that we can go as late as necessary and so that trial lawyers can finish the court day before beginning the mediation. While simple and inexpensive,⁴⁸ mediation rarely works without at least some discovery, and almost never works in a personal injury case, where the exchange of medical information or a medical exam is critical. The exchange of documents is usually not as expensive as depositions and may have been done, or at least begun, before the PTC. While discovery may drain some of the funds available to reach closure,

44. S.D.N.Y. LOCAL CIV. R. 83.12(l) (“All mediators shall serve without compensation and be eligible for credit and for pro bono service.”); *see generally* Baer, *supra* note 28, § 42.4(b), at 490.

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45. *Mediation-Now Is the Time*, *supra* note 42, at 63 (“When the parties themselves ask to submit written material [sic] I usually permit it, but grudgingly and only within strict guidelines. Briefs and affidavits tend to harden the positions of the parties and create rather than dissolve conflict.”).

46. *See* ¶ 8 of my PTCO, *supra* note 40 (“In the case of a mediation to be conducted by the Court, all parties must bring their respective clients to the mediation.”).

47. Baer, *supra* note 28, § 42.6(c)(3), at 505 (“Clients are encouraged to participate in discussions.”).

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48. *Mediation-Now Is the Time*, *supra* note 42, at 5 (“Mediation is not a cure-all, of course, but it is fast becoming the alternative of choice. It saves dollars. It saves time.”); *see* Frey, *supra* note 41, at 745; Shakman et al., *supra* note 43, § 24.12 (“If a dispute can be settled instead of litigated, both parties will normally save considerable amounts [of money] that would otherwise have to be expended to pay lawyers’ fees and the out-of-pocket costs of litigation while carrying the litigation through a court process that may take years.”).

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Mediating an agreement through a court-sponsored process will guarantee that transaction costs will be reduced. The reduction, however, is not as great as if the parties had negotiated or privately mediated their dispute without filing litigation. Because the case is before the court, the parties will have hired attorneys and their attorneys will have begun discovery, and motions and briefs may have been filed with the court, driving up the transaction costs.

Frey, *supra* note 41, at 745. *But see* Our Courts, Ourselves, *supra* note 37 (“The evidence to date indicates that [court mediation programs], like the earlier judicial settlement and arbitration programs, produce little in the way of time or cost savings.”).

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the expense is offset by an increased comfort level, which in turn makes resolution of the dispute easier for both sides. On balance, I find that discovery increases the chance for a resolution.⁴⁹ Where some discovery has been conducted and mediation is sought, the parties and I discuss what, if any, discovery remains to be done before the parties will be ready to mediate and if mediation is unsuccessful, how long the balance of discovery will take.

Once the parties are at the table, I attempt to conduct a relatively informal proceeding. Frequently, I even supply popcorn.⁵⁰ For the most part, the plaintiff tells his or her story with details filled in by counsel. Many times one can see how glad the parties are to be a part of the process and to hear the other side of the story with their own ears. I make it clear at the outset that we are not going to discuss previous settlement offers since they have apparently been fruitless. I also remind the parties that this is a non-confrontational exercise, that they should supply me with all of the facts and just the facts, and that what we do in chambers is confidential.⁵¹ I explain once more that the exercise is optional and that my feelings will not be hurt if I return to my more traditional role and decide their motions and try their case. I emphasize too that unless both sides have come to the table with a good faith belief that the case should be resolved, it would be foolish to even begin, since I have no magic wand to resolve disputes without their help.⁵²

Once each side has concluded his story, I begin a series of caucuses, one side at a time. In the regular course of business, a

49. Shakman et al., *supra* note 43, § 24.17 (noting that disclosure of discovery helps parties to settle as it allows the parties to hear about the facts and legal positions of all other parties to a given case).

50. *Mediation-Now Is the Time*, *supra* note 42, at 64 (“The atmosphere at a mediation is far less formal than a courtroom. . . . I have even supplied popcorn and soft drinks.”).

