

Report of the Mediation Program



**January 1, 2019 – December 31, 2021
(As of April 1, 2022)**

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INTRODUCTION



It is with great pleasure that I offer this introduction to a report of the Court's Mediation Program. This report spans three years (2019-2021). While much of our world changed dramatically during the pandemic, the functioning of the Court's Mediation Program stayed mostly the same (with the exception of the advent of remote mediation). The program retained all of its key design features: volunteer mediators, randomized assignment, and early referrals to mediation for most participating cases. Perhaps most surprising, the settlement rate for 2019 and 2020 was identical (61%) and though many matters are still open, 2021 looks like it will also be the same.

Approximate # of Civil Filings	Total # of Mediation Referrals	% of Mediated Cases Settled (YTD)
2019: 11,980	2019: 1800	61%
2020: 11,119	2020: 1284	61%
2021: 11,227	2021: 1483	59%

Community engagement is a feature of the Mediation Program and these years were no exception. The Mediation Program partnered with many other organizations to enhance services to mediators and litigants, including community mediation centers, schools, bar associations, and the New York State Unified Court System. On behalf of the judges of the

Southern District of New York, I offer my commendation to the Mediation Program which continues to offer such exemplary service to the bench and bar. I also encourage judges and litigants to think creatively about sending more matters to mediation. The benefits are obvious.

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

EXECUTIVE SUMMARY

The U.S. District Court for the Southern District of New York has offered mediation to litigants since 1992. In the last decade, the program has specialized in providing early mediation services in a wide range of cases. Each year, over half of the matters referred to mediation resolve, many before a pre-trial conference has been held. The success of this program saves resources for parties and the Court and provides access to creative resolutions not available through traditional litigation.

The following report provides statistical and other information about the Court's Mediation Program from 2019-2021. The time span of the report is significant in that it tracks data from just before and during the Coronavirus pandemic which began to impact Court operations in March 2020. As with many other Court offices, the pandemic prevented services from being delivered as usual and, therefore, was an opportunity for innovation. Key program changes were made so staff could work remotely. All in-person mediations scheduled for the last two weeks of March were adjourned, and by April 2020 the program was convening mediation over various remote platforms. Despite unavoidable Covid interruptions of many court functions, the Mediation Program proceeded largely on its usual schedule with work arounds.

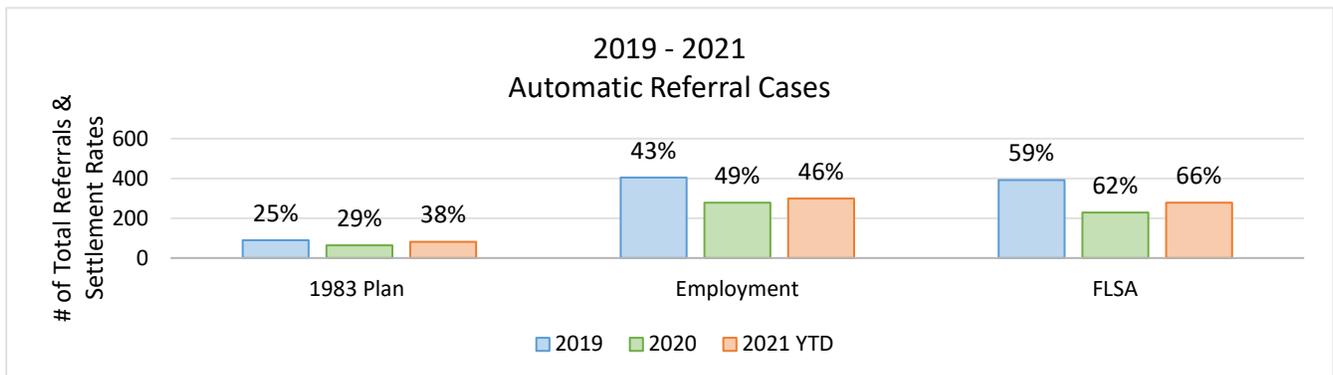
The number of referrals to mediation reflect the impact of Covid on the Court's docket. In 2019, there were 1800 referrals to mediation, which was an all-time high for the program. Overall civil filings were down in 2020. Notably, though overall mediation referrals for 2020 were also down from 2019, the percentage of cases referred by judges (not automatically) was up by 5%, and settlement percentages did not change.

