

Report of the Mediation Program



January 1, 2022 – December 31, 2022

As of October 2023

Mediation Program Staff:

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Report prepared by Rebecca Price and Anne Zeng-Huang

INTRODUCTION

As the Chair of the Court’s Mediation Services Committee, I am happy to offer this introduction to the most recent report for the program. This report primarily covers 2022 – with a short update on statistics from 2021 and some highlights from the first half of 2023. Those who find this report interesting can consult the Court’s website for reports from prior years. As you will read, the Court’s Mediation Program was very active in 2022, both mediating cases and participating in trainings and presentations for courts and other local, national, and international institutions. Of the 1550 matters referred to the program, 64% were outside of the Court’s automatic mediation protocols, marking an increase in matters referred directly by judges and often at the request of the parties. The overall settlement rate for the program was 65%, though there were substantial variations in settlement rates by case type. Also significant in 2022 was a review and revision of the Court’s mediation procedures. This effort between the Mediation Program, the Mediation Services Committee, and the Mediator Advisory Committee brought the procedures in line with current practices in the Court. The bench and bar continue to benefit from the Mediation Program, and the collective efforts the committed volunteers who offer such exemplary service. On behalf of the Court, I extend my thanks to them.

Hon. Gregory H. Woods
Chair of the Mediation Services Committee

EXECUTIVE SUMMARY

As with other reports from the Mediation Office, this one will provide program statistics, with a focus on calendar year 2022. The last report issued by the Mediation Program ran from 2019 to 2021. Since many of the 2021 referrals were still open when that report was issued, it bears noting that in 2021 a total of 1483 cases were referred to mediation and the overall settlement rate was 60%. As of October 2023, the overall settlement rate for 2022 is 65%.

