BUFFALO
BUSINESS FIRST

Federal ADR chips away at court docket

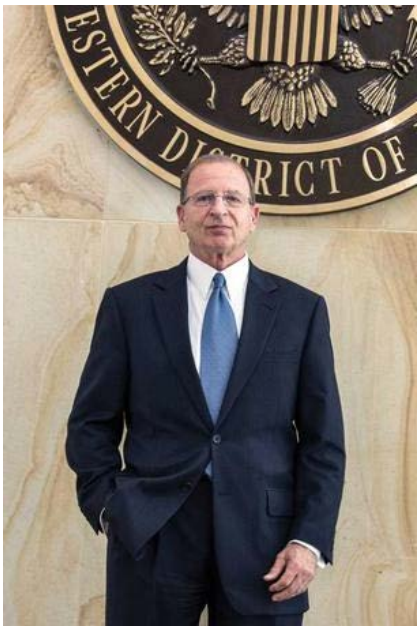
Special Report: Alternative Dispute Resolution

Jun 22, 2015, 9:00am EDT | **UPDATED:** Jun 22, 2015, 10:46am EDT

Michael Petro
Editor/Reporter Buffalo Law Journal- *Buffalo Business First*

Kevin Hogan can't help but utter the name of Judge William Skretny in at least every other sentence when discussing the alternative dispute resolution program in the federal court's Western District of New York.

After all, he said, the concept of automatically referring civil cases filed there to mediation was Skretny's baby and, under his leadership, became a pilot program in 2006. Now that the program has been fully instituted and is a model for other courts nationwide, it's a feather in the cap for Skretny, who later became the district's chief judge, and the Western New York legal community.



MICHAEL PETRO

Barry Radlin was appointed administrator of the ADR program in the federal court's Western District of New York.

Hogan, a partner in litigation at Phillips Lytle, said the federal ADR program wasn't as risky as it was visionary. The way the law and its procedures typically work is that they are based on previously established decisions, he said. Change is not the norm. This was different.

"It was unconventional," said Hogan, who's on the list of registered and approved mediators for the federal program. "Was there any great risk if it failed? No, but nothing ventured, nothing gained. In this case, there was a lot to gain. And by all accounts, the program Judge Skretny came up with has exceeded all expectations."

Skretny, who assumed senior status this spring, was the point man for the ADR program and then a group of mediation experts helped craft it, according to Barry Radlin, program administrator. At the time, they anticipated some resistance, so it began as a pilot program and was limited to Skretny's civil caseload.

The Western District, which is one of four in New York state and includes divisions in both Buffalo and Rochester, was dealing with nearly 3,400 cases annually, before the advent of the ADR program.

Radlin said when he travels around to make presentations about the program, telling others about the district's calendar-year workload almost always brings gasps. According to a recent study, it takes a civil case going through the litigation process in the district 67 months from the initial filing to completion.

"That's not justice," Radlin said.

The pilot program was renewed each year before becoming a standing order in 2010 for the Western District in Buffalo. The program spread to Rochester in 2012 to take on an equally taxing caseload in that division. There were already 48 mediators in Buffalo and 48 were added in Rochester. Early on in Rochester, Radlin said the program reached back to pick up current civil cases to spread them to the mediators.

He said more than 6,000 cases have gone to mediation since the program began. The success rate is 72 percent for cases mediated in Buffalo over the last nine years.

In the Rochester program's infancy, successful mediation was around 50 percent but rose to more than 60 percent through last year.

Last week, Radlin went to the Cardozo Law School in Manhattan to attend the annual conference of a national ADR group. Currently, there are only eight other federal districts with such programs and administrators. They all met last year in Kansas City to discuss features of their respective programs.

"It's flattering to be contacted to speak and I learn that there are these fairly muscular groups that are energetically promoting and making more efficient and acceptable the presence of ADR," he said.

While ADR programs have gained momentum around the nation, not many are an automatic process such as the Western District of New York's. Sharon Porcellio, who was among the original 24 mediators in the federal program, said what makes it so effective is that neither party has to ask for it. Oftentimes, she added, neither wants to be the side asking to mediate because it could make their case look weaker.

"It's early mediation, which may sound unusual — sometimes people first want discovery and they want more information — but oftentimes things can be settled at that stage," said Porcellio, a litigator at Bond Schoeneck & King. "I think it's important to have that early involvement."

Since many cases settle before trial anyway, she said, why not try to settle them as early as possible to save money and the emotional twists and turns that often come with litigation, as well as helping relieve the court docket. Through mediation, unique agreements that many times cannot be accomplished in court can be reached, she added.

“I think the federal ADR program has more than answered the call,” Porcellio said. “Parties are recognizing it is certainly a way to resolve their matters in an expeditious way.”

Part of the “genius” in this approach, according to Hogan, is that it is automatic at the earliest stage of the case — unless exempt or a motion is granted to ask out.

He said: “Many of these cases can still be resolved through mediation if you enter into a confidential process and, with a mediator that you trust, engage in informal, confidential exchange of the same information that would occur by going to discovery at a fraction of the cost at the outset of the case.”

Despite increasing use of mediation, the federal court system in the district remains overwhelmed.