During the time covered by this report, the Mediation Program enhanced the level of feedback from mediators and parties in an effort to support continuing evaluation and improvement. The program continued to explore

and provide new educational opportunities for mediators. The advent of remote technology not only allowed for continued operation of the program but also provided a new forum for mediations that will almost certainly continue after the Covid impact ends. Following is more detailed information about the Mediation Program.

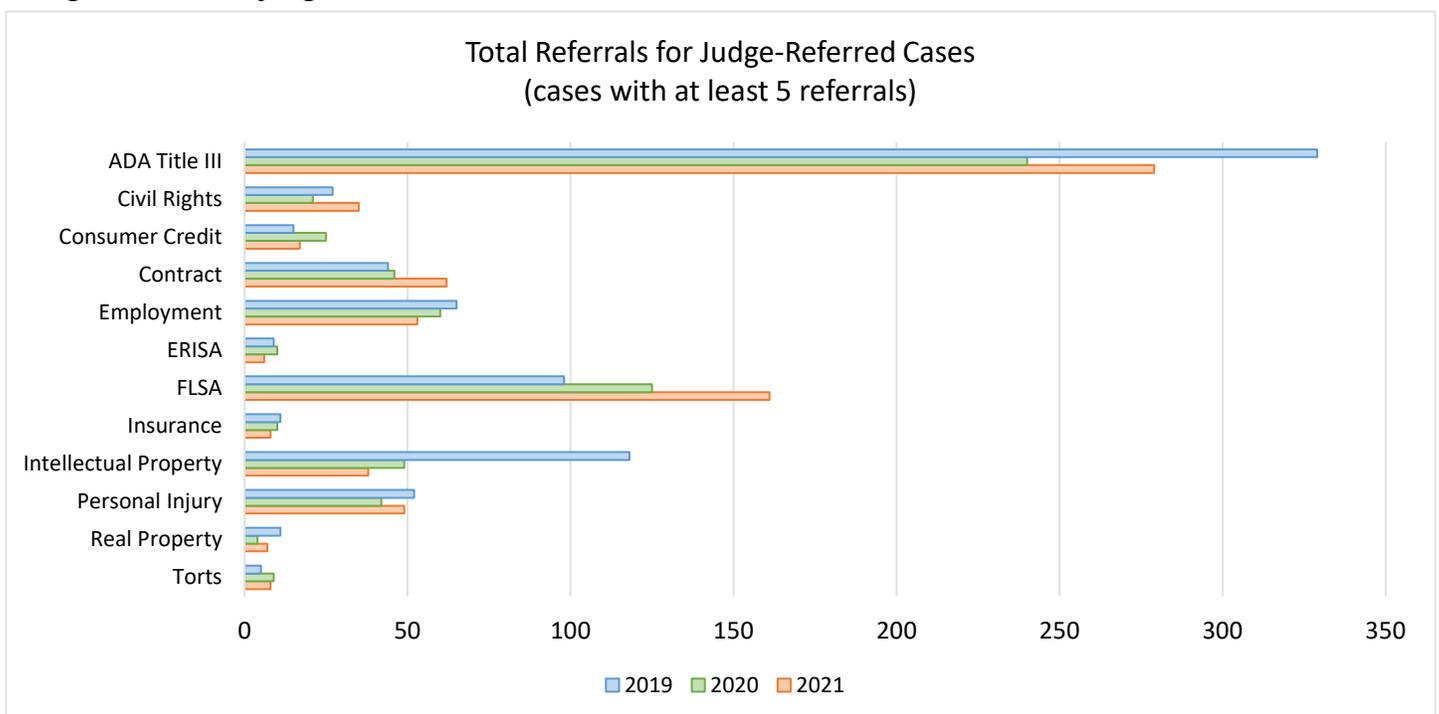
**AUTOMATIC REFERRALS FROM 2019 – 2021:
EMPLOYMENT, FLSA, § 1983 PLAN**

The following chart provides information about referral numbers and settlement rates for cases in our automatic protocols: FLSA, counseled employment