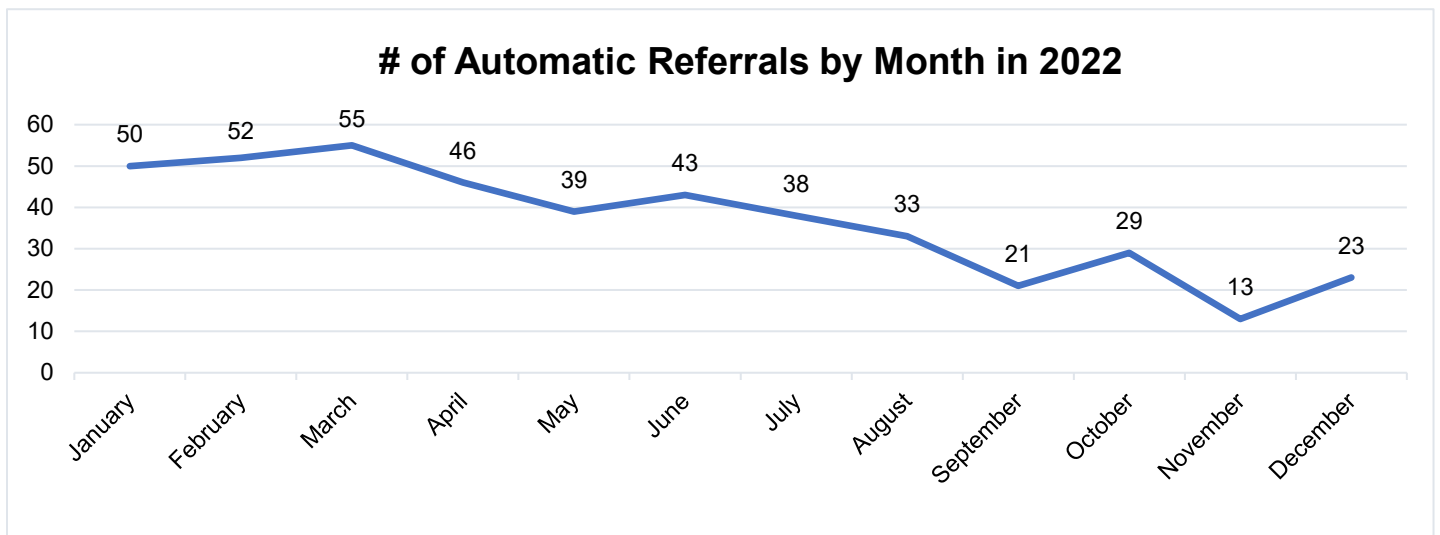
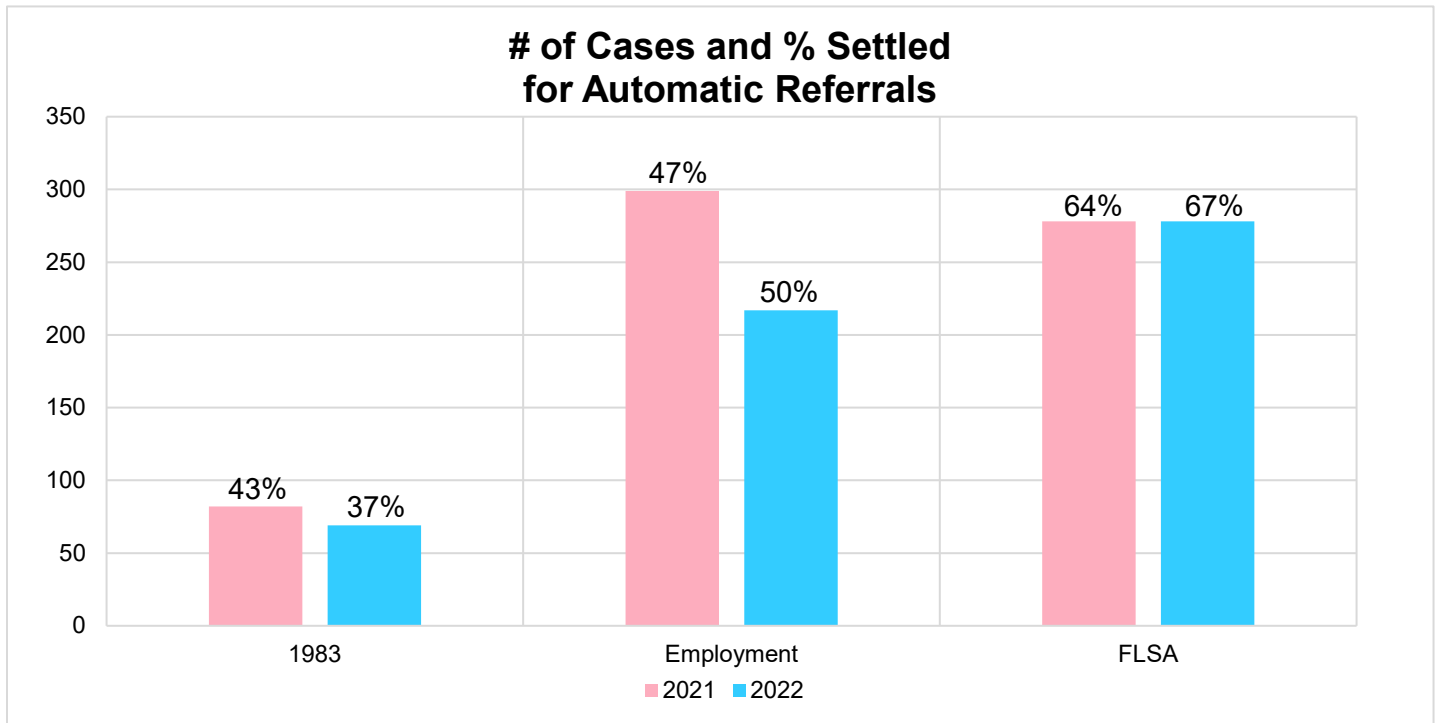
Cases enter the Mediation Program either through a process of automatic referral (FLSA, Employment, § 1983 Plan) or by referral by the assigned judge (“judge-referred” cases). In 2021, 44% of the cases referred were automatic and 56% were judge-referred. In 2022, 1550 cases were referred to mediation, 36% were referred through one of the Court’s automatic protocols, and 64% were judge-referred. The trending increase in referrals directly from judges is a positive one for the practice of mediation. It suggests that both judges and litigants are, on their own, considering the ways in which mediation might offer benefits. One aspect of the trend to highlight is that many of these non-automatic referrals are clustered in specific case types, like ADA Title III and FLSA. There are other natures of suit that also benefit greatly from mediation, like Insurance, ERISA, Intellectual Property, and Commercial matters.