In 2014 alone, there were 1,848 civil cases newly filed and by the end of the year there were 2,433 civil cases pending. Five-sixths of cases in the court are civil but the criminal cases have a speedy-trial requirement so more attention must be paid to them, Radlin said. Also, half the civil cases filed in the district last year were exempt from mediation. They include criminal civil rights issues or disability/Social Security appeals.

A level of resistance

The idea for such a program originated in 1998 from an order by Congress, which more strongly defined federal rules of procedure for ADR. The Alternative Dispute Resolution Act requires that each of the 94 federal districts in the nation use ADR in civil actions. However, time and budgetary issues prevent formal programs from proceeding.

When Skretny proposed the idea, other district judges in Buffalo accepted it because it would not have an impact on their cases. Radlin said there was careful management of the program at the outset to avoid troubling district judges.

There may have been a massaging period with lawyers, as well, especially for those who steadfastly believed in a period of discovery and anticipated the stare down of a trial date, according to Radlin. Early on, there seemed to be an assumption that mediation adds to attorneys’ hours and cost with no place to charge a fee for this time.

“Applying normal logic, you have the judge issue and then whether litigating lawyers would object,” said Radlin, an attorney who served as a mediator in the federal ADR program at its outset.

David Brock, a partner in litigation at Jaeckle Fleischmann & Mugel, recalled that when ADR first became an option, it was not well received. Early on, attorneys and their clients weren’t in tune with mediation’s procedural and economic advantages.

“A lawyer’s job is to fight for his or her client, and sometimes the emotion of fighting for the client can cloud their view,” said Brock, a federal mediator. “Once it became apparent that ADR has economic benefits to the client, the client really became more involved in saying, ‘Let’s see how we can resolve this on an economic basis.’”

That resistance to mediation isn’t as apparent these days, he said.

“I think it’s pretty well accepted at this point. By and large, the Trial Bar is fully aware of its benefits and how the process works. There is an ADR movement, even outside the federal program,” Brock said.

Radlin said if any of those problems did exist, they were overcome.

Several years after Skretny introduced the more robust ADR program in the Western District, Judge Richard Arcara decided that his civil cases would also go to mediators.

“For some, the concept of forcing people to mediate is uncomfortable,” Radlin said. “The word ‘mediation’ tends to mean cooperative with each other, so the idea that you must do it for something that’s supposed to be voluntary is a learning-curve experience to understand it. Some people may find it inappropriate and hard to swallow.”

By now, attorneys have greater awareness of ADR and at the federal level they know it’s part of the process, Porcellio said. The program’s success can even be used as a selling point for attorneys to clients, she said.

“It may be disappointing to trial lawyers who like to get to the trial, but it certainly is beneficial to the client and, therefore, beneficial to the lawyer,” she said.

Hogan said there are always going to be attorneys whose job is to litigate and they only mediate because they have to, but the number of attorneys who are less than enthusiastic about the process is declining.

“To the extent that there are those folks, the success of the program has to have persuaded or surprised some of them,” he said.

How federal mediators work

At the federal level, mediators agree to accept $300 for the preparation up through the first two hours of mediation. After that, there is a rate established for further service. Parties do not have to mediate beyond those first two hours. If at any time there is a decision to go back to mediation, the mediator is the same person.

Porcellio said she recently had a case that came back to mediation and was resolved. Sometimes there is a feeling that discovery is needed, she said, or the timing isn’t quite right during the initial mediation.

The skill set of mediators is another strength, according to Hogan. To start the federal program, he said the court sought respected practitioners who are effective communicators and have substantial trust in the legal community. The first class of mediators included many who are considered the “deans of the Bar,” he added. There are now 86 federal mediators on the district’s list.

“They just didn’t randomly select 24 attorneys to start the program. They selected 24 who would be good at it,” said Hogan, who was part of the second class of federal mediators chosen.

The mediation service is being provided at a reduced rate. Also, a large roster of mediators means there are enough in the program so they don’t get overwhelmed with

cases, he said.

“I couldn’t do this on a full-time basis at this stage of my career but it sure is fun, satisfying and enjoyable,” he said.

Being a mediator and litigator is rewarding in different ways, Porcellio said. As a mediator, she gets to play more of a positive role in bringing two parties together. She’s no longer an advocate for just one side.

“It gets the same adrenaline going but for different outcomes,” she said. “Your victory here is the parties resolving their issues.”

Hogan said what he’s learned as a mediator has changed his litigation style. He’s constantly reflecting on techniques used on both sides. He considers himself a practitioner as much as he’s a mediator or litigator.

“I’ll see something and say, ‘Wow, that works. I’ve got to try that myself.’ There’s no pride in authorship,” he said.

Where ADR may sometimes fall short is not so much in the type of dispute as in the personality of the parties involved, Brock said. Sometimes people are more interested in having their day in court or taking a “scorched-earth approach,” he said.

“I don’t see that very often, even when parties come to the mediation table with some personal issues, a vendetta or emotional involvement that makes it difficult to get past and seek a resolution,” Brock said. “One of the challenges for the mediator is to get the parties past that and convince them that there is life after this dispute.”

Is the ADR program useful and efficient? Radlin and his colleagues say yes. However, there is a realization that only so much can be done to cut down an enormous caseload in the Western District of New York.

“Imagine what it would be like if there weren’t these 86 mediators in the district,” Radlin said.