51. S.D.N.Y. LOCAL CIV. R. 83.12(k); *see also* Randall E. Butler, *Ethics in Mediation: Protecting the Integrity of the Mediation Process*, 38 HOUS. LAW. 40, 43 (2001) (“[U]nless all parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone . . .”). *But see* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 90 (2001) (“A surprising number of state statutes are ambiguous about the legal form of their confidentiality protection.”).

52. Baer, *supra* note 28, § 42.4(c)(1), at 491 (“It is vital for the parties to enter the [mediation] process with a sincere desire to reach an agreement. . . . This occurs, however, only when both sides are committed to resolving the matter. The mediator does not carry a magic wand . . .”).

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federal judge would never engage in *ex parte* conversation.⁵³ Therefore, I explain at the outset of the mediation process, and again before the first caucus, exactly what my role as mediator involves. I make sure that both sides understand and agree to the procedure and are ready, willing, and able to go forward. Their lawyers, hopefully, have explained this part of the procedure beforehand. Caucusing invariably provides me with additional information that was not put forth when the parties were together. Thus, I always make sure that before one side leaves the room and the other enters, I have permission to use certain information that might be helpful. Sometimes the party in question says no, but this occurs very rarely.⁵⁴

One great advantage of mediation has always been, in my view, the possibility of a creative resolution, something more and different than dollars.⁵⁵ Thus, once the caucusing begins, I explain my role as facilitator and then inquire into the possibility of creative solutions. Sometimes I find that all the plaintiff really wants is an apology, either orally, in writing, or both, and very frequently the

53. Baer, *supra* note 28, § 42.6(c)(4), at 506 (“While *ex-parte* meetings are prohibited at trial, the opposite is true at mediation sessions. *Ex-parte* communications are an essential element of successful mediation.”); *Mediation—Now Is the Time*, *supra* note 42, at 64 (“There is no caucusing and there are no *ex parte* meetings at trial. In fact, *ex parte* communications are frowned on or worse. Not so at mediation.”); *see also* Butler, *supra* note 51, at 43–44 (stating that a mediator is allowed to have *ex parte* communications with the parties in a mediation, which “would [otherwise] be inappropriate for a quasi-judicial functionary”).

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Studies also indicate that judges are more frequently using the technique of caucusing, which involves discussions with each party and that party’s attorney outside of the presence of the other party. Caucuses by judges are similar to those used by a mediator during formal mediation and take place with the permission of both parties; therefore, caucusing does not involve improper *ex parte* communications within the meaning of the Code of Conduct for United States Judges.

Daisy Hurst Floyd, *The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 55 (1994) (footnote omitted).

54. For a discussion on maintaining confidentiality in the mediation process, *see* Butler, *supra* note 51, at 43 (“Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other, . . . [and] shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.”) (quoting TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(d) (Vernon Supp. 2000)).

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55. S.D.N.Y. LOCAL CIV. R. 83.12(a) (“The main benefit of mediation is that it can produce creative solutions to complex disputes often unavoidable [sic] in traditional litigation.”); Baer, *supra* note 28, § 42.6(c)(4), at 506 (“Another good consideration in mediation is discussion of terms other than money.”); *see also* Our Courts, *Ourselves*, *supra* note 37.

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defendant is more than happy to accommodate.⁵⁶ For example, where an employer has discharged an employee and that employee has charged discrimination of some kind, it may turn out that while the plaintiff could have had a better work record, better evaluations or taken less sick leave, the employer is prepared to agree that his own negative attitude toward the employee may be somewhat exaggerated. Thus, the employer agrees that he can, in good conscience, write a neutral, albeit not glowing, letter of recommendation to aid the employee in seeking future employment.⁵⁷ Such a letter often proves to be a large part of the resolution of the lawsuit. There are a whole host of mechanisms like these, which have been used successfully, and which juries just cannot provide.⁵⁸