discrimination, and Local Civil Rule 83.10 (“the § 1983 Plan”). In each category, filings/referrals dipped in 2020 and bounced back in 2021, though none returned to pre-pandemic numbers. The settlement rates for employment and FLSA cases have been consistent since the inception of these protocols, and for the § 1983 Plan since 2016, demonstrating the variability in early settlement rates for different types of cases.

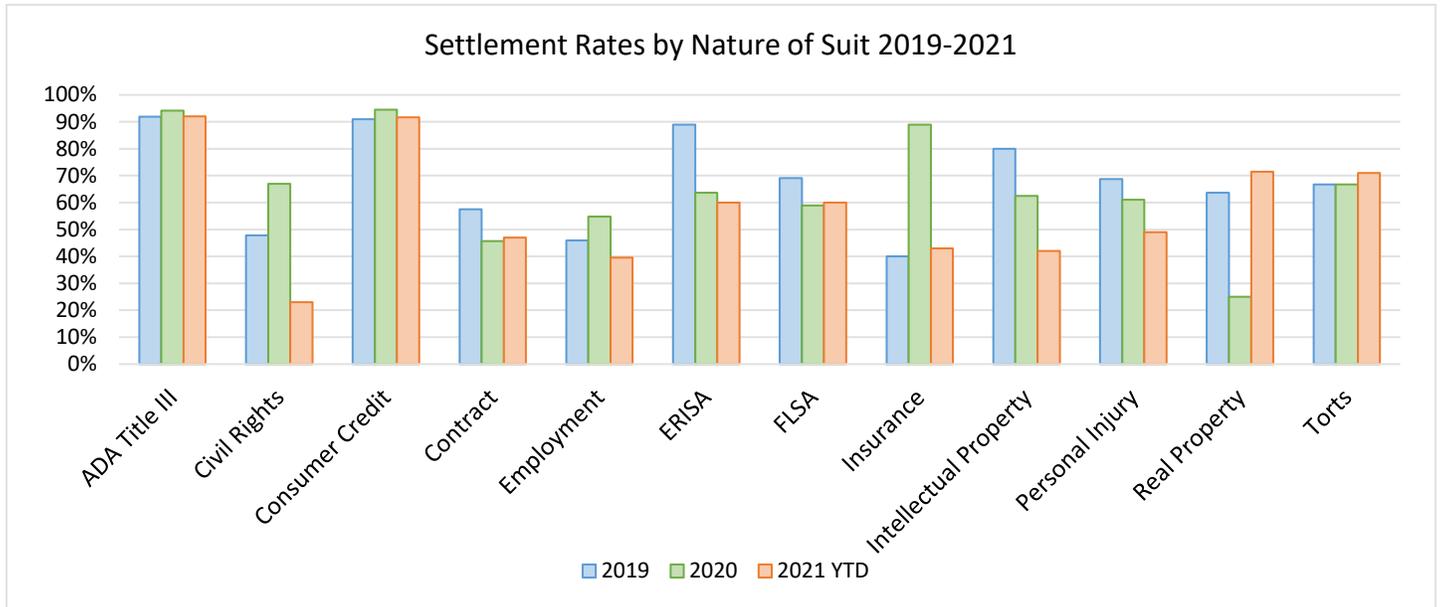


JUDGE-REFERRED CASES: REFERRAL NUMBERS AND SETTLEMENT RATES

Total referrals from judges (non-automatic) decreased 22% (916 to 714) from 2019 to 2020. However, this same period represented an increase of this referral type as a percent of the total referrals to the Mediation Program. In 2020, judge-referred matters were 56% of the total referrals.

