

2015

## "Start Spreading the News" ... The Big Apple Gets a Taste of Mandatory Mediation

Melissa A. Rodriguez

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Melissa A. Rodriguez, *"Start Spreading the News" ... The Big Apple Gets a Taste of Mandatory Mediation*, 7 *Y.B. Arb. & Mediation* 176 (2015).

This Student Submission - Recent Developments in Arbitration and Mediation is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

“START SPREADING THE NEWS”<sup>1</sup> ... THE BIG APPLE GETS A TASTE OF  
MANDATORY MEDIATION<sup>2</sup>

By  
Melissa A. Rodriguez\*

I. INTRODUCTION

In the words of Frank Sinatra, “start spreading the news”<sup>3</sup> because “mandatory mediation” made its way to New York City. On June 23rd, 2014, the Commercial Division of New York County’s Supreme Court officially adopted an eighteen-month “mandatory mediation” pilot (“Mediation Pilot”) that became effective on July 28th, 2014.<sup>4</sup>

The Commercial Division of the New York County Supreme Court is nationally and internationally renowned as the quintessential forum for commercial disputes.<sup>5</sup> However, prior to 1993, a negative reputation was tied to New York County state courts’ because of their poor ability to effectively address commercial litigation.<sup>6</sup> This damaging reputation quickly vanished when the New York County Supreme Court began enacting successful pilot programs and new court rules that were ultimately adopted statewide.<sup>7</sup>

---

<sup>1</sup> FRANK SINATRA, NEW YORK, NEW YORK (Reprise Records 1980).

<sup>2</sup> The New York County Commercial Division defines “mediation” as “[a] process in which a Neutral attempts to facilitate a settlement by conferring informally with the parties, jointly and in separate ‘caucuses,’ and focusing upon practical concerns and needs as well as the merits of each side’s position on the issues in the case.” See Honorable Sherry Klein Heitler, *Guide to the Alternative Dispute Resolution Program*, 1 (2011), <http://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment2.pdf>.

\* Melissa A. Rodriguez is an Associate Editor of *The Yearbook on Arbitration and Mediation* and a 2016 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

<sup>3</sup> See SINATRA, *supra* note 1.

<sup>4</sup> Sherry Klein Heitler, *Administrative Order*, (2014), <http://www.nycourts.gov/courts/comdiv/ny/PDFs/AO-ADR62014.pdf>.

<sup>5</sup> See Chief Judge Jonathan Lippman, *The Chief Judge’s Task Force on Commercial Litigation in the 21<sup>st</sup> Century, Report and recommendations to the Chief Judge of the State of New York*, 1 (2012) <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf>.

<sup>6</sup> Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 THE BUSINESS LAWYER 147, 152 (Nov. 2004), <http://www.eckertseamans.com/uploads/publications/historybusinesscourts2.pdf>.

<sup>7</sup> See *id.* at 153-155; see generally A Brief History, New York State Unified Court System, Commercial Division (April 1, 2014), <http://www.nycourts.gov/courts/comdiv/history.shtml>.

New York County’s publicly appraised and statewide-adopted judicial innovations<sup>8</sup> demonstrate that the Supreme Court and its Commercial Division are legal trendsetters. Thus, at the conclusion of its eighteen-month period, the Mediation Pilot will also likely prove to be successful in New York County and warrant statewide adoption.

The nationally renowned New York State Commercial Division, which stemmed from New York County’s “Commercial Parts Pilot Program,” proposed the Mediation Pilot.<sup>9</sup> The Mediation Pilot’s purpose is twofold: (1) to improve the efficiency and cost-effectiveness of New York County’s Commercial Division and (2) to promote Alternative Dispute Resolution (“ADR”) practices that the Commercial Division found were underutilized.<sup>10</sup> Upon proposal, the Mediation Pilot gathered an overwhelming amount of support from New York judges, commercial practitioners, and business litigants.<sup>11</sup> The Mediation Pilot’s estimated success will re-define New York County’s reputation as the premier hub for commercial business, as well as the attractiveness of the New York County Commercial Division venue. After all, if the Mediation Pilot can “make it there, [it will] make it anywhere. It’s up to you, New York, New York.”<sup>12</sup>

## II. BACKGROUND OF THE MEDIATION PILOT

### *A. Lower Courts Without Direction: Commercial Litigation Prior to 1993*

In 1993, the Civil Branch of New York County’s Supreme Court created four Commercial Parts, through a pilot program, to provide concentrated venues for the high volume of commercial disputes litigated in New York County.<sup>13</sup> Each Commercial Part adjudicated cases and dispositive motions related to commercial disputes.<sup>14</sup> Three

---

<sup>8</sup> New York County’s “Commercial Parts” pilot program and incorporation of Alternative Dispute Resolution practices in their Commercial Division court rules were adopted statewide. *See* A Brief History, *supra* note 7.

<sup>9</sup> *The Chief Judge’s Task Force on Commercial Litigation in the 21<sup>st</sup> Century*, *supra* note 5, at 25-28.