While non-monetary creativity is important and is frequently a piece of the puzzle, resolution generally includes a detailed discussion of monetary issues as well. Here too there are creative opportunities not generally available to a jury.⁵⁹ For instance, sometimes the timing of payments is important to a corporate defendant, or for that matter to anyone else who needs the use of all or at least a portion of his or her money for as long as possible. That is, the defendant may be willing to pay the plaintiff a set sum of money but may only be able to do so via periodic payments.⁶⁰ Another creative monetary resolution may involve one side devising a tax advantage of some sort and thus effectively increasing the total sum of money available to use toward a settlement.⁶¹

After some caucusing, a realistic number is usually put on the table by one side or the other—oftimes a quite different number from the number with which we started.⁶² While there is no doubt that I exercise my judgment even in concluding when this has occurred, once it has, it is my job to obtain the accord of all parties. I

56. For other examples of non-monetary settlements, see Baer, *supra* note 28, § 42.6(c)(4), at 506–07.

57. See also Our Courts, Ourselves, *supra* note 37.

58. See generally Baer, *supra* note 28, § 42.6(c)(4), at 506–07; see also Our Courts, Ourselves, *supra* note 37.

59. See Baer, *supra* note 28, § 42.6(c)(4), at 506; Our Courts, Ourselves, *supra* note 37.

60. Baer, *supra* note 28, § 42.6(a), at 500.

61. See, e.g., Morton Denlow, *Mediation of Commercial Disputes: A Useful Tool for Trial Lawyers & Their Clients*, CBA REC., Sept. 1995, at 30, 33.

62. *Mediation-Now Is the Time*, *supra* note 42, at 6 (“Once discussion of settlement figures begins, even widely divergent figures will not stop the good mediator. . . . A good mediator waits out the parties, knowing that such widely divergent figures are often but an opening gambit . . .”).

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find that the less interaction between the parties the better. Therefore, once the original session is over, I generally keep the parties apart⁶³ until they must all sign the mediation form containing the guts of the settlement and the stipulation of discontinuance.⁶⁴ The stipulation I use is attached as Exhibit 1. It provides only a few inches for me to write the elements of the accord and, thus, has very little room for details. My effort has always been to reduce the stipulation to essential language, and I cannot remember a mediation where I needed any more room. Mediations are sometimes, however, quite complicated. In such cases, I suggest to the parties that they are welcome to elucidate other concerns in a more extensive settlement agreement.

III.
THE ASSIGNED JUDGE AND HIS ROLE
IN MEDIATION

With an overview of the history and process of mediation behind us, the stage is set to explore the “phenomenon” of what the judge’s role in the mediation process should be. In the view of some, mediation saves neither time nor money and, thus, in any form is comparatively useless—and certainly not deserving of the time of a federal judge.⁶⁵ My anecdotal evidence on that score is quite to the contrary.⁶⁶ The Court Program shows about an 80%

63. Baer, *supra* note 28, § 42.6(c)(4), at 507 (“It is frequently best to avoid reuniting the parties until the terms are agreed upon and ready for review by the mediator in front of the parties. Keeping the parties apart until then prevents confrontations and spontaneous outbursts which can destroy a near-final agreement.”); *Mediation-Now Is the Time*, *supra* note 42, at 64 (“In my experience, closure has come more quickly when the parties are not reunited until I am ready to review the agreed-upon terms.”).

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64. S.D.N.Y. LOCAL CIV. R. 83.12(j) (“If a resolution is reached, a binding agreement shall be signed by all the parties, and a stipulation of discontinuance or other appropriate document filed promptly.”); Baer, *supra* note 28, § 42.7(b), at 508.

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65. Currently, federal judges have extremely impacted court dockets. The brutal fact of the matter is that federal trial judges do not have time to devote to assisting settlement negotiations at the level of detail required to do any good. . . . Whatever time [the judge has, considering the great size of the criminal docket and the low number of civil trials, is] more profitably spent trying civil cases than settling them.

Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712, 745 (1994); *see also id.* at 747.

