

Presumptive mediation

Kluwer Mediation Blog

September 18, 2019

Rafal Morek (DWF LLP)

Please refer to this post as: Rafal Morek, 'Presumptive mediation', Kluwer Mediation Blog, September 18 2019, <http://mediationblog.kluwerarbitration.com/2019/09/18/presumptive-mediation/>

Is this yet another case in which New York is setting global trends? By the end of the year, the state courts in New York are due to have a system in place requiring that civil and commercial disputes be resolved through presumptive mediation. "Presumptive mediation" means an "automatic", pre-trial, statewide program of court-sponsored ADR. In this context, the term ADR, and specifically its "alternative" first "A", sounds increasingly like an oxymoron, as mediation reclaims its central position in the mainstream of the justice system.



While similar programs already exist (or did exist) throughout some state courts in New York (see e.g. another [post on this blog dated 2014](#)), the new scheme will mandate presumptive mediation statewide. [The Report of the New York State ADR Advisory Committee](#) released earlier this year offers a broad overview of court-sponsored mediation programs, including some empirical evidence that "*court-sponsored mediation works*". The top two indicators of the effectiveness of mediation: participant satisfaction rates and settlement rates, are typically at levels above 60%.

[The existing program of the New Jersey courts](#), which was first introduced as a pilot on July 1, 1995, belongs to the most successful ones. There also exist ADR schemes tailored for specific categories of disputes, for example, [custody and visitation matters](#) or [attorney-client fee disputes](#).

However, the majority of the existing programs currently require either the parties to opt in to mediation, or individual judges to refer the parties to mediation in individual cases. The new program will rely on "*automatic presumptive referrals (subject to appropriate opt-out limitations) of identified types of disputes.*" While [the Report](#) does not use the term "mandatory mediation", but "presumptive mediation", in some respects the concept does resemble some existing schemes typically referred to as *mandatory*.

The program allows for adapting to local conditions and circumstances throughout the state. Administrative Judges are to formulate the individual plans taking the fullest advantage of a wide range of existing resources, including volunteer mediators and neutrals on court rosters, judges, nonjudicial staff, judicial hearing officers and community dispute resolution centres.

[In Brooklyn the new presumptive mediation program began on September 3](#) with a broad spectrum encompassing civil disputes. The fact that the program is "court-sponsored" means, among other things, that "*each case gets one free hour of a mediator's services*" at no cost. After the first session, the parties can decide to continue with a mediator or to move towards a trial.

Fingers crossed! Looking forward to seeing more and more New Yorkers presuming that mediation is THE method for resolving disputes!