

MOVING FROM MANDATORY: MAKING ADR VOLUNTARY IN NEW YORK COMMERCIAL DIVISION CASES

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I. INTRODUCTION

Due to its success during the last thirteen years, New York's Commercial Division in the state's Supreme Court has become the model for other states and countries seeking to establish a commercial division for their court systems.¹ Before 1993, New York's state court system had its dockets clogged with commercial cases.² Judges who heard commercial litigation cases often did not have the expertise or resources to handle them well or give them proper attention.³ As a result, New York businesses turned to Delaware's Chancery Court,⁴ federal courts, and private dispute resolution to resolve their disputes and avoid the New York State Court Sys-

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¹ Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 *STAN. L. REV.* 679, 715 n.120 (2002) (explaining the example Nevada took from New York's Commercial Division); see also Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism*, 24 *WM. MITCHELL L. REV.* 315, 319-320 (1998) (discussing the possibility of establishing a business court in Minnesota); Tamar Loomis, *High-Profile Case Casts Spotlight on Well-Regarded Court*, 227 *N.Y.L.J.* 5 (2002) (illuminating that representatives from countries including Zambia, Australia, Russia, and France have come to study New York's Commercial Division); Kimberly A. Ward, *Getting Down to Business-Pennsylvania Must Create a Business Court, or Face the Consequences*, 18 *J.L. & COM.* 415 (1999); Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 *BUS. LAW.* 147 (2004) (showing that Massachusetts, Florida, and Maryland also looked to New York's model).

² Robert L. Haig, *New York State Creates a Commercial Division*, 64 *DEF. COUNS. J.* 17 (1997) [hereinafter Haig, *Commercial Division*]; Loomis, *supra* note 1.

³ Telephone Interview with Simeon H. Baum, Member of the Advisory Committee to the New York County Supreme Court's Commercial Division ADR Panel, Neutral in New York's Commercial Division, and President of Resolve Mediation Services, Inc. in New York, N.Y. (August 14, 2006).

⁴ JUDITH S. KAYE, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §1:5 (Robert L. Haig ed., 2nd ed. 2005); see also Ad Hoc Committee on Business Courts, *Business Courts: Towards a More Efficient Judiciary*, 52 *BUS. LAW.* 947 (1997). Delaware's Chancery Court has existed for over 200 years and is a popular forum for business disputes as many corporations incorporate in Delaware.

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tem.⁵ Something needed to be done to attract businesses to use New York courts.

In 1992, New York Governor Mario Cuomo suggested establishing a court specializing in business disputes, and modeling it after Delaware's Chancery Court.⁶ In 1993, under Former Chief Judge Sol Wachtler, New York's courts ran a pilot program with four Supreme Court⁷ justices hearing commercial cases in Manhattan.⁸ New York County was chosen as the venue for the trial run as it was considered the place "where commercial litigation is the most complex [and] requires the most substantial investment of court resources."⁹ The pilot system strove to reduce expenses, produce consistency in case management, and create judicial expertise in business and commercial matters.¹⁰ In 1995, New York recognized the success of its pilot program and became one of the first states officially to establish a commercial division for its courts, with judges hearing 6,500 cases in New York County during the first year.¹¹ New York had considered creating a separate constitu-

⁵ KAYE, *supra* note 4; Bach & Applebaum, *supra* note 1.

⁶ Ad Hoc Committee, *supra* note 4. The Chief Judge at the time opposed Governor Cuomo's plan, which delayed the project, but when Governor Cuomo announced the plan again in 1994, he had the Chief Judge's support.

⁷ New York's Supreme Court is its trial court.

⁸ Ad Hoc Committee, *supra* note 4; Junge, *supra* note 1; Haig, *Commercial Division*, *supra* note 2. The pilot program was successful overall, although the commercial courtrooms suffered from lack of operating rules, alternative dispute resolution procedures, overbearing case loads and inadequate funding; *see also* Lauren J. Wachtler, *Updating the Commercial Division's Guidelines*, 231 N.Y.L.J. 9 (2005); Larry Smith, *All Systems Go: New York Business Courts Celebrate a First Anniversary*, 11 No. 1 INSIDE LITIG. 1 (1997). The judges in the Commercial Division can also choose to accept non-commercial cases. For instance, Judge Ira Gammerman occasionally accepts medical malpractice cases.

⁹ KAYE, *supra* note 4, at §1:5.

¹⁰ Bach & Applebaum, *supra* note 1.

¹¹ Robert L. Haig, *New York's New Business Court*, 26 COLO. LAW. 65 (1997) [hereinafter Haig, *New Business*] (noting that the official establishment of the business court followed a survey released by the New York Law Journal where 86% of lawyers who participated in the pilot program responded that commercial parts should exist in other parts of the state and 76% of respondents answered that there should be more commercial parts in Manhattan. In January 1995, the New York State Bar Association also released a report recommending the establishment of a commercial law division in New York State courts); *see also* Bach & Applebaum, *supra* note 1 (highlighting that the dissolution of the backlog of cases can be seen by a study showing that in 2002, contract cases brought before the Commercial Division were disposed of at a 44% decrease in days from 1992); Loomis, *supra* note 1 (describing that Delaware and Illinois were the only other two states with commercial courts at the time).

tional or statutory court for its commercial cases, but ultimately rejected the idea due to the complexity of the approval process.¹²

The Commercial Division has been so successful in New York State that it has now expanded into the counties of Albany, Erie, Kings, Nassau, New York, Queens, Suffolk, and Westchester, along with the Seventh Judicial District.¹³ Before the Commercial Division was created, a contract case took, on average, twenty months to resolve in the New York court system. By 2000, a typical Commercial Division case took only slightly over a year to resolve¹⁴ and by 2004, an average of only 224 days to resolve.¹⁵ It is no wonder then that, in 2000, the American Bar Association's Business Law Section called New York's Commercial Division "a model of a specialized court devoted to the resolution of business disputes."¹⁶

In this Note, I will argue that, although the New York Commercial Division has had much success with its mandatory Alternate Dispute Resolution ("ADR") program, and has allowed parties to choose the method of ADR, it should be left to the parties to decide whether to use ADR. Part II will lay out more background information on the Commercial Division, including its guidelines for bringing a suit, its ADR program rules, and the Division's immense success up to this point. Part III will give a brief overview of arbitration and mediation, two of the ADR processes used in the Commercial Division. Part IV will discuss the mandatory-versus-voluntary-ADR debate, focusing specifically on the use, advantages, and disadvantages of court-mandated ADR. Finally, this Note will propose, in Part V, that there would be even greater success for the Commercial Division if it makes its ADR program voluntary for parties. This argument will demonstrate that the benefits associated with ADR will be enhanced by making its use voluntary. Although this Note will often refer to ADR generally, for analytical purposes, this Note intends to focus specifically on mediation.