66. In the calendar year of 2000, I mediated more than 30 cases, each of which, according to the lawyers involved, would have taken an average of three days to try. Thus, assuming that the cases would have actually reached trial, mediation saved approximately 100 trial days and the many costs such trials entail (for

closure rate⁶⁷ and my, probably less accurate numbers, show an approximately 85% closure rate. In addition, I find that publicizing the fact that I do not have an unlimited amount of time to spend mediating causes my sessions to wrap up more quickly than do those heard in either the Court Program or the private sector. An average mediation before me takes about two hours. The average duration of a mediation in the Court Program is five hours,⁶⁸ while one in the private sector can last twice that long, or longer.⁶⁹ It is perhaps this monetary and time efficiency that has led the vast majority (over 90%) of the parties who have chosen to mediate in the last five years to mediate before me, instead of participating in the Court Program.⁷⁰ In either forum, the above-stated facts demonstrate that judge-run mediation saves the parties and the court system, itself, both time and money.

Another central criticism of judicial mediation argues that, not only is it a waste of resources for a federal judge to act as mediator, but it is also unethical for a judge to mediate a case that appears on his own docket.⁷¹ An allied concern is that acting as a case manager is not part of a federal judge's job description⁷² and that a

example, jury fees). More importantly, mediation often comes early in the litigation process and, thus, both sides have more money with which to resolve the case. In addition, the mediation process will likely cause less trauma all around than would a trial.

67. Interview with George O'Malley, Esq., Counsel and ADR Administrator, United States District Court for the Southern District of New York, U.S. Courthouse, 500 Pearl Street, New York, N.Y. 10019 (first quarter of 2002).

68. *In Search of "Good" Mediation*, *supra* note 28, at 250 tbl.5 (citing data from a recent study of court-connected mediation programs by the RAND Institute for Civil Justice, as part of a larger study of the 1990 CJRA). R

69. This estimate is based on my own experience with mediation in the private sector.

70. 28 U.S.C. § 651 requires: "Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program." 28 U.S.C. § 651(d). The Court Program in the Southern District of New York also requires that a supervising judicial officer with previous experience in the field be appointed. S.D.N.Y. LOCAL Civ. R. 83.12(b) ("The Chief Judge shall appoint one or more judicial officers to oversee the [Court] program."). Following passage of the federal act, the Chief Judge appointed me to serve as "judicial officer."

71. *See, e.g.*, Deason, *supra* note 51, at 83; Longan, *supra* note 65, at 734-39; *see infra* text accompanying notes 81-84. R

72. I disagree strongly with the Florida appellate court's "caveat," in *Evans v. State*, that "mediation should be left to the mediators and judging to judges." 603 So. 2d 15, 17 (Fla. Dist. Ct. App. 1992).

judge should do nothing of the kind.⁷³ Remarkably, though, this criticism does not spill over to the allied realm of settlement conferences. In order to understand the criticism more fully, then, we must examine the differences between settlement conferences and mediation.⁷⁴

As mentioned above, settlement conferences are governed by Rule 16 of the Federal Rules of Civil Procedure.⁷⁵ Rule 16 was amended in 1983, so as to “validate what many judges were already doing and provided specific authority for judges who had up until then been reluctant to discuss settlement with parties because of uncertainty about their authority to do so.”⁷⁶ The Advisory Committee’s notes to Rule 16 state that the amendment “recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.”⁷⁷ Furthermore, the Third Circuit Court of Appeals has emphasized that:

The purpose of Rule 16 is to maximize the efficiency of the court system by insisting that attorneys and clients cooperate with the court and abandon practices which unreasonably interfere with the expeditious management of cases. . . .

The intent and spirit of Rule 16 is to allow courts to actively manage the timetable of case preparation so as to expedite the speedy disposition of cases.⁷⁸

73. Floyd, *supra* note 53, at 48 (“[Critics] argue that the trial judge’s new role, that of case manager instead of neutral arbiter, may result in a loss of the impartiality that has always been the hallmark of the trial judge.”). *But see* Longan, *supra* note 65, at 734 (“[E]xperienced judges enjoy a special ability and credibility in assessing cases and therefore have a unique ability to bring the parties’ expectations together.”).

