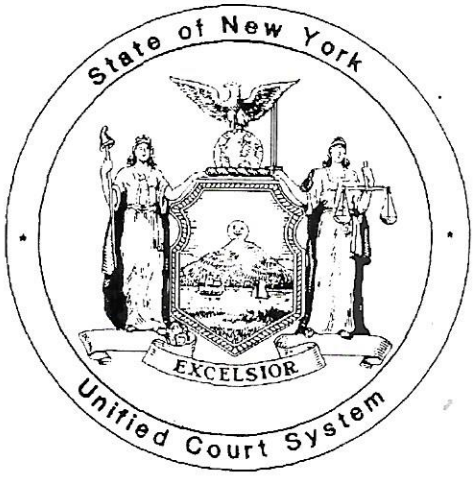

By Robert C. Meade Jr.

Commercial Division ADR: A Survey of Participants

A SURVEY conducted by the Commercial Division in March 1997 of close to 400 attorneys and neutrals who had participated in its alternate dispute resolution program revealed a high level of satisfaction. About 70 percent of neutrals and 45 percent of attorneys completed and returned the forms. This article will summarize a report of that survey.

The Commercial Division program is one of mandatory, court-annexed ADR (although parties are welcome to use a private provider) in cases deemed appropriate by the judges. The parties may choose the type of ADR and select the neutral from a roster of over 200 practitioners. Generally, discovery is stayed for 30 days and ADR should be completed within that period; although it may continue without a stay if needed. The process is confidential and free.

ADR is not a panacea nor a magic formula. But the dynamics of commercial litigation make these cases well-suited overall to ADR. The smaller cases, ones worth $25,000 to $100,000, are particularly good candidates when the costs of preparing and trying these cases are considered.

More than 300 cases have been referred to ADR in the Commercial Division. In cases where the process has concluded, 52 percent were completely settled.

More than half of responding practitioners reported having had "some experience" with mediation and a small number stated that they had had "considerable experience." Almost 80 percent of the neutrals have 16 or more years of experience, with 71 percent reporting having had some formal ADR training from sources including the U.S. District Court for the Southern District, the Association of the Bar of the City of New York. Seventy have undergone training sponsored by the Commercial Division.

Reporting on their most recent ADR proceeding, 83.3 percent of the neutrals indicated that they had spent more than three hours in the ADR process and almost 30 percent had spent over seven hours. Attorneys responded similarly.

Nearly 90 percent of the neutrals concluded that the process by which they had been designated to serve in particular cases had been efficient. Participating counsel agreed that the forms used to commence the ADR process are easy to use (91.8 percent).

In 76.9 percent of the cases, the program was able to provide participating counsel with a neutral of their choice. Neutrals (93.7 percent) and counsel (91.8 percent) felt that the Commercial Division Support Office responded well to communications about the ADR process.

Neutrals and participating counsel alike reported that the ADR Rules of the Commercial Division are clear and understandable (100 percent and 88.4 percent respectively) and fair to both sides (97.4 percent and 87.5 percent respectively).

Most neutrals and attorneys were satisfied with the amount of discovery. Three-quarters of the neutrals and participating attorneys indicated that there had been no problems in arranging the initial ADR session. Counsel overwhelmingly (92.6 percent) stated that the neutral had been diligent in contacting the parties prior to the session. Almost 80 percent of the attorneys indicated that their clients were willing to participate. Also, 77 percent of the attorneys were of the opinion that their opposing counsel had not obstructed the process. The belief that ADR is merely an occasion for tactical maneuvering is not borne out by the results of this survey.

Participating counsel were substantially satisfied with the neutrals: almost 87 percent thought that the neutral was fair to both sides, 85.2 percent felt that the neutral had demonstrated a familiarity with handling disputes in commercial litigation and 80.3 percent concluded that the neutral had demonstrated the skills necessary to conduct the ADR process. Both neutrals and attorneys (91.1 percent and 85.2 percent) concluded that the process had run smoothly.

Settlement

Just under half of the responding attorneys reported that their cases had settled in the process. An almost identical percentage of neutrals stated that their most recent case had settled.