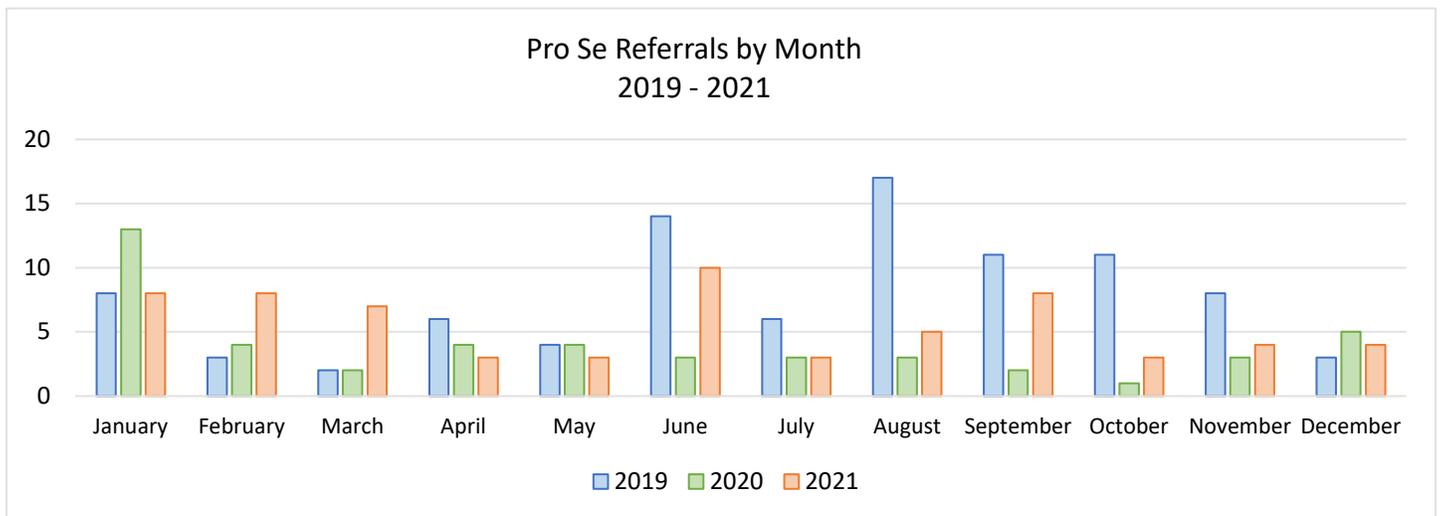


The overall settlement rate for judge-referred cases was 67% in 2019, 63% in 2020, and is 66% in 2021 – though many matters are still open.



