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AN **ALTERNATIVE APPROACH TO JUSTICE**: THE PAST, PRESENT, AND FUTURE OF THE
MEDIATION PROGRAM AT THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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ABSTRACT:

The practice of mediation has gone through enormous change in the last twenty-five years. No longer simply an “alternative,” mediation has in some settings become commonplace. At the same time, many courts across the country struggle to maintain staffing and support for programs that offer alternatives for dispute resolution. While private mediation firms have seen an increase in cases, some academics and practitioners question whether mediation has been co-opted by a litigation model such that it no longer serves as a meaningful alternative.

The Mediation Program at the U.S. District Court for the Southern District of New York, which has been in existence since it was piloted in the early 1990s, has recently undergone substantial change. This article will discuss the history of the program and analyze the initial choices that were made about program scope, staffing, and design. It will then track major developments in the program beginning in 2011 and highlight some of the issues that impact the program's future direction. Through this in-depth exploration of one court's mediation program, this article will demonstrate how and why mediation is still a dynamic conflict resolution model and why there is much more that can and should be done.

I. ORIGINS OF THE PROGRAM

The U.S. District Court for the Southern District of New York (the “Court”) has offered litigants options for alternative dispute resolution (“ADR”) since the 1980s. Its initial offering was a small arbitration program in collaboration with the American Arbitration Association.¹ In December 1990 Congress passed the Civil Justice Reform Act (“CJRA”) which proposed ADR as one mechanism to reduce expense and delay in civil litigation.² The Southern District of New York convened an advisory group of judges and members of the bar which recommended mediation as the best option for compliance with the CJRA.

*171 In 1991, the Court established a pilot mediation program for civil cases in Manhattan involving only money damages.³ Social Security cases, prisoner cases, tax cases and *pro se* cases were excluded from the referrals. A CJRA staff attorney was hired and potentially eligible cases were screened by the staff attorney and by the assigned judge.⁴ Based on the recommendation of the advisory group, cases were mediated by volunteers who were trained by the Court and appointed by the CJRA attorney.⁵ The Court's mediation program continued to handle approximately 200-250 cases per year for the next seventeen years until 2011 when the Court expanded the program significantly.⁶

II. 2011 EXPANSION

In 2011 the Court expanded the Mediation Program by adding two types of cases that would automatically be referred into the program based on the nature of suit instead of a case-by-case assessment by a judge or program administrator. These initiatives were designed to offer opportunities for early settlement to a larger number of cases than had previously entered the Mediation Program. They also created a presumption in favor of mediation by requiring litigants to affirmatively request removal should they wish to opt out of mediation.

Beginning in January 2011, employment discrimination cases filed in the Southern District of New York were automatically ordered into mediation when the answer was filed.⁷ On June 24, 2011, the Court began a Pilot Plan for Certain § 1983 Cases (“the § 1983 Plan”) which, among other processes, ordered plan-eligible cases to mediation within 180 days of filing.⁸ While the Court selected two case types that seemed amenable to early settlement processes, the two automatic programs were designed very differently.

The Court's program for the automatic referral to mediation of employment discrimination cases began with the referral of 364 cases in 2011. Under this order, *172 eligible cases are referred into the program when the answer is filed, before an initial case management conference⁹ or any substantial discovery has taken place. In the first two years of the program, Local Civil Rule 83.9 mandated that mediations take place within 30 days of the referral into the program. In 2011 the success rate for these cases was 42%.¹⁰

Over the first two years of the employment discrimination program the Court received some consistent suggestions for improvement from both mediators and the employment bar. One suggestion was to accommodate the participants' needs for early limited discovery in some cases.¹¹ Another was to change the timing of the referral to a later point in the litigation process. At a stakeholders' meeting in 2013 participants were fairly uniform in their desire to continue referrals at the early stage of the filing of the answer primarily because, in the employment context, it is so easy for attorneys' fees to outpace recovery for the plaintiff.¹² The stakeholders also expressed an interest in a baseline level of qualification for employment mediators.¹³