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74. *See generally* Baer, *supra* note 28, § 42.6(b)(2), at 502 (“Settlement conferences are usually shorter and quite different . . . from full blown mediation.”); Our Courts, Ourselves, *supra* note 37 (“Today, some judges and practitioners describe settlement conferences as ‘mediation,’ but others view them as a different form of conciliation, aimed at finding a compromise between parties’ positions; these theorists and practitioners reserve the term ‘mediation’ for a process aimed at finding an interest-based resolution of parties’ disputes.”); *see e.g.*, Frey, *supra* note 41, at 733 (incorrectly defining a settlement conference to be the process of mediation where the mediator is a judge, magistrate judge, or adjunct settlement judge).

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75. FED. R. CIV. P. 16.

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76. Floyd, *supra* note 53, at 51; *see also* Deborah R. Hensler, Suppose It’s Not True: Challenging Mediation Ideology 13 (Nov. 29, 2001) (unpublished manuscript, on file with author).

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77. FED. R. CIV. P. 16 advisory committee’s notes to the 1983 amendments.

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78. *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3d Cir. 1990).

It is true that settlement conferences are generally less pro-active than mediations. Unlike settlement conferences, mediations involve an inquiry into the pros and cons contended for by each side, the presence and participation of the parties, submissions, *ex parte* caucus, and a search for creative solutions. They also take longer than do settlement conferences.⁷⁹ There may, however, be a modicum of arm twisting in both settlement conferences and mediations, as both invariably involve an effort to convince one side or the other that a proposed resolution is a fair one.⁸⁰ Each is valuable in that it provides the parties and the court with an expeditious resolution to litigation. Thus, although the judge is somewhat more involved in the mediation process than in a settlement conference, it is odd that critics frown upon participation in one and not the other, since both involve the judge's recommendation as to an appropriate resolution.

Particular criticism of an Article III judge's mediation of a case comes primarily from academics (who frequently possess little practical experience).⁸¹ Criticisms include a suggestion that judges either do not understand confidential communications or cannot be trusted to use them in an unbiased manner;⁸² and, too, that regardless of a judge's good intentions, if the judge conducts a mediation that does not come to closure and then tries the same case, he may "inflict his wrath" on the party he believes kept him from reaching closure.⁸³ That this may happen is hard to deny categorically. However, it seems to me that such a judge would likely take sides at some stage of the litigation anyway. Therefore, ought judges be barred from the mediation process and all the advantages it holds on the unlikely chance that an extremely small percentage of judges will not act impartially? Judges who have sworn to do their job objectively do their job, and do it well—without regard to who the litigants may be and certainly without regard to whether six months earlier they had conducted a failed mediation. Further, the fact that any number of appellate decisions credit district judges with the ability in bench trials to make impartial, discretionary decisions, such as what statements do or do not constitute hearsay,

79. Baer, *supra* note 28, § 42.6(c)(1)–(4), at 504–07.

80. *See generally* Floyd, *supra* note 53, at 46–85 (discussing techniques used by courts to foster settlement).

81. *See, e.g.*, Longan, *supra* note 65, at 737–38.

82. *See* Shakman et al., *supra* note 43, § 24.36; *cf.* Frey, *supra* note 41, at 760.

83. *See* Longan, *supra* note 65, at 736–37.

lends support to this view.⁸⁴ Most litigators will agree that hardly a trial goes by where some action by some lawyer could be off-putting to the judge—far more off-putting, I dare say, than not reaching closure after a couple of hours of mediation. No suggestion has been made, however, that a judge need recuse him or herself when a litigator is off-putting.

Of course, no one would suggest that a district court judge, or anyone else for that matter, undertake mediation without some training. The Court Program in our district requires an intensive two or three day training for pro bono mediators and offers such training to judges on a voluntary basis.⁸⁵ The training plays a very important role in ensuring good mediators and good mediations. Importantly, even the most rudimentary training teaches the mediator to obtain the consents of the parties before proceeding.⁸⁶ Further, since judges know better than professors not to speak to parties or their lawyers *ex parte*, to suggest that such a thing happens without consent, as some critics have, is again farfetched.