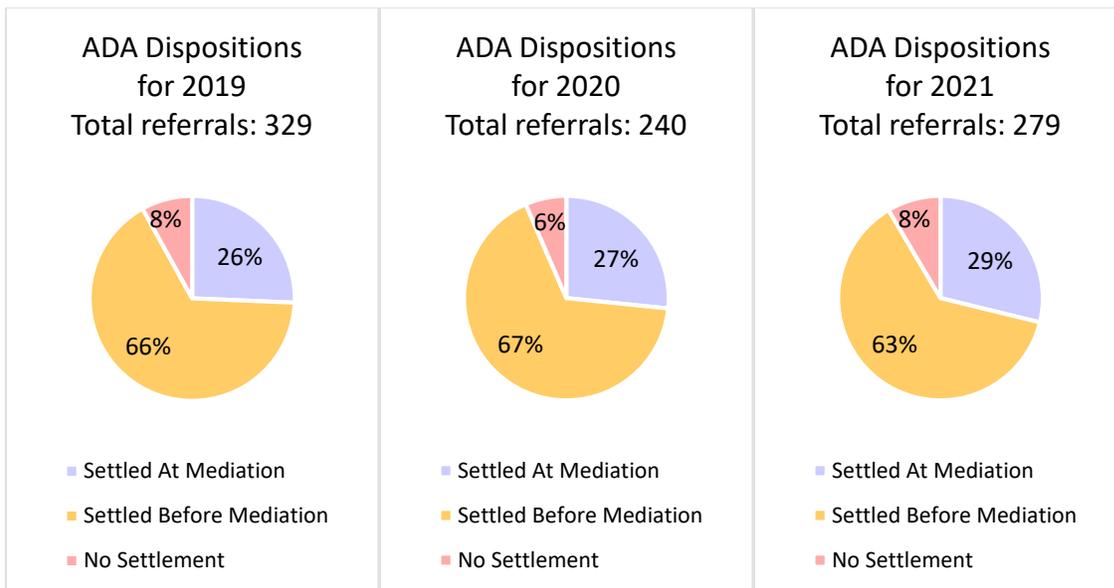
PRO SE EMPLOYMENT CASES: REFERRALS AND SETTLEMENT RATES

From 2019 to 2020, total pro se employment referrals dropped from 93 to 47, with an increase to 66 in 2021. In 2019 and 2020, settlements for these matters were approximately 59%. Though many 2021 matters are still open, the settlement rate is currently 75%.



SPOTLIGHT: CASES FILED UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT, AND CDRCP PILOT

From 2019-2021, cases filed under Title III of the ADA constituted between 35% - 40% of judge-referred matters. Over 90% of these matters settle, with over half of those settlements occurring prior to a formal session with negotiation assistance from the assigned mediator.

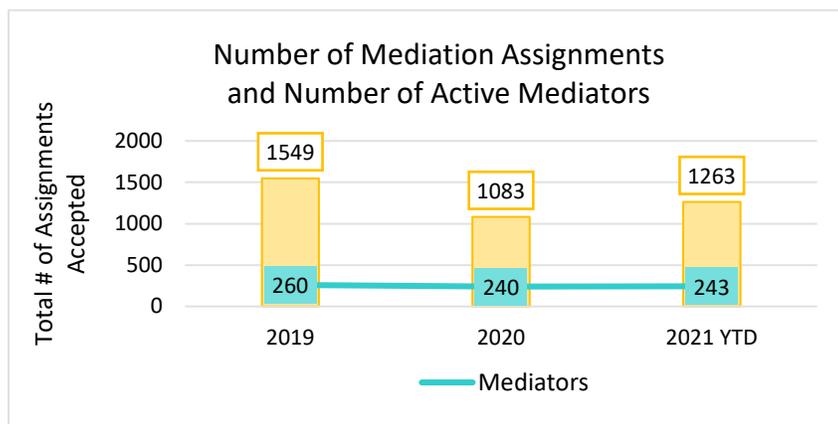


Despite the success of these matters, one challenge has been retaining mediators. In 2019, we commenced a pilot program for ADA Title III cases in partnership with the New York Peace Institute, one of the New York State Unified Court System’s community dispute resolution center programs (CDRCP). The goal of the pilot was to explore whether a collaboration could increase the number of skilled and trained mediators to serve on these cases. In 2021, Community Mediation Services, a CDRCP in Queens, joined the pilot. CDRCPs have been the core mediation network in the State of New York for many decades, and they have the highest standards for qualifying mediators of any program in the State.

In August 2021 the Mediation Program offered a two-hour CLE “Mediating Access Under the Americans with Disabilities Act” for both SDNY and CDRCP panel mediators. In addition to training, all CDRCP pilot mediators observe ADA Title III mediations, and then co-mediate one or more until they are ready to mediate independently. Four CDRCP mediators have completed onboarding and have been added to the SDNY roster for ADA Title III cases, and ten CDRCP mediators are currently going through the onboarding process. Since September 2021, the CDRCP mediators have accepted 18 cases for mediation with a settlement rate of 100%.