Like the employment mediation protocol, the § 1983 Plan was designed to support early resolution of disputes.¹⁴ The § 1983 Plan covers a subset of cases asserting claims against the New York City Police Department including false arrest, malicious prosecution and excessive force. Plan eligible cases must follow a protocol which includes automatic exchange of certain documents, automatic production of releases for information, and a mandate to exchange a demand and offer. Cases are referred to mediation when the answer is filed unless the parties have requested a settlement conference with a magistrate judge or have been removed from the § 1983 Plan for other reasons. In the first full year of the § 1983 Plan 449 cases were referred into the program with a success rate of 70%. The Court solicited written and oral feedback about the §1983 *173 Plan in a public hearing on June 11, 2013. In response to comments received from the bar, the Board of Judges recently approved modifications of the § 1983 Plan and extended it for another calendar year.

The Mediation Program's expansion in 2011 marked a substantial shift in the ADR culture of the Court and 2011-2012 marked a period of growth and adjustment for both the Mediation Program and litigants who were newly ordered to mediation. Where participation had been largely voluntary since the inception of the program it was now mandatory for the great majority of participants.¹⁵

The question of mandatory versus voluntary referrals to mediation has long been a subject of debate.¹⁶ Since a primary tenant of mediation is party self-determination, an order forcing parties to mediate seems to run contrary to a core premise of the practice.¹⁷ None the less, many court-connected programs have effectively mandated mediation or other ADR processes for cases that meet certain general criteria instead of engaging in an individualized assessment or referring only those cases in which the parties request ADR.¹⁸

Unlike mediation participants in settings that are truly voluntary¹⁹ litigants are acclimated to and even anticipate that they will be ordered to do many types of things while in court, therefore, the infringement on self-determination for the entry into mediation may be less strongly felt.²⁰ Although many members of the bar initially rejected the notion of court-ordered participation in mediation (and some still do) the feedback²¹ from mediation participants mostly indicates that there has been satisfaction with the mediation referrals.²² With the expansion of referrals into the Mediation *174 Program in 2011 came the opportunity to begin to reassess the program protocols for panel mediators.

III. 2013: REASSESSING THE MEDIATOR ASSIGNMENT PROCESS

Until 2012, the practice in the Court was to assign mediators to cases based on a number of factors including availability, interests, and mediation style.²³ Mediator selection in both the employment and § 1983 programs was initially consistent with the Court's long standing practice of assigning panel mediators without regard to subject matter expertise. As in the early days of the program the prevailing mindset was that a mediator with strong mediation process skills could mediate any type of case.²⁴ This method of assignment was also designed to avoid potential conflicts that could arise if only attorneys with experience in practice in a particular area were available as mediators.

In early 2013 the Court's Mediation Program reconsidered the issue of subject matter expertise and assignment of mediators. In addition to concerns raised by mediation participants, many panel mediators also informally reported that they both preferred to mediate and felt more proficient when mediating disputes where they had some substantive areas of knowledge.²⁵ This trend toward mediators with subject matter expertise may well be linked to the debate between evaluative and facilitative practice. Mediators who are strongly evaluative require knowledge to support their evaluation. Likewise, litigants who prefer an evaluative approach may feel more comfortable if the mediator's practice as a litigator is or was relevant to the subject matter of the dispute.²⁶

Matching mediators with cases in which they have subject matter expertise can also be considered a form of “cultural competence”; a concept that emerged in social work and counseling psychology literature in the early 1980's.²⁷ Cultural competence “is *175 the integration and transformation of knowledge about individuals and groups of people into specific standards, policies, practices, and attitudes used in appropriate cultural settings to increase the quality of services, thereby producing better outcomes.”²⁸ Applied to mediation, cultural competence provides a framework in which the subject matter knowledge of the mediator can allow for an increase in the quality of service for particular interventions. Within legal specializations there are different norms for behavior and knowledge of law and process. A mediator's ability to demonstrate knowledge of norms can be closely linked to the perception of mediator competence and the ability of the mediator to inspire trust and confidence.²⁹ Mediators without subject matter expertise obviously can be of tremendous use to disputants, but matching mediators to cases by expertise or interest may provide a baseline level of connection between participants and the mediator on which other successes can be built.