In addition, judges, especially after training, are extremely capable, and do explain, at the outset, that mediation need not result in closure. And in fact, in the practical world of litigation, attorneys may agree to mediation even without a belief that it will lead to closure. They may simply wish to use the mediation proceeding to size up their adversaries, to assess how the opposing clients will come across to a jury, or to obtain some free discovery.⁸⁷ No one believes that such a tactic would motivate an experienced litigator to mediate if he thought that it might produce a hostile judge at trial.

84. See Floyd, *supra* note 53, at 69–74 (citing cases that credit judges' abilities to refrain from bias when presiding over a case).

85. S.D.N.Y. LOCAL CIV. R. 83.12(c) ("Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 and complete the training program provided by the Court before serving as a mediator.").

86. The Court Program requires that the parties consent to mediation. See Exhibit 2.

87. Baer, *supra* note 28, § 42.5, at 499 ("One criticism of mediation that the practitioner should be aware of is that some lawyers come to the table only to obtain some free discovery."); Shakman et al., *supra* note 43, § 24.17 ("A more legitimate concern about mediation is that it may involve the disclosure of much of the factual and legal basis for each party's position in the dispute and focus the other side on precisely how a party intends to marshal factual and legal arguments.").

Clearly, judges must, as most judges do almost involuntarily, look at each case objectively.⁸⁸ Few judges will deny that every story has at least two sides. The advantages of mediation are available whether the mediator be a magistrate judge, private neutral, or an Article III judge, and whether or not the case is one on the judge’s own docket.⁸⁹ In sum, it can only be characterized as demeaning to lawyers and judges alike to suggest, as several law review articles do, that the judge cannot be fair regardless of the result of the mediation.⁹⁰

Other criticism that suggests that mediation is just a way to slough off cases in order to clear dockets that have grown unmanageable⁹¹ is also the product of minds without practical experience. Clearly, in state courts, at least in New York, dockets sometimes seem uncontrollable.⁹² Because of this, the Office of Court Administration (“OCA”) exerts pressure to resolve these cases.⁹³ This means, however, that state supreme court justices, as opposed to using mediation as a means of decreasing workloads, have no time to mediate.⁹⁴ In any event, this criticism is inapplicable to federal

88. Floyd, *supra* note 53, at 75 (citing CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (1992), which provides that “a judge should perform the duties of the office impartially and diligently”).

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89. *See generally* Longan, *supra* note 65, at 734–44.

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90. *See, e.g.*, Floyd, *supra* note 53, at 66.

[T]he mediator should not serve as a judge, master, guardian ad litem, or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation. A conflict may arise because the mediator will have had numerous ex-parte communications with the parties in the mediation, which would be inappropriate for a quasi-judicial functionary.

Butler, *supra* note 51, at 43–44 (footnote omitted).

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The mediation process lacks fairness when the trial judge acts as the mediator in his or her own case. . . .

If the mediator is the trial judge, the wall of silence no longer exists, and the judge knows that one of the parties has bypassed a reasonable settlement that he or she worked so hard to achieve.

Frey, *supra* note 41, at 760.

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91. *See generally* Floyd, *supra* note 53, at 85 (discussing the pressures on judges to keep their dockets moving); Longan, *supra* note 65, at 734–35 (noting that judges, unlike referral mediators, “face peer pressure among their fellow judges to keep their docket moving and to keep their dispositions high”).

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92. 144 Woodruff Corp. v. Lacrete, 585 N.Y.S.2d 956, 960 (Civ. Ct. 1992) (describing the high volume of cases in New York City Housing Courts).

93. *See, e.g.*, Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2020 (1999) (noting that administrative judges often question judges as to why “relatively old case[s] [have] remained unresolved”).

94. In the Housing Court, things can proceed and indeed have to proceed differently. *See, e.g.*, 144 Woodruff Corp., 585 N.Y.S.2d at 960 (noting that most cases

judges because their dockets, while crowded, bear no comparison, at least in New York, to those of the state courts.