¹² Ward, *supra* note 1, at 429 (asserting that another reason for rejecting a separate commercial court system was because of a sentiment towards consolidating, instead of expanding, an already bulky state court system).

¹³ The Commercial Division of the State of New York, *General Information*, http://www.nycourts.gov/comdiv/general_information.htm (last visited Jan. 22, 2006).

¹⁴ Loomis, *supra* note 1.

¹⁵ JUDITH S. KAYE, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §1:7 (Robert L. Haig ed., 2nd ed. 2005).

¹⁶ BLAIR C. FENSTERSTOCK, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §6:3 (Robert L. Haig ed., 2nd ed. 2005).

286 *CARDOZO J. OF CONFLICT RESOLUTION* [Vol. 8:283]II. SYNOPSIS OF THE COMMERCIAL DIVISION RULES
AND THEIR EFFICIENCY

A. The Scope of New York Commercial Division's Cases

The Commercial Courts Task Force was set up in 1995 by the Chief Judge of the State of New York, Judith Kaye.¹⁷ It was created to examine ways to promote business use of the Commercial Division,¹⁸ which was to be established initially in New York and Monroe Counties.¹⁹ The Task Force was headed by New York's Chief Administrative Judge E. Leo Milonas²⁰ and Robert L. Haig, Esq.²¹ The members of the Task Force served on different committees, designed to examine all the different components needed that would advance the Commercial Division's success.²² The Task Force focused on soliciting the views of the bar, the judiciary, and the business community.²³ The Task Force's main finding was that the Commercial Division should be part of the state court system and not an independent system.²⁴ An additional finding was that there should be no minimal or maximum jurisdictional dollar amount requirement for cases to come before the Commercial Di-

¹⁷ Robert L. Haig, *Can New York's Commercial Division Resolve Business Disputes as Well as Anyone?*, 13 *TOURO L. REV.* 193, 194 (1996) [hereinafter Haig, *Can New York?*].

¹⁸ *Id.*

¹⁹ Haig, *New Business*, *supra* note 11, at 67 (factoring into the decision of where to place the Commercial Division were the considerations of where there were more commercial disputes being brought and where there was receptivity to the idea of a business court).

²⁰ Haig, *Can New York?*, *supra* note 17, at 194; see E. Leo Milonas, <http://www.pillsburylaw.com> (last visited Mar. 29, 2007) (follow "Professionals" hyperlink; then follow "M" hyperlink; then follow "Milonas, The Honorable E. Leo" hyperlink). The Honorable Milonas has 26 years of judicial experience, including 16 years as Associate Justice of Appellate Division of The New York Supreme Court. He also served as Chief Administrative Judge to New York, where he was instrumental in achieving many court reforms including assisting in the creation of New York's Commercial Division.

²¹ KAYE, *supra* note 4; see Robert L. Haig, http://www.kelleydrye.com/attorneys/atty_data/00069 (last visited Mar. 29, 2007). Mr. Haig is Chair of the Committee on the Judiciary of the Association of the Bar of the City of New York and author of numerous articles and book chapters on New York's Commercial Division. See also Haig, *Can New York?*, *supra* note 17, at 194 (explaining that the other eighteen members of the task force were bar leaders, judges, commercial litigators, and business leaders).

²² Haig, *Can New York?*, *supra* note 17, at 195 (explaining further that there were nine committees altogether, which included case management, technology, ADR, jurisdiction, staffing, locale, facilities, and planning).

²³ *Id.* at 195 (reporting that the Task Force solicited opinions through surveys on business courts in general and public meetings that were held throughout the state).

²⁴ Ward, *supra* note 1, at 429.

vision.²⁵ This controversial decision would give large and small businesses equal access to the courts.²⁶ However, after ten years of implementation, the Commercial Division recently changed its rules and set minimal jurisdictional dollar amounts in each county's Commercial Division.²⁷ A third major recommendation by the Task Force was to identify which cases should be considered commercial cases that could come before the court.²⁸ It was determined that any party could designate a case to be commercial and bring it to the Commercial Division,²⁹ and a Commercial Division judge would then decide whether to adjudicate the case.³⁰

The Task Force's final recommendation made ADR an essential and sometimes mandatory part of the Commercial Division.³¹ Mediators were trained to listen to and help resolve business disputes in an attempt to avoid litigation.³² The court itself, however, could still attempt to settle cases.³³ New rules, enacted in January 2006, took a more decisive tone directing uniformly in all of the Commercial Division counties that "[a]t any stage of the matter, the court may direct or counsel may seek the appointment of an

²⁵ Haig, *New Business*, *supra* note 11, at 66 (elucidating that although \$100,000 had been considered often as a threshold number, the Task Force decided that a threshold amount like that would discourage small businesses from bringing their claims to the Commercial Division, leaving the Commercial Division with an elitist image); *but see* Daniel Wise, *Commercial Part at 3: Growing, Thriving*, 220 N.Y.L.J. 1 (1998) (contrasting that later there were complaints from bar groups and practitioners that in not having a uniform minimum jurisdictional standard in each county, judges were setting varying amounts, sometimes dependant on each case).

²⁶ Haig, *New Business*, *supra* note 11, at 66.

²⁷ The Commercial Division of the State of New York, *Statewide Standards and Rules*, <http://www.nycourts.gov/COMDIV/CD-Rules.pdf> (last visited Jan. 23, 2006). The Commercial Division set the minimal jurisdictional amount per suit excluding punitive damages, interests, costs, disbursements, and attorney fees as \$100,000 for New York and Westchester Counties and amounts ranging from \$25,000 to \$75,000 for the remaining counties. The current rules went into effect on January 17, 2006.

²⁸ Haig, *New Business*, *supra* note 11, at 66 (explaining the realization that there was a need to balance restraint on the number of cases the Division would accept, while at the same time allowing flexibility).

²⁹ *Id.* at 67 (describing that a party could indicate it as such on the Request for Judicial Intervention form).

³⁰ *Id.* (relating a general rule that the more complex a business case, the more likely it would get adjudicated in the Commercial Division); Bach & Applebaum, *supra* note 1 (highlighting that examples of topics within the jurisdiction include claims arising from business transactions like securities transactions, business agreements, breach of contract, breach of fiduciary duty, and fraud, in addition to UCC transactions, shareholder derivative suits, commercial bank transactions, accountant malpractice and other business cases).

³¹ Haig, *New Business*, *supra* note 11, at 67 (clarifying that there would be cases where ADR would not be appropriate; for example where there is going to be an upheld motion to dismiss).

³² 2 *Id.* at 67, 68.

³³ *Id.* at 68 (giving the example of mandatory settlement conferences).