MEDIATORS

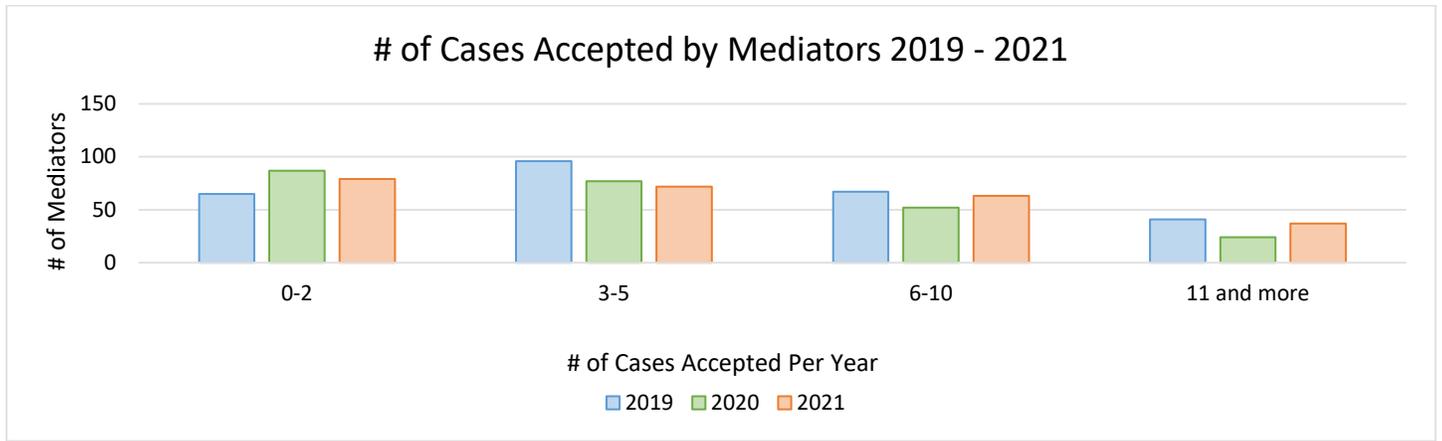
The SDNY has had a roster of volunteer mediators since the advent of the Mediation Program in 1992. Remarkably, some mediators from that initial group have continued to serve the Court in this capacity, and each year the Court adds new mediators. In 2019, there were approximately 260 mediators on the roster, including seven mediators who joined that year. Throughout 2020, approximately 240 mediators continued to mediate,



including four who joined the panel that year. In 2021, the roster had approximately 243 mediators, including three mediators who joined the roster that year. Approximately nine mediators are currently going through the onboarding process.

The pandemic brought about some changes in service by the mediators. Some mediators went on hiatus and/or retired from the program entirely. In September 2021, following efforts to determine who would

permanently retire or rejoin the active roster, approximately 25 mediators who became inactive during the pandemic officially retired from the roster. There were also a number of mediators whose service to the Court increased during the pandemic. This latter group included mediators whose law practices slowed down in the early days of the pandemic, giving them more time to volunteer. The advent of virtual mediation enabled many mediators to accept more matters since they did not have to contend with commuting to the sessions and could mediate regardless of whether they were in New York.