It is also preposterous to suggest, as some do, that a judge should simply walk down the hall, drop a case file on a colleague's desk, inquire as to its appropriateness for mediation, and then, if the case meets certain criteria, leave it with that colleague for mediation.⁹⁵ Both state and federal courts (although perhaps more so in federal court) provide each judge with responsibility for the care and feeding of his or her own docket. The goal is for each judge to reduce steadily his or her own docket. Thus, a colleague is unlikely to welcome another case, which, even if it were to reach closure, would have taken the colleague's time without even decreasing his or her own docket numbers.⁹⁶ Admittedly, the system is not perfect and there are areas that deserve further study and, perhaps, change, but the concerns are not the almost mythical ones conjured up in the critical toms to which this Article makes reference.

There are some more legitimate criticisms of mediation, however. One such criticism condemns judges who conduct mediations involving a pro se party as unfairly disadvantageous to the unrepresented party.⁹⁷ Here the critics have a point and the Court Program prohibits such mediations from going forward on the normal mediation track.⁹⁸ Instead, in light of our docket's 20-30% pro se population, the S.D.N.Y. has initiated a new program which offers mediation to pro se litigants (especially in employment discrimination cases) by helping them to secure counsel for the mediation proceeding.⁹⁹ While retaining pro bono counsel for full representation (i.e., from service of a summons and complaint through trial

in New York's Housing Courts are "disposed of at an average rate of five to fourteen minutes per case, with many settlements in the range of five minutes or less").

95. See, e.g., Longan, *supra* note 65, at 745 ("One solution to the problems of trial judge mediation is to have trial judges swap cases."); *id.* at 745 n.154.

96. Shakman et al., *supra* note 43, § 24.36 ("Presiding over mediation for a case on another judge's docket adds to the mediating judge's already full workload but does not reduce his or her docket if the mediation is successful.")

97. "A system in which represented parties routinely prevail over unrepresented parties—without regard to the merits of the case—cannot be viewed as fair or impartial; the notion of impartiality should compel judges and mediators to assist unrepresented parties, rather than prevent them from doing so." Engler, *supra* note 93, at 1990.

98. See, e.g., *id.* at 2028–30 (discussing how the court must actively assist unrepresented individuals, including during settlement negotiations).

99. This program, the *Pro Se* Employment Discrimination Mediation Program ("PSEDMP") exists in the United States District Court for the Southern District of New York and is administered by the *Pro Se* Office. The Court referral form for this program is attached as Exhibit 2. New York Lawyers for the Public Interest is just

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and sometimes appeal) is understandably difficult, as it requires a major commitment, volunteer counsel for mediation only (of course, this includes preparation) is far easier to secure.¹⁰⁰ If the case has some merit (and this can usually be determined at the initial pre-trial conference) and if both parties consent, an order is signed. The signed order is then forwarded to the pro se office, which contacts a pro bono attorney to represent the pro se party for mediation. The pro se office then contacts the plaintiff. This, in the court's view, avoids any appearance of impropriety or coercion. Both the parties and the lawyers have applauded this addition to the Court Program. Just as in the Court Program, in the PSEDMP, the advantages of utilizing the trial judge as mediator, if she is willing, are apparent. It bears repetition that only the trial judge, unlike any other mediator, can allow time outside of that allotted in the original pretrial scheduling order for the mediation to take place. In addition, she, of course, is the only one who can authorize the delay of a decision on a dispositive motion until mediation has been attempted or provide an extension of the due date to make such a motion. The latter is frequently a tactical consideration of some import as the expense for discovery and dispositive motions may run into tens of thousands of dollars.¹⁰¹ Another advantage of the trial judge as mediator is that usually, as noted, a session can be scheduled within a week or two—certainly before discovery is to be completed.

Finally, there is truth to the criticism that urges the trial judge not to mediate a bench trial, since in such a case the judge is the trier of fact as well as of the law. As one author writes, "Parties who do not quickly agree to the judge's settlement figures at a pretrial conference will usually find themselves promptly picking a jury. . . . [But if] the judge is both lawgiver and trier-of-fact as well, she may

one of several groups that participates in the program. This group alone has produced close to fifty volunteers for this project.