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uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation.”³⁴ In practice though, up to the present time, courts generally have only mandated ADR when it has been in accordance with parties’ wishes.³⁵ Furthermore, relatively few cases have been referred to the ADR program by the Commercial Division judges, with an even smaller number referred to the program against the parties’ wishes.³⁶

B. The New York State Commercial Division Alternative Dispute Resolution Rules

The New York County Commercial Division’s ADR program was established in 1996 with much input given by the Commercial Division ADR Advisory Committee.³⁷ The Advisory Committee was set up by Administrative Judge Stephen G. Crane to recommend ADR rules to implement in the Division.³⁸ The Committee consisted of approximately ten attorneys who had experience in ADR.³⁹ While later Commercial Divisions in other states had the New York model to look at in terms of which ADR methods to implement, the Commercial Division had no prior commercial divi-

³⁴ The Commercial Division of the State of New York, *Statewide Standards and Rules*, *supra* note 27; *see also* 3 BRIAN M. COGAN, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §31:12 (Robert L. Haig., 2nd ed. 2005). Previously, the rules had merely directed some counties’ Commercial Divisions to encourage litigants’ use of ADR. The new rules were meant to inform litigants that the court can appoint a mediator on its own to force the parties into at least one mediation session.

³⁵ Telephone Interview with Robert C. Meade, First Chief Deputy Clerk of Supreme Court of New York and Director of the Commercial Division in N.Y. (Feb. 14, 2006) (explaining that because judges in the Commercial Division may choose to hear non-commercial cases and there are certain types of cases which could not be sent to ADR, there are no recorded percentages of eligible commercial cases which are sent to ADR. According to Mr. Meade, it would be an administrative near-impossibility to record on top of this how many cases are sent to ADR against the parties’ wishes).

³⁶ *Id.*

³⁷ The Commercial Division of the State of New York, *A Brief History of the Commercial Division*, at http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm (last visited Nov. 30, 2005).

³⁸ Telephone Interview with Robert C. Meade (Nov. 5, 2006).

³⁹ *Id.* No judges were invited to be part of the Advisory Committee in order to distance them from any potential conflicts of interest. This caution continues to be promulgated by not informing judges who the neutral is in any case, in order to keep the litigation completely separate from the ADR.

sion model to examine.⁴⁰ Many of the Committee's recommendations were accepted and implemented into the Commercial Division's ADR Rules.⁴¹

The Commercial Division ADR rules apply to all cases that a Commercial Division judge refers to the ADR program.⁴² The rules dictate that a judge's order to send a case to ADR should be done as close as possible to the beginning of the proceedings.⁴³ The judge often refers the case to the ADR program following a mandatory preliminary conference with the parties and their attorneys.⁴⁴ Once a case is referred, the assumption is that the parties will enter the Commercial Division's ADR program, but the parties also retain the option of going through a different, private ADR process.⁴⁵ If the parties decide to use the court's ADR program, their action is assigned to a neutral⁴⁶ from the Commercial Division's ADR panel, but parties may jointly select a neutral without the court's intervention.⁴⁷ Parties are not required to pay neu-

⁴⁰ *Id.* There were however advisory committees for other matters in New York, like matrimonial, tort, and medical malpractice, on which this advisory committee was able to model itself.

⁴¹ *Id.* Such recommendations included training activities for neutrals, the number of hours of training a neutral should have, and ethical standards for mediators. *See also* The Commercial Division of the State of New York, *Standards of Conduct for Arbitrators and Neutral Evaluators in Alternative Dispute Resolution*, <http://www.courts.state.ny.us/comdiv/ADRethicsforarbitrators.htm> (last visited Mar. 29, 2007).

⁴² The Commercial Division of the State of New York, *Rules of the Alternative Dispute Resolution Program*, http://www.nycourts.gov/comdiv/ADR_Rules.htm (last visited Oct. 12, 2005). There are other authorized judges as well who may refer a case to the Commercial Division's ADR program. Additionally, the parties can consent, on their own, to send a case to the ADR program.

⁴³ *Id.* Presumably, the reason for an early referral to ADR is to cut the costs and time involved in a court case that will not be beneficial. The case can still be referred by the justice to the ADR program later on in the proceedings if necessary; *see also* 4 DAVID KLINGSBERG & JEFFREY FUISZ, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §6:3 (Robert L. Haig ed., 2nd ed. 2005) (stating that a specific reason for referring early is to avoid unnecessary discovery and motions).

⁴⁴ COGAN, *supra* note 34 (stating that the conference is held within 45 days of the case being assigned to the Commercial Division, or within 30 days if certain motions are filed); The Commercial Division of the State of New York, *Statewide Standards and Rules*, *supra* note 27.

⁴⁵ The Commercial Division of the State of New York, *Rules of the Alternative Dispute Resolution Program*, *supra* note 42 (indicating further that the rules of the Commercial Division still apply to ADR proceedings done through private ADR in regard to deadlines and confidentiality).

⁴⁶ BLACK'S LAW DICTIONARY 473 (2nd ed. 2001) (defining neutral as "a judge, mediator, arbitrator, or actor in international law refraining from taking sides in a dispute.").

⁴⁷ The Commercial Division of the State of New York, *Rules of the Alternative Dispute Resolution Program*, *supra* note 42 (establishing that these neutrals are unpaid and must comply with the Code of Ethical Standards for Neutrals of the Commercial Division); *see also* 4 JOHN HARTJE, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §46:14 (Robert L. Haig ed., 2nd ed. 2005) (recounting that other requirements for joining the

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trials from the Commercial Division's ADR panel, but are allowed to do so after the process is complete, if they so choose.⁴⁸

To become a neutral in the Commercial Division, an applicant must meet certain criteria. If the neutral is an attorney, he or she must have practiced or had significant experience with commercial law for at least seven years.⁴⁹ A neutral does not necessarily have to be an attorney, but can be an accountant, executive, or business person if he or she has had a comparable amount of experience.⁵⁰ A neutral must also complete twenty-four hours worth of training in mediation.⁵¹ Once an applicant becomes a neutral on the Commercial Division's roster, that neutral must undertake two or three pro bono matters per year.⁵² Parties can select their neutral from The Roster of Neutrals, which "identifies each [n]eutral and indicates the [n]eutral's admissions, education, professional background, and ADR training and experience."⁵³

Akin to a judge's immunity, any neutral selected by the parties or selected randomly is immune to any subsequent action arising from the ADR proceedings.⁵⁴ Parties can choose the form of ADR they wish to use, but the default ADR method is mediation,⁵⁵ with 95%-99% of cases referred to the Commercial Division's ADR program proceeding to mediation.⁵⁶ Parties must attend at least the first court mandated ADR session and the second session if the neutral so orders.⁵⁷ The first ADR program session must be held within thirty days of its confirmation date and end within forty-five

panel of neutrals also include having seven years experience in commercial law or an equivalent and 24 hours of mediation training); Bach & Applebaum, *supra* note 1 (articulating that there are over 250 volunteer neutrals).