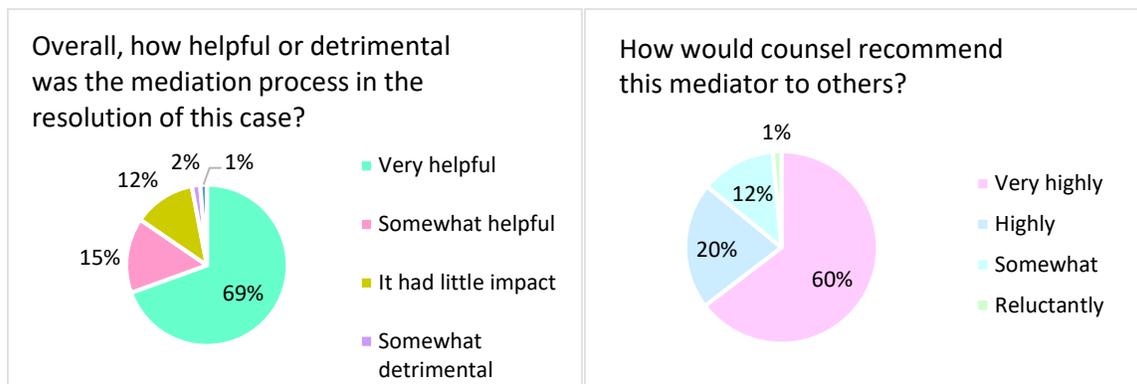


The Mediation Program has continued efforts to train, recruit, and retain diverse mediators. From 2019-2021, the Mediation Program collaborated with the New York State Unified Court System to provide mediation trainings to prospective diverse neutrals across New York State, and convened a panel on starting an ADR practice for diverse attorneys. Recruitment has been most effective through the CDRCP pilot for ADA Title III cases. That group of onboarding mediators is 43% diverse in terms of race/ethnicity, and 79% female, which are significantly higher percentages than the typical pool of applicants to the general roster.

POST-MEDIATION SURVEYS IN 2021

Starting in 2021, increased efforts were made to collect feedback from mediation participants. Prior to this change, less than 5% of cases resulted in the return of a post-session survey. Since 2021, the response rate for surveys has been between 30%-50%. 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 contacts counsel for all parties to gather more information. 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.

Examples of Feedback Obtained in 2021



SOME NOTABLE COMMENTS FROM COUNSEL:

“(The mediator) was a creative problem solver, understood the issues, and even called outside parties (the worker's comp carrier) to help resolve a lien issue. He was extremely helpful in settling the case and we could not have done it without his assistance.”

“(The mediator) showed patience and determination. Because of him, the plaintiff voluntarily discontinued his action against my client. I don't believe this outcome would have been achieved without mediation.”

“(The mediator) was terrific in facilitating a fair resolution of the case. The mediation took all day, yet she was incredibly patient and engaged. I appreciated the combination of mediation skill, in-depth knowledge of employment law, and practicality. I would recommend her without reservation to anyone seeking to resolve a case through mediation.”

“The program is a critical part of the litigation process and the mediator was superb in helping the parties to compromise and settle.”

“(The mediator) was an excellent listener and communicator. He was thoughtful and understanding and spoke effectively. I think the program is well run and should be expanded to the greatest extent possible. The mediator assigned to our case quickly gauged the temperature in the room and worked to bring the parties together.”

“(The mediator) was a pleasure to work with throughout the day. Every action had thoughtful purpose and was delivered with sincerity and kindness. One of the best (if not the best) mediator I have had the pleasure to work with.”

“I thought (she) was an outstanding mediator. This was a tough case to mediate, and she was very prepared and patient. Her mediation style is my preferred style - she just encouraged the parties to continue to make moves. I would definitely want her as a mediator again.”

“(The mediator) was excellent. He worked very hard with us over three remote sessions to resolve the case. (He) was fair, extremely prepared, and obviously reviewed the various submissions; and he was effective at parsing issues and valuations which assisted all counsel in reaching a resolution. I was very impressed with (him). Thank you for the referral.”