<sup>10</sup> *See id.* at 25-27.

<sup>11</sup> *See generally* Proposed Creation of a Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County, NYCOURTS.GOV, <http://www.nycourts.gov/rules/comments/PDF/received/CommDivMediationPC-Recvd.pdf> (last visited Oct. 23, 2014) (displaying every comment received as feedback for the Mediation Pilot from December 2013 to February 2014).

<sup>12</sup> *See* SINATRA, *supra* note 1.

<sup>13</sup> NYCOURTS.GOV, *supra* note 7.

<sup>14</sup> *Id.*

specialized business judges were in charge of handling the dockets of all four Commercial Parts.<sup>15</sup>

Further, the Commercial Parts pilot program also sought to repair the negative reputation that clouded New York state courts.<sup>16</sup> Commercial practitioners frequently criticized the New York State judicial system's inability to properly address business litigation.<sup>17</sup> The state court dockets were clogged, overburdened, and shunned by commercial litigators.<sup>18</sup> As a result, practitioners preferred alternate venues such as the federal courts and specialized courts in other states.<sup>19</sup> One attorney even opined that if presented with a choice, a business litigant would likely not "have elected to litigate in the state courts in New York. Most such litigants preferred the federal courts, the courts of other states like Delaware, and private [alternative dispute resolution]."<sup>20</sup>

The Commercial Parts pilot program immediately proved to be successful.<sup>21</sup> New York County's Civil Court docket showed a thirty-five percent increase in the disposition of cases within only one year of the creation of the four Commercial Parts.<sup>22</sup> At the recommendation of the New York State Bar Association's Commercial and Federal Litigation Task Force ("New York Bar Task Force"), the success of the Commercial Parts pilot program prompted the Honorable Judith S. Kaye, former New York State Chief Judge ("Chief Judge Kaye"), to expand the Commercial Parts across the state.<sup>23</sup> In November 1995, Chief Judge Kaye created the New York State Commercial Division.<sup>24</sup>

---

<sup>15</sup> Bach, *supra* note 6 at 153.

<sup>16</sup> *Id.* at 152.

<sup>17</sup> *Id.*; see also Steven C. Krane, *Judith Smith Kaye*, NYCOURTS.GOV, <https://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/kaye-judith.html> (last visited Oct. 23, 2014).

<sup>18</sup> See Krane, *supra* note 17.

<sup>19</sup> See Bach, *supra* note 6 at 152; see also Krane, *supra* note 17.

<sup>20</sup> Bach, *supra* note 6 at 152 (quoting a legal opinion letter written by Robert L. Haig, Esq. to Washington Legal Foundation on Jan. 9, 1998).

<sup>21</sup> *Id.* at 153; see also Henri-Louis Delsol, *Report Concerning Restructuring of New York Courts*, ATLANTIC LEGAL FOUNDATION, 7 (2005), available at [http://www.atlanticlegal.org/Restructuring\\_of\\_New\\_York\\_Courts.pdf](http://www.atlanticlegal.org/Restructuring_of_New_York_Courts.pdf) (quoting Peter Bijur, former chairman of the Business Council of New York State, who praised the Commercial Division for moving New York "from a court system that often evoked frustration among businesses, to a business court that is the envy of other states.").

<sup>22</sup> Bach, *supra* note 6 at 153.

<sup>23</sup> See Bach, *supra* note 6 at 153-155; see also NYCOURTS.GOV, *supra* note 7.

<sup>24</sup> See NYCOURTS.GOV, *supra* note 7.

## B. Constitution of the Commercial Division

The November 1995 expansion enacted Commercial Divisions in counties that adjudicated high volumes of commercial disputes.<sup>25</sup> The Commercial Divisions “serve as a forum for resolution of complicated commercial disputes.”<sup>26</sup> New York State has a current total of ten Commercial Divisions within eight counties and two districts.<sup>27</sup> Specifically, the Commercial Divisions are presently located in New York’s seventh and eighth districts as well as the following counties: Albany, Kings, Nassau, New York, Onondaga, Queens, Suffolk, and Westchester.<sup>28</sup> Currently, there are twenty-eight Commercial Division justices spread throughout the ten Commercial Divisions,<sup>29</sup> while nine justices sit in New York County’s Commercial Division.<sup>30</sup>

Each Commercial Division presides over one thousand dispositive motions and cases a year, including various high-stakes and complex commercial disputes.<sup>31</sup> Because the Commercial Division is a specialized court, certain guidelines must be met for a case to sit on a Commercial Division’s docket.<sup>32</sup> First, the principal claim or action must involve or consist of a commercial dispute as defined by Rule 202.70.<sup>33</sup> Second, if the claim or action requests monetary relief, then the relief must meet the monetary threshold for the specific Commercial Division.<sup>34</sup>

The Commercial Division’s organized and systematic case management quickly gained the Commercial Division a favorable reputation in throughout New York State.<sup>35</sup>

---

<sup>25</sup> See NYCOURTS.GOV, *supra* note 7.