In 2022, 1550 cases were referred to the Court’s Mediation Program with an average settlement rate of 65%.

In addition to statistics, this report presents information about the extraordinary mediators without whose service the program would not exist. Advancements in our data gathering have enabled us to aggregate information to learn more about what mediators are doing, and what else they might like to do. One takeaway is that when mediators work with participants to prepare for mediation sessions, that appears to have a beneficial effect on settlement. We also hear from our mediators that diversity in the cases we refer to them keeps them engaged and challenged. Our mediators perform a crucial service for the Court, and also choose to lend their time and expertise to the Court because it is enriching for them. As a Court program, we need to continue to evolve so that both the needs of the Court and the needs of the mediators are met.

AUTOMATIC REFERRALS

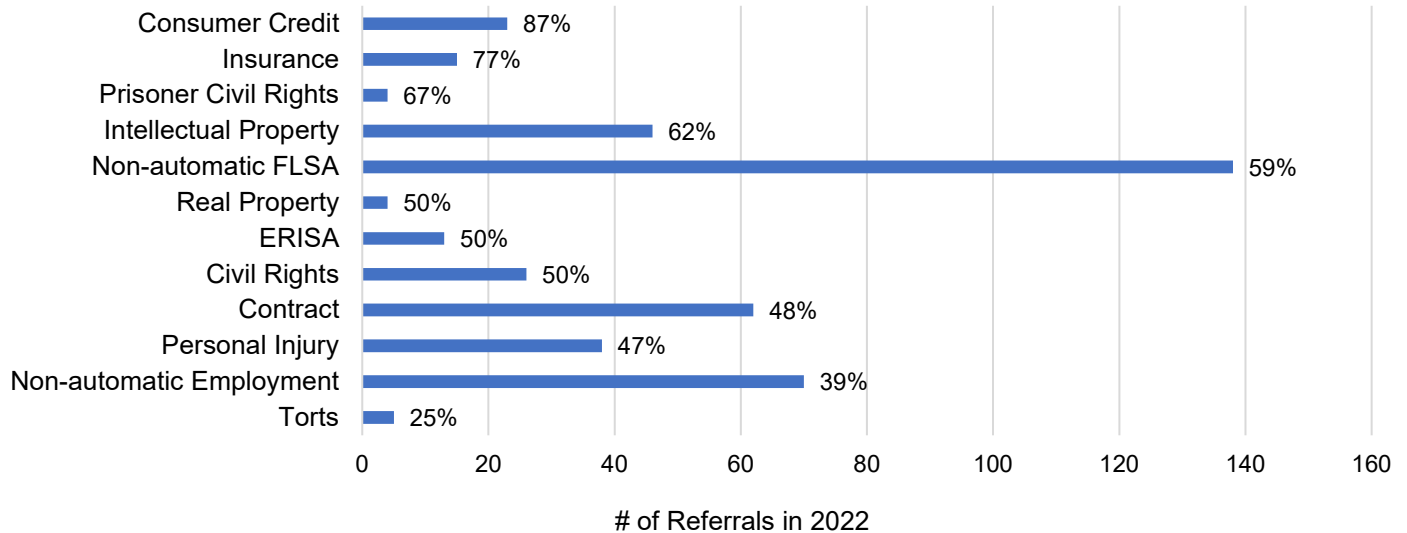
The Court began to use focused automatic protocols in 2010 with a standing order for counseled employment discrimination cases. Protocols for § 1983 and FLSA matters followed. For approximately the first decade of these protocols, they accounted for the large majority of referrals into the mediation program. In more recent years, the majority of mediation referrals have been for matters that are not part of these protocols. This change is reflective both of trends in filings (decreased filings for both employment and § 1983 cases), and in formal and informal protocols developed by judges which send certain matters to mediation that otherwise are not subject to automatic referral, such as copyright and ADA Title III. In 2022, 36% of the total mediation referrals were through our automatic protocols and the settlement rates were consistent with previous years.



