UNITED STATES DISTRICT COURT
NEW YORK, NY 10007

CHAMBERS OF
ROBERT W. SWEET
DISTRICT JUDGE

November 18, 1991

Abel J. Mattos
Acting Chief
Court Programs Branch
Administrative Office of the
US Courts
Washington, DC 20544

Dear Abel,

Thanks for your very kind words. Sorry I forgot the Appendices which are enclosed.

Sincerely,

RWS/pw
Encl.

REPORT AND RECOMMENDATIONS OF THE SOUTHERN DISTRICT OF NEW YORK CIVIL JUSTICE REFORM ACT ADVISORY GROUP

VOLUME II SUPPORTING MATERIALS

Marcia Alazraki, Esq.
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Robert L. Conason, Esq.
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Gerald Walpin, Esq.
Edwin Weseley, Esq., ex officio
Hon. Robert W. Sweet, Chairman

November 1, 1991

TABLE OF EXHIBITS

IV. Differential Treatment, Petrial Process and Complex Cases

E. Current Practices and Procedures with Respect to Case Assignment and Case Management

1. Case Filing and Case Assignment

Information and Designation Form
(Page 42, Report)

...COVER SHEET

...44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (For more detailed instructions, see separate instruction sheet.)

...S 44(C) SNY
Rev. ...-90

PLAINTIFFS

DEFENDANTS

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

ATTORNEYS (IF KNOWN)

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

Has this or a similar cause been previously filed in SDNY at anytime? No ☐ Yes ☐ Judge Previously Assigned _____

If yes, was this case Vol. ☐ Invol. ☐ Dismissed. No ☐ Yes ☐ If yes, give date _____ & Case No. _____

(PLACE AN X IN ONE BOX ONLY)

NATURE OF SUIT

ACTIONS UNDER STATUTES

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
[ ] 110 INSURANCE	PERSONAL INJURY	PERSONAL INJURY	[ ] 610 AGRICULTURE		[ ] 400 STATE REAPPORTIONMENT
[ ] 120 MARINE			[ ] 620 FOOD & DRUG		[ ] 410 ANTITRUST
[ ] 130 MILLER ACT			[ ] 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881	[ ] 422 APPEAL 28 USC 158	[ ] 430 BANKS & BANKING
[ ] 140 NEGOTIABLE INSTRUMENT	[ ] 310 AIRPLANE	[ ] 362 PERSONAL INJURY-MED MALPRACTICE		[ ] 423 WITHDRAWAL 28 USC 157	[ ] 450 COMMERCE/ICC RATES/ETC.
[ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT	[ ] 315 AIRPLANE PRODUCT LIABILITY	[ ] 365 PERSONAL INJURY-PRODUCT LIABILITY		PROPERTY RIGHTS	[ ] 460 DEPORTATION
[ ] 151 MEDICARE ACT	[ ] 320 ASSAULT, LIBEL & SLANDER	[ ] 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY	[ ] 630 LIQUOR LAWS	[ ] 820 COPYRIGHTS	[ ] 470 RACKETEER INFL. ENCED & CORRUPT ORGANIZATION ACT & CO
[ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL. VETERANS)	[ ] 330 FEDERAL EMPLOYERS' LIABILITY		[ ] 640 R.R.& TRUCK	[ ] 830 PATENT	[ ] 810 SELECTIVE SERV
[ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS	[ ] 340 MARINE	PERSONAL PROPERTY	[ ] 650 AIRLINE REGS	[ ] 840 TRADEMARK	[ ] 850 SECURITIES/ COMMODITIES/ EXCHANGE
[ ] 160 STOCKHOLDERS' SUITS	[ ] 345 MARINE PRODUCT LIABILITY	[ ] 370 OTHER FRAUD	[ ] 660 OCCUPATIONAL SAFETY/HEALTH		[ ] 875 CUSTOMER CHALLENGE 12 USC 3410
[ ] 190 OTHER CONTRACT	[ ] 350 MOTOR VEHICLE	[ ] 371 TRUTH IN LENDING	[ ] 690 OTHER	LABOR	[ ] 891 AGRICULTURE ACTS
[ ] 195 CONTRACT PRODUCT LIABILITY	[ ] 355 MOTOR VEHICLE PRODUCT LIABILITY	[ ] 380 OTHER PERSONAL PROPERTY DAMAGE		[ ] 710 FAIR LABOR STANDARDS ACT	[ ] 892 ECONOMIC STABILIZATION ACT
	[ ] 360 OTHER PERSONAL INJURY	[ ] 385 PROPERTY DAMAGE PRODUCT LIABILITY		[ ] 720 LABOR/MGMT. RELATIONS	[ ] 893 ENVIRONMENTAL MATTERS
				[ ] 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT	[ ] 894 ENERGY ALLOCATION ACT
				[ ] 740 RAILWAY LABOR ACT	[ ] 895 FREEDOM OF INFORMATION ACT
				[ ] 790 OTHER LABOR LITIGATION	[ ] 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE
				[ ] 791 EMPL. RET. INC. SECURITY ACT	[ ] 950 CONSTITUTIONALITY OF STATE STATUTES
					[ ] 890 OTHER STATUTORY ACTIONS

ACTIONS UNDER STATUTES

REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS
[ ] 210 LAND CONDEMNATION	[ ] 441 VOTING	[ ] 510 MOTIONS TO VACATE SENTENCE 28 USC 2255
[ ] 220 FORECLOSURE	[ ] 442 EMPLOYMENT	[ ] 530 HABEAS CORPUS
[ ] 230 RENT LEASE & EJECTMENT	[ ] 443 HOUSING/ ACCOMMODATIONS	[ ] 535 DEATH PENALTY
[ ] 240 TORTS TO LAND	[ ] 444 WELFARE	[ ] 540 MANDAMUS & OTHER
[ ] 245 TORT PRODUCT LIABILITY	[ ] 440 OTHER CIVIL RIGHTS	[ ] 550 CIVIL RIGHTS
[ ] 290 ALL OTHER REAL PROPERTY		

Check if demanded in complaint

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ | OTHER

Check YES only if demanded in complaint

JURY DEMAND: ☐ YES ☐ NO

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.?
IF SO, STATE:

JUDGE _____ DOCKET NUMBER _____

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(SEE REVERSE)

EXHIBIT IV-2

IV. Differential Treatment, Petrial Process and Complex Cases

E. Current Practices and Procedures with Respect to Case Assignment and Case Management

1. Case Filing and Case Assignment

Chart Setting Forth Twelve "Nature of Suit" Categories
(Page 42, Report)

(PLACE AN [X] IN ONE BOX ONLY)

NATURE OF SUIT

CONTRACT

- 110 INSURANCE
- 120 MARINE
- 130 MILLER ACT
- 140 NEGOTIABLE INSTRUMENT
- 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- 151 MEDICARE ACT
- 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL. VETS)
- 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS
- 160 STOCKHOLDERS' SUITS
- 190 OTHER CONTRACT
- 195 CONTRACT PRODUCT LIABILITY

REAL PROPERTY

- 210 LAND CONDEMNATION
- 220 FORECLOSURE
- 230 RENT LEASE & EJECTMENT
- 240 TORTS TO LAND
- 245 TORT PRODUCT LIABILITY
- 290 ALL OTHER REAL PROPERTY

TORTS

PERSONAL INJURY

- 310 AIRPLANE
- 315 AIRPLANE PRODUCT LIABILITY
- 320 ASSAULT, LIBEL & SLANDER
- 330 FEDERAL EMPLOYERS' LIABILITY
- 340 MARINE
- 345 MARINE PRODUCT LIABILITY
- 350 MOTOR VEHICLE
- 355 MOTOR VEHICLE PRODUCT LIABILITY
- 360 OTHER PERSONAL INJURY

PERSONAL INJURY

- 362 PERSONAL INJURY-MED MALPRACTICE
- 365 PERSONAL INJURY PRODUCT LIABILITY
- 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

PERSONAL PROPERTY

- 370 OTHER FRAUD
- 371 TRUTH IN LENDING
- 380 OTHER PERSONAL PROPERTY DAMAGE
- 385 PROPERTY DAMAGE PRODUCT LIABILITY

ACTIONS UNDER STATUTES

CIVIL RIGHTS

- 441 VOTING
- 442 EMPLOYMENT
- 443 ACCOMMODATIONS/Hou
- 444 WELFARE
- 440 OTHER CIVIL RIGHTS

PRISONER PETITIONS

- 510 MOTIONS TO VACATE SENTENCE 28 USC 2255
- 530 HABEAS CORPUS
- 540 MANDAMUS & OTHER
- 550 CIVIL RIGHTS

ACTIONS UNDER STATUTES

FORFEITURE/PENALTY

- 610 AGRICULTURE
- 620 FOOD & DRUG
- 630 LIQUOR LAWS
- 640 R.R. & TRUCK
- 650 AIRLINE REGS
- 660 OCCUPATIONAL SAFETY/HEALTH
- 690 OTHER

LABOR

- 710 FAIR LABOR STANDARDS ACT
- 720 LABOR/MGMT. RELATIONS
- 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT
- 740 RAILWAY LABOR ACT
- 790 OTHER LABOR LITIGATION
- 791 EMPL. RET. INC. SECURITY ACT

BANKRUPTCY

- 422 APPEAL 28 USC 158
- 423 WITHDRAWAL 28 USC 157

PROPERTY RIGHTS

- 820 COPYRIGHTS
- 830 PATENT
- 840 TRADEMARK

SOCIAL SECURITY

- 861 HIA(1395FF)
- 862 BLACK LUNG(923)
- 863 DIWC(405(g)
- 863 DIWW(405(g)
- 864 SSID TITLE XVI
- 865 RSI(405(g)

FEDERAL TAX SUITS

- 870 TAXES
- 871 IRS-THIRD PARTY 26 USC 7609
- 875 CUSTOMER CHALLENGE 12 USC 3410

OTHER STATUTES

- 400 STATE REAPPORTIONMENT
- 410 ANTITRUST
- 430 BANKS & BANKING
- 450 COMMERCE/ICC RATES/ETC.
- 460 DEPORTATION
- 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO)
- 810 SELECTIVE SERVICE
- 850 SECURITIES/ COMMODITIES/ EXCHANGE
- 891 AGRICULTURAL ACTS
- 892 ECONOMIC STABILIZATION ACT
- 893 ENVIRONMENTAL MATTERS
- 894 ENERGY ALLOCATION ACT
- 895 FREEDOM OF INFORMATION ACT
- 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE
- 950 CONSTITUTIONALITY OF STATE STATUTES
- 890 OTHER STATUTORY ACTIONS

EXHIBIT IV-3

IV. Differential Treatment, Petrial Process and Complex Cases

E. Current Practices and Procedures with Respect to Case assignment and Case Management

3. Procedure for Handling Pro Se Cases

Chart Setting Forth Most Common Categories of Pro Se Cases
(Page 46, Report)

TABLE I

PRO SE CASE LOAD ACTIVITIES (July 1990 - June 1991)

	Soc Sec	Emp Dis	§1983	§2255	§2254	§2241	Other	Totals
July 1990	7	9	35	7	31	3	28	120
Aug. 1990	4	24	49	10	18	5	34	144
Sept. 1990	4	13	51	10	19	6	34	137
Oct. 1990	2	7	60	31	14	5	20	139
Nov. 1990	8	7	64	9	18	9	34	149
Dec. 1990	5	6	35	0	15	0	48	109
Jan. 1991	7	8	54	7	25	1	45	147
Feb. 1991	3	10	32	5	22	0	29	101
Mar. 1991	4	4	49	11	25	2	31	126
Apr. 1991	3	9	62	7	25	3	39	148
May 1991	3	11	57	10	17	2	35	135
June 1991	3	8	51	6	15	2	23	108
TOTALS	53	116	599	113	244	38	400	1,563*

*Total number of cases filed in the Pro Se Office for the statistical year. There were 1,306 cases filed in the July 1989-June 1990 period.

EXHIBIT IV-4

IV. Differential Treatment, Petrial Process and Complex Cases

K. Special Case Management Techniques for Complex Cases

3. RICO Case Statement

Two Proposed RICO Case Statements
(Page 84, Report)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

:

Plaintiff :

- against - : ORDER

:

Defendant :

----------x

Plaintiff has brought a claim under the Racketeer Influenced and Corrupt Organizations Act ("R.I.C.O."). If the R.I.C.O. claim herein is to be pursued, plaintiff shall serve and file, within thirty (30) days from the date of this Order, a R.I.C.O. case statement. This statement shall include the facts plaintiff is relying upon to initiate the R.I.C.O. claim as a result of the "reasonable inquiry" required by Rule 11, Fed. R. Civ. P. In particular, this statement shall be in a form which uses the numbers and letters set forth below, and shall state in detail and with specificity the following information:

1. Whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. A list of each defendant and a statement of the alleged misconduct and basis of liability of each defendant.

3. A list of the alleged wrongdoers, other than the defendants listed above and the alleged misconduct of each wrongdoer.

6. A detailed description of the alleged enterprise for each R.I.C.O. claim. A description of the enterprise shall include the following information:

a. The names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. A description of the structure, purpose, function and course of conduct of the enterprise;

c. Whether any defendant is an employee, officer or director of the alleged enterprise;

d. Whether any defendant is associated with the alleged enterprise;

e. Whether the defendant is an individual or entity separate from the alleged enterprise;

f. If any defendant is alleged to be the enterprise itself, or a member of the enterprise, explain whether such defendant is a perpetrator, passive instrument, or victim of the alleged racketeering activity.

7. A description of the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

8. A description of the benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

9. A description of the effect of the activities of the enterprise on interstate or foreign commerce.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SWIG WIEL[redacted] and ARNOW MANAGEMENT CO

Plaintiffs,

- against -

JEFFREY STAHL, LEWIS STAHL, PRIMO CONSTRUCTION, INC. and JOHN DOES

Defendants.

89 Civ. 2290 (MGC)

ORDER

Cedarbaum, J.

In this action, claims have been asserted under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961. The complaint has been amended twice without sufficient particularity under Fed. R. Civ. P. 9(b). In order to facilitate compliance with Rule 9(b), it is hereby ordered that the plaintiff shall file, within twenty (20) days hereof, a RICO case statement. This statement shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Fed. R. Civ. P. 11. In particular, this statement shall be in a form which uses the numbers and letters as set forth below, and shall state in detail and with specificity the following information.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the court in processing your RICO claim.

SO ORDERED.

Dated: New York, New York
November 21, 1989

Miriam Goldman Cedarbaum

MIRIAM GOLDMAN CEDARBAUM
UNITED STATES DISTRICT JUDGE

IV. Differential Treatment, Petrial Process and Complex Cases

N. Case Management Techniques for Prisoner and Pro Se Cases

2. Standard Discovery in Pro Se Prisoner Cases

Standard Interrogatories and Document Requests for Use in Prisoner Cases
(Page 93, Report)

- - - - - - - - - - - x
:
: PLAINTIFF'S FIRST
: SET OF INTERROGATORIES
: AND REQUESTS FOR
: PRODUCTION OF DOCUMENTS
:
- - - - - - - - - - - x

Pursuant to Fed. R. Civ. P. 33 and 34, the plaintiff hereby requests that the defendants answer, under oath, the following interrogatories, and produce copies of the following documents, within 45 days of the service of the complaint in this action, at the plaintiff's current address and at the United States Courthouse, Pro Se Office, 40 Centre Street, Room 41, New York, N.Y. 10007.

DEFINITIONS

1. "Incident" refers to the event or events described in the Complaint. If the Complaint alleges due process violations in the course of prison disciplinary proceedings, "Incident" refers to the event or events that gave rise to the disciplinary proceedings.

2. "Department" refers to the Department of Correction of the City of New York, or the New York State Department of Correctional Services, or any other police or governmental entity that had custody of the Plaintiff at the time of the Incident.

3. "Facility" refers to the correctional facility or other institution where the Incident occurred.

2. Identify all Department employees who were assigned to work in the area where the Incident occurred on the date of the Incident at or around the time of the Incident, and for each state:

(i) each assignment, post or location during the Incident;

(ii) the name and date of any reports or other documents prepared by the person regarding the Incident.

3. Identify all persons other than Department employees who participated in, witnessed or have knowledge of the Incident, and for each provide:

(i) each assignment or location during the Incident;

(ii) the author, transcriber and date of any written statements prepared by or taken from the person regarding the Incident.

4. If any person received medical treatment as a result of the Incident, identify all medical care providers assigned to work in the Facility clinic on the date of the Incident, and for each provide the name and date of any reports or other writings prepared by the person regarding the Incident or regarding the treatment of any person involved in the Incident.

5. Identify all employment-related actions, whether administrative, civil or criminal, to which any Defendant has been a party, and for each state:

(i) the agency or court in which the action was filed;

injury to inmate reports, Inspector General or Internal Affairs Division investigative files, Board or Commissioner of Correction inquiries or reports, Watch Commanders Log entries, Facility Control Post Log entries, misbehavior reports, disciplinary hearing record sheet, hearing transcript, disposition sheet, notices of appeal and supporting documents, decisions on appeal, and submissions and decisions in any Article 78 proceeding.

3. From any log, chart, schedule or other document maintained in the area of the Incident, produce all entries made on the date of the Incident.

4. Produce from the Plaintiff's inmate file all documents relating to the Incident and all documents relating to any occasion in which Plaintiff was subject to discipline.

