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### Column: Overcoming resistance to mediation in complex cases

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BY FRED D. WEINSTEIN

Lawyers who specialize in complex commercial litigation are closely watching a pilot program that will begin July 28 with the assignment of one out of five cases to mandatory mediation in New York County's Commercial Division of the New York Supreme Court. My hope is that if successful, the pilot – designed to ease the court's crushing backlog – will also make mediation a more acceptable tool to resolve disputes and spare clients from the financial and emotional drain that plagues complex commercial litigation today.

The cost of complex litigation has escalated sharply, particularly in this age of electronic discovery. Legal teams are required to immerse themselves in troves of electronic data and produce the relevant nonprivileged contents, usually with the aid of companies that provide vital specialized support for this process. Lawyers are held professionally liable if they fail to vet paper and electronic trails thoroughly, with the result that pretrial discovery may commonly cost clients hundreds of thousands or even millions of dollars. Other significant litigation costs contribute to the tab: expert witness fees, deposition transcript fees, as well as protracted discovery disputes between parties.



Fred Weinstein

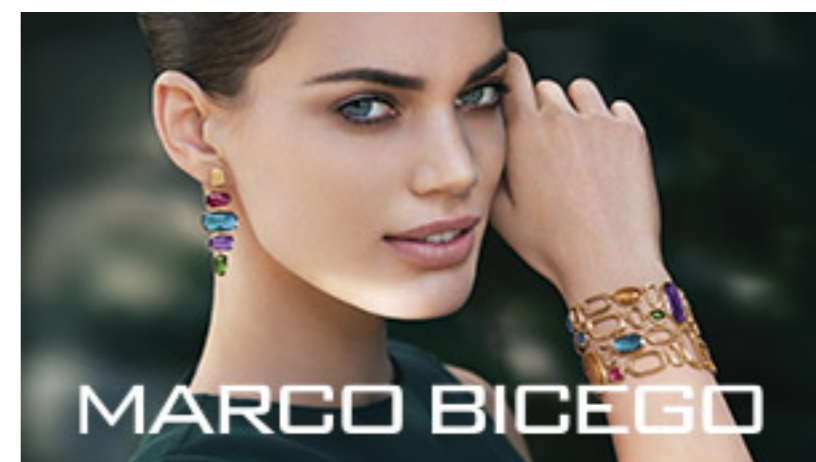
The irony is that there's a good chance the parties will enter into a settlement anyway. More than 90 percent of business disputes end in a settlement, according to a report by the Chief Judge's Task Force on Commercial Litigation in the 21st Century. However, settlements usually are made late in the game, after discovery, dispositive motions (to dismiss the case, for example), and extended pretrial proceedings in court. This is unfortunate for all concerned.

#### A mushrooming docket

The pilot program also is designed to retain the Commercial Division's stature as a leading commercial law standard setter, and a key reason why companies choose to do business in New York. In 1995, New York became the first state in the country to create a specialized commercial court to handle complex business lawsuits. With their singular focus on complex commercial matters, Commercial Division judges regularly decide cutting-edge legal issues. The division's expertise and efficiency has taken business case law to new heights, and the Commercial Division's influence extends beyond the state.

But the Commercial Division is a victim of its own success, with a mushrooming docket and more complex cases, particularly in the wake of the 2008 financial crisis. To ease the backlog, it has been suggested that judges use their authority to send more cases to mediation. But attorneys often resist. They advise business clients not to be the first party to suggest mediating a dispute for fear of appearing weak or as lacking confidence in their cases. The mandatory mediation pilot is designed to override attorney resistance to opt for mediation before a trial commences. At present, parties, if they agree, have the option to decline to participate in

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mediation and any party may seek exemption for good cause.

The New York County pilot program will last 18 months, after which it will be evaluated and either expanded, modified or abandoned. One cannot predict the future with certainty, but I believe the pilot program will be a resounding success. So do many of the legal profession's most influential groups, such as the New York State Bar Association's Commercial and Federal Litigation Section and the Supreme Court Committee of the New York County Lawyers' Association, which have endorsed the idea.

Mandatory mediation will only enhance the reputation of the Commercial Division as a court attuned to the needs of business and its need to cost-effectively resolve disputes. With its own vibrant economy, Westchester County has its own Commercial Division. By promoting greater use of the mediation process in the county Commercial Division, the Westchester business community makes the county a more desirable place to start, relocate or expand a business.

Attorneys now have the opportunity to educate clients about the benefits of opting for mediation over litigation. Opening the door to mediation should no longer be viewed as a sign of weakness; more often than not, it's a sign that lawyers are putting their clients' interests first.

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