⁴⁸ Telephone Interview with Robert Meade, *supra* note 38. If parties select a neutral on their own who is not on the panel, it is to be decided between the parties and the neutral if and how much the neutral would be paid.

⁴⁹ The Commercial Division of the State of New York, *Commercial Division Alternate Dispute Resolution Program*, http://www.nycourts.gov/comdiv/ADR_GUIDE.HTM (last visited Mar. 30, 2007).

⁵⁰ *Id.*

⁵¹ *Id.* (explaining that training in arbitration would not suffice).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ The Commercial Division of the State of New York, *Rules of the Alternative Dispute Resolution Program*, *supra* note 42.

⁵⁵ *Id.* (declaring that mediation can be changed to binding arbitration at any time during the proceedings with the consent of both parties).

⁵⁶ FENSTERSTOCK, *supra* note 14; Telephone Interview with Robert Meade, *supra* note 38.

⁵⁷ The Commercial Division of the State of New York, *Rules of the Alternative Dispute Resolution Program*, *supra* note 42. Even after the termination of an ADR program, the court can order the parties to enter into another ADR program.

days of its confirmation date.⁵⁸ All ADR program proceedings remain confidential.⁵⁹ Following the ADR proceedings, either party or the court may request a second referral to the ADR program.⁶⁰

C. The Success of the Commercial Division's ADR Program

According to Robert Meade's 1997 survey of neutrals and attorneys who utilized the Commercial Division's ADR system that year and a similar survey done in 2002, the Commercial Division's ADR program has received mostly positive feedback.⁶¹ The 1997 survey showed that 52% of the 300 cases referred to ADR through its court-mandated program were settled by the time that the formal ADR process had concluded.⁶² An additional 16% of the cases settled after the conclusion of the ADR process, but owed their settlement in some part to the ADR process.⁶³ Meade's survey found that client involvement in the ADR process boosted the chances of a settlement.⁶⁴ In cases that did not settle, differences and/or hostility between the parties were reduced in a majority of the cases.⁶⁵ Lawyers and neutrals participating in the survey expressed a high level of satisfaction with the ADR program in the Commercial Division.⁶⁶ This satisfaction was due in part to previous experience the neutrals had with mediation, which made ADR

⁵⁸ *Id.* (mandating that at least 10 days before the first ADR session, both parties must submit to the neutral their pleadings and a memorandum).

⁵⁹ *Id.* (stipulating that a settlement agreement can only be made public if the parties agree to it).

⁶⁰ *Id.* (stating that the rules apply to both proceedings, with the only difference being that the parties must pay the neutral the second time the proceedings are conducted).

⁶¹ Robert C. Meade, *Commercial Division ADR: A Survey of Participants*, 218 N.Y.L.J. 1 (1997). The survey was a paper survey of nearly 400 attorneys and neutrals who had participated in the Commercial Division's Alternative Dispute Resolution Program. About 70% of neutrals and 45% of attorneys responded to the survey.

⁶² *Id.*

⁶³ *Id.* (establishing that for statistical purposes, any cases that did not result in a settlement in the ADR program itself were considered "failures").

⁶⁴ *Id.* (detailing that some type of participation by the clients resulted in settlement rates of 60% as opposed to a 0% settlement rate in the 17 cases where there was absolutely no participation by the client).

⁶⁵ *Id.* (finding that two-thirds of the neutrals reported a decrease in hostility between the parties).

⁶⁶ *Id.* (detailing that 100% of neutrals and 88.4% of attorneys felt that the ADR Rules of the Commercial Division were easy to understand; 97.4% of neutrals and 87.5% of attorneys felt that the rules were fair to both sides; 93.7% of neutrals and 91.8% of attorneys felt that the Commercial Division Support Office responded well to communications; 91.1% of neutrals and 85.2% of attorneys felt that the process had run smoothly).

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sessions they facilitated more efficient.⁶⁷ The 2002 figures showed that over 60% of the cases brought to the ADR program settled at or near their commencement.⁶⁸ Although not fully compiled, unofficial results in late 2006 showed that of cases in 2006 in which the mediation process had concluded, 52% had settled.⁶⁹

III. CHOOSING TO USE ADR

A. Analysis of the Main ADR Program Method-Mediation

While arbitration centers on the parties presenting their positions to the arbitrator, the key decision-maker,⁷⁰ mediation allows the parties to take a more active role, working together towards settlement, with the mediator facilitating their resolution efforts.⁷¹ As the Model Standards of Conduct for Mediators states, “self-determination is the fundamental principle of mediation.”⁷² Flexibility and minimal procedural rules are both inherent in the self-determination of mediation.⁷³ Mediation allows the parties to discuss not only substantive issues, but technical issues and relation-

⁶⁷ Robert C. Meade, *Commercial Division ADR: A Survey of Participants*, *supra* note 61. In the 1997 survey, about 80% of the neutrals who responded had at least 16 years of experience in legal practice, while 71% had some formal ADR training and 70% had received ADR training sponsored by the Commercial Division.

⁶⁸ Bach & Applebaum, *supra* note 1.

⁶⁹ Letter from Robert C. Meade to this author (Nov. 20, 2006) (on file with author).

⁷⁰ Michael E. Weinzierl, *Wisconsin's New Court-Ordered ADR Law: Why it is Needed and its Potential for Success*, 78 *MARQ. L. REV.* 583, 592 (1995).

⁷¹ Thomas J. Stipanowich, *Contracts Symposium: Contract and Conflict Management*, 2001 *WIS. L. REV.* 831, 847 (2001); Telephone Interview with Simeon H. Baum, *supra* note 3 (defining mediation as negotiation facilitated by a neutral third party. The mediator helps the parties identify their issues, needs and interests; consider alternatives to any proposed negotiated agreement; reflect on the realities impinging upon the parties, including the legal, factual, financial, interpersonal, and businesses context; and fosters effective communications, enhancing inter-party understanding and development of settlement agreements).

⁷² Stephen Landsman, *ADR and the Cost of Compulsion*, 57 *STAN. L. REV.* 1593, 1600 (2005).