5. Produce from each Defendant's personnel file, disciplinary records and notices of interviews with the Inspector General or Internal Affairs Division.

6. Produce all files of the Inspector General or Internal Affairs Division regarding all investigations into Defendants' conduct.

7. If Plaintiff alleges physical injury produce records of all medical treatment provided to the Plaintiff while he was in the custody of the Department.

8. If any defendant claims to have been physically injured in the Incident, produce all records of

EXHIBIT V-1

V. Discovery Practices in the Court

E. Summary of Discovery Abuse and Misuse as Reported in the Case Law of the Southern District

1. Abuse and Misuse of Discovery as Reported in the Case Law of the Southern District

Abuse and Misuse of Discovery as Reported in the Case Law of the Southern District
(Page 105, Report)

V. Discovery Practices in the Court

E. Summary of Discovery Abuse and Misuse as Reported in the Case Law of the Southern District

1. Abuse and Misuse of Discovery as Reported in the Case Law of the Southern District

A survey in the courts of the Southern District and an examination of the one hundred most recent cases regarding discovery disputes reveal a variety of misconduct, much of which is defined by the courts as "abusive." Although most disputes are settled without written opinion, and few warrant review in the appellate court, some examples of the most common kinds of discovery abuse are in the public domain. Therefore, examples of some types of common abuse or misuse are drawn from other districts, or from older cases, such as the IBM case. United States v. International Business Machines Corp., 76 F.R.D. 97 (S.D.N.Y. 1977). The IBM case, however, has no monopoly on misused discovery. Nor are all discovery disputes the result of attorney misconduct. Though reported through the filter of the judiciary, at least some of these cases reveal overwhelmed and perhaps uninterested judges overseeing inefficient discovery practices that seem impervious to intervention. Rules are unevenly and unpredictably applied to parties who range from the confused

of those who commented agreed that interrogatories routinely seek information which could be more readily obtained through other discovery methods. Id. at 19.

In one example, counsel's request for 8,000 pages of statistical data that could only be interpreted by an expert was found to be abusive when counsel had no intention of hiring the necessary expert to undertake the statistical analysis. Sanctions were awarded. Greenberg v. Hilton International Co., 870 F.2d 926 (2d Cir. 1989); see also Scott v. Dime Savings Bank of New York, 1989 WL 140,286 (S.D.N.Y. 1989) (no official cite) (pro se plaintiff's document request was held to be overbroad, vast and unreasonable; plaintiff's demand to depose defendant's chief executive officer at home or to designate which of defendant corporation's officers would be deposed was denied); Sumitomo Electric Industries, Ltd. v. Corning Glass Works, 1988 WL 137,692 (S.D.N.Y. 1988) (no official cite) (discovery was allegedly used as a means to gather information for future lawsuits, or as a tactic of harassment); O'Brien v. Lane Bryant, Inc., 1987 WL 6914 (S.D.N.Y. 1987) (Tyler, Magistrate Judge) (no official cite) (overbroad interrogatory requests were held to be more openly within the ambit of depositions).

b. Failure to Produce Documents or Failure to Produce Documents as Organized

Failure to produce documents is another common complaint brought to the court's attention. See, e.g., Apex

1977) (Edelstein, J.) (Memorandum and Order); Xerox Corp. v. International Business Machines Corp., 399 F. Supp. 451 (S.D.N.Y. 1975) (Edelstein, J.).

Another form of failing to produce documents is failing to produce documents as organized. Rule 34(b) of the Federal Rules requires a party to produce documents in response to a request for production "as they are kept in the usual course of business or [to] organize and label them to correspond with the categories in the request." Sixty-two percent of New York State attorneys agreed or strongly agreed with the proposition that documents provided in response to written requests are seldom produced in an organized fashion. 1988 Report at 18. This, of course, adds greatly to the time it takes the party receiving the documents to analyze them, further delaying litigation.

c. Failure to Respond to Interrogatories

Parties' failures to respond to interrogatories, even following court orders to do so, are a fixture of abusive discovery practice in the district. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980) (sanctions imposed upon lawyers who failed to respond to court-ordered interrogatories and who failed to timely brief

F.R.D. 75 (S.D.N.Y. 1988) (party's insistence on deposing witnesses in London without good reason was abusive and grounds for sanctions).

e. Failure to Produce Witnesses

Parties also abuse discovery by failing to produce witnesses at scheduled depositions. See, e.g., Baker v. Ace Advertisers' Service, Inc., 134 F.R.D. 65 (S.D.N.Y. 1991); Dreieck Finanz A.G. v. Sun, 1990 WL 48,071 (S.D.N.Y. 1990) (no official cite); Mill-Run Tours, Inc. v. Khashoggi, 124 F.R.D. 547 (S.D.N.Y. 1989) (Francis, Magistrate Judge).

f. Failure to Answer Questions at Depositions

Attorneys may abuse the discovery process by improperly instructing a witness not to answer deposition questions. (Fifty-six percent of New York State attorneys agreed or strongly agreed that counsel defending depositions often obstruct the deposition's course. 1988 Report at 16.) When this behavior is continued following a magistrate judge's instructions to answer, it may result in sanctions if done without a good faith belief in their propriety. Sargent v. Samsonite Furniture Co., 1987 WL 15,641 (E.D.N.Y. 1987) (no official cite); see also Werbungs Und Commerz Union

h. Amendments to Pleadings

Parties often seek to expand their discovery by amending their pleadings. This process can greatly delay the completion of discovery. Courts have occasionally viewed this process as an abuse of discovery.

i. Repeated Amendments

Repeated attempts to amend pleadings have been denied when the intent was dilatory. Absent good faith or declared good reason, evidence of undue delay or bad faith on the part of the movant, or evidence of movant's repeated failure to cure deficiencies by amendments previously allowed, may signal the court that a requested amendment will unduly prejudice the opposing party. Fomin v. Davis, 371 U.S. 178, 182 (1962) (granting leave), citing FRCP 15(a).

j. Delayed Amendments

A delay in amending pleadings can also delay discovery. The timing of a motion to amend may be important inasmuch as it relates to defendant's charge of dilatory motive and its questioning of plaintiff's good faith. United States v. International Business Machines Corp., 1975 WL 837 (S.D.N.Y. Jan. 8, 1975).

Corp., 882 F.2d 682 (2d Cir. 1989) (plaintiff and attorney sanctioned with joint and several liability including attorney's fees) (Hoar I); aff'd on rehearing, 900 F.2d 522 (2d Cir. 1990) (Hoar II). [See also infra, III(G)3.]

ii. Court-Offered Choice of Remedies

When defendants were shown to have engaged in vexatious and misleading pretrial discovery, the court offered plaintiffs a choice of remedies following a verdict for the defendants: either the amount of damages would be reduced by approximately one-half, or the verdict would stand but a new trial would be held and sanctions and costs would be levied. Werbungs Und Commerz Union Austalt v. Collectors Guild Ltd., 728 F. Supp. 975 (S.D.N.Y. 1989). [See also infra. § III(G)2.]

iii. Hearing Regarding Contribution

Prior to the imposition of sanctions on counsel for vexatious discovery abuse, counsel was entitled to a hearing to establish whether party ought to contribute. Imperial Chemical Industries, Plc. v. Barr Laboratories, Inc., 126 F.R.D. 467 (S.D.N.Y. 1989) (Lee, Magistrate Judge).

Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958). The 1970 amendment to Rule 37, deleting the term "willfully," has not changed the Societe Internationale requirements. The Court concluded that before imposing the sanction of dismissal, a trial court must find some willfulness, bad faith or fault when a party fails to comply with an order compelling discovery. Simultaneously, the trial court must be convinced that the failure to comply was not due to any inability or accident. Applying the test and finding willfulness, bad faith, and fault, Judge Sweet held that an action was subject to dismissal for failure to comply with a discovery order, and that the action was also subject to dismissal under Rule 11. Murray v. Dominick Corp. of Canada, Ltd., 117 F.R.D. 512 (S.D.N.Y. 1987).

d. Default

Under Rule 37(b)(2)(c), default is limited to cases involving willfulness, bad faith, or fault on the part of the non-complying party. Societe Internationale Pour Participations Industrielles et Commerciales, S.P.A. v. Rogers, 357 U.S. 197, 212 (1958). Since Societe Internationale, the Second Circuit has held that gross negligence qualifies as "fault" under this doctrine. Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1065-66 (2d Cir. 1979).

V. Discovery Practices in the Court

E. Summary of Discovery Abuse and Misuse as Reported in the Case Law of the Southern District

2. Standing Orders on Effective Discovery in Civil Cases -- Eastern District

Standing Orders on Effective Discovery in Civil Cases -- Eastern District

appeal or appearing in the proceeding on remand. Upon request of the *pro se* party the attorney shall file the notice of appeal. Such advise shall include available sources of appointed counsel, including but not limited to the panel for appellate representation of indigent parties before the United States Court of Appeals for the Second Circuit.

9. Educational Panels.

(a) The court shall authorize the establishment of panels of attorneys and others experienced in the preparation and trial of the most common types of civil actions involving *pro se* parties brought before the court (e.g., social security appeals, employment discrimination actions, civil rights actions, habeas corpus actions).

(b) The educational panels are authorized to conduct educational programs for attorneys on the Civil Pro Bono Panel to train and assist said attorneys in the preparation and trial of the most common types of civil actions involving *pro se* parties brought before the court.

(c) The clerk is authorized to maintain a list of attorneys experienced in the preparation and trial of the most common types of civil actions involving *pro se* parties brought before the court, whether or not such attorneys serve on an educational panel or the Pro Bono Panel. The clerk shall obtain the prior consent of the attorneys to their inclusion on such lists. Such attorneys may be consulted by attorneys on the Civil Pro Bono Panel as necessary and appropriate.

APPENDIX B. STANDING ORDERS ON EFFECTIVE DISCOVERY IN CIVIL CASES—EASTERN DISTRICT

Subject to the power of any judge or magistrate to rule otherwise for good cause shown, the following are adopted as Standing Orders of this Court:

I. GENERAL PROVISIONS

1. Cooperation Among Counsel. Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures.

2. Stipulations. Unless contrary to a prior order of the court entered specifically in the action, the parties and when appropriate a non-party witness may stipulate in any suitable writing to alter, amend or modify any practice with respect to discovery.

II. JUDICIAL INTERVENTION

3. (a) *Scheduling Conference.* Promptly after joinder of issue, but in any event as soon as practicable and reasonably before the expiration of the 120 day period provided by Fed. R. Civ. P. 16(b), the judge shall determine whether the judge or the magistrate shall deal with the scheduling order, and if the magistrate, the judge shall make a suitable reference.

(b) *Scheduling Order.* Prior to any scheduling conference, the attorneys for the parties shall attempt to agree to a scheduling order and if agreed to, shall submit it to the court. If such scheduling order is reasonable, the court will approve it and advise counsel. The court may for any reason convene a conference with counsel by telephone or otherwise to clarify or modify the scheduling order agreed to by counsel. If the attorneys for the parties cannot agree on a scheduling order, they shall promptly advise the court.

4. Reference to Magistrate.

(a) *Selection of Magistrate.* A magistrate shall be assigned to each case at random on a rotating basis upon the commencement of the action, except in those categories of actions set forth in Civil Rule 45 of this Court. A magistrate so assigned shall take no action with respect to any matter until a suitable order of reference is received.

(b) *Scope of Reference.* At the time the judge determines whether the judge or the magistrate shall deal with the scheduling order, the judge shall determine whether discovery matters shall be referred to the magistrate and the scope of such reference. The judge may at any time enlarge or diminish the scope of any reference to the magistrate.

(c) *Orders of Reference.* The attorneys for the parties shall be provided with copies of all orders referring a matter to the magistrate, the scope of such reference, and any enlargement or diminution thereof.

5. Review of Magistrate's Rulings.

(a) *Procedure.* A party may make application to the judge to review a ruling of the magistrate on a discovery matter pursuant to Fed. R. Civ. P. 72(a). Such application shall be made by short-form notice of motion as appears in Form A, delineating the scope of the issues to be reviewed by the judge.

(a) Where an officer, director or managing agent of a corporation or a government official is served with a notice of deposition or subpoena regarding a matter about which he or she has no knowledge, he or she may submit reasonably before the date noticed for the deposition an affidavit to the noticing party so stating and identifying a person within the corporation or government entity having knowledge of the subject matter involved in the pending action.

(b) The noticing party may, notwithstanding such affidavit of the noticed witness, proceed with the deposition, subject to the witness' right to seek a protective order.

11. **Directions Not to Answer.**

(a) Repeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should.

(b) Where a direction not to answer such a question is given and honored by the witness, either party may seek a ruling as to the validity of such direction.

(c) If a prompt ruling cannot be obtained, the direction not to answer may stand and the deposition should continue until (1) a ruling is obtained or (2) the problem resolves itself.

12. **Suggestive Objections.** If the objection to a question is one that can be obviated or removed if presented at the time, the proper objection is "objection to the form of the question." If the objection is on the ground of privilege, the privilege shall be stated and established as provided in Standing Order 21. If the objection is on another ground, the objection is "objection." Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper.

13. **Conferences Between Deponent and Defending Attorney.** An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted.

14. **Document Production at Depositions.** Consistent with the requirements of Fed. R. Civ. P. 30 and 34, a party seeking production of documents of another party in connection with a deposition should schedule the deposition to allow for the production of the documents in advance of the deposition. If requested documents which are discoverable are not produced prior to the deposition, the party noticing the deposition may either adjourn the deposition until after such documents are produced or, without waving the right to have access to the documents, may proceed with the deposition.

IV. INTERROGATORIES

15. **Form Interrogatories.** Attorneys serving interrogatories shall have reviewed them to ascertain that they are applicable to the facts and contentions of the particular case. Interrogatories which are not directed to the facts and contentions of the particular case shall not be used.

16. **Interrogatories Shall Be Drafted and Read Reasonably.**

(a) Interrogatories shall be drafted reasonably, clearly and concisely, be limited to matters discoverable pursuant to Fed. R. Civ. P. 26(b), and shall not be duplicative or repetitious.

(b) Interrogatories shall be read reasonably in the recognition that the attorney serving them generally does not have the information being sought and the attorney receiving them generally does have such information or can obtain it from the client.

17. **Responses to Interrogatories.** Each interrogatory and each part thereof shall be answered separately and fully to the extent no objection is made. No part of an interrogatory shall be left unanswered merely because an objection is interposed to another part of that interrogatory.

V. REQUESTS FOR DOCUMENTS

18. **Form Requests For Documents.** Attorneys requesting documents pursuant to Fed. R. Civ. P. 34 and 45 shall have reviewed the request or subpoena to ascertain that it is applicable to the facts and contentions of the particular case. A request or subpoena which is not directed to the facts and contentions of the particular case shall not be used.

19. **Requests for Documents and Subpoenas Duces Tecum Shall Be Drafted and Read Reasonably.**

(a) Requests for documents and subpoenas *duces tecum* shall be drafted reasonably, clearly and concisely and be limited to documents discoverable pursuant to Fed. R. Civ. P. 26(b).

(b) A request for documents or subpoena *duces tecum* shall be read reasonably in the recognition that the attorney serving it generally does not have knowledge of the documents being sought and the attorney receiving the request or subpoena generally does have such knowledge or can obtain it from the client.

VI. OTHER

20. **Discovery of Experts.** After completion of fact discovery and within a reasonable period but in no event less than thirty days prior to the time for completion of all discovery, each party, if requested pursuant to Fed. R. Civ. P. 26(b)(4), shall identify each person the party expects to call as an expert witness at trial and shall state the subject matter

REFERRAL ORDER

_____x CV_____

The civil case hereinabove set forth is referred to Magistrate _____ [ ] for the following pre-trial purposes:

_____ All of the following:

or

Those purposes indicated below:

_____ 1. To enter the scheduling order provided for in F.R.Civ.P. 16(b);

_____ 2. To consider holding a discovery conference and entering the related order provided for in F.R.Civ.P. 26(f);

_____ 3. To hear and determine any disputes arising from discovery;

_____ 4. To hear and determine any other pre-trial matters to the extent allowed by 28 U.S.C. § 636(b)(1)(A);

_____ 5. To consider the possibility, if any, of settlement and to assist therewith as may be appropriate;

_____ 6. To prepare a pre-trial order where such order seems indicated;

_____ 7. To schedule an appropriate trial date, in consultation with the chambers of the undersigned;

_____ 8. To file a report with the undersigned within 120 days [ ] as to the status of the case, in the event the tasks set forth above are not then completed.

_____ 9. _____

_____

_____ 10. _____

_____

SO ORDERED.

_____

U.S.D.J.

Dated: Brooklyn, New York

, 19__

APPENDIX C. PLAN FOR COURT-ANNEXED ARBITRATION—EASTERN DISTRICT

1. LOCAL ARBITRATION RULE

Section 1. Certification of Arbitrators.

A. The Chief Judge or a judge or judges authorized by the Chief Judge to act (hereafter referred to as the certifying judge) shall certify as many arbitrators as may be determined to be necessary under this rule.

B. An individual may be certified to serve as an arbitrator if he or she: (1) has been for at least five years a member of the bar of the highest court of a state or the District of Columbia, (2) is admitted to practice before this court, and (3) is determined by the certifying judge to be competent to perform the duties of an arbitrator.

C. Each individual certified as an arbitrator shall take the oath or affirmation required by Title 28, U.S.C. § 453 before serving as an arbitrator.

D. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

Section 2. Compensation and Expenses of Arbitrators.

An arbitrator shall be compensated $75.00 for service in each case assigned for arbitration. If the parties agree to arbitration before a single arbitrator, the single arbitrator shall be compensated $225.00 for services. If an arbitration hearing is protracted, the certifying judge may entertain a petition for additional compensation. The fees shall be paid by or pursuant to the order of the Court subject to the limits set by the Judicial Conference of the United States.

Section 3. Civil Cases Eligible for Compulsory Arbitration.

A. The Clerk of Court shall, as to all cases filed after January 1, 1986, designate and process for compulsory arbitration all civil cases (excluding social security cases, tax matters, prisoners' civil rights cases and any action based on an alleged violation of a right secured by the Constitution of the United States or if jurisdiction is based in whole or in part on Title 28, U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of $75,000.00 exclusive of interest and costs.

B. The parties may by written stipulation agree that the Clerk of Court shall designate and process for compulsory arbitration any civil case wherein money damages only are being sought in an amount in excess of $75,000.00 exclusive of interest and costs.

C. For purposes of this Rule only, in all civil cases damages shall be presumed to be not in excess of $75,000.00 exclusive of interests and costs, unless:

(1) Counsel for plaintiff, at the time of filing the complaint, or in the event of the removal of a case from state court or transfer of a case from another district to this court, within thirty (30) days of the docketing of the case in this district, files a certification with the court that the dam-

EXHIBIT V-3

V. Discovery Practices in the Court

H. Summary of Scholarly Analyses of Proposed Solutions

Summary of Scholarly Analyses of Proposed Solutions

H. Summary of Scholarly Analyses of Proposed Solutions

1. Judicial Control

The solution suggested most commonly to the problem of abused or misused discovery is greater judicial control of pretrial proceedings. Rule 16 of the Federal Rules was substantially amended in 1983 to encourage such control, permitting "a process of judicial management that embraces the entire pretrial phase, especially motions and discovery." FRCP 16 (Advisory Committee Notes, 1983 amendment), reprinted in 97 F.R.D. 165, 207. Involvement by the judge in the discovery process, it is argued, will save him time in the long run. Most attorneys agree: among attorneys in New York State, 90% favor procedures allowing them to raise discovery disputes by a short letter to the court, and 80% would favor a procedure whereby judges or magistrates would be available by telephone. 1988 Report at 26-27; see infra § IV(B). Robert T. Berendt, associate general counsel for litigation at Monsanto Co. in St. Louis, notes that many detached judges do not grapple with discovery problems. "Judges' failure to involve themselves in discovery leads to more instances of discovery abuse" down the road. 5 Inside Litigation 21 (May 1991). Most scholars

particularly troublesome, and that deposition guidelines ought be promulgated. 1988 Report at 27.

Judge Pollack, while conceding that discovery is not abused in most cases, notes that those cases in which discovery abuse does occur predominate in demanding judicial attention. Judge Pollack writes that changing the language of the Rules would not be sufficient to hamper discovery abuse, and recommends instead greater judicial oversight: "[the] more promising possibility to stop runaway discovery or obstruction of legitimate inquiry is to rein in the runaway, and use bridle and spurs effectively; that is, judicial control by the judge who will have to try the controversy and deal with the product of the discovery if and when presented at the trial." Pollack at 223.

Judge Pollack suggests that the trial judge meet with the trial lawyers shortly after the pleadings are closed. Id. The judge should then fix a time for compliance with document disclosure, and discuss plans for depositions and establish a plan for the parties to confirm agreements reached amongst themselves. The judge must also ensure that he is regularly available to counsel to mediate those disputes which can be resolved orally. Discovery cutoff dates are appropriate, but should not be completely rigid.

practice is considered a success. In the Southern District, 90% percent of judges participating in the Survey reported using magistrates for discovery, and most parties agree that their supervision helps facilitate the speedier progress of discovery and other pretrial matters. Since 1968, when commissioners were replaced by magistrates, each federal court has had the power to assign responsibility for discovery oversight; in the Eastern District of New York, the court had expanded from six authorized judges and no magistrates in 1938 to twelve authorized judges, four senior judges, and five full-time magistrates in 1988. Weinstein, Wiener, "Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the FRCP," 62 St. John's L. Rev. 429, 430 (1988).

Judge Jack B. Weinstein approves of the changes. "Some management of discovery is probably necessary; leaving discovery as a game among the parties alone creates incentives for rational but abusive cost-imposing tactics . . . . But with attentive and firm management by a judge or magistrate, it is my experience and belief that almost all discovery abuse can be controlled or prevented . . . The federal magistrate can be extraordinarily useful in supervising civil discovery. In my district, we typically

who decries the "ad hoc versions of specialized rules" which have replaced what she calls "trans-substantive" or "global" rule making. (The Report of the Committee on Federal Courts of the New York State Bar Association refers to this as the "balkanization" of federal practice. 1988 Report at 30.) Silberman, "Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure," 137 U. Pa. L. Rev. 2131 (1989). Silverman writes that the use of masters and magistrate judges is one example of such ad hoc proceduralism, as these masters "customize procedure for particular and individual cases." Id. While conceding that their use has been helpful, Silberman argues that a revision of the procedural code is nonetheless necessary. "In short, I think delegations of judicial power to masters and magistrates have become the substitute [or a more precise and specialized procedural for 'trans-substantive'] code, [which I advocate]." Id. at 2132.

Silberman suggests that the delegation of case management functions itself may create an incentive for expansion of the pretrial phase of litigation, and an additional danger comes with layering the pretrial phases with magistrate judges' and masters' decisions requiring further review by the district judge. She warns that "special masters may represent an even greater threat to the

in the "volume of case dispositions . . . improved techniques for factfinding [rather than the substantive law in general or the merits of a particular case] has become the be-all and end-all of many within the federal judiciary." Resnik, "Failing Faith: Adjudicatory Procedure in Decline," 53 U. Chi. L. Rev. 494, 534 (1986).

3. Local Rules

Magistrate judges and special masters are only one aspect of the problem of multiple discovery rules. Most individual judges promulgate rules which they believe fill gaps created by either the federal or district rules. Like all courts created by Congress, federal district courts are authorized by statute to adopt local rules to manage and conduct their business. 28 U.S.C. § 2071; FRCP 83; Fed. R. Crim. P. 57. The Local Rules Project of the United States Judicial Conference has recently identified about 5,000 rules of the 94 federal district courts; numerous subrules and standing orders fill other procedural gaps. Duane, "Local Rules in Ambush," 17 Litigation 33 (Spring 1991). The variety is daunting to most, and may confuse the unwary.

cause and effect relationship between the two. Amendments to the rules which limit the permissible scope of discovery and broaden the scope of available sanctions will have the effect of changing district judges' attitudes towards discovery abuse. Conversely, it is perhaps the hesitancy on the part of district judges to impose sanctions which has led to some of the amendment[s]." Porter, "Discovery Abuse: Interrogatories, Sanctions, and Two Proposals to the Federal Rules Which Were Not Adopted," Forum 482, 487 (1981).

4. Limiting Interrogatories

Many jurisdictions both limit the number and prescribe the scope of interrogatories. Nevertheless, interrogatories are a favorite tool of discovery abusers. "The use of canned interrogatories (sometimes even submitted to an opponent in computer printout form with blanks filled in to tailor them to the particular case) has been largely abolished in those jurisdictions." Sherman, Kinnard, "Federal Court Discovery in the '80's -- Making the Rules Work," 95 F.R.D. 245, 264. In New York State, slightly more than half of attorneys surveyed support some numerical limitation on interrogatories, although 37% disagreed. 1988 Report at 21. One district court (N.D. Ill.) forbids

discovery conferences and schedules to give direction to discovery and obtain cooperations among the parties offers a better solution to interrogatory abuse." Id. at 295.

5. New Courts

Several states, including Massachusetts, Pennsylvania and Texas, have proposed legislation calling for specialized courts that would hear only complex business cases, and would have specialized rules of discovery to prevent the types of abuse frequently associated with such cases. 5 Inside Litigation 20 (May 1991). Proposals have included the use of form interrogatories, pre-scheduled conferences following a pre-determined schedule, and examiners and magistrates with business expertise and experience acting under the supervision of judges who would be specially assigned to a complex business case part. Id.

6. Notice Pleading

Suggestions to amend the FRCP to require preliminary issue pleading before discovery are raised but typically rejected. Becker, "Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound

that a case which embarks on the discovery process has already been screened either by defendant's counsel or by a judicial determination as one in which facts yet to be determined may result in a verdict for the plaintiff. Rule 11 sanctions, however, are a critical component of any contemporary review of the discovery process. The 1983 amendments to Rule 11 envisioned it as a powerful tool against abusive lawsuits. Rule 11 does nothing, though, to prevent the misuse of discovery in a case brought in good faith. Most commentators agree that screening procedures are inadequate to prevent the kind and magnitude of discovery abuse described herein. See, e.g., Louis, "Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the FRCP" 67 N.C.L. Rev. 1023, 1033 (1989).

Sanctions are the most frequently employed and most heatedly debated method for addressing the professional improprieties of pretrial practice. Federal Rule of Civil Procedure 11 ("Rule 11" or the "Rule") sanctions punish attorneys (and sometimes clients) for failure to make reasonable investigations of facts or law (while no longer requiring a showing of bad faith), and invest the courts

(Sanctions may include an order to pay the amount of the reasonable expenses incurred because of the violation, including attorneys' fees.) Rule 11's parallel requirements (governing motions relating to discovery) similarly mandate that every pleading, motion, and other paper of a party represented by an attorney be signed by at least one attorney of record in the attorney's individual name, who is then accountable for its contents based on an objective standard of reasonableness.

Former Judge Abraham D. Sofaer believes that discretionary monetary sanctions for discovery abuse are quite useful, for unlike non-monetary sanctions, monetary sanctions do not affect the merits of the case. Sofaer, "Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment," 57 St. John's L. Rev. 680, 698 (1983). (This may not be correct. Oftentimes, the so-called "merits" of a case are merely a calculation wherein the likelihood of recovery is simply contrasted to the cost. Monetary sanctions may therefore very much impact the so-called "merits" of a case.) Sofaer lists other advantages of monetary sanctions: monetary sanctions subject the judge imposing them to less scrutiny, since the sanctions are not subject to immediate appeal, and

> stated . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The 1983 amendment 1) substituted an objective standard of reasonableness for the previous subjective "good faith" test; 2) imposed on counsel a duty of reasonable pre-filing investigation of both the facts and the law bearing on the filed papers; and 3) mandated sanctions for a violation of the rule. Amendments to Rules, 97 F.R.D. 165, 198 (Advisory Committee Note, 1983); see Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750 (7th Cir. 1988) (regarding the mandatory nature of sanctions).

A divided Supreme Court recently held that Rule 11 applies to a party who signs a pleading, motion, or other paper (including affidavits) even though represented by

United States, attorneys' fees, referral to attorney disciplinary authorities, entry of preclusion, dismissal or default orders, enjoining future access to courts, and suspension or disbarment from practice. Cole, "Rule 11 Now," 17 Litigation 13 (Spring 1991); see also Figueroa-Ruiz v. Alegria, 905 F.2d 545, 549 (1st Cir. 1990); Traina v. United States, 911 F.2d 1155 (5th Cir. 1990); Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) (en banc); supra, § 11(E). Although attorneys' fees are the sanction of choice, the deterrent purpose of Rule 11 requires no "match" between the sanction and the damage done. Cooter & Gell v. Hartmarx Corp., ___ U.S. ___, 110 L. Ed. 2d 359, 374 (1990) (purpose of Rule 11 is sanction, not reimbursement); Samuels v. Wilder, 906 F.2d 272, 276 (7th Cir. 1990) (no entitlement to perfect match).

c. Standards

Where a party represented by an attorney is the target of a Rule 11 motion, the subjective good faith test applies; a showing of bad faith is not required where conduct of counsel is at issue. Greenberg v. Hilton International Co., 870 F.2d 926 (2d Cir. 1989).

who turn to the courts for the vindication of their rights." Renfrew, "Discovery Sanctions: A Judicial Perspective," 67 Calif. L. Rev. 264, 267 (March 1979); see also Renfrew, "Discovery Sanctions: A Judicial Perspective," 2 Review of Litigation 71 (1981). Former judge Renfrew believes that sanctions are underutilized not because of unavailability but because the courts are themselves hesitant. He cites several reasons why judges are unwilling to impose sanctions:

- Lawyers are unwilling to seek sanctions, possibly out of a sense that by not objecting to other attorneys' abuse they leave open the door for their own.

- Judges do not wish to punish the client for his attorney's mistakes. Renfrew advises that this may be avoided by imposing monetary sanctions directly on the attorney and by prohibiting the attorney from passing on the cost. The client could also recover damages through a legal malpractice suit. The threat of sanctions may then lead attorneys to exercise a greater level of care.

- Judges forget that the goal of sanctions is deterrence, which requires a willingness to impose strong penalties. If courts begin to impose sanctions, litigants and lawyers willing to engage in questionable tactics will reevaluate their approach to litigation.

- Not all judges fully realize that the number and complexity of federal cases has greatly increased and that the courts can no longer tolerate professional misconduct of any sort.

- Judges are concerned about using sanctions that limit or deny the opportunity for a hearing on the merits of a party's lawsuit. Renfrew argues that though this is an important point, it must be balanced against other concerns, including the right of the other side to have a prompt and inexpensive determination of their substantive rights.

Litigation Abuse 6-7 (1989). "The rule embodies the view that the quality of practice in the federal courts has so deteriorated that merely requiring good faith from lawyers and litigants is inadequate to protect the system from abuse." Cole, "Rule 11 Now," 17 Litigation 11 (Spring 1991).

Some critics suggest that Rule 11 stifles creativity and proscribes the zeal necessary to effective advocacy; others argue that sanctions are unevenly and unpredictably applied. One critic has noted the potential effect on premature or improper settlements: "In a small percentage of cases, discovery sanctions may cause the decision to rest partially on some basis other than the merits." Kilgarlin, Jackson, "Sanctions for Discovery Abuse Under New Rule 215," 15 St. Mary's L.J. 767, 820 (1984). They caution, however, that "a litigant who avails himself of the court system to assert or defend his rights and then flaunts its rules invites sanctions." Id. Nevertheless, the New York State Bar Association (the "Bar Association") has recommended that Rule 11 be amended. The Bar Association's recommendations included an amendment to confirm the propriety of non-monetary sanctions and an amendment to the rules of professional responsibility to clarify that where sanctions are imposed against an attorney, reimbursement by the client

EXHIBIT VI-1

VI. Alternative Dispute Resolution

Proposed Local Rule for Mandatory Court-Annexed Arbitration
(Page 137-38, Report)

PROPOSED LOCAL RULE FOR MANDATORY COURT-ANNEXED ARBITRATION

A. Certification of Arbitrators

1. The Chief Judge shall certify as many arbitrators as determined to be necessary under this rule.

2. An individual may be certified to serve as an arbitrator if he or she: (a) has been for at least five years a member of the bar of any state or the District of Columbia; (b) is admitted to practice before this court; and (c) is certified by the Chief Judge to be competent to perform the duties of an arbitrator.

3. Each individual certified as an arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as an arbitrator.

4. Each individual certified as an arbitrator shall agree to serve without compensation in any case referred to arbitration under this rule in which one of the parties is appearing *in forma pauperis*.

5. A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

B. Compensation of Arbitrators

1. Arbitrators shall be compensated at the rate of $225.00 per case if serving alone, or $75.00 per case if serving on a panel of three, except for cases in which one of the parties is appearing *in forma pauperis* where there shall be no compensation. In the event that the arbitration hearing is protracted, the court will entertain a petition for additional compensation. If no party files a timely demand for *de novo* trial, the arbitration fees shall be deposited with the Clerk by the losing party or parties within ten (10) days of the entry of judgment, and the clerk shall promptly distribute the fees to the arbitrator(s). If any party timely files a *de novo* demand, that party shall deposit the arbitration fees with the Clerk upon filing the demand, and the Clerk shall promptly distribute the fees to the arbitrator(s). If the party demanding *de novo* trial obtains a more favorable result at trial, then the clerk shall tax the arbitration fees as costs against the other party or parties in order to reimburse this amount to the demanding party.

2. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this rule.

C. Civil Cases Eligible for Referral

1. The Clerk shall designate and process for compulsory arbitration all civil cases (excluding appeals from administrative orders, prisoners' rights cases, any action based on an alleged violation of a right secured by the Constitution of the United States, and any action in which jurisdiction is based in whole or in part on 28 U.S.C. § 1343) wherein money damages only are being sought in an amount not in excess of $100,000, exclusive of interest, costs, fees, and punitive damages.

2. For purposes of this rule only, in all civil cases subject to this rule damages shall be presumed to be not in excess of $100,000, exclusive of interest, costs, fees, and punitive damages, unless:

a. counsel for plaintiff, at the time of filing the complaint, or in the event of removal of a case from state court or transfer of a case from another district to this court, within thirty (30) days of the docketing of the case in this district, files a certification with the court that the damages sought exceed $100,000, exclusive of interest, costs, fees, and punitive damages; or

4. Any party may submit a written request to the Clerk within ten (10) days from the date of the notification of the name(s) of the arbitrator(s) for the disqualification of an arbitrator for bias or prejudice as provided in 28 U.S.C. § 144. A denial of such a request by the Clerk is subject to review by the assigned judge upon motion filed within ten (10) days of the date of the Clerk's denial.