<sup>26</sup> *Id.*

<sup>27</sup> The Commercial Division was first established in New York and Monroe counties in 1995, followed by expansion to Nassau, Erie, and Westchester counties in 1998, and expansion to Albany, Suffolk, and Kings counties in 2002. See NYCOURTS.GOV, *supra* note 7; see also Bach, *supra* note 6 at 154.

<sup>28</sup> NYCOURTS.GOV, *supra* note 7.

<sup>29</sup> *Id.*

<sup>30</sup> See *New York County – Manhattan*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/comdiv/ny/newyork.shtml> (last visited Oct. 23, 2014) (listing the nine current justices that sit in the New York County Commercial Division).

<sup>31</sup> See THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 1; see also NYCOURTS.GOV, *supra* note 7.

<sup>32</sup> See Rules of the Commercial Division of the Supreme Court, § 202.70 (2006), <http://www.nycourts.gov/rules/trialcourts/202.shtml#70>,

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* The monetary threshold of New York County, for example, is \$500,000.

<sup>35</sup> See Bach, *supra* note 6 at 158-160 (noting that the Commercial Division “has been described within New York as ‘a virtually unqualified success.’”).

The creation and expansion of the Commercial Division transformed New York state courts from being avoided by business attorneys and litigants, to being applauded by various organizations.<sup>36</sup> The Commercial Division has been considered “a case study in successful judicial administration”<sup>37</sup> as well as “the envy of businesses in other states.”<sup>38</sup> The Commercial Division has also been mirrored by other states and jurisdictions.<sup>39</sup>

### III. THE MEDIATION PILOT OF THE NEW YORK COUNTY COMMERCIAL DIVISION

#### *A. Proposing and Adopting the Mediation Pilot through the Creation of the Task Force and Advisory Council*

In February 2012, the Honorable Jonathan Lippman, current New York State Chief Judge (“Chief Judge Lippman”), created the Chief Judge’s Task Force on Commercial Litigation in the 21<sup>st</sup> Century (“Task Force”).<sup>40</sup> The Task Force, which was comprised of various distinguished judges, commercial litigators, law professors, and businessmen, spent six months exploring ways to improve the management of Commercial Division resources.<sup>41</sup> Subsequently, the Task Force released a report in June 2012 (“June 2012 Report”), which included numerous recommendations for improving efficiency and the overall operation of the Commercial Division throughout New York State.<sup>42</sup> These recommendations were supported by an in-depth analysis of national and local judicial reform initiatives, input from national and local judges, and statistical information regarding the Commercial Divisions.<sup>43</sup>

---

<sup>36</sup> See Bach, *supra* note 6 at 158-160.; *see also* NYCOURTS.GOV, *supra* note 7.

<sup>37</sup> NYCOURTS.GOV, *supra* note 7 (quoting the Commercial and Federal Litigation Section of the New York Bar Association).

<sup>38</sup> *Id.* (quoting the Business Council of New York State in 2000).

<sup>39</sup> See THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 1 (stating that Delaware’s new Complex Commercial Litigation Division was modeled after New York’s Commercial Division); *see also* Bach, *supra* note 6 at 159 (noting that New York’s Commercial Division had been emulated by courts in Philadelphia, Massachusetts, Maryland, and Florida).

<sup>40</sup> NYCOURTS.GOV, *supra* note 7; *see also* Chief Judge Jonathan Lippman, State of the Judiciary Address (Feb. 14, 2012) (quoting, “[w]e must make sure that New York remains at the cutting edge of how commercial disputes are resolved. It is time to set a new vision for how we in the New York State court system might better serve the needs of the business community and our state’s economy.”).

<sup>41</sup> See NYCOURTS.GOV, *supra* note 7. The names of every Task Force member is listed before the table of contents in the June 2012 Report, *see* THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 2.

<sup>42</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 2-4.

<sup>43</sup> *Id.* at 5-6.

The June 2012 Report recommended establishing a permanent Commercial Division Advisory Council.<sup>44</sup> Giving substantial deference to the recommendations included in the June 2012 Report, Chief Judge Lippman approved the establishment of a Commercial Division Advisory Council (“Advisory Council”) in 2013.<sup>45</sup> The Advisory Council would serve as a permanent board composed of reputable commercial practitioners and judges from New York State that would advise Chief Judge Lippman on all matters related to the Commercial Division.<sup>46</sup>

The June 2012 Report also recommended the adoption of a “mandatory mediation” program.<sup>47</sup> Although the Commercial Division had been utilizing ADR practices since 1996, the Task Force concluded that mediation was “substantially underutilized” in New York State.<sup>48</sup> The Task Force attributed this discrepancy to the “inherent adversarial nature” of mediation coupled with the judge’s tendency to severely limit the number of cases referred to mediation under Section 202.70, Rule Three of the Rules of the Commercial Division of the Supreme Court.<sup>49</sup>

To support the proposed idea of “mandatory mediation,” the Task Force highlighted three main “hallmarks” for operating a successful “business dispute resolution” forum, including: (1) efficient resolution of disputes, (2) a cost-effective resolution process, and (3) satisfaction with the fairness of the result.<sup>50</sup> After consulting with various in-house counsel and commercial practitioners, the Task Force concluded that these “hallmarks” would most effectively be achieved by implementing mandatory mediation in the Commercial Division.<sup>51</sup> The Task Force specifically recommended an eighteen-month “mandatory mediation” pilot (“Mediation Pilot”) that would first be experimented in the Commercial Division of New York County.<sup>52</sup> The number of commercial disputes adjudicated in New York County, and its high concentration of

---

<sup>44</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 25-28.