⁷³ Brian Wessner, *Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 *CARDOZO J. CONFLICT RESOL.* 1 (2002); see also JACQUELINE NOLAN HALEY, HAROLD ABRAMSON, & PAT K. CHEW, *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* 31 (2005) (quoting legal philosopher Lon Fuller, commenting on mediation's “capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”).

ship issues as well, which are meant to facilitate resolving disputes in the future.⁷⁴

Both attorneys and parties usually participate in mediation.⁷⁵ After a preliminary session with both sides present, a mediator will often separate the opposing parties and serve as the intermediary for them, while at other times, he or she will conduct all sessions with both parties present.⁷⁶ Mediation centers around both parties coming to an agreement on the issue or issues in question,⁷⁷ which is especially important for maintaining ongoing relations between the parties once the case ends.⁷⁸ Because a mediator does not make any decisions, judicial review of mediation settlements does not exist.⁷⁹ Even if mediation fails to bring a settlement immediately, the shift in the parties' attitudes regarding their own positions can lead to a settlement in the future.⁸⁰

Although the parties are meant to settle on their own terms, a mediator may make an impact or abstain from interventions that obstruct a settlement.⁸¹ A main task of an effective mediator should be to "focus parties on their interests- not on their positions."⁸² A second, and arguably equally, essential role for mediators is to "administer the sessions so as to avoid confrontations and disputes."⁸³

⁷⁴ Stipanowich, *supra* note 71, at 847.

⁷⁵ Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 86 (1996) (stressing that at the very least, sessions need to be attended by those who have power to agree to a settlement).

⁷⁶ *Id.* at 87; Telephone Interview with Simeon H. Baum, *supra* note 3.

⁷⁷ Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and For the Future*, 27 WM. MITCHELL L. REV. 745 (2000) (elaborating that compromise can be viewed both positively and negatively. On the positive side, it may be the best way to resolve a problem. On the negative side, if it is the only way to resolve a problem, parties may feel they are being forced into it).

⁷⁸ HARTJE, *supra* note 47, at § 46:5.

⁷⁹ Eric D. Green, *International Commercial Dispute Resolution: Courts, Arbitration, and Mediation-Introduction*, 15 B.U. INT'L L.J. 175,178 (1997); Telephone Interview with Simeon H. Baum, *supra* note 3 (stressing that "there might be judicial enforcement of (or challenge to) mediated settlement agreements.").

⁸⁰ ALAN I. RAYLESBERG, *NEW YORK PRACTICE SERIES-COMMERCIAL LITIGATION IN NEW YORK STATE COURTS* §5:51 (Robert L. Haig ed., 2nd ed. 2005).

⁸¹ HARTJE, *supra* note 47, at § 46:5 (lauding mediators who have the unique ability to prompt an apology from one party to the other, which can have an important effect on the negotiations).

⁸² *Id.* (allowing more room for flexibility from the parties instead of them being tied to strict positions).

⁸³ *Id.*

IV. THE DEBATE OVER COURT-MANDATED ADR

A. Advantages Proposed for Court-Mandated ADR

Starting in the 1980's, there was a push for both federal and state courts to use ADR in their proceedings.⁸⁴ Courts began creating programs where parties had to participate in ADR before their case could be heard in court.⁸⁵ Magistrate Judge Wayne D. Brazil summarized the promise of court-mandated ADR programs for parties:

[W]e acknowledge you, we acknowledge your needs, we acknowledge your entitlement to define for yourself what is most important to you, and we acknowledge that in some circumstances the established system of litigation serves some legitimate needs poorly. Just like when we provide you with a trial, we cannot and do not guarantee any particular outcome or achievement; we cannot and do not guarantee that if you use an alternative process you will be successful, by whatever criteria you define success. We cannot guarantee that you will save time or money. We cannot guarantee that you will achieve a better result than you would through litigation. Instead, the promise we make through our ADR program is to provide you with an opportunity, an opportunity to see if some other way might serve you better.⁸⁶

Before parties can be adjudged in court, court systems with mandated ADR programs often require good-faith participation by the parties in the ADR programs.⁸⁷ Many times the court will require the parties to use mediation or Early Neutral Evaluation

⁸⁴ Landsman, *supra* note 72, at 1605 (detailing that Rule 16 of FRCP was amended in 1983 to allow Federal district courts to push pretrial settlement. Although this opened up the possibility for ADR use, courts did not take significant action with this mandate. The Civil Justice Reform Act was passed by Congress in 1990 to encourage courts to experiment with alternatives to litigation. The courts' responses were still disappointing, so the Alternative Dispute Resolution Act (ADRA) was enacted by Congress in 1998 to compel Federal District Courts to require civil litigants to consider using ADR. Use in Federal Courts of ADR is pervasive, while it varies in state courts, but is still widespread.); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (supporting policy that favors use of arbitration in international commercial case).

⁸⁵ Landsman, *supra* note 72, at 1605-1606. The use of these court-mandated ADR programs was largely due to the ADRA act passed by Congress.

⁸⁶ Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 95-96 (2002). Judge Brazil is a United States Magistrate Judge in the Northern District of California.

⁸⁷ Landsman, *supra* note 72, at 1607 (indicating that the number of case opinions about the good-faith participation requirement has progressively grown since 1990).

(ENE),⁸⁸ a program similar to mediation, where parties are able to get an assessment of their positions' strengths and weaknesses.⁸⁹ Court-mandated ADR is generally better attended than voluntary ADR programs.⁹⁰ Even if both sides in a dispute want to try ADR, often, each party fears appearing weak, so neither will initiate an ADR proposal.⁹¹ There is a misconception that one appears sly if one suggests using voluntary ADR, as expressed by Judge Brazil:

[T]o "volunteer" a case into a program, usually all parties must agree, and when one party/lawyer suggests participation in an ADR program, the other parties/lawyers are likely to be suspicious that some ulterior motive inspires the suggestion, e.g., that the party making the suggestion is doing so because it expects to gain some advantage over the others through the ADR process that has been suggested.⁹²

Another advantage of court-mandated ADR is the number of settlements ADR produces without tying up court resources or participants' money and time.⁹³ As with voluntary mediation, parties felt satisfaction in being self-determinative in court-mandated ADR mediation programs.⁹⁴ In one survey, judges and lawyers, recognizing the advantages of court-mandated ADR in their own experiences, overwhelmingly agreed that non-binding court-mandated ADR should be used in some circumstances, even if it is against the parties' wishes.⁹⁵ Finally, many studies have found that participants in court-sponsored ADR were more likely to be satis-

⁸⁸ *Id.* at 1605.

⁸⁹ Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1489 (1994). The program was designed by a subcommittee appointed by Chief Judge Robert F. Peckham in 1982 to develop procedures that would reduce pretrial costs and delays.

⁹⁰ Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN. ST. L. REV. 327, 329-330 (2003) (suggesting a list of reasons why this may be so, which includes the following: parties do not know about or do not understand benefits of mediation; parties prefer familiar processes like litigation; American culture has created a litigious society; attorneys distrust volunteer mediators).

⁹¹ Hutchinson, *supra* note 75, at 89-90 (referring to it as "the first to blink system" where each party waits for the other to make the first move towards settlement).