F. Arbitration Hearing

1. The arbitration hearing shall take place in the courthouse at the place and time designated by the Clerk in accordance with this rule. The arbitrator may request that the Clerk adjourn the hearing, provided that the hearing takes place within thirty (30) days of the scheduled date.

2. Counsel for the parties shall report settlement of the case to the Clerk and the arbitrator(s).

3. The arbitration hearing may proceed in the absence of any party who, after notice, fails to be present. However, damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s). In the event that a party fails to attend the hearing or to otherwise participate in the arbitration process in a meaningful manner, the arbitrator(s) shall so advise the assigned judge in writing at the time the arbitration award is filed with the Clerk, but shall not disclose the award to the assigned judge. Within ten (10) days from the date the award is filed, the assigned judge may enter an order imposing appropriate sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

4. Rule 45 of the Federal Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this rule. Testimony at an arbitration hearing shall be under oath or affirmation.

5. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except those intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the hearing. The arbitrator(s) shall receive exhibits in evidence without formal proof unless counsel has been notified at least five (5) days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrator(s) may refuse to receive in evidence any exhibit of which a copy or photograph has not been delivered to the adverse party as provided herein.

6. A party may have a recording or transcript made of the arbitration hearing, but that party shall make all necessary arrangements and bear all expenses thereof. Except as otherwise provided in this rule, no transcript or recording of the arbitration hearing shall be admissible in evidence at any subsequent *de novo* trial of the action.

7. The arbitrator(s) shall be authorized to make reasonable rules consistent with this rule necessary for the fair and efficient conduct of the hearing.

8. If the hearing is before a panel of three arbitrators, the majority of the panel shall be required for any action or decision by the panel.

9. There shall be no *ex parte* communications between the arbitrator(s) and any counsel or party on any matter touching the action except for purposes of scheduling or continuing the hearing.

G. Arbitration Award and Judgment

1. The arbitrator(s) shall file the arbitration award (not in excess of $100,000, exclusive of interest, costs and fees) with the Clerk under seal promptly after the hearing is concluded and shall mail a copy of the

EXHIBIT VI-2

VI. Alternative Dispute Resolution

Proposed Local Rule for
Voluntary ADR Program
(Page 138, Report)

PROPOSED LOCAL RULE FOR VOLUNTARY ADR PROGRAM

A. Materials Provided to Litigants

1. Notification to the parties of an initial pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure shall be accompanied by a copy of this local rule, informational material explaining each of the ADR options available under this rule, and a questionnaire soliciting information about the case relevant to the selection of an appropriate ADR option.

2. The questionnaire shall be completed by counsel and returned to the assigned judge at least ten (10) days prior to the date of the conference.

B. Initial Pre-Trial Conference

1. The assigned judge shall review and discuss the completed questionnaires with counsel at the initial pre-trial conference in order to determine which ADR option would be best suited for the case. If appropriate, the judge shall made a recommendation to the parties to pursue one of the available ADR options.

2. If counsel consent to use the recommended option, or one of the other available ADR options, then counsel shall execute a stipulation consenting to the referral of the case to the voluntary arbitration program and the court shall issue an order directing the clerk to designate the case for the chosen ADR option in accordance with this rule. If ADR fails to result in the resolution of the action, then the case shall be returned to the calendar of the court and treated for all purposes as if it had not been referred to ADR, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

3. If counsel for the parties do not consent to use ADR, then the case shall proceed in the usual manner.

C. Mediators and Evaluators

1. Certification of Mediators and Evaluators. The Chief Judge shall certify as many mediators and evaluators as determined to be necessary under this rule.

2. Minimum Qualifications. An individual may be certified to serve as a mediator or evaluator if he or she: (a) has been for at least five years a member of the bar of any state or the District of Columbia; (b) is admitted to practice before this court; and (c) is certified by the Chief Judge to be competent to perform the duties required.

3. Separate lists of all persons certified as mediators and evaluators shall be maintained by the Clerk. The list of certified evaluators shall indicate each evaluator's area of expertise.

4. Each certified mediator and evaluator shall be required to attend training sessions prior to serving as deemed necessary by the court.

5. Compensation. Each mediator and evaluator shall be compensated at the rate of $75.00 per case. The compensation shall be borne by the parties equally and shall be deposited with the Clerk by the parties within ten (10) days from the date of the order referring the case to ADR. In the event that the ADR proceeding is protracted, the mediator or evaluator may petition the assigned judge for additional compensation. If additional compensation is permitted, then the parties shall deposit the additional amount with the clerk within ten (10) days from the date of the order approving the additional compensation. The Clerk shall distribute the compensation to the mediator or evaluator shortly after the conclusion of the ADR process.

stipulation shall be presented by the parties to the assigned judge for approval, and the action shall be dismissed with prejudice.

g. Failure to Reach Settlement. If the mediator is unable to mediate a settlement, he or she shall promptly file with the Clerk a notice indicating that the mediation requirements of this rule have been met but that no settlement has been achieved. Upon receipt of this notice, the Clerk shall place the action on the court calendar and the action shall be treated for all purposes as if it had not been referred to mediation.

3. Early Neutral Evaluation

a. Selection of the Evaluator. The Clerk shall select a neutral evaluator with expertise in the subject matter of the action from among the individuals on the list of certified neutrals. The evaluator shall disqualify himself or herself in any action in which he or she would be required under 28 U.S.C. § 455 to be disqualified if a justice, judge or magistrate. The Clerk shall promptly notify the parties of the name of the evaluator.

b. Early Neutral Evaluation Procedure. Upon notification to the parties of the name of the evaluator, the parties shall provide to the evaluator copies of their respective pleadings. The evaluator shall fix a time and place for the evaluation session. The session must take place within this district, and the parties must be given at least fourteen (14) days written notice of the date of the session. No later than five (5) days in advance of the evaluation session, each party shall submit to the evaluator, and serve on all other parties, a written evaluation statement. Such statement may not exceed ten pages and must (i) address whether there are any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions, and (ii) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations. These statements shall not be filed with the court, and their contents shall not be disclosed in whole or in part, directly or indirectly, to the assigned judge.

c. Attendance. Counsel for each party and the parties themselves shall attend the evaluation session, consistent with the purpose of early neutral evaluation to afford litigants an opportunity to articulate their position and to hear, first hand, opposing parties' versions of the matter in dispute. A party other than an individual (e.g., a corporation, association, partnership, governmental agency) shall satisfy this attendance requirement if it is represented at the session by a person (other than counsel) with authority to bind the party to terms of a settlement and to enter into stipulations. Failure of any party to participate in the evaluation session in good faith shall be reported to the assigned judge by the evaluator and may result in the imposition of sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

d. Confidentiality. All proceedings of the evaluation session, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and confidential, and shall not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at an evaluation session unless a settlement or stipulation is entered into, in which event the settlement agreement or stipulation shall be reduced to writing and shall be binding upon all signatory parties.

e. The Evaluation Session. The evaluator shall have considerable discretion in structuring the evaluation session. The session shall proceed informally and the Federal Rules of Evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. At the session the evaluator shall: (i) permit each party to make an oral presentation; (ii) help the parties identify areas of agreement and, where appropriate, enter stipulations; (iii) assess strengths and weaknesses of parties' contentions and evidence; (iv) estimate, where feasible, the likelihood of liability and the dollar range of damages; and (v) help the litigants devise a plan for sharing the important information and/or conducting the key discovery

the strengths and weaknesses of the parties' positions and, where appropriate, suggest a dollar range for settlement.

g. Settlement. If the mini-trial results in a settlement, the settlement agreement shall be reduced to writing and shall be executed by the parties together with a stipulation of discontinuance. The stipulation shall be presented by the parties to the assigned judge for approval, and the action shall be dismissed with prejudice.

h. Return to Court Calendar. If no settlement is reached following the conclusion of the mini-trial, the magistrate shall file with the Clerk a notice indicating that a mini-trial has been conducted but that no settlement has been reached. The Clerk shall place the action on the court calendar and the action shall be treated for all purposes as if it had not been referred for a mini-trial.

5. Summary Jury/Non-Jury Trial

a. Selection of the Presiding Judge. The Clerk shall assign the action for purposes of conducting a summary trial to a judge other than the assigned judge. The Clerk shall promptly notify the parties of the assignment.

b. Summary Trial Procedure. Upon notification to the parties of the presiding judge, the parties shall provide to the judge copies of their respective pleadings. The judge shall schedule the summary trial to commence approximately 180 days from the date the action was referred for summary trial. Any party may request a continuance from the judge based upon a showing that sufficient discovery has not been conducted to enable the party to present its case. If the parties have waived their right to a jury trial, then the summary trial shall be conducted before the presiding judge who shall render the advisory verdict. If the parties have preserved their right to jury trial, then the summary trial shall proceed before the presiding judge and a six-member jury selected in the usual manner from the court's jury pool, and the jury shall render the advisory verdict.

c. Attendance. Counsel for each party and the parties themselves shall attend the summary trial, consistent with the purpose of the summary trial to afford litigants an opportunity to articulate their position and to hear, first hand, an abbreviated presentation of each party's best case. A party other than an individual (e.g., a corporation, association, partnership, governmental agency) shall satisfy this attendance requirement if it is represented at the session by a person (other than counsel) with authority to bind the party to terms of a settlement. Failure of any party to participate in the summary trial in good faith may result in the imposition of sanctions by the presiding judge pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

d. Confidentiality. All proceedings of the summary trial, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and confidential, and shall not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission against interest in a subsequent *de novo* trial. No party shall be bound at a *de novo* trial by anything done or said at the summary trial.

e. The Summary Trial Presentations. The attorney presentations shall be organized in the manner of a typical trial, except that no witness testimony will be allowed. First, plaintiff's counsel shall present an opening statement, followed immediately by defense counsel's opening statement. Next, counsel shall present their affirmative cases in turn by providing the fact-finder with a narrative overview of the evidence, including the identity of witnesses and their anticipated testimony and a description of documentary evidence. Next, counsel shall present their rebuttal cases and make closing arguments. The presiding judge shall establish a time limit for the presentations and shall have considerable discretion in structuring all other necessary procedural rules.

EXHIBIT VI-3

VI. Alternative Dispute Resolution

Summary of Arbitration
Case Tracking Statistics
(Page 138, Report)

EXHIBIT VI-5

VI. Alternative Dispute Resolution

C. Other Forms of Court-Annexed Alternate Dispute Resolution

1. Background on Mandatory Court-Annexed Arbitration Programs

Background on Mandatory Court-Annexed Arbitration Programs
(Page 152, Report)

TABLE A
Summary of Arbitration Case Tracking Statistics

	E.D. Pa.	N.D. Cal.	M.D. Fla.	M.D. N.C.	D. N.J.	W.D. Okla.	W.D. Tex.	W.D. Mich.	W.D. Mo.	E.D. N.Y.
Filings from:	1/85	10/84	10/84	1/85	3/85	5/85	5/85	7/85	12/85	1/86
to:	12/85	12/85	9/85	6/86	3/86	4/86	10/86	12/86	11/86	12/86
Number of Cases Identified as Eligible	2,415	669	630	161	1,376	596	144	579	261	423
Percentage removed or consolidated	13	10	10	21	16	8	31	15	31	11
Actual Arbitration Caseload	2,094	599	569	127	1,161	547	100	495	179	377
Number (%)	55	19	27	5	52	11	4	23	9	2
of pending cases	(3)	(3)	(5)	(4)	(4)	(2)	(4)	(5)	(5)	(3)
Number (%) of	2,039	580	542	122	1,109	536	96	472	170	375
closed cases	(97)	(97)	(95)	(96)	(96)	(98)	(96)	(95)	(95)	(97)
Percentage Closed:										
Before referral	48	59	45	34	55	57	40	28	25	61
After referral, before hearing	36	28	27	40	29	22	27	30	39	26
After hearing, no *de novo* demand	7	7	8	8	8	10	14	12	15	8
After *de novo* demand before trial	7	4	18	14	7	9	18	28	18	5
After trial began	3	1	2	4	1	2	2	2	4	1
Arbitrations as a Percentage of All Cases	17	14	30	26	18	22	35	43	36	14
De Novo Demands as a Percentage of										
All cases	11	7	23	19	11	12	22	32	23	7
All arbitrations	62	49	74	70	58	55	63	74	61	46
Trial Rate as a Percentage of										
All closed cases	3	1	2	4	1	2	2	2	3	<1
All closed arbitrations	18	11	7	16	7	8	6	5	10	2

EXHIBIT VI-4

VI. Alternative Dispute Resolution

B. Mandatory Court-Annexed Mediation -- the Special Mediator Program

3. Recommended Program Features

Relevant Forms for Implementing Court-Annexed Mediation Program
(Page 144, Report)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CERTIFICATION
OF COUNSEL
RE: RECOVERABLE DAMAGES

----------x

I, _____, counsel for _____ do hereby certify pursuant to the Local Arbitration Rule, that to the best of my knowledge and belief the damages recoverable in the above-captioned civil action exceed the sum of $100,000 exclusive of interest costs, fees and punitive damages.

Dated:_____

_____
Counsel for

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

NOTICE OF
ARBITRATION HEARING

- -x

Please take note that the above-captioned civil case will be arbitrated pursuant to the Local Arbitration Rule of the Southern District of New York.

The arbitration hearing has been scheduled for _____ at _____ before _____, who has been selected at random from the SDNY's panel of certified arbitrators. You are expected to substantially complete discovery prior to the hearing date. The Judge may refer the case to a magistrate for purposes of discovery.

The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except those intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the hearing.

A party may have a recording and transcript made of the arbitration hearing, but that party shall make all necessary arrangements and bear all expenses thereof.

In the event that the parties agree that this case will be ready for an arbitration hearing prior to the above date, you should advise me in writing within the next fifteen (15) days; I will schedule the arbitration hearing for an earlier date.

Very truly yours,

CLERK OF COURT

By:_____
Arbitration Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TO: **ARBITRATOR APPOINTED UNDER THE SOUTHERN DISTRICT OF NEW YORK LOCAL ARBITRATION RULE**

You have been appointed to serve as an arbitrator pursuant to the provisions of the Local Arbitration Rule of the Southern District of New York. The appointment shall remain in effect until the termination of the arbitration proceeding.

Please note the following points regarding the arbitration process:

1. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Relevance and efficiency shall be the primary considerations.

2. The arbitrator shall have the power to issue subpoenas for the attendance of witnesses and the production of documentary evidence in accord with Rule 45 of the Federal Rules of Civil Procedure.

3. The arbitration hearing may proceed in the absence of any party who, after due notice, fails to appear, but an award shall not be based solely upon the absence of any party.

4. A party may transcribe or record the proceeding at his own expense. Such a recording or transcript must be furnished to any other party, unless the parties otherwise agree.

5. The arbitrator shall utilize the Form of Award adopted by the Court. No findings of fact or conclusions of law shall be issued.

6. The SDNY arbitration clerk is your liaison with the Court in the event of any questions you may have regarding your assignment. He (she) may be reached at _____.

MAXIMUM COMPENSATION FOR ARBITRATOR

$225.00 Per Case*

Note: The arbitrator shall not be reimbursed for actual expenses incurred in the performance of his or her duties.

In referring to your assigned case please identify it by its caption, docket number and assigned Judge.

*If parties have stipulated to a panel of three arbitrators, maximum compensation is $75.00 per arbitrator per case. The arbitrator may petition the Court for additional compensation if the hearing is protracted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OATH OF WITNESS
AT ARBITRATION HEARING

YOU DO SWEAR (OR AFFIRM) THAT THE TESTIMONY YOU ARE ABOUT TO GIVE ON THE MATTER NOW BEFORE THE ARBITRATION PANEL OF THIS COURT IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ARBITRATION AWARD

----------x

I, the undersigned arbitrator, having been duly certified and sworn and having heard the above-captioned civil action on _____, 19____ do hereby make the following award pursuant to the Local Arbitration Rule of the Southern District of New York.

_____
Arbitrator

NOTICE

This award will become a final judgment of the court, without the right of appeal, unless a party files with the court a demand for trial *de novo* within thirty (30) days after the entry of the arbitration award.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

DEMAND FOR
TRIAL *DE NOVO*

- -x

I, _____, counsel for _____, hereby demand a trial *de novo* in the above-captioned matter wherein an arbitration award was filed with the Clerk on _____, 19____.

I have deposited with the Clerk of Court an amount equal to the arbitration fees of the arbitrator as provided in the Local Arbitration Rule. I understand that this sum so deposited will be returned in the event my client obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. If my client does not obtain a more favorable result after trial, the sum so deposited shall be paid by the Clerk to the arbitrator.