<sup>45</sup> See Press Release, Hon. A. Gail Prudenti, Chief Judge Names Members of Commercial Division Advisory Council (Mar. 26, 2013) *available at* [http://www.nycourts.gov/press/PDFs/PR13\\_05.pdf](http://www.nycourts.gov/press/PDFs/PR13_05.pdf).

<sup>46</sup> *See id.*

<sup>47</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 25-28.

<sup>48</sup> *Id.* at 26.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 26.

<sup>51</sup> *Id.* at 26.

<sup>52</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 27.

available and experienced ADR Neutrals made New York County the ideal jurisdiction for testing the Mediation Pilot.<sup>53</sup>

In September 2013, the newly established Advisory Council endorsed immediate adoption of the Mediation Pilot proposal.<sup>54</sup> The Advisory Council considered the potential ramifications of enacting the Mediation Pilot, but ultimately concluded that the benefits of mandatory mediation outweighed any potential negative effects.<sup>55</sup> When reviewing the Mediation Pilot proposal, the Advisory Council gave substantial deference to the opinions of their in-house counsel members, who strongly supported the Mediation Pilot based on their personal and professional experiences with mediation.<sup>56</sup>

Overall, the Advisory Council concluded that the proposal was “fairly conservative” because parties were provided with the opportunity to “opt-out” of the program, and the freedom to choose their own mediator.<sup>57</sup> The Advisory Council also concluded that removing the Mediation Pilot’s “mandatory” nature would severely undermine the purpose of enacting the Mediation Pilot in the first place.<sup>58</sup> The Advisory Council rationalized that the “inherent adversarial nature” of mediation would only be overcome by creating a program that required parties to experience the benefits of mediation at an early stage, before the litigation costs substantially accrued.<sup>59</sup>

In June 2014, the Honorable Sherry Klein Heitler, Administrative Judge of New York County’s Supreme Court, signed an Administrative Order that officially adopted the Mediation Pilot in New York County’s Commercial Division.<sup>60</sup> The Mediation Pilot became effective on July 28, 2014, and will remain in effect for an eighteen-month

---

<sup>53</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 27.

<sup>54</sup> Memorandum from John w. McConnell to “all interested persons” (Dec. 11, 2013) *available at* <http://www.nycourts.gov/rules/comments/PDF/PC-PacketCommDivMedPilot.pdf>.

<sup>55</sup> Memorandum from the ADR Committee of the New York County Commercial Division Advisory Council to the Honorable Sherry Klein Heitler, Administrative Judge for the New York County Commercial Division (Sept. 13, 2013) at 2-3 *available at* <http://www.nycourts.gov/rules/comments/PDF/PC-PacketCommDivMedPilot.pdf>.

<sup>56</sup> *Id.* at 4.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *See Id.* at 3 (“[M]aking [the Mediation Pilot] less mandatory would be to largely ignore the Task Force’s key findings as to the efficacy of mandatory mediation programs in other jurisdictions and the ‘substantial utilization’ of mediation in the Commercial Division.”).

<sup>59</sup> *See* Memorandum from ADR Committee to Sherry Klein Heitler, *supra* note 55 at 3.

<sup>60</sup> *See, e.g.,* Administrative Order, *supra* note 4.

period.<sup>61</sup> Once the eighteen-month period concludes, the Advisory Council will assess whether the Mediation Pilot should be extended, reformed, or abandoned altogether.<sup>62</sup>

### *B. Rules of the Mediation Pilot*

The crux of the Mediation Pilot requires that every fifth newly-assigned case to the Commercial Division be mediated within 180 days of assignment to a Commercial Division Justice.<sup>63</sup> The Mediation Pilot is designed to facilitate settlement during the early stages of litigation, thereby providing a cost-effective and successful outcome.<sup>64</sup> In the June 2012 Report, the Chief Judge’s Task Force explained that mediation should occur before the parties have engaged in “sunk litigation costs.”<sup>65</sup>

The Mediation Pilot requires all participating parties to adhere to the Rule of the Alternative Dispute Resolution Program (“ADR Rules”) of New York County.<sup>66</sup> The ADR Rules require all parties to physically attend the mediation session for the first four hours.<sup>67</sup> The first four hours of the mediation session are free of charge to the parties.<sup>68</sup> If the mediation session exceeds the first four hours, the ADR Neutral may charge the parties up to \$300.00 per hour.<sup>69</sup> If one or all parties fail to comply with the ADR Rules,

---

<sup>61</sup> See, e.g., Administrative Order, *supra* note 4.