As an example, in New York State, disputes concerning special education under the Individuals with Disabilities Education Improvement Act³⁰ are mediated by a core of mediators trained by local community dispute resolution centers as well as the New York State Education Department.³¹ Like many other areas of the law, special education disputes have their own norms. Acronyms are used with the assumption of full understanding of those present (e.g. the individualized education plan (“IEP”) or physical therapy (“PT”)). Anecdotal reports from special education mediators, and my own experience mediating hundreds of these cases, demonstrate that participants more quickly are able to trust the mediator if that person does not have questions about core aspects of the law and understands the unique language of these cases.³²

A related consideration in mediator assignment is whether the mediator is chosen by the participants or assigned by the program. Since the inception of the Mediation Program at the Southern District of New York parties have been assigned a mediator instead of being able to choose from among the panel mediators.³³ Other programs rely *176 solely on party selection³⁴ or use a hybrid model whereby parties are given a short time period to select a mediator and, if they do not, the program assigns the mediator with or without party input.³⁵

There are benefits and drawbacks with each type of assignment process. On the one hand, proponents of party choice correctly note that this model is the most supportive of party self-determination. Having parties agree on a mediator also insures that the parties have at least one agreement before mediation has even begun. On the other hand, having a process where the court assigns the mediator enables participants to gain exposure to different style of practice and different types of mediators than they might normally choose.

In the Southern District of New York we have had some remarkable moments when litigants discover that mediators from outside of their practice areas, or spheres of contact, can offer tremendous value.³⁶ Anecdotal reports from program mediators whose practices are strongly facilitative suggest that mediation program participants value mediation styles that reflect core mediation principles (long joint session, interest-based problem-solving, facilitative interventions) as long as the mediators are transparent with the interventions they will/will not utilize and the parties have a sense of the competence of the mediator at the outset.³⁷

Court assignment of mediators also supports the goal of increasing diversity. On panels where parties choose the mediator, they will typically choose mediators they know or to whom they relate. Some court panels may have only a small number of active mediators relative to the entire panel since parties who have worked well with a mediator are likely to choose that person for future matters. A consequence of this is that it can be very difficult for newer mediators to get experience and exposure.

In mediation programs where the mediator is chosen by the Court, however, there is an increased obligation to insure the quality of the neutrals on the Court's roster.³⁸ Measuring the quality of mediators requires establishing clear standards of practice and a *177 system of assessment both when adding mediators to the panel and throughout their service.³⁹ The Southern District of New York's Mediation Program has undertaken several training initiatives in 2013 and 2014 to bolster the skills of panel mediators and, with the promulgation of a revised local rule and procedures in 2014, intends to continue to support quality mediator practice.

IV. 2014: INCLUSION OF *PRO SE* PARTIES, MEDIATOR ASSESSMENT, CODE OF CONDUCT

At the start of 2014 the Mediation Program of the Southern District of New York promulgated a new Local Civil Rule 83.9 and Procedures of the Mediation Program.⁴⁰ Among the changes in the new rule was an opening of the mediation program to *pro se* litigants, the introduction of a process for ongoing mediator education and assessment, and a code of conduct.⁴¹

The expansion to explicitly include *pro se* parties is directly related to an identified benefit of mediation; the increased experience of procedural justice.⁴² Throughout the history of mediation much has been made about it providing a cheaper and faster alternative to litigation.⁴³ Although these benefits can sometimes be realized, one of the most important aspects of mediation is the perception of procedural justice that *178 often accompanies a thoughtfully executed mediation.⁴⁴ The benefits of procedural justice, the sense that one has received the type of hearing and the quality of engagement one hoped for in the court, is particularly meaningful to *pro se* parties who may well be unfamiliar with the ins and outs of litigation.⁴⁵ The Court's inclusion of *pro se* litigants in mediation is an acknowledgement of the benefits available through that process.⁴⁶

In addition to the expansion of the Mediation Program to *pro se* parties, the process for ongoing mediator assessment and the code of conduct were designed to set clear standards for mediators on the panel at the Southern District of New York and to foster a community of mediators committed to high quality practice. For many people in conflict, a court-connected program may be their first experience in mediation, therefore, there is an imperative to strive for a mediation program that represents the best aspects of the practice. A high quality mediation program will continue to educate the bar and the judiciary about the difference between judicial settlement conferences and mediation, and the benefits of offering two distinct processes.