Dated: _____

_____
Counsel for

EXHIBIT VI-5

VI. Alternative Dispute Resolution

C. Other Forms of Court-Annexed Alternate Dispute Resolution

1. Background on Mandatory Court-Annexed Arbitration Programs

Background on Mandatory Court-Annexed Arbitration Programs
(Page 152, Report)

VI. Dispute Resolution

C. Other Forms of Court-Annexed Alternate Dispute Resolution

1. Background on Mandatory Court-Annexed Arbitration Programs

Beginning in the 1970s, several district courts implemented mandatory court-annexed arbitration programs in which cases seeking only monetary relief below a specified amount are automatically referred for non-binding arbitration by the clerk of the court when the action is commenced. By 1988, the number of district courts utilizing mandatory court-annexed arbitration had grown to ten.[1] The mandatory arbitration programs in these ten districts were formally designated by Congress as a five-year experiment by the

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1. The ten district courts implementing mandatory arbitration as of 1988 were: Northern District of California, Middle District of Florida, Western District of Michigan, Western District of Missouri, District of New Jersey, Eastern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and Western District of Texas.

with the programs by a sampling of court personnel, attorneys, and litigants; 3) a summary of program features identified with program acceptance; 4) a description of the levels of satisfaction relative to the cost per hearing of each program; and 5) a recommendation to Congress on whether to terminate or continue the mandatory arbitration programs. Because of the great volume of available statistics, we have devoted a separate section to arbitration, notwithstanding that we recommend the implementation of a voluntary ADR program involving additional techniques in the following section of this report.

a. The FJC Report

The primary source of data for the FJC Report consisted of survey responses of 3,501 attorneys, 723 litigants, and 62 judges who had participated in the mandatory arbitration programs. These responses indicate that implementation of court-annexed arbitration programs can lead to perceived reductions in costs, delays and court burdens while maintaining or improving the quality of justice delivered. The FJC Report follows from date of filing to termination a sample of cases filed either during the first year of each pilot district program's operation or, in the

the majority of cases closed before reaching an arbitration hearing, and over two-thirds did not return to the court's regular trial calendar. Although the districts varied considerably in the proportion of cases that reached hearing, that demanded trial de novo, and that closed at various stages of the arbitration process before trial, the trial rate of the arbitration caseloads was similar across the districts, ranging from less than 1% in the Eastern District of New York to 4% in the Middle District of North Carolina. Statistical summaries prepared by the Eastern District of Pennsylvania provide evidence of the impact of court-annexed arbitration on the decreasing trial rate. During the ten years and five months of program operation, only 368 (or 2%) of the 16,180 cases placed in the court's arbitration program have required a trial de novo. During the same period, 8% of the civil cases that were not placed in the arbitration program required a trial. Statistical Reports, Clerk's Office, United States District Court for the Eastern District of Pennsylvania.

De novo demand rates as a proportion of the arbitration caseload ranged from a low of 7% in the Northern District of California and the Eastern District of New York to a high of 32% in the Western District of Michigan, nine

percentage points higher than in any other district. These generally low de novo demand rates resulted primarily from the low percentage of the arbitration caseload that reached hearing, rather than from frequent acceptance of an arbitration award. In eight of the ten pilot programs, over half of the arbitrations resulted in a demand for a trial de novo. The lowest de novo demand rate (as a proportion of hearings held) was 46% in the Eastern District of New York. FJC Report, supra note 3, at 48.

ii. Reducing Delays in Case Disposition

There is little statistical evidence that arbitration programs effectively reduce disposition times. Graphs 1 through 9, reporting the results of the Federal Judicial Center Study and annexed as Appendix 2, indicate no significant decrease in disposition time. Arbitration does not, however, appear to delay resolution of cases, even when a de novo demand is made and parties report reasonable case-processing times. Id. at 7.

In instituting its arbitration program, the Middle District of North Carolina maintained a control group of randomly selected cases not subject to arbitration, thereby

enabling a comparison of disposition times for arbitration and control cases. According to Graph 1, more control than arbitration cases terminated during the first few months after filing. The arbitration caseload then began to terminate at a faster rate, and the percentage of closed arbitration cases surpassed that of control cases in the tenth month after filing. The time of disposition evened out again seven months later. Id. at 95-96.

In the other pilot districts, disposition times in samples of civil cases that were filed before and after the effective date of program implementation were compared to determine whether arbitration programs reduced the time from filing to disposition. This method for addressing the impact of arbitration on disposition time may not be statistically reliable. In districts where only a small percentage of cases are diverted to arbitration, the impact of the program will be difficult to detect. The higher the percentage of civil cases diverted to the arbitration program, the more likely it is that the post-program sample contains a significant percentage of arbitration cases, thereby increasing the likelihood that the impact of the program will be detected by analysis. Furthermore, factors other than introduction of the program could contribute to any

differences. Therefore, findings based on these data should be viewed as suggestive rather than definitive. Id. at 97 Graphs 2 through 9 display the cumulative percentage of cases closed from one to eighteen months after filing, for the pre-program and post-program samples. As can be seen from Graph 2, there was very little overall difference in the speeds with which the two samples terminated. Id.

Arbitration programs do appear to have reduced disposition time in the Western District of Michigan (see Graph 3), where the post-program sample terminated sooner than the pre-program sample throughout an eighteen-month period, and in the Middle District of Florida (see Graph 4), where the post-program cases showed a faster rate of termination throughout the eighteen-month period after the first month. Arbitration also seemed to speed terminations in the Western District of Missouri after the sixth month (see Graph 5). Id. at 98.

In other districts, arbitration did not seem to increase the speed of disposition. The Western District of Texas (see Graph 6) did not show a reduction in the overall time from filing to disposition, but displayed a pattern very similar to that found in the Middle District of North

Carolina: post-program cases closed much more slowly at first, then equaled and finally surpassed the rates of pre-program cases in the eighth through eleventh months, and then fell behind again. In the Western District of Oklahoma, the District of New Jersey and the Eastern District of New York (see Graphs 7 through 9), there was little to distinguish between the two distributions. Id. at 102.

As another measure of speed of disposition, attorneys were asked whether referral to arbitration led to earlier settlement discussions and whether referral to arbitration led to quicker settlements. Over half (54%) of the attorneys in cases that closed after referral but before a hearing agreed that referral of their cases to arbitration resulted in settlement discussions at an earlier point than would otherwise have occurred. There were, however, great variations among the districts. In the Eastern District of Pennsylvania, 61% of attorneys surveyed agreed that settlement occurred earlier, followed by the Eastern District of New York at 57%. The Western District of Texas had the smallest percentage and was the only district in which less than half (38%) of the attorneys agreed that referral to arbitration prompted earlier settlement talks. Fifty percent of attorneys in the Northern District of California and the

Western District of Missouri reported earlier settlement discussions, as did slightly over half of those from the other districts. The views of the attorneys surveyed, however, did not coincide closely with the findings from the pre-program to post-program comparison of disposition times For example, a high percentage of attorneys in a district where time did appear to be reduced--the Western District of Missouri--agreed that earlier settlement discussions had been promoted; while a high percentage of attorneys in a district with no evidence of speedier dispositions--the Eastern District of New York--agreed that settlement discussions occurred earlier. Id. at 103.

Attorneys in cases that closed before the arbitration hearing were also asked if the case settled more quickly than they had anticipated at the outset. A majority of attorneys from all districts (51%) disagreed with the statement that referral to arbitration led to quicker settlement. The responses varied somewhat across districts. In the Middle District of Florida, the Western District of Texas, the Western District of Michigan and the Eastern District of New York, a majority agreed that their cases settled earlier, while in the Eastern District of Pennsylvania, the Northern District of California, the

Western District of Oklahoma and the Western District of Missouri, a majority disagreed with that conclusion. In the District of New Jersey, 50% agreed that their cases settled earlier. Id. at 104. Seventy percent of attorneys in cases that failed to settle and returned to the trial calendar after demand for de novo trial stated that they thought arbitration did not delay resolution. Id. at 106-107.

Finally, parties were asked if the time required to resolve the dispute was reasonable. A majority of parties from all districts reported that the disposition time was reasonable, with the percentage ranging from a low of 53% in the Western District of Michigan to a high of 75% in the Western District of Missouri. Parties in cases closed either before or as a result of the arbitration hearing were more likely to agree that the disposition time was reasonable, but even in de novo demand cases a majority responded favorably. Id. at 107-108.

iii. Cost Savings

Arbitration programs can reduce the cost of litigation and provide for a hearing on the merits at a cost that attorneys and parties find reasonable. A four-year Rand

Corporation study of court-annexed arbitration in the Middle District of North Carolina asked counsel to compare the private litigation costs in arbitration with a randomly selected control group of cases not subject to arbitration. Total costs and fees, adjusted for demand, averaged $19,972.76 per case in the arbitration group and $25,047.36 per case in the control group for a saving of approximately 20%.[4]

None of the other pilot districts maintained a control group of cases simultaneously proceeding along the traditional track so that a direct comparison of costs in those districts cannot be made. However, cost reduction can be measured by asking attorneys and litigants whether they viewed the time and money costs of arbitration as reasonable. Of the surveyed attorneys, 60% reported that their arbitration program saved them time, 62% agreed that the cost was lower and 65% said that the referral to arbitration saved their clients time. After controlling for other factors, the responses across the pilot districts were not significantly different. In each district except the

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4. E. Lind, Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court 37-38 (The Rand Corporation 1990).

Western District of Michigan, a majority of the attorneys reported that the arbitration procedures saved time and money. In the Western District of Michigan, a majority reported cost savings, but said that neither they nor their clients saved time. This is due to the fact that the Western District of Michigan has the highest de novo rate, and over 60% of the attorneys in de novo demand cases did not attribute any savings to the program. This contrasts sharply with the views of those participating in cases that closed before the hearing, at least 60% of whom reported savings of all types, and with the favorable reports of at least 75% of the attorneys in successfully arbitrated cases. FJC Report, supra note 3, at 85-86.

Of the parties surveyed, 65% reported that costs were reasonable and 71% indicated that resolving the case took a reasonable amount of their time. The percentage agreeing that the cost was reasonable ranged from under 60% in the Western District of Texas, the Western District of Michigan and the Eastern District of New York to over 70% in the District of New Jersey and the Western District of Missouri. The percentage agreeing that the time was reasonable ranged from 65% in the Western District of Oklahoma and the Western District of Michigan to 80% in the

District of New Jersey. The differences remain significant after controlling for other factors. Id. at 89-90.

Parties' responses also differed depending on the stage at which their cases closed, with those in de novo demand cases less likely to report reasonable time and cost expenditures. However, 54% of parties in cases where trial de novo was demanded still reported that the cost was reasonable and 59% reported that they spent a reasonable amount of their personal time. Id. at 90.

iv. Reducing Court Burden

Since court-annexed arbitration programs seek to reduce court burden, the FJC Report surveyed judges' opinions as to the success of court-annexed arbitration in minimizing their caseload. Fifty-eight percent of the judges strongly agreed that their arbitration program reduced the caseload burden. An additional 38% agreed, while 3% disagreed and none strongly disagreed. Id. at 114.

The extent to which burden is reduced appears to depend on how many cases are diverted to the arbitration process, how judges' involvement in the pre-hearing phase of

arbitration cases relates to what their involvement would be absent the program and how many arbitration cases return to the regular trial calendar with demands for trial de novo. Judges who reported less frequent involvement in arbitration cases before the hearing, and those in programs that divert at least 15% of the caseload to the arbitration program, were significantly more likely to agree, and agree strongly, that the program reduces the caseload burden of judges. Neither the actual nor perceived rate of de novo demands in arbitration cases affected these assessments, a finding attributable to the fact that less than a third of the arbitration caseload returned to the regular trial calendar in every pilot district. Id. at 115.

v. Recommendation Based upon the FJC Report

While the statistics presented in the FJC Report indicate that judges, attorneys and litigants perceive mandatory court-annexed arbitration as a useful and efficient dispute resolution mechanism, the statistics do not conclusively demonstrate that mandatory court-annexed arbitration programs actually reduce delays, costs and court burdens. We therefore recommend that the Southern District adopt court-annexed binding and non-binding arbitration as part of a voluntary program.

b. Recommended Program Features

Within certain guidelines set forth in the 1988 Act, the ten district courts utilizing mandatory arbitration programs have implemented rules with a variety of different features. Table B, annexed as Appendix 3, lists the features adopted by each district court, both initially under the 1988 Act and as subsequently modified. While the FJC Report concludes that no one program feature either guaranteed success or resulted in overall dissatisfaction, certain features did have an influence on particular program goals. Id. at 9. Our recommendations on the various features to be adopted are discussed below with a view toward the enhancement of program goals we believe essential to the success of voluntary court-annexed arbitration in the Southern District.

Based upon our review of the programs implemented by other districts and the conclusions reached in the FJC Report, we recommend that the voluntary court-annexed arbitration program include the specific provisions listed below. A proposed local rule implementing these provisions, as well as other necessary provisions, is annexed as Appendix 4 and relevant forms are annexed together as Appendix 5.

i. Case Eligibility Criteria

At the initial Rule 16 conference, the judge and the parties should discuss voluntary participation in ADR, and determine whether arbitration would be a suitable mechanism. If the parties agree that court-annexed arbitration is appropriate, they should enter into a stipulation following the conference submitting the case to either binding or non-binding arbitration.

ii. Timing of the Hearing

The time period required by the pilot programs for the commencement of the hearing varies from within 80 to within 180 days from the date of filing of the last answer. The FJC Report concludes that shorter answer-to-hearing periods resulted in quicker settlements before the hearing, but increased the probability that a non-settling case would result in a de novo demand, perhaps indicating that when a case does not settle prior to the hearing, the hearing occurs too early in the proceedings. We believe that the goal of reducing court burden is of higher priority than the goal of increasing the speed of settlement, and therefore recommend that the program adopt a longer answer-to-hearing time period.

If the parties agree to submit to arbitration, the hearing should be scheduled 150 days from the date the last responsive pleading is filed, or earlier if desired by the parties, except that the hearing may not commence until 30 days after the disposition by the assigned judge of any motion to dismiss the complaint, motion for judgment on the pleadings, motion to join necessary parties or motion for summary judgment. The parties are expected to complete sufficient discovery prior to the hearing date to enable them to present their cases to the arbitrator.

iii. Number of Arbitrators

Some of the pilot programs require that the hearing be conducted before a single arbitrator, some require a panel of three and some permit the parties by consent to choose between these options. One-arbitrator hearings were viewed by attorneys as less satisfactory, but the number of arbitrators did not affect the views of the parties or those of attorneys who actually participated in a hearing as to the fairness of the hearing or their preference for arbitration as the method of dispute resolution. Cases in one-arbitrator districts were more likely to be arbitrated and to result in de novo demands, but imposed less burden on the court in

connection with assigning arbitrators and scheduling hearings. Since one-arbitrator hearings are less burdensome to administer and do not result in less satisfaction to those who participate in the hearing, we recommend that the court appoint a single arbitrator, unless the parties specifically request a three-panel hearing. This approach will enhance the perceptions of fairness while at the same time, according to the FJC Report, still result in the large majority of hearings being conducted before a single arbitrator.

iv. Arbitrator Fees

The FJC Report concludes that higher arbitration fees do not enhance the quality of the arbitration program, but rather result in decreased approval by attorneys of the concept of arbitration and the program. Higher fees do not discourage litigants from either proceeding to arbitration or demanding de novo trials. We recommend that arbitrators serving alone be compensated at the rate of $225 per case and that arbitrators serving on a three-member panel be compensated at the rate of $75 per case. The arbitrator may petition the assigned judge for additional compensation if the hearing is protracted. These amounts are the same as the compensation to arbitrators under the program implemented in

the Eastern District of New York, and should be sufficient to attract qualified attorneys. We also recommend that the Southern District explore alternative non-monetary incentives to attract experienced and qualified attorneys. For example, the Western District of Oklahoma and the Western District of Texas exempt attorneys who serve as arbitrators from certain Criminal Justice Act appointments. The arbitrator's fee should be borne equally by the parties, and should be deposited with the ADR Administrator prior to the commencement of the hearing.

v. Selection of the Arbitrator

Some pilot districts permit the arbitrator to be selected by the litigants from the court's certified list, other districts permit the clerk to select the arbitrator without any input from litigants, and still other districts utilize a mixture of these two methods by allowing the litigants to chose from a fixed number of candidates initially selected by the clerk. Permitting input from litigants does not affect the litigants' perception of fairness and neither encourages nor discourages de novo demands. Cases in programs with some litigant input are more likely to be arbitrated, but there is no affect on the

likelihood that the arbitration award will be accepted. Attorneys viewed party input as a negative factor with respect to time and money savings; however, litigants' views of the reasonableness of their cost and time expenditure were not affected by this feature.

Based upon the heavy administrative burden of selecting arbitrators with litigant input, we recommend that the ADR Administrator randomly select arbitrators from a list of individuals certified to serve as arbitrators by the court. The arbitrator must disqualify himself or herself in any action in which he or she would be required to be disqualified pursuant to 28 U.S.C. § 455 if a justice, judge or magistrate. We also recommend that a party be permitted to make a written request to the ADR Administrator that the arbitrator be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 within ten days from the date the ADR Administrator notifies the parties of the arbitrator's name. A refusal by the ADR Administrator to grant such a request should be subject to review by the assigned judge upon motion filed within ten days of the date of the ADR Administrator's denial.

vi. The Arbitration Process

If the parties agree to submit to arbitration, the assigned judge issues an order referring the action to arbitration. The ADR Administrator then notifies counsel of the name of the arbitrator and the date and time for the hearing. The arbitration hearing is conducted at the courthouse in a room assigned by the ADR Administrator. Testimony is given under oath and the Federal Rules of Evidence serve as a guide but are not strictly enforced.