<sup>62</sup> The ADR Committee of the Advisory Council is responsible for closely monitoring the impact of the Mediation Pilot during the eighteen-month period, see Memorandum from ADR Committee to Sherry Klein Heitler, *supra* note 55 at 5.

<sup>63</sup> See THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 28 (stating the Task Force’s formal Mediation Pilot proposal).

<sup>64</sup> See *id.* at 27.

<sup>65</sup> The “tipping point” is described by the Task Force as a point in time where parties to a litigation have incurred substantial legal costs and as a result, are less likely to turn to ADR practices because they have little incentive to halt the litigation, see *id.* at 27.

<sup>66</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 28.

<sup>67</sup> See *Rules and Procedures of the Alternative Dispute Resolution Program*, COMMERCIAL DIVISION: SUPREME COURT, NEW YORK COUNTY, Rule 7(a)(1) available at <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf> (last updated June 6, 2014)

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; A chart displaying the requirements of the ADR Neutrals and the financial costs for mediation in the Commercial Division of New York County is available at, New York State Unified Court System: Office of Alternative Dispute Resolution and Court Improvement Programs (last updated Mar. 2014) available at <http://www.nycourts.gov/ip/adr/CourtAnnexedADRPrograms.pdf>.

the ADR Neutral must contact the ADR Administrator and may recommend sanctioning the party or parties.<sup>70</sup>

*C. Ensuring Judicial Flexibility of Commercial Practitioners and Litigants: “Opt-out” Provisions and Mediator Selection*

While the “mandatory” component of the Mediation Pilot may portray the program as unduly constricting a litigant’s freedom to decide whether to engage in mediation, the Mediation Pilot provides litigants with a broad range of flexibility through mediator selection and “opt out” options. These components of the Mediation Pilot will likely contribute to the program’s estimated success because it will enable open discourse between willing parties, which will invariably lead to more successful mediation. Thus, allegations that the Mediation Pilot “coerces” mediation is likely overstated because parties are free to choose their mediator or “opt out” of the program entirely.

The Mediation Pilot allows parties to “opt out” of the program if: (1) all parties express a disinterest in the case being mediated; or (2) at least one party shows “good cause” for why mediation would be “unjust or ineffective.”<sup>71</sup> The plain language of the Mediation Pilot does not list specific examples of “good cause” that would satisfy the “opt out” requirement.<sup>72</sup> If the Task Force intended the Mediation Pilot’s “opt out” requirement to be stringent, the Task Force would have likely defined “good cause” very narrowly in the June 2012 Report.

Other jurisdictions with similar “mandatory mediation” programs explicitly define what does and does not constitute a showing of “good cause” when requesting to opt out of the program.<sup>73</sup> For example, the United States District Court for the Western District of New York (“Western District”) does not recognize “inconvenience, travel costs, attorney fees, or other costs” as “good cause” reasons for opting out of their ADR Plan.<sup>74</sup> Some “mandatory mediation” programs, such as New Jersey’s Civil Presumptive Mediation Program, do not even allow parties to opt out prior to engaging in the mediation session, regardless of whether “good cause” is shown.<sup>75</sup> Because the Task Force did not explicitly define “good cause” in their June 2012 Report, the Mediation

---

<sup>70</sup> *Rules and Procedures of the Alternative Dispute Resolution Program*, COMMERCIAL DIVISION: SUPREME COURT, NEW YORK COUNTY, Rule 10(e) *supra* note 67 at 5.

<sup>71</sup> See THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 28.

<sup>72</sup> See *id.*

<sup>73</sup> See UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK, ALTERNATIVE DISPUTE RESOLUTION PLAN, 2 (2011) available at <http://www.nywd.uscourts.gov/sites/default/files/ADRPlanRevisedJune242011.pdf>; see also Laura A. Kaster & Janine Dickey, *Progress on the N.J. Mediation Front*, 211 N.J.L.J. 794, 794-796 (2013).

<sup>74</sup> See UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK at 5.

<sup>75</sup> Kaster, *supra* note 73 at 795.

Pilot’s “opt out” provision may be interpreted broadly. The Task Force would have likely included restrictive language and narrow examples of “good cause” if they intended to draft a strict “opt out” provision.

Under the Mediation Pilot, parties also have the option of choosing a private mediator or requesting a mediator from the program’s ADR Administrator.<sup>76</sup> Parties have ninety days after case assignment to a Commercial Division Justice to jointly inform the ADR Administrator whether they have selected a mediator or are requesting one.<sup>77</sup> Parties who do not inform the ADR Administrator of their selection within ninety days may be subjected to sanctions by the ADR Administrator.<sup>78</sup> If the parties request a mediator, the ADR Administrator will send a list of up to five potential mediators that were selected from a pool of New York County “ADR Neutrals.”<sup>79</sup> The parties must then

---

<sup>76</sup> See THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 28.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The pool of ADR Neutrals is comprised of highly qualified mediators who voluntarily applied, and were selected, to provide mediating services for the Commercial Division. See *Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters*, COMMERCIAL DIVISION: SUPREME COURT, NEW YORK COUNTY, available at <http://www.courts.state.ny.us/rules/chiefadmin/146.shtml#4>.