V. CONCLUSION

Since the inception of mediation there has been much talk about its failure to live up to its potential.⁴⁷ Embedded in this discussion is a larger issue: whether the success in integrating mediation into the mainstream legal world has led to a weakening of the core practices that make mediation unique. In court-connected settings this dialogue tends to focus on the conflation of mediation and settlement conferences, an increasingly evaluative approach that is requested by parties and practiced by many mediators, the use of caucus over joint sessions, the abandonment of creative problem-solving techniques, and the marginalization or exclusion of the parties.⁴⁸

In my view, court-connected settings are an ideal place to support the continuation of core mediation practice by developing programs and using processes and interventions that support self-determination, party participation, and allow for interest *179 based, creative problem-solving when that is possible. Unlike private settings where mediators or program managers may feel pressure to respond to the demands of the market, court-connected programs have the freedom to educate participants as to the benefits of different forms of practice.

At the Southern District of New York the last years have been focused on expanding and refining the Mediation Program and those goals will likely carry us for the next several years.⁴⁹ Though much has been said about the failure of mediation to live up to its promise, from where I sit there is nothing but potential.⁵⁰ At least in the Southern District of New York, it is clear that the Mediation Program has long roots, and there is room to continue to improve and flourish. The challenge for this program, and for many court-connected programs, is in staying close to the core values of mediation, and offering a truly alternative form of dispute resolution.

Footnotes

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¹ Interview with the Court's District Executive's Office (Dec. 11, 2013).

² 28 U.S.C. §§ 471-482 (1990); FEDERAL JUDICIAL CENTER, *ADR in the Federal District Courts: An Initial Report* 1 (2011).

³ FEDERAL JUDICIAL CENTER, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 199 (1996); Edward D. Cavanaugh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts be Remedied by Local Rules*, 67 ST. JOHN'S L. REV. 721, 752-754 (Fall 1993).

⁴ Plapinger & Steinstra, *supra* note 3, at 199.

⁵ *Id.* at 199-201.

⁶ Although the CJRA sunset, the Authorization of Alternative Dispute Resolution Act was passed in 1998 further mandating the provision of ADR in civil cases. *See* 28 U.S.C. §§ 651-658 (1998).