JUDGE-REFERRED CASES

Judges may refer cases to mediation at any point, with or without a request from the parties. In 2022, 986 fully counseled cases were referred by judges, representing 60% of total referrals. An additional 60 pro se employment cases were referred with an order for the appointment of limited scope mediation counsel. The average settlement rates for both pro se and counseled referrals was 70%.

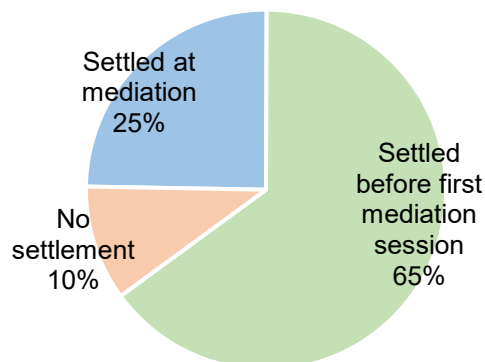
Referrals Numbers/Settlement Percentages for Natures of Suit with Four or More Referrals in 2022 (see below for ADA Title III)



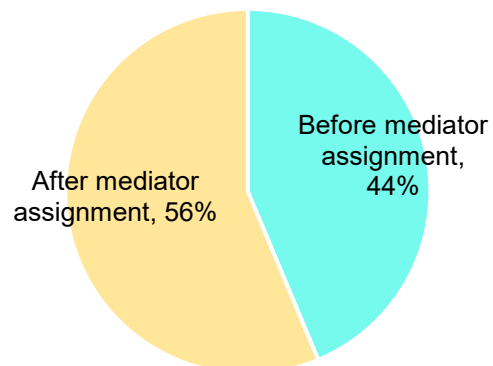
SPOTLIGHT: CASES FILED UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT

Cases filed under Title III of the Americans with Disabilities Act address access for people with disabilities to physical and electronic locations. In 2022, the Mediation Program received over 400 referrals of such cases, constituting 45% of cases referred directly from judges. Of the matters referred, approximately 50% settled prior to holding a formal mediation session. Of those cases that settled before the session, 56% settled after a mediator was assigned.