In order to qualify to be an ADR Neutral, the applicant must satisfy the requirements set forth by the ADR Rules. See *Rules and Procedures of the Alternative Dispute Resolution Program*, COMMERCIAL DIVISION: SUPREME COURT, NEW YORK COUNTY, Rule 2 *supra* note 66 at 1. Rule 2 lists the pre-requisites to qualify as an ADR Neutral for the Commercial Division of New York County. Relevant Section provides:

Rule 2. Panel of Neutrals. The Administrative Judge shall establish and maintain a panel of Neutrals (“the Panel”) for the Program. To be eligible to join the Panel as a Mediator, a person shall have a minimum of ten years of experience in the practice of commercial law or comparable experience as an accountant or business professional and satisfy the requirements of Part 146 of the Rules of the Chief Administrator. To become a Neutral Evaluator on the Panel, a person must be an attorney or former Judge who has the background and the training required by Part 146. Each member of the Panel shall, in the event that the caseload of the Program requires it, serve as a Neutral in at least three matters annually in the Program. Persons may be added to or removed from the Panel as the Administrative Judge may determine . . . .

In addition to the requirements set forth in the ADR Rules, the ADR Neutral must also satisfy the requirements set forth by § 146.4. See *Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters*, COMMERCIAL DIVISION: SUPREME COURT, NEW YORK COUNTY, *supra* note 82 at §146.4. Relevant Section provides:

(a) Neutral Evaluation. Neutral evaluators who wish to qualify for appointment to a court roster must have successfully completed at least six hours of approved training in procedural and ethical matters related to neutral evaluation and be:

(1) Lawyers admitted to practice law for at least five years who also have at least five years of substantial experience in the specific subject area of the cases that will be referred to them; or

mutually agree on one of the listed mediators or rank their mediator preferences.<sup>80</sup> The parties have seven days within receiving the list of ADR Neutrals to submit their ranked lists to the ADR Administrator.<sup>81</sup> If the parties submit a list of ranked preferences to the ADR Administrator rather than mutually agreeing on a mediator, the ADR Administrator will select the most favorably ranked mediator from the combined lists of preferences.<sup>82</sup>

#### IV. REACTIONS TO THE MEDIATION PILOT

On December 11, 2013, the Office of Court Administration for New York County's Commercial Division welcomed comments from any parties who wished to express their support or concerns regarding the Mediation Pilot.<sup>83</sup> Comments were received for two months, until February 11, 2014.<sup>84</sup> These comments were considered public and available for full disclosure under the *Freedom of Information Law*.<sup>85</sup>

The Mediation Pilot is supported by numerous current and retired judges, commercial practitioners, bar associations, and professors of law.<sup>86</sup> Although a few mediators expressed support for the Mediation Pilot as well, the majority expressed more feelings of concern than approval.<sup>87</sup> The number of supporters for the Mediation

---

(2) Individuals who have served at least five years as a judge with substantial experience in the specific subject area of the cases that will be referred to them.

(b) Mediation. Mediators who wish to qualify for appointment to a court roster must have successfully completed at least 40 hours of approved training as follows:

(1) At least 24 hours of training in basic mediation skills and techniques; and

(2) At least 16 hours of additional training in the specific mediation techniques pertaining to the subject area of the types of cases referred to them.

(c) Mixed Process. Persons who serve as both mediators and neutral evaluators in the same matter must meet the qualifications and training specified in both subdivisions (a) and (b) of this section.

<sup>80</sup> See THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 28.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Memorandum from John w. McConnell to "all interested persons," *supra* note 54.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See Proposed Creation of a Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County, *supra* note 11. Amongst the numerous supporters for the Mediation Pilot, the following are most notable: The Dispute Resolution Section of the New York State Bar Association, the Commercial and Federal Litigation Section of the New York State Bar Association, the Alternative Dispute Resolution Committee of the New York City Bar Association, and the New York County Lawyer's Association.