⁹² Howard H. Dana, *Court-Connected Alternative Dispute Resolution in Maine*, 57 ME. L. REV. 349, 360 (2005).

⁹³ Weinzierl, *supra* note 70, at 588-589.

⁹⁴ Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 643 (2002). Empirical studies were done on court-connected mediation in 9 Ohio courts. Findings were based on answers to questionnaires by mediators, parties, and attorneys who had participated in mediation.

⁹⁵ Brazil, *supra* note 86, at 113. The study was conducted among 220 attorneys and judges from the Western United States at the Ninth Circuit Court's annual conference in 2000. Of the respondents, 72% of judges and 86% of attorneys agreed with this statement.

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fied with the process and find it fairer than those who had their cases adjudicated.⁹⁶ Even for those parties who were not able to get their cases settled in court-mandated ADR, there is a value to the parties in knowing that, at least they tried to settle.⁹⁷

B. Disadvantages to Court-Mandated ADR

Many downsides have been presented about court-compelled ADR.⁹⁸ Professor Stephen Landsman has been an outspoken critic of the court-mandated ADR system.⁹⁹ He claims there is no guarantee of impartiality to the parties.¹⁰⁰ Neutrals in mediation sometimes bring up settlement amounts themselves or perform evaluative mediation instead of allowing parties to come to settlement amounts and conclusions on their own.¹⁰¹ Neutrals do not always understand their roles as facilitative mediators and that they are not party to the suit.¹⁰² Landsman's concerns stem from the fact that there is no review of the court cases sent to ADR which yield settlements.¹⁰³ Additionally, as expressed earlier, there may be some cases which are important or contain recurring issues and those cases would be better ones to be adjudicated in order for there to be a recorded precedent.¹⁰⁴ If those cases went through the mandated ADR process and settled there, there would not be any precedential values as ADR sessions are confidential.¹⁰⁵

Critics have also stated that there are many general procedural problems with court-mandated ADR, not all of which apply to New York's Commercial Division ADR Program. Parties may later feel that some part of the proceedings was unjust, or that the

⁹⁶ *Id.* at 97. Studies were taken by the Federal Judicial Center and involved court-sponsored arbitration.

⁹⁷ *Id.* at 107. This sentiment was expressed by Robert Rack, chief mediator of the Sixth Circuit.

⁹⁸ Landsman, *supra* note 72, at 1619-1625.

⁹⁹ *Id.* at 1593. Professor Landsman is a Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law.

¹⁰⁰ *Id.* at 1619. This may be due in part to the variation of approaches used by neutrals which may produce different results in different cases.

¹⁰¹ *Id.* Of the mediators in Rochelle Wissler's study, 28% recommended a settlement amount.

¹⁰² *Id.* (explaining that this too was due to different neutrals using different tactics).

¹⁰³ *Id.*

¹⁰⁴ See Harold Brown, *Alternative Dispute Resolution Realities and Remedies*, 30 SUFFOLK U. L. REV. 743, 773 (1997).

¹⁰⁵ Hutchinson, *supra* note 75, at 90.

mandatory proceedings unfairly influenced the settlement amount to which they agreed.¹⁰⁶ There is a scarcity of resources devoted to some ADR programs, so that not enough time is spent on sessions to generate a settlement.¹⁰⁷ This point, however, is not true of the Commercial Division, which has many resources devoted to its ADR program. Generally, in court-mandated ADR, there is little supervision of neutrals during the arbitration or mediation proceedings, which can be problematic if a mediator departs from the code of conduct expected of a mediator.¹⁰⁸ While this might not be a problem if all the neutrals were uniformly trained and skilled, this is a complex problem when courts turn to outside neutrals with different skill and commitment levels.¹⁰⁹ There is the same risk of corruption¹¹⁰ and bias¹¹¹ as exists with private ADR, albeit on a slightly lower level if the neutrals are not being compensated.¹¹²

The compensation level to neutrals performing ADR can skew the efficiency of the neutrals and of the court system if it is too high or too low.¹¹³ As the Commercial Division only allows parties to pay neutrals selected from the Roster after the ADR proceeding is complete, it is unclear what impact this has on neutrals' efficiency. There can be pressure on the mediator to get a settlement between the parties, which can create bad feelings on the part of the parties.¹¹⁴ This can also encourage unscrupulous behavior by the neu-

¹⁰⁶ Landsman, *supra* note 72, at 1621.

¹⁰⁷ *Id.* at 1620. Empirical research has shown that in most court-mandated ADR programs, one two-three hour session is the entire amount of ADR provided. Believing that disputes can be settled in this short of a time frame can actually hinder disputes from being settled.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* With the large amount of neutrals, court administrators can not possibly oversee all of them effectively.

¹¹⁰ *Id.* There may also be corruption from amongst the judges, as judges in systems where there is not a randomly selected assignment to neutrals may assign cases to friends who are neutrals.

¹¹¹ *Id.* The bias that Professor Landsman alleges comes from what he claims to be the preponderance of middle-aged white males serving as neutrals.

¹¹² Telephone Interview with Simeon H. Baum, *supra* note 3 (clarifying that the risk is countered by the neutral's desire to perform satisfactorily, so that the parties may, in the future, choose to use the neutral's ADR services in a private setting).

¹¹³ Landsman, *supra* note 72, at 1620. If the fees are too low, then there will be an overbearing onslaught of ADR cases, while if rates are too high, costs of the process will reach the problematic levels of litigation costs or only wealthy parties will be able to participate. At this point though, even with no extra fee for ADR, there has not been an overbearing onslaught of cases in the Commercial Division.

¹¹⁴ *Id.* at 1621-22. Congress itself pushed settlement by passing ADRA and many legislative bodies cite settlement as a main reason for setting up an ADR system

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tral in order to force the parties to settle.¹¹⁵ Professor Landsman illustrates an extreme example demonstrating the possible ramifications of neutrals feeling forced to settle a case: there was a fourteen-hour mediation session that ended at 1:00 a.m., which resulted in an elderly woman of questionable capacity entering into a settlement agreement which would likely lead her being rendered homeless.¹¹⁶ Another disadvantage is that, before beginning ADR, parties are not always told the costs of an ADR program compared to those of the judicial system.¹¹⁷ Many of these concerns expressed about court-mandated ADR, however, do not necessarily apply to the well-respected, efficient Commercial Division. Neither Landsman nor anyone else has found there to be any 1:00 a.m. horror stories in the Commercial Division. It is important to keep these concerns in mind though, since the Commercial Division changed its rules to officially sanction court-mandated mediation.