- 7 *In re: Cases Assigned to Mediation by Automatic Referral* (S.D.N.Y. 2011), available at http://www.nysd.uscourts.gov/rules/Standing_Order_ADR_01032011.pdf. This standing order excludes *pro se* cases and cases filed under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201).
- 8 *Plan for Certain § 1983 Cases Against the City of New York* (S.D.N.Y. 2013), available at <http://www.nysd.uscourts.gov/rules/1983%20Revised%20CCC20Plan%20and%20CCC%20Exhibits.11.22.2013.pdf> [hereinafter Section 1983 Plan].
- 9 See Fed. R. Civ. P. 16.
- 10 The Mediation Program of the Southern District of New York currently measures mediation success as any case that settles either fully or partially as a result of mediation session(s), or that settle post-referral and pre-mediation where there has been no other judicial intervention.
- 11 This request was clarified at a stakeholder' meeting held at the Court in June 2013.
- 12 See *Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, *5-*6 (2d Cir. 2013) (For the propositions that attorney fees are not to be judged in proportion to the amount in settlement but rather the degree of success obtained by counsel for the clients, and that fee-shifting statutes are designed in part to generate fees that are “disproportionate” to plaintiff's recovery. (citing *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 169 (2d Cir. 2011)))
- 13 Based on this request the Court convened a team of employment law specialists from the American Bar Association, Cornell ILR, National Employment Lawyers Association, New York City Bar Association, and the New York State Bar Association to develop base-line criteria for expertise in employment mediation and training for those mediators who did not already meet these standards. In Spring 2014, the Court is offering six half-day CLE classes on basic employment law for mediators, and one advanced seminar. By the conclusion of the training program approximately 220 of the panel mediators will have been trained.
- 14 Section 1983 Plan, *supra* note 8.
- 15 The automatic referrals increased the number of cases in the mediation program from 250 to almost 1000 per year.
- 16 Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 481-500 (2010).
- 17 *Id.* at 484; AAA-ABA-SPIDR MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).
- 18 In New York State alone parties are ordered to mediation in both the Southern and Eastern Districts of New York, the New York State Supreme Court Civil Branch, and Small Claims Court. The Commercial Division of the New York State Supreme Court recently proposed a pilot program ordering every fifth case into mediation. The Western District of New York, as of June 2011, sends almost every civil case to ADR.
- 19 Community cases that are mediated at local community dispute resolution centers are one example.
- 20 “At the very least, mandatory mediation programs should be changed to permit parties to opt out easily” Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 426 (2004-2005). The Southern District of New York also allows parties to request removal from mediation from the presiding judge and these requests are typically granted.
- 21 The Mediation Program sends post-mediation surveys to counsel of record.
- 22 In other settings, participants in mandated mediation have reported satisfaction with the process even though they may not have chosen to participate. McAdoo & Welsh, *supra* note 20, at 596; Wayne D. Brazil, *Should Court-Sponsored ADR Survive*, 21 OHIO ST. J. ON DISP. RESOL. 241, 251 (2006).
- 23 Mediator assignment is a key aspect of court-connected programs. This aspect of program design can have a huge impact on the practice of mediation in the court, the experience of the litigants who participate, and on the perception of the program.

- 24 Because the § 1983 Plan was multifaceted, the Court provided training to all panel mediators to orient them to its requirements and provide an overview of the relevant legal issues.
- 25 Another sub-set of mediators continue to feel that, with the exception of some highly technical categories of cases, a combination of strong mediation process skills and self-education enables them to mediate almost any type of dispute. A smaller group adheres to the adage that “the parties will educate the mediator” as to anything she needs to know to mediate a particular dispute.
- 26 Since Leonard Riskin's 1996 grid of mediator styles, there has been heavy debate in the field about best practices and the use of evaluative technique. See Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Other authors have posited that, particularly in court settings, this presents a false dichotomy since both evaluative and facilitative techniques might be necessary. See Richard Birke, *Evaluation and Facilitation: Moving Past Either/Or*, 2000 J. DISP. RESOL. 309, 314-315 (2000); Yishai Boyarin, *CourtConnected ADR--A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993, 1007 (2012) (“For example, a more directive form of mediation, such as evaluative mediation, may be appropriate in some cases and, in fact, may be precisely what the parties want.”).
- 27 This conceptual framework was proposed to the author by Dan Kos, Management Analyst, New York State Unified Court System Office of Alternative Dispute Resolution Programs.
- 28 Davis, K. (1997). *Exploring the intersection between cultural competency and managed behavioral health care policy: Implications for state and county mental health agencies*. Alexandria, VA: National Technical Assistance Center for State Mental Health Planning.
- 29 Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators*, 8 Dispute Resolution Alert 1, 5 (2008) (“The central conclusion to be drawn from these three studies is that a core element (and perhaps THE core element) in mediator success is the mediator's ability to establish a relationship of trust and confidence with the disputing parties.”).
- 30 Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004).
- 31 I was the Coordinator of the Special Education Mediation Program for the Safe Horizon (now the New York Peace Institute) from 2008-2011.
- 32 Goldberg & Shaw, *supra* note 29, at 5.
- 33 The New York City Family Court, Civil Court, and Small Claims Court all use a similar system.
- 34 Most notably, JAMS Arbitration, Mediation and ADR Services.
- 35 The U.S. District Court for the Eastern District of New York and the Commercial Division of the New York State Supreme Court both run hybrid assignment processes.
- 36 In the initial year of the § 1983 Plan there was concern from both the plaintiffs' bar and the New York City Law Department that mediators of § 1983 Plan cases have prior expertise litigating § 1983 actions. Since the majority of the Court's panel mediators did not have civil rights backgrounds this standard was impossible to meet. We are now two years in to the § 1983 Plan and, with a settlement rate of approximately 70% it appears that the mediators can handle these cases quite capably.
- 37 Goldberg & Shaw, *supra* note 32, at 5.
- 38 Nancy Welsh & Barbara McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, 37 THE JUDGES JOURNAL 11, *43 (Winter 1998) (“Your decision regarding what to require of those who wish to serve as neutrals will be influenced by your other decisions. For example, if you opt for an ADR program that is administered directly by the courts and that does not permit parties to select their own neutrals, you will need to establish stringent eligibility standards for those serving as neutrals. Some courts have adopted a screening process for neutrals which involves a written application process, extensive training, apprenticeship, and even evaluation based on performance in real or mock mediations.”).
- 39 There are many obstacles to standardizing mediator quality that are outside the scope of this article. For mediation organizations, resources and staffing are always an issue since quality assessments take time. In New York State where there is no state-wide credentialing, mediation organizations can either choose to work only with mediators trained and approved by them, or to accept

