START SPREADING THE NEWS: MANDATORY MEDIATION COMES TO NEW YORK

By Lorraine M. Brennan, Esq.

As someone who started her legal career as a litigator, I, like many other litigators, viewed mandatory mediation with both skepticism and some suspicion. When my client was sent to court-ordered mediation by a judge in the SDNY in the 1990s, I assumed that my adversary and I would merely tick the "attendance" box and return to the judge to let him know that mediation had failed to resolve our complex dispute. But it was not to be. Our mediator, a retired partner from a prestigious law firm, literally saved the day. He pointed out to both sides the risks inherent in going to court. Weaknesses in my case that I had dismissed as minimal were suddenly food for thought—who really knew what a jury might do? Similarly, my adversary had his eyes opened to the fact that his case, while not completely frivolous, was quite weak and that he stood to lose it all if he insisted on going to court. The mediator spent the entire day with us, and at the end of it, we had a fair and reasonable settlement that both sides could live with. We saved time, money and a lot of unnecessary hostility on both sides. I became a believer in the process. It worked.

Thus, when I learned that the "The Chief Judge's Task Force on Commercial Litigation in the 21st Century" had issued a June 2012 report recommending a pilot project that called for one in five commercial cases to be sent to mediation, I was enthusiastic. The pilot program is set to begin on July 28, 2014, and will apply to cases in the New York County Commercial Division only. The pilot is scheduled to run for 18 months, to give the users and the courts time to assess its efficacy and to determine if the program should be expanded to other counties. The program has some flexibility, including an "opt out," or exemption on good cause shown. While undoubtedly there will be some resistance, my belief is that many parties who go through the mediation process will be satisfied with it and will return—even voluntarily—to mediate other matters. When mediation works, it is a "win" for the client. A matter that might spend years in the court system can often be resolved in a day or two, thus saving the client considerable time, money and the inevitable business disruption that a litigation brings. The solutions reached in mediation can be innovative and creative, and in many cases serve the clients in a better fashion than a judicial decision.

New York is not the first jurisdiction to adopt mandatory mediation. Indeed, many states have had programs in place that require all cases of a certain type or dollar value to go to mediation before they can get before a court. These programs have generally worked quite well, and parties in those jurisdictions have become comfortable with the process. Outside the U.S., there have been serious attempts to raise awareness and encourage the use of mediation as well. For example, the 2008 EU Directive on Cross-Border Mediation called for the implementation of transparent and user-friendly mediation schemes for cross-border disputes. Many countries in the EU used different techniques to encourage parties to use mediation, including mandatory mediation, tax incentives, refunds of court filing fees and other innovative mechanisms to make mediation more palatable. Some jurisdictions went beyond the dictates of the EU Directive, which was addressed to cross-border disputes, and implemented domestic mediation programs as well. These programs have met with varying degrees of success in certain jurisdictions, but countries such as Italy, which had an enormous backlog of cases and ensuing delays, can point to data that indicates a significant lessening of the backlog as a result of the use of mediation.

Mediation is here to stay, and it is encouraging to see the New York courts lead the way in this state with this pilot project. The more users are exposed to it, the more uptake there will be. I am reminded of a conversation I had with a General Counsel of a large corporation some years ago. He told me he had had one bad experience with arbitration and that he would "never use it again." I asked him how many pleasant experiences he had had with litigation. He was silent. ADR exists for a reason: Parties want and need alternatives to the court system, which in some places is drastically under-funded, backlogged and inefficient. My hope is that this pilot project will be the start of a real effort to move those cases that should be mediated to mediation or arbitration and save only those cases where a verdict is a necessity for the courts. ■

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