ADA Title III Settlement Statistics



Pre-Session Settlements

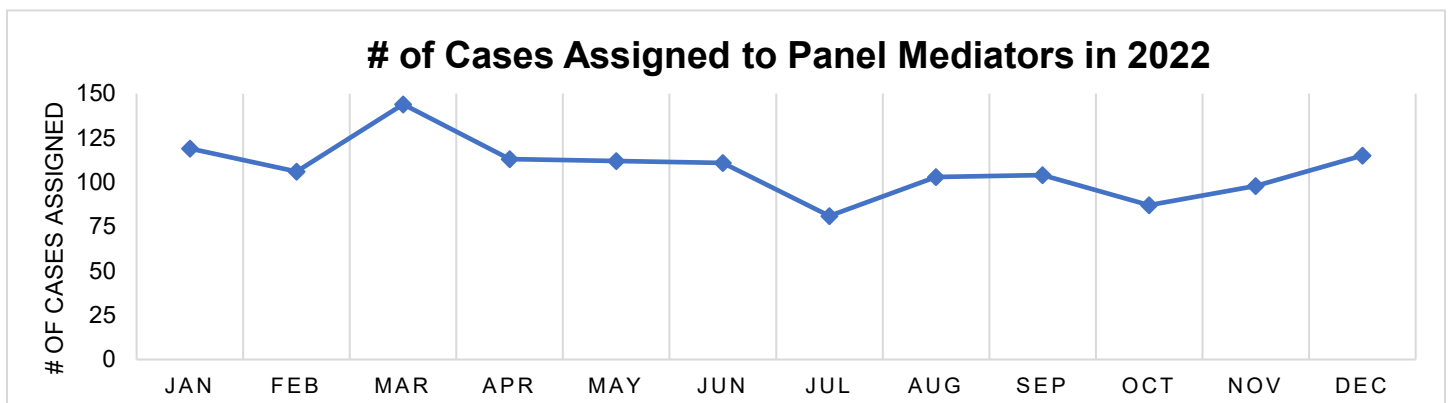


MEDIATORS

Roster mediators settled over 60% of Insurance, Intellectual Property, FLSA, ADA, and Consumer Credit referrals in 2022.

Since its inception, the Court's Mediation Program has benefitted from the dedicated service of a roster of volunteer neutrals. Although the size of the roster has varied over time, for the past several years it has stayed consistent at about 250 volunteer mediators. In 2022, approximately 200 of the mediators were accepting cases at any given time. Generally, assignment of cases

to mediators is based on their availability, areas of expertise, and whether they can clear conflicts. The Mediation Procedures require mediators to accept at least two cases per year to remain in good standing. On average, panel mediators were offered eight cases over the course of the year and mediated four. In 2022, 3 mediators accepted 20 cases, and 29 mediators accepted between 10-19 cases. Two staff mediators accepted over 80 cases each in 2022. There were 