The program's 52 percent settlement rate, however, tells only part of the story. Program statistics do not reflect instances in which a case settles after the ADR process ends as a result of that process. Indeed, 16 percent of the responding counsel stated that although their cases had not during ADR, the process had contributed to settlement shortly thereafter. All of these cases would have been recorded for statistical purposes as "failures," though they were not. Furthermore, close to one-third of the responding attorneys reported that ADR had served to narrow differences although the case did not settle. Over two-thirds of the neutrals responded that the process reduced hostility and anger between or among the parties.

Counsel overwhelmingly indicated that the litigation resumed quickly after an unsuccessful ADR effort. All the neutrals indicated that they would be willing to serve again.

Compulsory Process

Whether mediation should be compulsory is controversial. Some argue that since mediation is a consensual process, it makes no sense for it to be other than purely voluntary. Not unexpectedly, 97.5 percent of the neutrals backed a mandatory program.

It is striking, though, that the vast majority of attorneys, over three-quarters, also believed that the current program should not be voluntary. Somewhat unexpected was this: 84 percent of the attorneys representing plaintiffs and 72 percent of the attorneys representing defendants indicated that the ADR Rules should not be changed to make the program purely voluntary. That ADR may produce settlements sooner than litigation is recognized to benefit both plaintiffs and defendants.

Examination of the variables in the study (by regression analysis) produced some interesting results. The presence of the clients, at least by phone, at the ADR session resulted in settlement rates of nearly 60 percent. In the 17 cases in which clients were neither present nor available by phone, the settlement rate was zero.

It seems clear that the chances for settlement will increase if the client or the corporate decision-maker is present. (The rules might provide for an exemption if the neutral is persuaded that good cause for an exemption exists, as in a small number of cases in which a client is located outside the country).

Further, this analysis showed that attorneys with considerable mediation experience are more than twice as successful at reaching settlements as are attorneys with no previous experience. On the other hand, settlement rates were substantially similar whether the attorneys hailed from small, medium or large firms.

Conclusions

From these statistics, a number of conclusions seem reliably to emerge. The ADR process is being handled efficiently by the division and the ground rules are clear and fair. Most parties can obtain a neutral of their choice. Neutrals are responsive and generally well-suited to their task. Significant time is being devoted to the mediation process. On average, every other case settles in ADR, and of those that do not, differences are narrowed in a notable number of instances and other cases settle after the process concludes. The process does not take an unreasonable amount of time. If it fails, litigation resumes quickly.

The report contains a number of recommendations. The first is that an additional percentage of cases should be referred to the program. Attorneys are encouraged to agree to mediation in cases pending in the Commercial Division. The program will accept pending cases voluntarily brought to it even though the program has primarily been a mandatory one to this point.

(For information about how the program works, a copy of the *Guide to the Alternative Dispute Resolution Program* can be obtained by telephoning (748-5303).

The report recommends that the compulsory nature of the program be maintained. While some cases are doomed to failure in ADR (e.g., certain cases in which a party has a serious motion to dismiss or for summary judgment based on the law), many other matters are appropriate candidates. If the program were purely voluntary, these potentially resolvable cases would continue to grind their way through the expensive discovery process.

A mandatory program eliminates the fear of conflict with aggressive clients over a recommendation to pursue ADR, and the fear of being perceived as weak because of a willingness to consider it. Since the parties choose both their own neutral and the form of ADR they prefer, the imposition upon the parties caused by a mandatory system is limited.

Of course, there is the risk that the process will fail, that time will be lost and expenses incurred; but the program is designed to keep these risks to a minimum.

The report recommends that the discovery stay be retained. This provides a window of opportunity during which the parties may concentrate seriously on ADR while avoiding the expense of disclosure. However, the stay period is brief and should continue to be so (30 days initially with a 30-day extension if granted by the court). The report recommends increasing training requirements for neutrals. It emphasizes the need to keep the ADR process a smooth and quick one overall (though admittedly there are some cases in which it takes time for mediation to bear fruit). And it recommends that, for the time being, the program continue to operate without charge to the parties. The neutrals are all volunteers who serve without fee.

The ADR Program of the Commercial Division is one of the court system's pilot programs in the ADR field.

No doubt there are things in it that can be improved, some of which are discussed in the report. But the survey shows that there are reasons to be encouraged and good reasons why clients and attorneys should consider ADR as an option.

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