We recommend that two types of arbitration be available to parties: binding and non-binding. The arbitration process should be the same whether binding or non-binding in all respects other than the decision's effect upon the parties. Following the hearing in binding arbitration, the arbitrator files the award with the ADR Administrator and sends copies to counsel. The award is entered as a final, non-appealable judgment of the court within 30 days from the date the award is filed, unless the losing party moves to set aside the award pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Where the arbitration is non-binding, a party may request that the action be restored to the court calendar within 30 days from

the date the arbitration award is filed. If no such demand is filed, the award becomes final and is not subject to appellate review. Where a demand is made, the action proceeds before the assigned judge as if the case had not been referred to arbitration, and neither the amount of arbitration award nor any aspect of the arbitration proceedings are revealed to the assigned judge or jury during the pendency of the action, except that testimony given during the hearing may be used for purposes of impeachment at trial. The arbitration award remains under seal until the trial has been completed and a judgment has been entered, or the action has otherwise been terminated. Where, however, the party seeking to restore the action to the court docket fares no better at trial, that party shall bear the costs of the arbitration, including attorneys' fees.

A number of forms to be used in the arbitration program, modeled after forms used in the Eastern District of New York, are annexed as Appendix 5.

2. Other Voluntary ADR Options

a. Description of ADR Options

In addition to mediation and arbitration, there are four other ADR devices presently being utilized by courts throughout the country. They are early neutral evaluation, mini-trial, summary jury/non-jury trial, and medical review panel. In addition to these five mechanisms, some districts have experimented by adding ADR elements to formal settlement conferences. For example, District of Connecticut Judge Robert C. Zampano appoints neutrals with subject matter expertise to participate in the settlement process. These experts analyze and evaluate each side's claims, attend settlement conferences conducted by the judge and make non-binding settlement recommendations. Zampano, Settlement Conferences With Experts.

i. Early Neutral Evaluation

Early Neutral Evaluation (ENE") is a process held within a specified period of time after the filing of the complaint, before the parties have engaged in substantial discovery but after they have had time to develop the basis

of their case.[5] In an informal session, each party makes an oral presentation to a neutral evaluator with expertise in the subject matter of the case. Based on these presentations and short briefs submitted in advance, the neutral evaluator addresses the strengths and weaknesses of the parties' contentions and evidence, identifies and evaluates the primary issues in dispute, identifies any areas of agreement which can be the subject of a stipulation, and estimates, where appropriate, the likelihood of liability and the range of damages. The neutral evaluator also may explore the possibility of settlement if the parties desire, help the parties devise a discovery or motion plan, and discuss whether a follow-up session would be fruitful.[6]

In 1985, the Northern District of California selected approximately one dozen cases, representing a range of civil matters, for participation in a pilot ENE program. The court arranged for Professor David Levine of the University of California, Hastings College of the Law, to monitor the progress of the assigned cases and to analyze the program's effect.

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5. Special Issue: ADR in the Courts, Alternatives 103 (July 1991).

6. See generally, Brazil, Kahu, Newman & Gold, Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution, 69 Judicature 279 (1986).

Based on the success of the pilot program as measured by Professor Levine, the court launched a second stage of experimentation in mid-1986. In this second stage, the court designated for inclusion in the ENE program about 150 lawsuits (due to attrition, ENE was held in only 67 cases) and Professor Levine conducted a more elaborate analysis of these cases. In addition to tracking the progress and outcome of these cases, Levine and his staff collected, through written questionnaires and telephone interviews, data and opinions from evaluators, litigators and clients. The results of Levine's study, summarized below, persuaded the court to make ENE a permanent program in 1988. General Order No. 26. Early Neutral Evaluation.

Perhaps the most significant finding reported by Levine was that almost 90% of the lawyers whose cases had been compelled to participate in ENE expressed the view that the program should be expanded to more cases in the federal court.[7] Overall, participants' reactions to ENE were very positive. For example, 52.6% of the attorneys agreed that the ENE procedure provided them with new information about

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7. Levine, A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values, 1990 U. Chi. Legal F. 303, 341.

their own case and 58.8% agreed they obtained new information about the other party's case. The parties themselves obtained new information about the other party's case (63.5%) and even about their own case (40.4%). By similar margins, the attorneys and parties agreed that they obtained information sooner and at less expense than they would have without ENE. The process also helped the participants make use of this information: they frequently agreed that it enabled them to identify key issues in the case (77.2% of the attorneys, 85.7% of the parties). There was also strong agreement that the process improved the prospects for settlement (57.8% of the attorneys, 66.6% of the parties). In fact, in 37% of the cases in which an ENE session was held, a settlement was achieved either at the session itself or as a direct result of the session.[8]

Participants overwhelmingly agreed that the evaluators made useful contributions to the parties' understanding of their cases (80% of the attorneys, 81% of the parties). More specifically, according to the parties and attorneys, the evaluators provided new insights (54.9% of

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8. Levine, Northern District of California Adopts Early Neutral Evaluation Dispute Resolution, 72 Judicature 235, 236 (1989).

the attorneys, 61.9% of the parties), a fresh perspective (52.6% of the attorneys, 47.6% of the parties), or a more complete understanding (46.5% of the attorneys, 52.4% of the parties). Evaluators also reportedly facilitated communications (60.2% of attorneys, 52.4% of parties), identified key issues (75.4% of attorneys, 47.5% of parties), and improved prospects for settlement (54.9% of attorneys, 58.5% of parties). Less frequently, evaluators enabled parties to enter into stipulations of facts (20.2% of attorneys), discovery plans (30.9% of attorneys), or to shape the future of the case through motions (33.4% of attorneys). Virtually all parties and attorneys agreed that the evaluators were not biased and were prepared for the ENE session. Most participants indicated that in the future it would be fair to charge a fee for the evaluation, in the $500 range, if the charge were split equally between the parties (the evaluators presently serve on a pro bono basis). Id.

Given these statistics, it is not surprising that when asked to comment on their satisfaction with the program, both attorneys and parties indicated a high level of satisfaction (79.6% of attorneys, 73.8% of parties) and agreed that ENE was fair (94.5% of attorneys, 88.1% of parties).

Limited data exist on the costs and potential savings of ENE. Just under half (47%) of the litigators polled believed that ENE reduced the overall cost of litigating their cases. However, since it is impossible to determine the costs that would have been incurred had there been no ENE program, this evidence is not a reliable measure of cost savings. Levine, supra note 7, at 343.

While the Northern District of California has the most extensive ENE program, other federal and state courts have begun experimenting with ENE. District of Connecticut Judge Robert C. Zampano has developed a judicially supervised Special Masters Program that resembles early neutral evaluation (except that it generally occurs after discovery is completed). For over twenty years, Judge Zampano has asked neutrals with subject matter expertise to conduct confidential settlement negotiations, and the process is now governed by Connecticut District Court Local Rules 11 and 28. Experts chosen by court administrators and judges meet with the parties and their counsel, analyze and evaluate each side's claims, conduct settlement discussions not attended by the judge and submit to the parties a non-binding settlement proposal. Over 40% of the cases in which neutral evaluation is conducted settle immediately following the procedure. Zampano, Court-Annexed ADR: A View From the Bench 11.

The federal district court for the District of Columbia launched a voluntary ENE program a year and a half ago. The Eastern District of California is now conducting a pilot ENE program. Courts in several states, including Colorado, Ohio and Hawaii, are also developing ENE programs. Special Issue: ADR in the Courts, supra note 5, at 101.

ii. Mini-Trial

The mini-trial is a settlement procedure in which a panel comprised of party representatives with settlement authority--preferably senior executives who have no personal involvement in the subject matter of the case--and a neutral advisor hear an abbreviated presentation of each party's "best case." Following the presentations, the party representatives meet and attempt to reach a pragmatic resolution. The procedure usually occurs after significant discovery has been taken.[9] By directly exposing clients to the other party's views as well as the opinion of a neutral advisor, the mini-trial assists the parties to appreciate the weaknesses of their own case and therefore to assume a realistic settlement position.

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9. CPR Legal Program, Alternatives to the High Cost of Litigation 8 (Special Issue 1985).

The mini-trial has been used with success by Judge Robert E. Keeton of the District of Massachusetts, Judge Sherman G. Finesilver of the District of Colorado, Judge Donald E. Ziegler of the Western District of Pennsylvania, and by judges in the Western District of Michigan (under Local Rule 44(c)).

iii. Summary Jury/Non-Jury Trial

The summary trial is an abbreviated trial, usually held after the close of discovery, at which a jury or judge renders a non-binding verdict. This ADR option consists of informal, brief presentations (usually without testimony) of each side's case to the trier of fact. After the advisory judgment is rendered, counsel are permitted to question the judge or jury to explore the reasoning behind the judgment and to assess how the fact finder reacted to particular arguments or evidence. If the parties fail to settle after the advisory judgment is rendered, the case proceeds to de novo trial before a new judge or jury, at which the advisory judgment is not admissible. The procedure is designed to improve the accuracy of litigants' expectations about trial outcomes at a lower cost than traditional forms of litigation and to thereby spur settlement negotiations. Id. at 6-7.

The summary trial was developed by Judge Thomas D. Lambros of the Northern District of Ohio. Id. at 6. Judge Lambros first used a summary trial in March 1980, and as of January 1984, 92% of the cases in which a summary trial was held in that district settled prior to de novo trial. Id. Currently, thirteen federal district courts have local rules specifically authorizing summary trials, and many judges in districts without local rules hold them on an ad hoc basis. Special Issue: ADR in the Courts, supra note 5, at 105. In the District of Connecticut, for example, Magistrate F. Owen Eagan, under the direction and supervision of Senior Judge T. Emmet Clarie, holds summary jury trials, and over 40% of the cases submitted settle immediately following the process.

iv. Medical Review Panel

This ADR option, which has been implemented by local rule in the Eastern and Western Districts of Pennsylvania, is used in personal injury actions. A judge may, after consulting with the parties, order that the plaintiff undergo an examination by an impartial medical expert or experts designated by the court. The court may choose the expert from a panel established for this purpose by a state or local medical society, or may permit the parties to make

nominations and select from among those nominated. Copies of the report of the examining physician are made available to all parties, and the doctor may be called as a witness at trial.[10]

b. Recommendations

There is little statistical information available to enable us to conduct a thorough evaluation of the above ADR options. Nevertheless, with the exception of the medical review panel, these ADR devices have been used with success by a number of courts. We do not recommend that a medical review panel be offered as an option. The clerks of the Eastern and Western Districts of Pennsylvania report that the medical review panel is rarely used, and has been largely unsuccessful in resolving disputes when it is chosen. Rather, use of this option seems merely to add another medical expert to the list of experts who will testify at trial. We conclude that use of a medical review panel will not ease the court's burden or result in any savings of cost or time to litigants. Based upon the available information, we recommend that, in addition to arbitration, early neutral

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10. Eastern District of Pennsylvania Local Rule 25; Western District of Pennsylvania Local Rule 5.

evaluation, mini-trial, and summary jury/non-jury trial also be made available to litigants through a voluntary court-annexed program. The voluntary program should also make court-annexed mediation available on a voluntary basis for cases that do not meet the eligibility requirements for mandatory referral.

Under the proposed voluntary ADR program, the assigned judge would send, with the notice of the Rule 16 pre-trial conference, the local rules implementing the voluntary ADR program, informational material explaining each of the available ADR options and the cases which they are best suited to resolve, and a questionnaire, to be completed and returned to the court by counsel prior to the conference, designed to solicit information relevant to the selection of an appropriate ADR mechanism. At the conference, the judge would review the completed questionnaires with the parties and, if appropriate, make a recommendation to the parties to pursue one of the available options. Counsel should be prepared to explain to the court why the recommended option is not appropriate. If counsel for the parties did not consent to use the recommended ADR option, or some other option, the case would proceed to trial in the usual manner. The completed questionnaires would not be filed with the

court and would not become part of the court record. A proposed stipulation for the referral of cases to the program, a proposed local rule and relevant forms for voluntary court-annexed arbitration, a proposed local rule for voluntary ADR, and a proposed questionnaire are attached as Appendix 4.

Some courts authorize the assigned judge to order the parties to engage in ADR without the parties' consent. For example, in the Multidoor Courthouse program in place in the Superior Court of the District of Columbia, the court has the power to order the parties to participate in the ADR procedure determined to be most suitable based on responses provided by the litigants on a case classification form. The court may alternatively decide not to submit a case to ADR.[11] Matching Fuss to Forum: D.C. Trial Court's Creative ADR submission to ADR raises questions of fairness. Some ADR procedures, such as summary trials and mini-trials, may require the parties to reveal trial strategy and impose significant financial burden on the litigants. One circuit court has therefore held that the judge may not order parties

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11. Matching Fuss to Forum: D.C. Trial Court's Creative ADR Case-Classification Procedures, Alternatives (March 1991).

to participate in a summary jury trial. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988). But see McKay v. Ashland Oil Co., 120 F.R.D. 43 (E.D. Ky. 1988); see also Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988).

On a purely practical level, a program in which parties may be ordered to submit to neutral evaluation or even the more adversarial processes such as summary jury/non-jury trials or mini-trials is less likely to succeed. Because ADR procedures require cooperation and a willingness by the parties to participate actively,[12] critics argue that forcing the parties to take part defeats the very purpose of these mechanisms and fails to result in a resolution of the case. Id.

If both parties consent to one of the ADR options, the parties would stipulate to refer the case to alternative dispute resolution (see Appendix 6) and would pursue that option in accordance with procedures set forth in the local rules.

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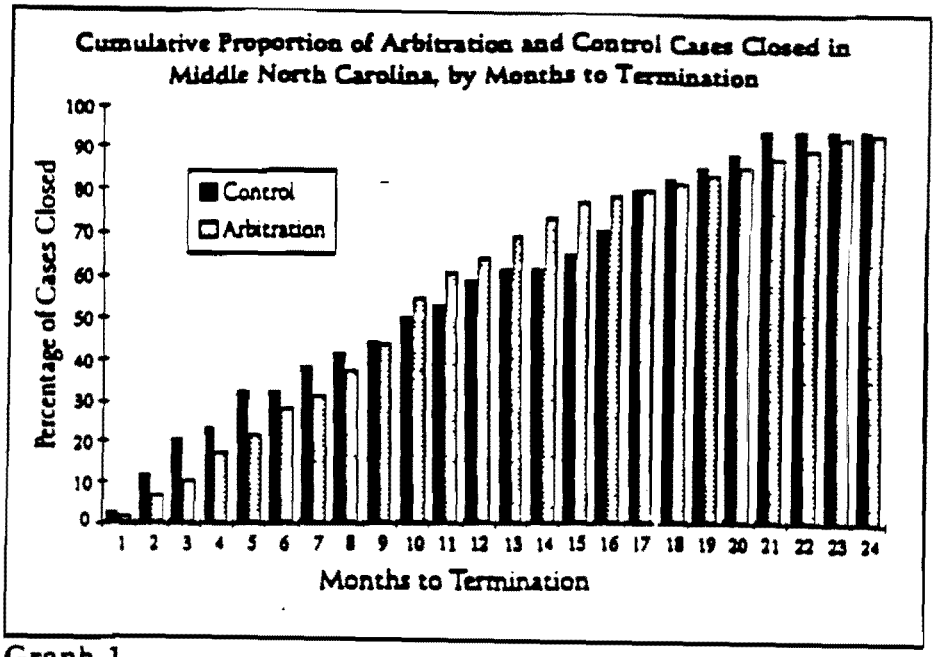
12. CPR Legal Program, ADR and the Courts: A Manual for Judges and Lawyers, 212 (Butterworth Legal Publishers 1987).