5 mediators added to the roster in 2022 and 5 more will have been added by the close of 2023. A new class of mediators will begin the Court's observation and mentoring program in November 2023.



Nature of Suit	# of Mediators with the Expertise	# of Referrals in 2022-2023 YTD
Consumer Credit	12	23
Disability Act	83	442
Labor Law	84	416

Since 2022, it has been possible to compare the number of mediators with certain expertise to the number of referrals in each nature of suit. In natures of suit where referrals exceed capacity, there are fewer available mediators, and it may take longer for a case to be assigned to a mediator and for mediation to take place.

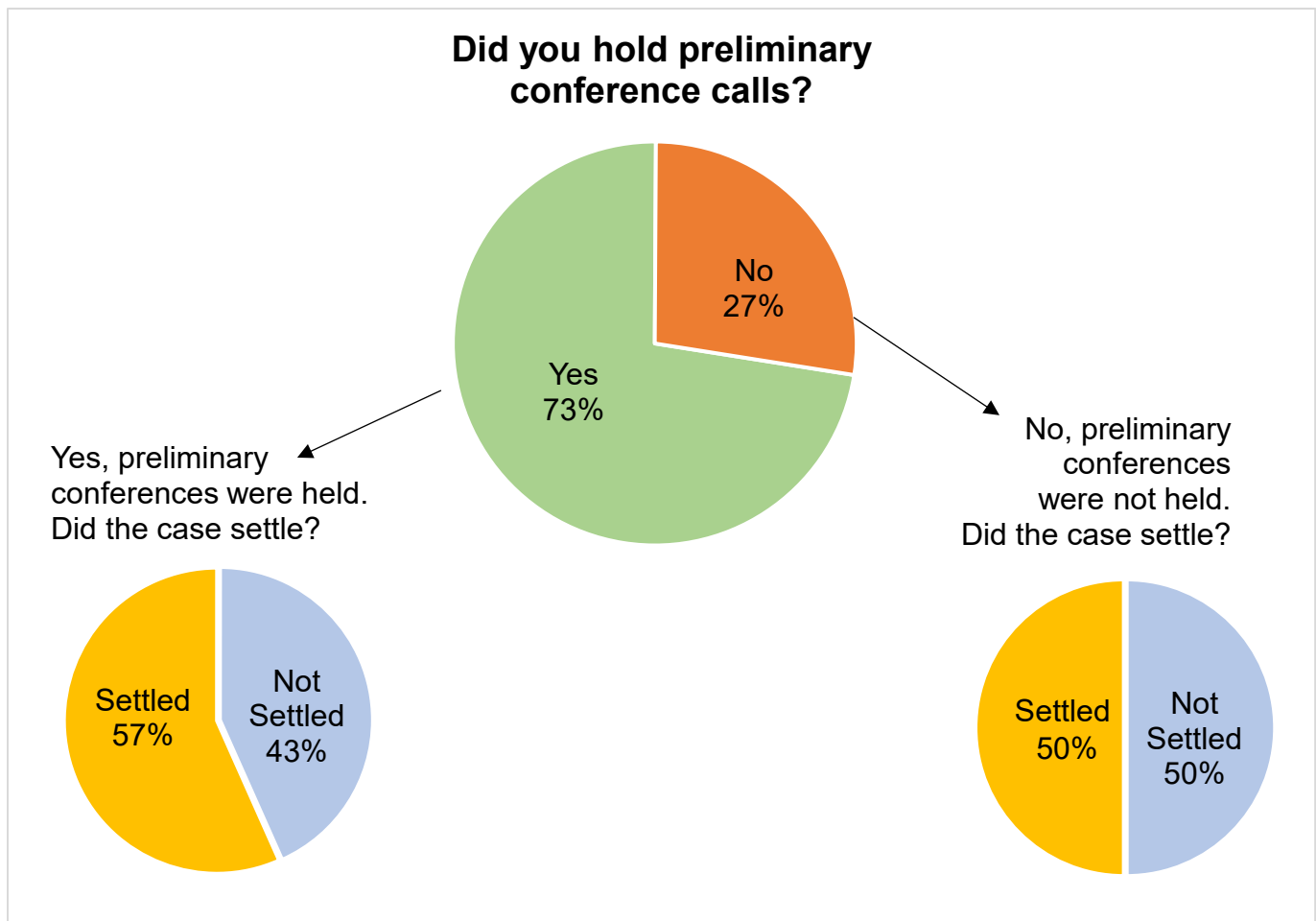
Likewise, in matters in which capacity exceeds referrals, it is likely that assignment to a mediator and the mediation itself could take place quickly. Natures of suit where mediators have capacity for additional matters are frequently in areas that tap into mediator expertise, and where referrals will enhance the experience of service on this roster for the mediators themselves.