<sup>87</sup> See *id.*

Program, however, has greatly surpassed the number of non-supporters, with the supporters truly believing that the Mediation Pilot will be successful in New York County for a variety of reasons.<sup>88</sup>

### *A. Approval of the Mediation Pilot*

Proponents of the Mediation Pilot believe that the program is undoubtedly more cost-effective and efficient than traditional litigation practices.<sup>89</sup> The Commercial Division of New York County is one of the busiest forums for commercial disputes in the entire country.<sup>90</sup> As such, the Mediation Pilot will likely serve as an effective way to “steer commercial disputes away from a backlogged court, saving parties time and expense and judges docket space.”<sup>91</sup> By exploring methods to transform the Commercial Division into a more cost-effective and less “clogged” forum, the Task Force and Advisory Council believes that New York City will continue to be a desirable location to conduct business.<sup>92</sup> The Mediation Pilot’s estimated success will likely ensure that New York County’s Commercial Division remains an attractive venue for commercial practitioners to adjudicate business disputes, rather than turning to federal courts.<sup>93</sup>

Supporters of the Mediation Pilot are also confident that underutilization of mediation in New York County will no longer be an issue because the Mediation Pilot will bring positive exposure to the “inherently adversarial nature” of ADR practices.<sup>94</sup> For example, there may be commercial practitioners who have never utilized mediation

---

<sup>88</sup> See *id.*; see also Suevon Lee, *With Few Exceptions, Proposed Pilot Mediation Program Draws Support*, NEW YORK COMMERCIAL LITIGATION INSIDER, Feb. 26, 2014 available at <http://www.litinsider.com/PubArticleCLI.jsp?id=1202644396857&slreturn=20140905022814> (quoting Mediation Pilot supporter and CEO of the litigation finance firm Burford Capital, Christopher Bogart, “[a]t Burford, we’re after the rational and efficient resolution of commercial disputes, and mediation – when done well – promotes those objectives. We’re always enthusiastic about it.”).

<sup>89</sup> See Proposed Creation of a Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County, *supra* note 11.

<sup>90</sup> Celebrating a Twenty-First Century Forum for the Resolution of Business Disputes, THE COMMERCIAL DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, 3, Jan. 25, 2006 available at <http://www.nycourts.gov/courts/comdiv/PDFs/ComDiv-Jan06.pdf> (highlighting that during its first year of operation, in 1995, over 6,500 cases were filed in the Commercial Division of New York County alone).

<sup>91</sup> Lee, *supra* note 88.

<sup>92</sup> See Memorandum from John w. McConnell to “all interested persons,” *supra* note 54; see also THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 25.

<sup>93</sup> See generally THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 25.

<sup>94</sup> *Id.*; See also Lorraine Brennan, *Start Spreading the News: Mandatory Mediation Comes to New York*, JAMS ADR BLOG, July 23, 2014 available at <http://jamsadrblog.com/2014/07/23/start-spreading-the-news-mandatory-mediation-comes-to-new-york/>.

throughout their professional career for reasons that do not pertain to the effectiveness of ADR practices.<sup>95</sup> After being subjected to the Mediation Pilot, however, these commercial practitioners may respond positively to the practice of mediation, as well as other forms of ADR.<sup>96</sup> Overall, proponents of the Mediation Pilot believe that the program will increase awareness and shed light on the benefits of ADR.<sup>97</sup>

Moreover, supporters of the Mediation Pilot concluded that judges were also underutilizing their discretion to mandate cases to ADR under Section 202.70, Rule Three of the Rules of the Commercial Division of the Supreme Court.<sup>98</sup> Advocates of the Mediation Pilot reason that New York County judges will have more time to dedicate towards complex commercial litigation issues, rather than wasting resources on matters that could easily be mediated.<sup>99</sup> Thus, the Mediation Pilot acts as a “filter” by making an effort to ensure that judicial resources are better allocated towards solving critical issues of commercial litigation.<sup>100</sup> Last, proponents of the Mediation Pilot are confident that the program will deliver successful results and maintain the Commercial Division’s prestigious reputation.<sup>101</sup>

### *B. Disapproval of the Mediation Pilot*

The majority of individuals who expressed disapproving views towards the Mediation Pilot were either mediators or practicing commercial litigators.<sup>102</sup> First,

---

<sup>95</sup> See Brennan, *supra* note 94.

<sup>96</sup> See *id.* (quoting, “As someone who started her legal career as a litigator, I, like many other litigators, viewed mandatory mediation with both skepticism and some suspicion . . . [t]he 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”).

<sup>97</sup> See Lee, *supra* note 88 (quoting Elayne Greenberg, Assistant Dean for Dispute Resolution Programs at St. John’s University School of Law and former chair of the New York State Bar Association’s Committee on Alternative Dispute Resolution, “If people are informed, educated, and understand the opportunities mediation provides, they’re more likely to want to use mediation. For lawyers who are reluctant to bring their cases to mediation, let’s educate these lawyers and address their concerns.”).

<sup>98</sup> See *id.* (quoting John Wilkinson, of counsel at Fulton, Rowe & Hart as well as chair of the New York State Bar Association’s Dispute Resolution Committee, “Until now, some judges have not taken the initiative to use their authority to direct the parties to mediation, or if they did, they waited until the parties had completed discovery.”).

<sup>99</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 25; Memorandum from ADR Committee to Sherry Klein Heitler, *supra* note 55 at 1.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See Proposed Creation of a Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County, *supra* note 11.

concerns regarding the “randomness” of the program were expressed to the Advisory Council.<sup>103</sup> Critics of the Mediation Pilot believe that mandating one out of every five cases to mediation ultimately undermines a judge’s discretion to order ADR for appropriate cases.<sup>104</sup> If New York County judges are not fully taking advantage of their power to mandate appropriate cases to mediation, however,<sup>105</sup> then their judicial discretion is already being undermined.