INTERNAL TRAINING AND MEDIATOR SUPPORT IN 2020 AND 2021

During the pandemic, monthly practice groups continued to provide an opportunity for mediators to support one another. Approximately 70 mediators were regular attendees at these sessions, now hosted over Zoom, including 16 mediators who joined or returned to practice groups in 2020 and 2021. In addition to the practice groups, in 2020 and 2021 the following trainings were offered to panel mediators: How do you Start when They are Too Far Apart; Get Down Get Settled: The Music of Mediation; and Mediating Access under the Americans with Disabilities Act. In 2020, the Mediation Program started a mediation-related book group to read and discuss: “Mediating Dangerously” (Ken Cloke), “Litigation Interest and Risk Assessment” (Lande, Keet, Heavin), “If I Understood You Would I Have This Look on My Face?” (Alan Alda), “The Guide to Reflective Practice in Conflict Resolution” (Michael Lange), “Ask for More: 10 Questions to Negotiate Anything” (Alex Carter), and “The Person You Mean to Be” (Dolly Chugh). Last, the Mediator Advisory Committee created two tip sheets for panel mediators: The Mediator’s Opening (Remote Mediation Supplement) and Conflicts: The Duty to Investigate, Disclose, Recuse.

EXTERNAL OUTREACH AND TRAINING IN 2020 AND 2021

Because so many organizations and institutions converted quickly to remote platforms, outreach and training continued much as it had before the pandemic. Community outreach included presentations to undergraduate and graduate schools, and a variety of bar associations. In collaboration with the Mediator Advisory Committee, the SDNY Mediation Program offered a panel program for diverse attorneys on starting a mediation practice called “Jumpstarting an ADR Practice: Insights from Diverse Neutrals” at which there were 170 attendees. We also offered basic mediation trainings to groups of court employees, attorneys, and non-attorneys in collaboration with Community Mediation Services, The New York City Bar Association, and the NYS Unified Court System’s Office of ADR Programs. The Mediation Program also worked closely with the Statewide ADR Advisory Committee to support the NYS Unified Court System as it developed and implemented presumptive ADR programs state-wide.

REMOTE SUPPORT FOR MEDIATORS

Starting in April 2020, the Mediation Program transitioned from being a provider of in-person mediation services to (almost entirely) a provider of remote mediation services. Key to this transition was the training of mediators to run remote platforms. To accomplish this objective, the Mediation Program offered both one-on-one training and small group practice sessions on remote platforms. For many mediators these sessions enabled independent management of the platforms. Between April 2020 and December 2021, over 100 mediators were trained on the Zoom platform. The program also produced written training materials: Best Practices for Zoom Mediation (with an update in 2021), How to Use BlueJeans, and How to Finalize Documents Remotely.

Shortly after the technical training began, it became clear that some number of mediators would not be able to run remote platforms independently. There were also several mediators who could run these platforms, but who preferred not to. In April 2020, the Mediation Program launched a collaboration with the Dispute Resolution Program at John Jay College of Criminal Justice. Five students who had lost their internships once the pandemic began joined the SDNY as technical assistants for video conference mediation sessions. This inaugural group launched a program that continues to this day. The Mediation Program trains students to host mediation sessions – using either an account provided by the mediator or the Mediation Program. As of March 2022, a total of 29 students have assisted in 366 mediation sessions. These volunteers assisted mediators with 151 cases in 2020 and 215 cases in 2021.

HARVARD STUDY ON COMMERCIAL CASES

In 2021, the Mediation Program partnered with the Harvard Law School Dispute System Design Clinic to explore the question of whether the SDNY should consider developing a mediation protocol specifically for some category of commercial cases and, if so, how it might be designed. The students interviewed 40 stakeholders and conducted research to come up with various considerations and recommendations. The students found that 1) stakeholders in commercial matters (generally) value mediator selection, and 2) ripeness for mediation is very dependent on the facts and circumstances of any given matter. They concluded that these two findings are in tension with the SDNY mediator assignment procedures and with an automatic protocol. Ultimately, the students recommended that we implement a “mandatory consideration” rule under which counsel would be prompted to meet and confer and report to the Mediation Program whether the case was ready for mediation.

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