Nature of Suit	# of Mediators with the Expertise	# of Referrals in 2022-2023 YTD
Contracts	124	62
Personal Injury	53	38
Torts	52	5
Insurance	45	15
Real Estate	38	4

As in past years, during 2022 the Mediation Program offered several professional development opportunities for panel mediators including observing other mediators, co-mediation, and monthly groups focused on both information/advice sharing and reflective practice.

MEDIATORS' POST-SESSION REPORTS FROM 2021-2023

Since 2021, the Mediation Office has gathered data from mediators through a survey filled out once mediation has concluded. Taken together (August 2021 to October 2023), the data from these reports reveals some interesting insights into mediation practice at the SDNY. On nearly 63% of these surveys, mediators report spending between 2-5 hours preparing for mediation. About 65% of preparation was through preliminary phone or video conferences that lasted less than one hour. Before the initial session, 68% of mediators checked in with parties regarding discovery. In 65% of cases, mediation sessions lasted between 2-5 hours. 26% of sessions lasted longer than 5 hours and 4% were less than an hour. Mediators reported that the main barrier to resolution was “disagreement over the value of the case” and that the likely next step in litigation was continued discovery. By isolating responses from 2022, the chart below indicates a slight increase in settlements in matters where mediators held preliminary calls.

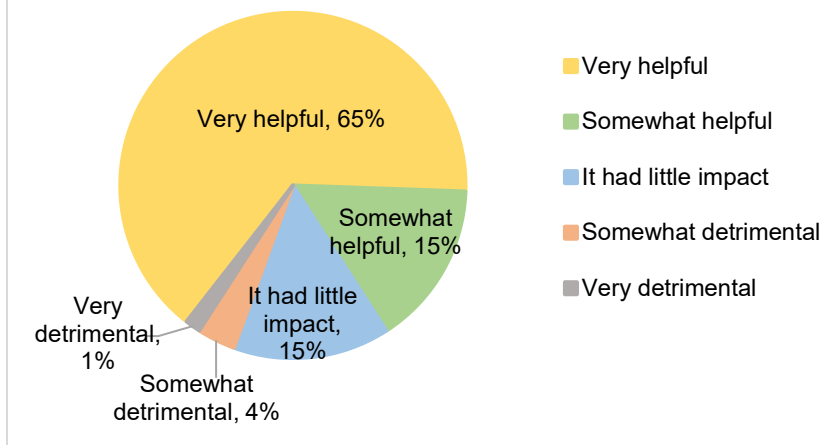


POST-MEDIATION SURVEYS IN 2022

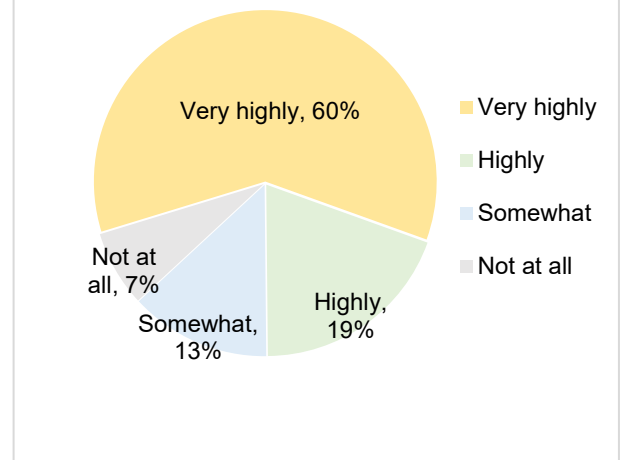
In 2022, 38% of counsel responded to post-mediation surveys soliciting feedback on the mediator and process. Notable feedback – both positive and negative – is provided to the mediator by the program. When negative feedback rises to the level of a complaint or concern, the Mediation Program investigates. If a complaint is substantiated, the program procedures dictate that a meeting be held with the mediator to discuss and, if necessary, to form a remediation plan. In most instances, an investigation and report to the mediator is sufficient to address the complaint. In some instances, mediators go through remediation and/or have resigned or been removed from the roster.

“One of the counsel’s law students gave the case a 5% chance of settlement before the mediation began. The parties ... had personal issues and had known each other for 20+ years. Despite the above, [Mediator] settled the case by taking the time to hear everyone out and, most importantly, remaining optimistic and open about getting the case settled.”

Overall, how helpful or detrimental was the mediation process in the resolution of this case?



How would counsel recommend this mediator to others?



SOME NOTABLE COMMENTS FROM COUNSEL:

“In general, I find mediation to be a highly effective tool in my employment cases. [Mediator] did a wonderful job of listening to and asking relevant questions of me and my clients and helped us find a reasonable resolution to my clients' grievances.”

“[Mediator] started discussions by phone in the days prior to formal session, which facilitated an efficient mediation session. Well done. The telephone conferences before the formal session were very helpful and should be recommended for all mediators.”

“The SDNY mediation program continues to prove to be effective in settling actions in which I am involved. I am a consumer advocate, and although the mediators are most likely to have an industry defense background, I have found them to understand my clients' viewpoint and sense of case value, even if the mediator's own personal viewpoint may differ.”

“[Mediator] worked very hard, demonstrated skill and professionalism, and handled a very difficult settlement process very well. Although the parties were unable to reach a settlement, she greatly assisted the parties (and my client), including by determining, at the appropriate moment, that the mediation should cease. We believe that any further discussions likely would have made things worse.”

OUTREACH AND TRAINING

In addition to being a resource to the Court and litigants, the Mediation Program plays an important role in the larger ADR communities – locally, nationally, and internationally. In 2022, the program offered training and information to various colleges and law schools, the New York State Bar Association, the Federal Bar Council, the Administrative Training Conference convened by the Administrative Office of the Federal Courts, and judges and mediators in Brazil and Turkey. Program staff trained prospective mediators and court staff through the New York City Bar Association and the New York State Unified Court System.

For more information about the SDNY Mediation Program:
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<https://www.nysd.uscourts.gov/programs/mediation-adr>