100. The program's form entitled Order Declaring Case Eligible or Ineligible for Mediation states: "If the case is not resolved through the mediation process, the attorney shall have no obligation to have any further involvement in the case." The form continues: "Under no circumstances shall the Court require the attorney to accept representation for any further part of the litigation." This form is attached as Exhibit 3.

101. A March 9, 1999 meeting of lawyers representing predominantly Fortune 500 corporations and organized by the Chief Judge of the Southern District of New York concluded that 80% of litigation dollars go to discovery.

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not feel comfortable having a heart-to-heart with the lawyers.”¹⁰² In such cases, if a judge were to agree to mediate, fairness would require, at the very least, that he engage in a full explanation of the situation to both sides and that he secure their unequivocal and informed consent. In my view, the better course is not to undertake such a mediation at all, even when asked to do so by the parties.

It may be that sometime in the future, a senior or magistrate judge will agree to take over the mediation sphere because he or she finds mediations as challenging and rewarding as trials. If this occurs, perhaps trial judges will then be relieved of even considering mediation. However, for now, the well-trained trial judge should be commended for conducting mediations. The criticisms on ethical grounds and the suggestions concerning an inability to be fair, an inability to obtain consent where appropriate, and a perceived inability to overcome these obstacles deserve reconsideration.

102. *Mediation-Now Is the Time*, *supra* note 42, at 6; *see generally* Baer, *supra* note 28, at 496 (noting that “A.D.R. procedures should be held only before a judicial officer where he or she will not be the fact-finder if the procedure fails”).

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

- against -

___ Civ. ___ (HB)

POST-MEDIATION ORDER
OF DISCONTINUANCE

-----X

The parties having participated in a mediation before me and having reached a disposition as follows:

It is hereby

ORDERED that the above entitled action be and hereby is discontinued with prejudice and without costs to either party. The parties are aware that a failure to perform in accordance with the above disposition may result in the entry of a judgment against the non-performing party.

Dated: New York, New York

I agree:

Plaintiff

Defendant

Attorneys for Plaintiff

Attorneys for Defendant

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REFERRAL FORM FOR PRO SE EMPLOYMENT DISCRIMINATION MEDIATION

Case name _____

Docket number _____

Date this case was filed _____

This case was referred by Judge _____, who will/will not (circle one) conduct the mediation.

Pro Se Plaintiff's name: _____ Defendant's name: _____

Address: _____ Represented by: _____

_____ Address: _____

Telephone number: _____ Telephone number: _____

****FOR THE PARTIES TO COMPLETE****

The purpose of the mediation is to attempt to arrive at a mutually acceptable resolution of the dispute in a cooperative and informal manner.

The undersigned agree to participate in mediation.

Signature of plaintiff _____ Signature of defendant's attorney _____
Date: _____ Date _____

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

Plaintiff,

**ORDER DECLARING CASE
ELIGIBLE OR INELIGIBLE
FOR MEDIATION**

- against -

Defendant.

-----X

To the Clerk of Court:

This case is determined to be eligible for mediation

SOLELY FOR THE PURPOSES OF THIS MEDIATION, Plaintiff is represented by:

This attorney has volunteered to participate in the Court's mediation project. If there is any conflict of interest, the attorney shall notify Natalie J. Sobchak, Senior Staff Attorney, in the Court's Pro Se Office immediately at 212-805-0177. The attorney shall consult with plaintiff and shall attend the mediation when scheduled. **If the case is not resolved through the mediation process, the attorney shall have no obligation to have any further involvement in the case. Under no circumstances shall the Court require the attorney to accept representation for any further part of the litigation.**

The entire mediation process is confidential. The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. Any timetable set by the Court contained in a scheduling order or otherwise governing the completion of discovery, motion practice or trial date, etc. is to be strictly complied with and is in no way changed by the entry of this mediation Order.

SO ORDERED:

Harold Baer, Jr., U.S.D.J.

Dated:
New York, New York