Appendix 1

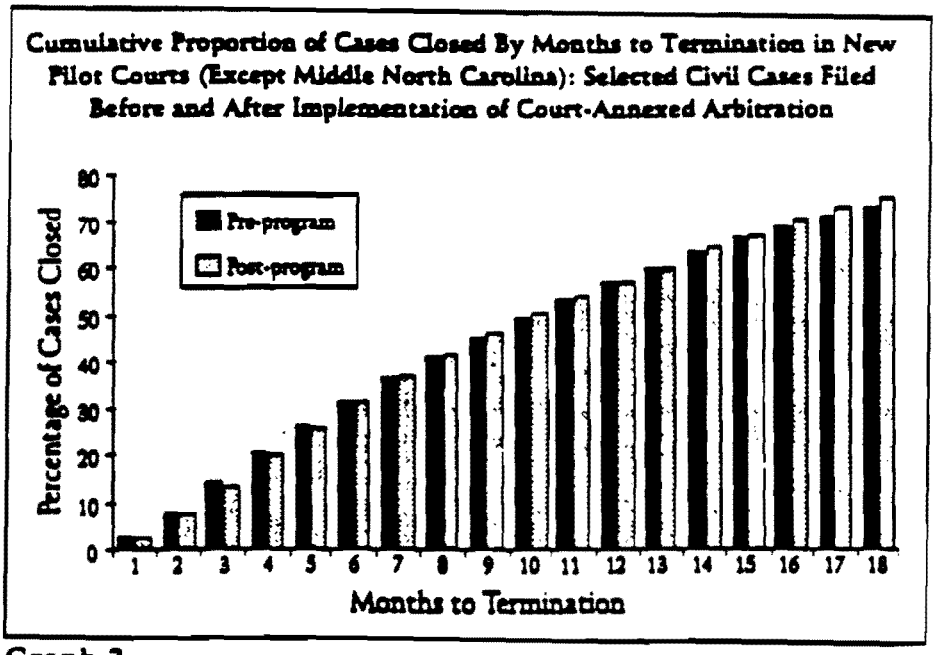
TABLE A
Summary of Arbitration Case Tracking Statistics

	E.D. Pa.	N.D. Cal.	M.D. Fla.	M.D. N.C.	D. N.J.	W.D. Okla.	W.D. Tex.	W.D. Mich.	W.D. Mo.	E.D. N.Y.
Filings from:	1/85	10/84	10/84	1/85	3/85	5/85	5/85	7/85	12/85	1/86
to:	12/85	12/85	9/85	6/86	3/86	4/86	10/86	12/86	11/86	12/86
Number of Cases Identified as Eligible	2,415	669	630	161	1,376	596	144	579	261	423
Percentage removed or consolidated	13	10	10	21	16	8	31	15	31	11
Actual Arbitration Caseload	2,094	599	569	127	1,161	547	100	495	179	377
Number (%)	55	19	27	5	52	11	4	23	9	2
of pending cases	(3)	(3)	(5)	(4)	(4)	(2)	(4)	(5)	(5)	(3)
Number (%) of	2,039	580	542	122	1,109	536	96	472	170	375
closed cases	(97)	(97)	(95)	(96)	(96)	(98)	(96)	(95)	(95)	(97)
Percentage Closed:										
Before referral	48	59	45	34	55	57	40	28	25	61
After referral, before hearing	36	28	27	40	29	22	27	30	39	26
After hearing, no *de novo* demand	7	7	8	8	8	10	14	12	15	8
After *de novo* demand before trial	7	4	18	14	7	9	18	28	18	5
After trial began	3	1	2	4	1	2	2	2	4	1
Arbitrations as a Percentage of All Cases	17	14	30	26	18	22	35	43	36	14
De Novo Demands as a Percentage of										
All cases	11	7	23	19	11	12	22	32	23	7
All arbitrations	62	49	74	70	58	55	63	74	61	46
Trial Rate as a Percentage of										
All closed cases	3	1	2	4	1	2	2	2	3	<1
All closed arbitrations	18	11	7	16	7	8	6	5	10	2

Appendix 2



Graph 1



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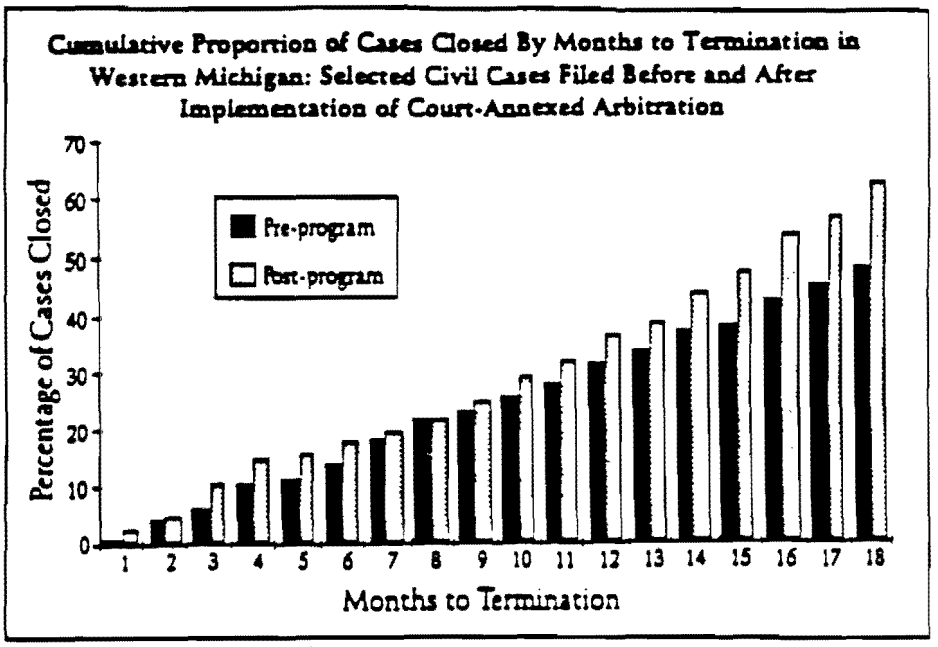
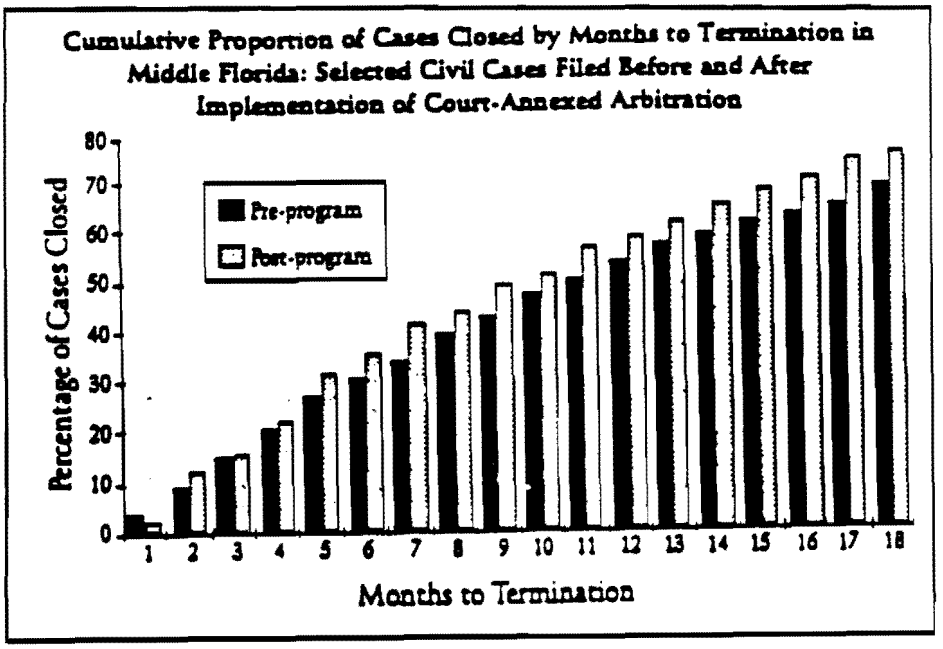
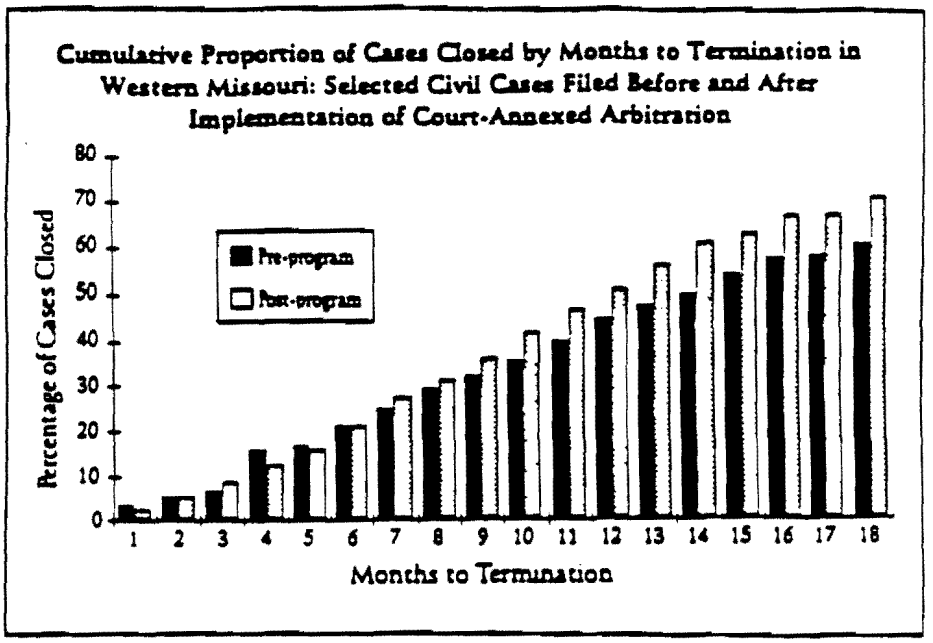


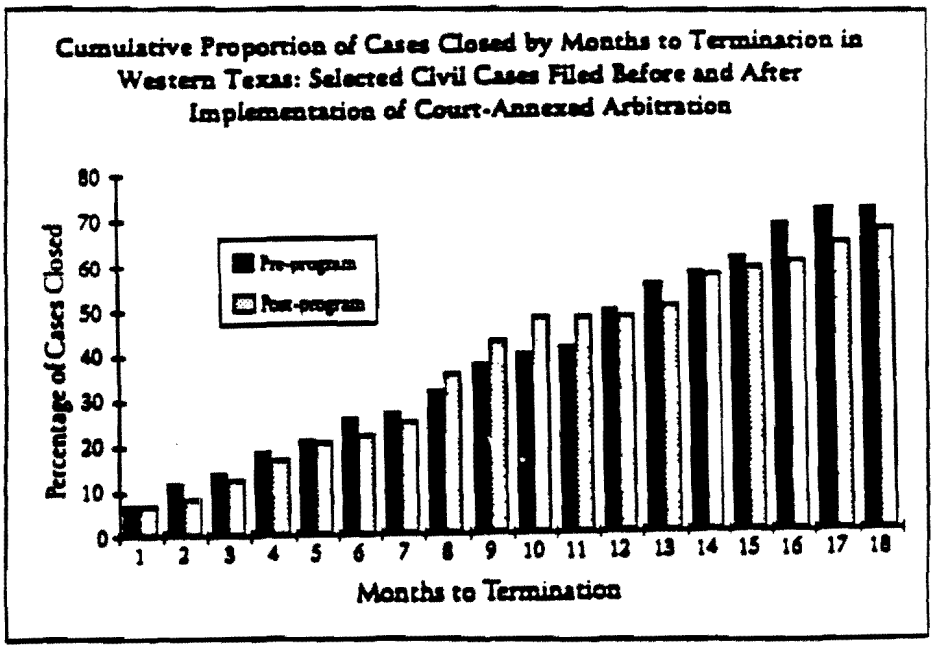
Graph 3



Graph 4



Graph 5



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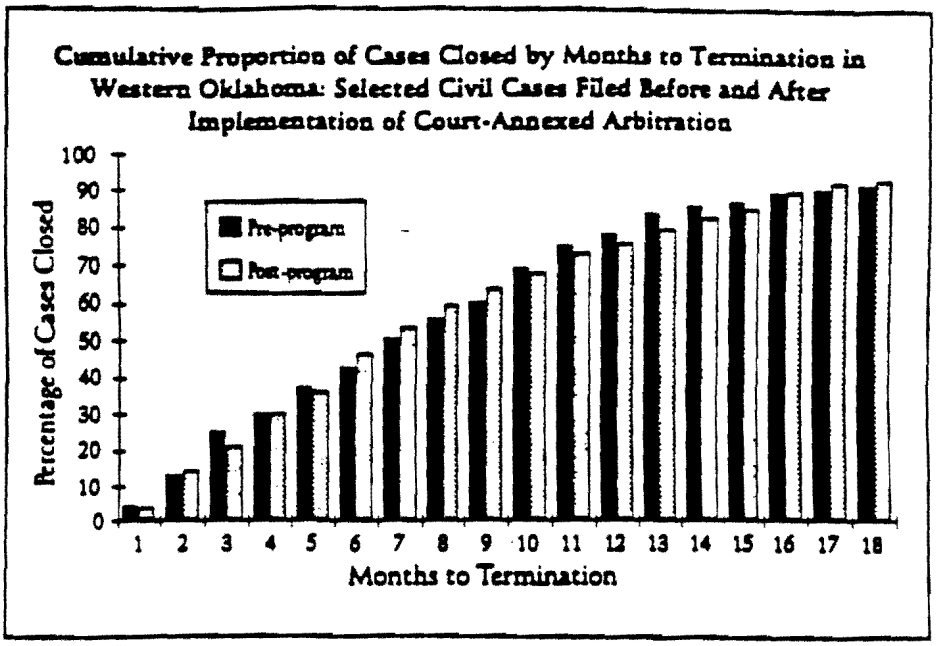

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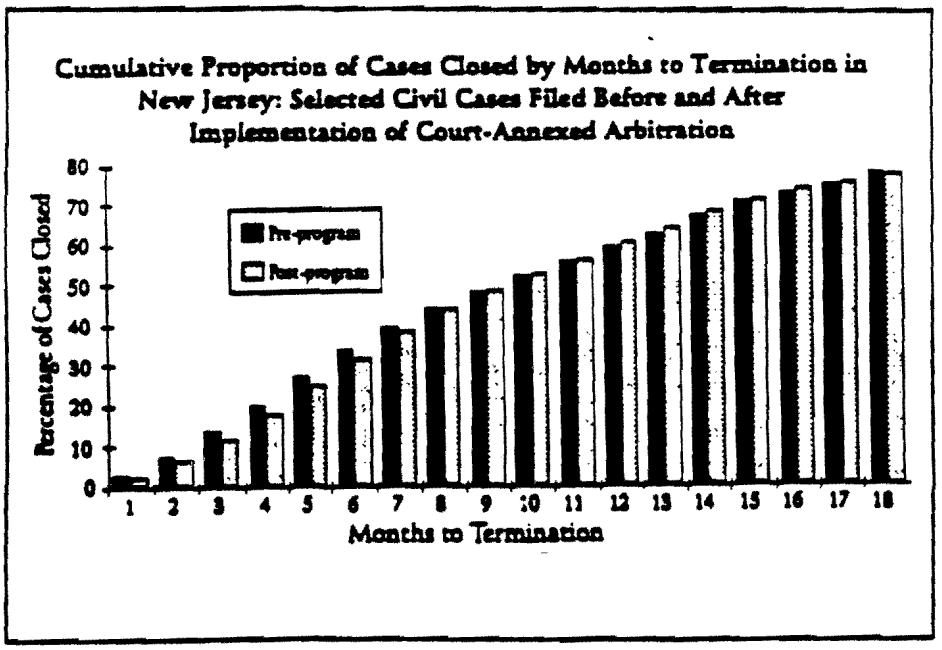
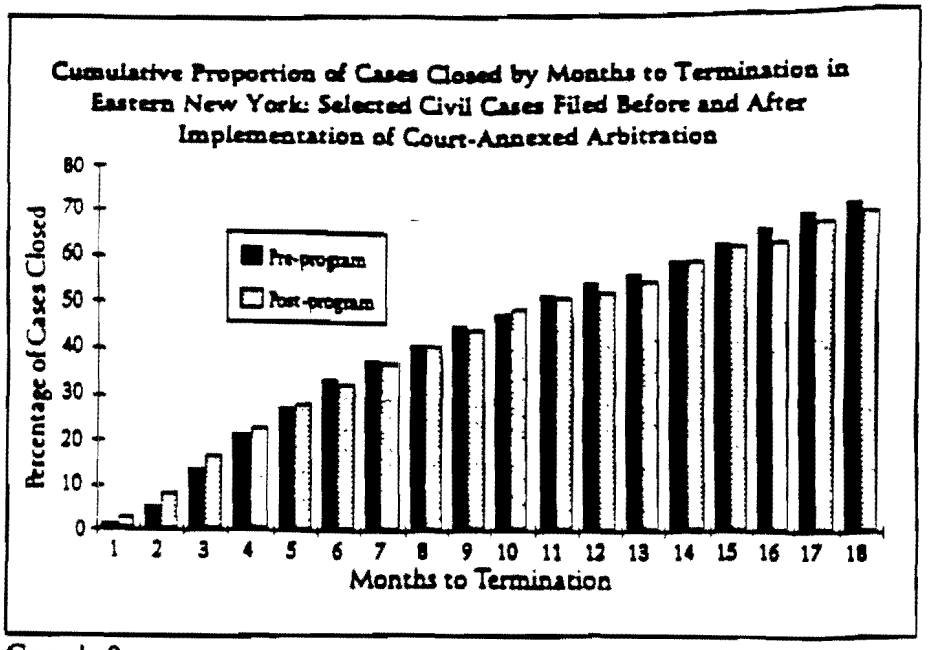


Graph 8


Cumulative Proportion of Cases Closed by Months to Termination in Eastern New York: Selected Civil Cases Filed Before and After Implementation of Court-Annexed Arbitration
Percentage of Cases Closed
0
10
20
30
40
50
60
70
80
Pre-program
Post-program
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
Months to Termination

Graph 9

Appendix 3

TABLE B

Summary of Program Features

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
N.D. Cal. Local Rule 500	Contract or negotiable instrument (diversity, federal question, maritime). Personal injury or property damage (diversity, federal question, maritime). Federal Tort Claims Act Longshoremen & Harbor Worker's Act Admiralty Act Miller Act	$100,000 Current: $150,000 excluding punitive damages.	Random selection of 10 arbitrators by clerk; each party entitled to strike two names, starting with plaintiff; rank remaining six names in order of preference with defendant given first choice.	One, or three if parties agree in writing.	$150 per day for one arbitrator; $75 per day per panel member. Current: $250 and $150.	Scheduled by clerk 20 to 120 days after selection of arbitrators.	Any location selected by arbitrator(s).	None, except in extreme and unanticipated emergencies as established in writing and approved by the judge.	If party who demands trial *de novo* fails to obtain more favorable judgment at trial, costs may be assessed. Current: None.	30	None.