mediators who have been trained elsewhere. In 2014 the Court hopes to complete a pilot program that may lead to an ongoing assessment protocol for panel mediators.

40 Both documents are available on the Court's website. *See* www.nysd.uscourts.gov.

41 Prior versions of the Local Civil Rule had an exclusion for "certain other *pro se* cases." The Court has a project to provide pro bono counsel to certain *pro se* litigants in employment cases for the limited purpose of mediation but otherwise did not regularly send *pro se* cases to mediation.

42 In their book, *Procedural Justice: A Psychological Analysis*, John Thibaut and Laurens Walker originally coined the term "procedural justice" to describe the way in which litigants' satisfaction with the resolution of their legal dispute is influenced by the perception of fairness within the dispute resolution process as well as in the substantive outcome of the dispute. In two closely related studies which collected systematic, empirical evidence regarding the effect of perceived justice of the outcome of litigation, Thibaut and Walker distinguished two types of perceived fairness: "'procedural justice,' the belief that the techniques used to resolve a dispute are fair and satisfying in themselves; and 'distributive justice,' the belief that the ultimate resolution of the dispute is fair." *See* JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67-68 (1975); Laurens Walker, E. Allan Lind & John Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (December 1979).

43 Kimberly R. Wagner, *The Perfect Circle: Arbitration's Favors Become Its Flaws in an Era of Nationalization and Regulation*, 12 PEPP. DISP. RESOL. L.J. 159, 182 (2012) ("Three of mediation's most boastful characteristics are: the potential creativity of the outcomes; the informality of the proceedings, leading to a faster and cheaper result; and the ability of the parties to discuss their positions so that they feel that their views have been considered.").

44 *See* McAdoo & Welsh, *supra* note 20 (for a discussion about the import of procedural justice to mediation participants).

45 *Id.*

46 Although full exploration of this idea is outside the scope of this article, a possible support for *pro se* (and non-*pro se*) mediation participants is Nancy Welsh's recommendation of a "cooling off" period after mediation for parties to consider whatever agreements were reached. Building in some time for parties to consider their agreements reduces the risk of coercive pressure from the mediator. Nancy Welsh, *The Thinning Vision of Self Determination: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 86-92 (Spring 2001).

47 The opening panel of the 2014 New York State Bar Association Dispute Resolution Section annual meeting was titled "Has Success Changed Mediation? How Has--or Might--the Growth and Institutionalization of Mediation Changed the Culture, Opportunities, Strategies, and Practices of Mediators, Counsel and Parties?"; *see also* Welsh, *supra* note 46; McAdoo & Welsh, *supra* note 20; Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61 (Spring 2012).

48 Nolan-Haley, *supra* note 48, at 63; McAdoo & Welsh, *supra* note 20, at 590-591.

49 The scope of this short symposium discussion was relatively limited. There are obviously topics outside this article about which the Mediation Program is engaged in exploration, including mediator compensation and diversity of both panel members and case types.

50 *See* Wayne D. Brazil, *supra* note 22, at 242.

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