An additional downside of court-mandated ADR is that psychological experiments reveal that Americans prefer to use adversarial adjudicatory methods as opposed to court-mandated ADR.¹¹⁸ Although not true in the Commercial Division, it has been shown that parties often have to pay full price to neutrals, even in court-mandated ADR.¹¹⁹ Parties who do not get the better deal will often feel like they would have done better in court.¹²⁰ Connected with this feeling is the risk that participants of the court's mandatory ADR program will resent the system for what they perceive to be the court's interest in shooing the matter from

¹¹⁵ *Id.* at 1622 (including types of unscrupulous behaviors like "improperly communicating with trial judges for the purpose of fostering conditions that increase settlement pressure, manipulating the timing of cases to heighten settlement prospects, ignoring unethical conduct by lawyers in order to secure a settlement, and overemphasizing settlement techniques at the expense of other approaches.").

¹¹⁶ *Id.* The settlement agreement was appealed, but was affirmed by Judge Brazil's court in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) as the length of the mediation session was found to be around fourteen hours, but the woman's condition at the time was found to be much more coherent and healthy than she had claimed.

¹¹⁷ Brown, *supra* note 104, at 760.

¹¹⁸ Landsman, *supra* note 72, at 1623. This idea was suggested first by John Thibaut and Laurens Walker and has been confirmed in many subsequent experiments done since then. A suggested reason is that litigation provides a greater opportunity for a party to present proof for its side, thus giving the party more control, in addition to giving it more voice, and hence, more satisfaction. Another reason is that there is a greater belief in fairness in the court system than in ADR.

¹¹⁹ Brazil, *supra* note 86, at 115 (raising the question many have asked as to why litigation provided by the court is free, but ADR has an additional cost).

¹²⁰ Landsman, *supra* note 72, at 1624.

its docket rather than finding a settlement.¹²¹ Again, to date, this has not occurred in practice in the Commercial Division, but with the new rules in place, it is unclear what will be the practice years down the line. Finally, there are those who feel that ADR, and mediation in particular, is meant to be voluntary, so there is a fundamental wrongness in forcing it upon the parties.¹²²

C. Experts' Recommendations on Courts Mandating ADR

Since there is not enough research to determine which ADR method is ultimately the best,¹²³ Professor Deborah Hensler¹²⁴ recommends that federal and state courts mandate ADR, but offer parties the choice of ADR techniques they wish to use, as the Commercial Division does.¹²⁵ Many courts now impose mandatory pre-trial mediation on parties who may have no interest in ADR.¹²⁶ One suggestion is that ADR programs where parties can opt out if they do not approve of the way the ADR process is working would be an advantage to the current system.¹²⁷ As noted, the Commercial Division follows this opt out suggestion by only mandating that parties referred to the ADR system attend one or two sessions and then retain the option of continuing or not.¹²⁸

¹²¹ Brazil, *supra* note 86, at 123.

¹²² Hutchinson, *supra* note 75, at 90.

¹²³ *Id.* at 123, 125.

¹²⁴ Professor Hensler is a Judge John W. Ford Professor of Dispute Resolution at Stanford Law School, a senior fellow at the RAND Institute for Civil Justice and author of the 2000 symposium article "ADR Research at the Crossroads" in the Missouri Journal of Dispute Resolution.

¹²⁵ Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101 (2002) (defining this idea as a "multi-door courthouse.").

¹²⁶ *Id.*

¹²⁷ *Id.* at 119 (giving the parties an element of self-determination).

¹²⁸ The Commercial Division of the State of New York, *Rules of the Alternative Dispute Resolution Program*, *supra* note 42.

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Mr. Campbell C. Hutchinson¹²⁹ also takes a pro-mandatory ADR stance in his article *The Case for Mandatory Mediation*.¹³⁰ In terms of when the ADR process should take place, he feels:

Timing of the mediation process, or any ADR procedure is critical. There is no magic time to commence mediation; it can be initiated prior to filing a lawsuit, at any point during the litigation process, or even during or after trial. The scope of the dispute, its complexity, and the issues and amounts involved are a few of the many factors to consider in deciding when to mediate.¹³¹

Hutchinson asserts that the best time for mandatory mediation to be initiated is when some of discovery has been completed, enough so that the lawyers could make a settlement from the information garnered.¹³² An initial meeting should be held early on in the trial, so that the parties and the judge can set a schedule for the remainder of the proceedings and discovery period.¹³³

Hutchinson believes that the steps described above are intended to benefit the parties' outcomes. Hutchinson suggests another list of ideal features for mandatory mediation that would attract attorneys.¹³⁴ His main points include the following: allowing parties to opt out for reasonable cause;¹³⁵ allowing parties to select their own mediator instead of a court-appointed one; instituting minimum standards for neutrals; discouraging mediators who are aggressive towards reaching a settlement instead of facilitating the parties to reach a settlement themselves; and allowing

¹²⁹ Soren Gallery, *Campbell Hutchinson Biography*, http://www.sorengallery.com/artists/hutchinson/hutchinson_bio.html (last visited Jan. 25, 2006). Mr. Hutchinson received his LLB from Tulane University School of Law. He has his own arbitration and mediation office and previously was a partner at Stone, Pigman, Walther, Wittmann & Hutchinson, LLP.

¹³⁰ Hutchinson, *supra* note 75, at 90 (admitting that there are situations when mandatory ADR should not be used, i.e. when there needs to be a public trial, when there is an imbalance in power between parties, or when a precedent needs to be set).

¹³¹ *Id.* at 92.

¹³² *Id.* (explaining that at this point, the lawyers will not have spent the excessive amount of money that litigation requires, that they will feel satisfied enough with the knowledge they know to reach an agreeable settlement. If needed, Hutchinson recommends that there still be time allowed for discovery once the mediation process starts if the parties need it).

¹³³ *Id.* at 92, 93. Hutchinson stresses that flexibility is needed for mandatory mediation to succeed; *see also* Wissler, *supra* note 94, at 698 (corroborating in her study that settlement was more likely when the mediation was held soon after the case was filed).

¹³⁴ Hutchinson, *supra* note 75, at 93 (intending to give legitimacy to the mandatory mediation process).

¹³⁵ *Id.*; *see also* Bingham, *supra* note 125, at 119 (showing that an opt out program in a voluntary court-ADR program has comparable participation levels to court-mandated ADR programs).

the participants to grade the mediators as a check on the mediators.¹³⁶

V. CONCLUSION: APPLYING THE ANALYSIS TO THE NEW YORK COMMERCIAL DIVISION

The New York Commercial Division would be best suited by changing its rule to make its ADR program voluntary. Again, it must be noted that there has been a high level of satisfaction with New York's Commercial Division and that many other commercial divisions model themselves after New York's. A change to the Commercial Division's ADR rules would not be a criticism of the system, but rather, an adjustment to make the Commercial Division even more successful. Since there are no statistics kept on the number of cases referred to the ADR program against the parties' wishes,¹³⁷ it is difficult to quantify the exact number of cases which would be better off by allowing parties full authority to choose whether or not to enter ADR. With the new rules only in force since January 17, 2006, it is too early to see the effects of the broad mandate allowing judges to compel participants to use the ADR program. Even if the judges do not do so immediately, the language of the rules that "[a]t any stage of the matter, the court may direct. . .the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation"¹³⁸ allows any judge in the Commercial Division to force parties to conduct ADR against their wishes.