A few mediators also expressed concerns about the Mediation Pilot because the first four hours of the parties’ mediation session are held at no additional cost to the parties.<sup>106</sup> It should be noted that a majority of mediators who shared this concern were overall supporters of the Mediation Pilot, but simply requested to lower the number of “free mediation” hours.<sup>107</sup> One mediator specifically asked the New York County Commercial Division to consider lowering the Mediation Pilot’s number of free mediation hours from four to two, and offered New Jersey’s Civil Presumptive Mediation Program as a guiding example.<sup>108</sup>

Moreover, critics of the Mediation Pilot are skeptical about the program’s “mandatory” nature, referring to the Mediation Pilot as “coerced mediation.”<sup>109</sup> According to the U.S. Model Standards of Conduct for Mediators, the process of mediation is intended to be voluntary and “focuses on self-determination as a controlling principle.”<sup>110</sup> Studies analyzing the correlation between “coerced mediation” and

---

<sup>103</sup> Lee, *supra* note 88.

<sup>104</sup> *See id.*; *see also* Memorandum from Elayne Greenberg, (Feb. 11, 2014) *available at* <http://www.nycourts.gov/rules/comments/PDF/received/CommDivMediationPC-Recvd.pdf> (quoting, “[f]irst, the randomness of the referral undermines the importance of referring appropriate cases to the appropriate ADR process and diminishes the likelihood that the mediation referral will be a meaningful one. Second, such a referral process does not address the real reasons judges and attorneys are not using the commercial mediation program with greater frequency.”).

<sup>105</sup> THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 26.

<sup>106</sup> *Rules and Procedures of the Alternative Dispute Resolution Program*, *supra* note 66 at Rule 7(a)(1); *see also* Proposed Creation of a Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County, *supra* note 11.

<sup>107</sup> *See* Proposed Creation of a Pilot Mandatory Mediation Program in the Commercial Division of the Supreme Court, New York County, *supra* note 11.

<sup>108</sup> *See id.* (Laura Kaster’s comment).

<sup>109</sup> *See* Lee, *supra* note 88 (quoting Jeff Kickhaven, a commercial mediator from Los Angeles, “I call it coerced mediation. It’s too mild a term to call it mandatory mediation . . . [i]f they’re not willing to go there, that’s their decision . . . [w]hat gives the court the right to interfere with a lawyer’s independent, professional judgment on behalf of a client? A lawyer has an ethical obligation to exercise independent, professional judgment on behalf of a client.”).

<sup>110</sup> Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 484 (2010).

satisfactory outcomes have shown that higher levels of coercion inevitably lead to higher rates of unfair outcomes and lower rates of settlement amongst parties.<sup>111</sup>

The plain text of the Mediation Pilot does not promote “coercive mediation.”<sup>112</sup> First, although the Mediation Pilot requires the parties to attend a mediation session, the parties are not forced to mediate whatsoever.<sup>113</sup> If the parties conclude that the business dispute cannot be mediated at the end of their mediation session, the Mediation Pilot still permits the litigation to proceed.<sup>114</sup> Further, parties who are subjected to mediation via the Mediation Pilot will not incur additional litigation costs by attempting to mediate the case because the Mediation Pilot provides the first four hours of the mediation session at no cost to the subjected parties.<sup>115</sup> Thus, parties are essentially sacrificing minimal time in order to receive four hours of high-quality mediation at no additional cost. Further, if at least one of the parties subjected to the Mediation Pilot believe that mediation will be “unjust” or “ineffective,” the Mediation Pilot includes an “opt out” provision.<sup>116</sup> Therefore, criticism of the Mediation Pilot on the basis that the program is “coercive” is likely erroneous and misguided.

## V. CONCLUSION

The dynamic nature of the New York County judicial system is responsive to the ever-changing demands of the United States’ economy and society. Through its continuous usage of task forces and advisory councils, New York County has been successful in improving their court system through the Commercial Parts Pilot Program, which was ultimately adopted statewide in 1995.<sup>117</sup> Now that the year is 2014, New York County faces different challenges that the Mediation Pilot will likely fix.

In January 2016, the Advisory Council will assess whether to extend, reform, or abandon the Mediation Pilot entirely.<sup>118</sup> The best interest of New York County’s Commercial Division is likely vested within permanently adopting the Mediation Pilot because it will likely result in improved efficiency and cost-effectiveness. Therefore, if the Mediation Pilot proves to be successful at the end of the program’s eighteen-month

---

<sup>111</sup> See Quek, *supra* note 110.

<sup>112</sup> See THE CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, *supra* note 5 at 28.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *id.*

<sup>116</sup> *Id.*

<sup>117</sup> See NYCOURTS.GOV, *supra* note 7.

<sup>118</sup> *Id.*

period, the New York County Commercial Division should seriously consider adopting the Mediation Pilot permanently.