Given the above disclaimer about exact numbers, although the present settlement rate is about 50-60% in ADR cases, this settlement rate could be higher if all the parties in the ADR program wanted to be there. Indeed, two studies found a higher rate of settlement when there was voluntary referral as opposed to mandatory referral.¹³⁹ None of the studies found higher settlement rates for mandatory referrals.¹⁴⁰ While Meade's survey showed the success of the ADR program and a showing that 97.5% of the responding neutrals endorsed maintaining a mandatory ADR pro-

¹³⁶ Hutchinson, *supra* note 75, at 93-94.

¹³⁷ Telephone Interview with Robert C. Meade, *supra* note 35.

¹³⁸ The Commercial Division of the State of New York, *Statewide Standards and Rules*, *supra* note 27, Rule 3.

¹³⁹ Wissler, *supra* note 114, at 697.

¹⁴⁰ *Id.* (admitting though that more research is needed before conclusions can be drawn).

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gram, over 75% of the responding attorneys expressed support for making the ADR program voluntary.¹⁴¹

Restructuring the Commercial Division's ADR program to make party participation voluntary would be an ideal fit with the other new rules and progressions of the Commercial Division. There would be no point in advocating voluntary mediation if the system could not handle any potential increase in court cases as a result. When the Commercial Division was just starting, it would have been pointless for a Division designed to reduce the number of cases to keep the same amount of judges and have the same amount of, if not more, cases. This was especially true when there were only two counties with Commercial Divisions.¹⁴² Expanding the counties with Commercial Divisions though, has increased the capacity for New York to hear more commercial cases. Therefore, any increase in the amount of cases as a result of making ADR voluntary could be consumed by the system without the backlog that existed in the early 1990's. Increases in the number of cases have already been offset by the expansion of the counties hearing commercial cases.¹⁴³ The new minimal jurisdictional amounts required in order to bring a case, and the restriction on the matters allowed to be brought in the Commercial Division¹⁴⁴ should further reduce the number of cases entering the Commercial Division and allow for any increase in cases stemming from eliminating mandatory ADR.

The studies quoted above have shown that voluntary ADR could produce higher rates of settlement while this Note has argued that the Commercial Division could efficiently handle more cases without backlogging the Commercial Division's docket. The question remains though why would the Commercial Division, which has been touted for all of its accomplishments, want to change the structure of its ADR program? The old saying of "[d]o not fix something that is not broken" should be sending off alarm

¹⁴¹ Telephone Interview with Robert C. Meade, *supra* note 35 (finding that 84% of plaintiffs' attorneys and 72% of defendants' attorneys expressed this sentiment).

¹⁴² Presumably, by initially making the ADR program completely voluntary, there would have been some parties who would choose to do ADR as opposed to litigation. However, the reduction in cases in the court docket would have been offset by an influx in cases coming to the new haven for commercial cases, which would have previously been heard in other court systems. The judges for the Commercial Division had been assigned from the New York Supreme Court, so there was no increase in the number of judges.

¹⁴³ See The Commercial Division for the State of New York, *General Information*, *supra* note 13; KAYE, *supra* note 4, at §1:7.

¹⁴⁴ See The Commercial Division for the State of New York, *Statewide Standards and Rules* *supra* note 27.

bells at this point. The answer is that there is a fundamental problem with a mandatory ADR program. Among the many claims of those who tout ADR, one that has been evoked possibly most prominently has been that ADR gives parties more control.¹⁴⁵ Aside from control over choosing a neutral, choosing the rules for an ADR process, or even choosing which ADR process to utilize, the true means of control is really choosing whether or not to go into ADR in the first place. How can a court system which prides itself on its options for participants not give parties the most important option? This reasoning parallels the point raised about court-annexed ADR by Landsman - forcing mediation on parties will push them away from all ADR.¹⁴⁶

One advantage claimed for court-mandated ADR, and ADR in general, is that parties feel greater satisfaction both with the process and with settlements than they do in litigation.¹⁴⁷ Even if parties do not settle, they still have value in knowing that they exhausted the option of settling their case.¹⁴⁸ If parties voluntarily choose ADR in the Commercial Division or in any court system, instead of feeling that a settlement or a court judgment was forced upon them, parties should feel satisfaction in knowing that they were able to control their destiny in terms of choosing ADR over litigation.

Another advantage of mandatory ADR is that neither party fears having to initiate the ADR process. While this may be true, the advantages of ADR should speak convincingly for themselves - if a party has been informed about ADR, and especially about its success rate in spurring settlements in the Commercial Division, it should choose ADR without any fear. Parties in the Commercial Division should not be afraid to suggest ADR if it will save both parties time and money.¹⁴⁹ It should not be presumed that parties will be afraid of entering ADR if they know that they are entering a program where they will have more control, including being able to choose from a list of 250 skilled neutrals.¹⁵⁰ A party who enters the Commercial Division should not be afraid of ADR if they want

¹⁴⁵ Wissler, *supra* note 114, at 690; *see also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 139 (1998) (specifying this about mediation).

¹⁴⁶ Landsman, *supra* note 72, at 1625.

¹⁴⁷ Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); *see also* Brazil, *supra* note 86, at 105.

¹⁴⁸ Brazil, *supra* note 86, at 107.

¹⁴⁹ Weinzierl, *supra* note 70, at 584.

¹⁵⁰ Bach & Applebaum, *supra* note 1.

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to preserve their relationship for future matters with the opposing party.¹⁵¹ A party may still be afraid, but if that party sees all the advantages of ADR in general and in the Commercial Division, and turns down ADR out of fear, that party will not be strong enough to win at trial either.

Voluntary ADR in New York's Commercial Division would satisfy everyone involved. If parties and their lawyers choose ADR, they would still be able to get the same, if not increased, settlement rates. The Commercial Division might receive a few more cases on its docket, but this should not be more than its current resources could handle. The Commercial Division can continue to promote its image as a model commercial court - one that offers a strong ADR program, but that does not contain the air of compulsion. This would give plaintiffs and defendants alike the utmost capability of controlling their own destiny and feeling confident in making a choice that greatly benefits them. For all these reasons and potential benefits, New York's Commercial Division should move from mandatory to voluntary ADR.

¹⁵¹ HARTJE, *supra* note 47.