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
M.D. Fla. Local Rule 8	Contract or negotiable instrument (diversity, federal question). Personal injury or property damage (diversity, maritime). Federal Tort Claims Act Miller Act As approved by the Attorney General Jones Act FELA	$100,000 Current: $150,000 excluding punitive damages	Selection by parties from list of all eligible arbitrators; if not completed in 10 days, (current: 20 days) random selection by clerk	Three, parties may agree to fewer.	To be determined by Chief Judge (now at $75 per day).	Scheduled by clerk within 60 days (current: 90 days) of selection and designation of arbitrators on at least 20 days notice to parties.	U.S. Courthouse.	None, except that judge may grant for good cause shown.	Arbitration fees if award at trial not greater than award at arbitration. Current: Fees must be posted with court when demand for *de novo* trial filed.	20 Current: 30	None.
W.D. Mich. Local Rule 43	All civil cases except Social Security and pro se civil rights cases.	$100,000, excluding punitive damages.	Random selection of three names by clerk. Each side may strike one; if two names remain, clerk will randomly select one.	One.	$250 plus reimbursement for expenses reasonably incurred.	Clerk sets hearing from 20 to 45 days after close of discovery and arbitrator selection.	Any location designated by the arbitrator.	None, except in extreme and unanticipated emergencies as established in writing and approved by the judge.	Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when demand for *de novo* trial filed. Current: In addition, attorneys fees may be assessed if trial judgment not 10% more favorable than award.	30	1. Clerk schedules discovery. 2. Judges are to defer ruling on motions for summary judgment.

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
W.D. Mo. Local Rule 302	All civil cases except administrative appeals and prisoner cases.	$100,000, excluding punitive damages.	Random selection by clerk.	Three, parties may agree to one	$75 per day, reasonable expenses reimbursed.	Scheduled by clerk about five months from date last answer filed.	Any room designated in order assigning the case.	Arbitrator may grant for up to 30 days; thereafter requires approval of judge.	1. Court may sanction failure to participate in a meaningful way, including but not limited to striking of any demand for a trial *de novo*. 2. Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when demand for *de novo* trial filed.	30	1. Clerk schedules discovery. 2. Judges may defer ruling on motions filed within 30 days of hearing.
N.J. Local Rule 47	Contract or negotiable instrument. Personal injury or property damage. Federal Tort Claims Act Longshoremen & Harbor Workers' Act Miller Act Jones Act FELA	$50,000, excluding punitive damages. Current: $100,000	Selected by clerk	One.	$150 per case; will entertain petition for expenses.	Set by clerk approximately six months from date last answer filed.	No mention.	Arbitrator may grant for up to 30 days; thereafter requires approval of judge.	1. Court may sanction failure to participate in a meaningful way, including but not limited to striking of any demand for a trial *de novo*. 2. $250 deposit at time of demand for trial *de novo*; returned if requesting party does better at trial. Current: deposit is now $150.	30	Judges may defer ruling on motions filed within 30 days of hearing.

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
E.D.N.Y.	All civil cases except Social Security and prisoner cases. Current: Also excludes civil rights cases & tax matters.	$50,000 Current. $75,000	Random selection by clerk	Three, or one if parties agree in writing.	$75 per case for each panel member; $225 per case for single arbitrator.	Scheduled by clerk about five months from date last answer filed. Current: Clerk sets an outside limit of 180 days.	U.S. Courthouse Current: courtroom in the courthouse.	Arbitrator may grant for up to 30 days; thereafter requires approval of judge.	1. Court may sanction for failure to participate, including striking of any demand for a trial *de novo*. 2. Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when demand for *de novo* trial filed.	30	Judges may defer ruling on motions filed within 30 days of hearing.

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
M.D.N.C. Local Rule 601-611 Current: Local Rule 601-608	Contract or negotiable instrument (diversity, federal question, maritime, interpleader). Personal injury or property damage (diversity, federal question, maritime, interpleader). Federal Tort Claims Act Longshoremen & Harbor Workers' Act Miller Act Jones Act FELA Current: Excludes civil rights and adds cases in which purpose of arbitration is likely to be achieved.	$150,000, excluding punitive damages.	Selected by parties with choice either from list maintained by Private Adjudication Center or of any other person, whether or not an attorney. If not selected in 15 days, Adjudication Center submits list of five names to each party; each party may strike two names. Current: The tasks previously done by the Adjudication Center are now done by the clerk's office.	One.	$40 per hour, up to maximums of $80 for preparation; $380 for hearing; $40 for post-hearing conference. Maximum per case of $500. Current: $120 for preparation; hearing time paid at $60 per hour to a maximum of $600; $80 for post-hearing conference. Maximum of $800 per case.	After issue clerk establishes 90 day discovery period and "end date for arbitration" 60 days after close of discovery. Hearing scheduled by arbitrator, in consultation with clerk and parties, prior to the "end date." Current: "end date" set at end of discovery; hearing to be set 30 days from reference order.	Lawyers' conference room or courtroom; arbitrator may move to another location in consultation with the clerk and parties.	No mention.	1. If party who demands trial *de novo* fails to obtain more favorable judgment at trial arbitrator fees and expenses are assessed. 2. Court may impose sanctions for failure to proceed in good faith. Current: Fees to be posted at time of *de novo* demand, to be returned if demanding party obtains a more favorable judgment, if clerk is notified of settlement at least 10 days before trial, or if court determines that demand was made for good cause. Failure to proceed sanctions still in effect.	30	1. Clerk schedules discovery. 2. Judges are to defer ruling on dispositive motions (except jurisdiction). Current: Judges are to resolve dispositive motions.

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
W.D. Okla. Local Rule 43	Contract or negotiable instrument (diversity, federal question, maritime). Personal injury or property damage (diversity, federal question, maritime). Federal Tort Claims Act Longshoremen & Harbor Workers' Act Admiralty Act Miller Act	$100,000	Random selection of 10 arbitrators by clerk; each party may strike two names, starting with plaintiff; rank remaining six names, defendant given first choice. If parties fail to select arbitrators within 10 days, clerk randomly selects from original list of 10 names. Or, in cases with multiple parties where all parties cannot agree among themselves, each may select one name and clerk makes final determination.	One, or three if parties agree in writing.	$75 per day for one arbitrator or for each panel member.	Scheduled by clerk 20 to 90 days after arbitrator selection.	Any place designated by arbitrator, including courtroom or office building made available by the clerk.	None, except for extreme and unanticipated emergencies as established in writing and approved by the assigned judge.	Arbitration fees if award at trial not greater than award in arbitration. Must be posted with court when request for *de novo* trial is filed. In addition, if position of party who requests trial *de novo* not improved in excess of 10% of arbitration award, opposing counsel's fees and costs may be imposed.	20	None.
E.D. Pa. Local Rule 8	All civil cases except Social Security and prisoner cases. Current: Excludes civil rights cases.	$75,000 Current: $100,000	Random selection by clerk.	Three. Current: May agree to one.	$75 per case; will consider additional compensation in protracted cases.	Scheduled by clerk about five months from date last answer filed. Current: Time for hearing reduced to 120 days.	U.S. Courthouse; room selected by arbitration clerk.	Arbitrator may grant for up to 30 days; thereafter requires approval of judge.	1. Court may sanction for failure to participate, including but not limited to striking of any demand for a trial *de novo*. 2. Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when request for *de novo* trial filed.	30	1. Clerk schedules discovery. 2. Judges may defer ruling on motions filed within 30 days of the hearing.

District and Local Rule	Case Type	Ceiling	Selection of Arbitrators	Number of Arbitrators	Arbitrator Compensation	Time of Hearing	Place of Hearing	Authority to Grant Continuances	Disincentives to Demanding Trial *De Novo*	Days to Demand Trial *De Novo*	Procedures to Reduce Judge Involvement
W.D. Tex. Local Rule 300-309	Contract or negotiable instrument (diversity, federal question). Personal injury or property damage (diversity, federal question, maritime). Miller Act As approved by the Attorney General Jones Act	$100,000 Current: $150,000	Selection by clerk of five arbitrators; each party may strike one name.	Three.	$75 per day.	Scheduled by clerk 20 to 40 days after panel selection.	Courthouse, federal building or other office building made available by clerk's office.	Arbitrator may grant for up to 30 days; thereafter requires approval of judge.	Arbitration fees if award at trial not greater than award at arbitration. Must be posted with court when request for *de novo* trial filed.	30	None.

Appendix 4

PROPOSED LOCAL RULE FOR VOLUNTARY ADR PROGRAM

A. Materials Provided to Litigants

1. Notification to the parties of an initial pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure shall be accompanied by a copy of this local rule, informational material explaining each of the ADR options available under this rule, and a questionnaire soliciting information about the case relevant to the selection of an appropriate ADR option.

2. The questionnaire shall be completed by counsel and returned to the assigned judge at least ten (10) days prior to the date of the conference.

B. Initial Pre-Trial Conference

1. The assigned judge shall review and discuss the completed questionnaires with counsel at the initial pre-trial conference in order to determine which ADR option would be best suited for the case. If appropriate, the judge shall made a recommendation to the parties to pursue one of the available ADR options.

2. If counsel consent to use the recommended option, or one of the other available ADR options, then counsel shall execute a stipulation consenting to the referral of the case to the voluntary arbitration program and the court shall issue an order directing the clerk to designate the case for the chosen ADR option in accordance with this rule. If ADR fails to result in the resolution of the action, then the case shall be returned to the calendar of the court and treated for all purposes as if it had not been referred to ADR, and any right of trial by jury that a party would otherwise have shall be preserved inviolate.

3. If counsel for the parties do not consent to use ADR, then the case shall proceed in the usual manner.

C. Mediators and Evaluators

1. Certification of Mediators and Evaluators. The Chief Judge shall certify as many mediators and evaluators as determined to be necessary under this rule.

2. Minimum Qualifications. An individual may be certified to serve as a mediator or evaluator if he or she: (a) has been for at least five years a member of the bar of any state or the District of Columbia; (b) is admitted to practice before this court; and (c) is certified by the Chief Judge to be competent to perform the duties required.

3. Separate lists of all persons certified as mediators and evaluators shall be maintained by the Clerk. The list of certified evaluators shall indicate each evaluator's area of expertise.

4. Each certified mediator and evaluator shall be required to attend training sessions prior to serving as deemed necessary by the court.

5. Compensation. Each mediator and evaluator shall be compensated at the rate of $75.00 per case. The compensation shall be borne by the parties equally and shall be deposited with the Clerk by the parties within ten (10) days from the date of the order referring the case to ADR. In the event that the ADR proceeding is protracted, the mediator or evaluator may petition the assigned judge for additional compensation. If additional compensation is permitted, then the parties shall deposit the additional amount with the clerk within ten (10) days from the date of the order approving the additional compensation. The Clerk shall distribute the compensation to the mediator or evaluator shortly after the conclusion of the ADR process.

D. Available Court-Annexed ADR Options

1. Arbitration

a. Voluntary non-binding arbitration shall be conducted in accordance with the local rule governing mandatory court-annexed arbitration.

b. Upon the consent of the parties, the court shall order that the action be referred to non-binding arbitration in the same manner as if the case had been eligible for referral to the mandatory arbitration program, and the Clerk shall designate and treat the action as if it had been referred for mandatory arbitration.

2. Mediation

a. Selection of the Mediator. If the parties are able to agree upon the selection of a mediator, they shall so notify the Clerk within ten (10) days from the date of the order referring the case to mediation. If the parties cannot agree, then the Clerk shall choose a mediator at random from among the individuals on the list of certified mediators. The mediator shall disqualify himself or herself in any action in which he or she would be required under 28 U.S.C. § 455 to be disqualified if a justice, judge or magistrate. The Clerk shall promptly notify the parties of the name of the mediator.

b. Mediation Procedure. Upon notification to the parties of the name of the mediator, the parties shall provide to the mediator copies of their respective pleadings. The mediator shall fix a time and place for the initial mediation conference and all adjourned sessions. All conferences must take place within this district, and the parties must be given at least fourteen (14) days written notice of the initial conference

c. Attendance. The attorney primarily responsible for handling each party's case shall attend the initial mediation conference and all adjourned sessions and shall be prepared to discuss all liability issues, damages issues, and his or her client's settlement position in detail and in good faith. The mediator may, at his or her discretion, require that party representatives with settlement authority be present at any of the conferences. Failure of any party to participate in the mediation process in good faith shall be reported to the assigned judge by the mediator and may result in the imposition of sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

d. Confidentiality. All proceedings of the mediation conference(s), including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and confidential, and shall not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at mediation conferences unless a settlement is reached, in which event the settlement agreement shall be reduced to writing and shall be binding upon all parties to that agreement.

e. Mediator's Role. Through the mediation conference(s), the mediator shall attempt to define issues, suggest possible resolutions, and otherwise assist the parties in reaching their own negotiated settlement. The mediator may, in his or her discretion, provide the attorneys for the parties with a written settlement recommendation memorandum, and the attorneys shall forward the memorandum to their clients. No copy of any such memorandum shall be filed with the court or made available in whole or in part, directly or indirectly, to the assigned judge.

f. Settlement. If the mediator is successful in settling the action, the settlement agreement shall be reduced to writing and executed by the parties together with a stipulation of discontinuance. The

stipulation shall be presented by the parties to the assigned judge for approval, and the action shall be dismissed with prejudice.

g. Failure to Reach Settlement. If the mediator is unable to mediate a settlement, he or she shall promptly file with the Clerk a notice indicating that the mediation requirements of this rule have been met but that no settlement has been achieved. Upon receipt of this notice, the Clerk shall place the action on the court calendar and the action shall be treated for all purposes as if it had not been referred to mediation.

3. Early Neutral Evaluation

a. Selection of the Evaluator. The Clerk shall select a neutral evaluator with expertise in the subject matter of the action from among the individuals on the list of certified neutrals. The evaluator shall disqualify himself or herself in any action in which he or she would be required under 28 U.S.C. § 455 to be disqualified if a justice, judge or magistrate. The Clerk shall promptly notify the parties of the name of the evaluator.

b. Early Neutral Evaluation Procedure. Upon notification to the parties of the name of the evaluator, the parties shall provide to the evaluator copies of their respective pleadings. The evaluator shall fix a time and place for the evaluation session. The session must take place within this district, and the parties must be given at least fourteen (14) days written notice of the date of the session. No later than five (5) days in advance of the evaluation session, each party shall submit to the evaluator, and serve on all other parties, a written evaluation statement. Such statement may not exceed ten pages and must (i) address whether there are any legal or factual issues whose early resolution might reduce the scope of the dispute or contribute significantly to the productivity of settlement discussions, and (ii) identify the discovery that promises to contribute most to equipping the parties for meaningful settlement negotiations. These statements shall not be filed with the court, and their contents shall not be disclosed in whole or in part, directly or indirectly, to the assigned judge.

c. Attendance. Counsel for each party and the parties themselves shall attend the evaluation session, consistent with the purpose of early neutral evaluation to afford litigants an opportunity to articulate their position and to hear, first hand, opposing parties' versions of the matter in dispute. A party other than an individual (e.g., a corporation, association, partnership, governmental agency) shall satisfy this attendance requirement if it is represented at the session by a person (other than counsel) with authority to bind the party to terms of a settlement and to enter into stipulations. Failure of any party to participate in the evaluation session in good faith shall be reported to the assigned judge by the evaluator and may result in the imposition of sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

d. Confidentiality. All proceedings of the evaluation session, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and confidential, and shall not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at an evaluation session unless a settlement or stipulation is entered into, in which event the settlement agreement or stipulation shall be reduced to writing and shall be binding upon all signatory parties.

e. The Evaluation Session. The evaluator shall have considerable discretion in structuring the evaluation session. The session shall proceed informally and the Federal Rules of Evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. At the session the evaluator shall: (i) permit each party to make an oral presentation; (ii) help the parties identify areas of agreement and, where appropriate, enter stipulations; (iii) assess strengths and weaknesses of parties' contentions and evidence; (iv) estimate, where feasible, the likelihood of liability and the dollar range of damages; and (v) help the litigants devise a plan for sharing the important information and/or conducting the key discovery

that will equip them as expeditiously as possible to enter into meaningful settlement discussions or to posture for other forms of disposition.

f. Settlement. If the action settles during the evaluation session, the settlement agreement shall be reduced to writing and executed by the parties together with a stipulation of discontinuance. The stipulation shall be presented by the parties to the assigned judge for approval, and the action shall be dismissed with prejudice.

g. Return to Court Calendar. Following the conclusion of the evaluation session, if no settlement is reached, the evaluator shall file with the Clerk a notice indicating that the early neutral evaluation requirements of this rule have been met and shall forward to the assigned judge copies of all stipulations entered into during the evaluation session. The Clerk shall place the action on the court calendar and the action shall be treated for all purposes as if it had not been referred to early neutral evaluation.

4. Mini-Trial

a. Selection of the Advisor. The Clerk shall assign the action for purposes of conducting a mini-trial to a magistrate other than the magistrate already assigned to preside over discovery matters in the action, if applicable. The Clerk shall promptly notify the parties of the assignment.

b. Mini-Trial Procedure. Upon notification to the parties of the assigned magistrate, the parties shall provide to the magistrate copies of their respective pleadings. The magistrate shall schedule the mini-trial to commence approximately 180 days from the date the action was referred for mini-trial. Any party may request a continuance from the magistrate based upon a showing that sufficient discovery has not been conducted to enable the party to present its case.

c. Attendance. Counsel for each party and the parties themselves shall attend the mini-trial, consistent with the purpose of the mini-trial to afford litigants an opportunity to articulate their position and to hear, first hand, an abbreviated presentation of each party's best case. A party other than an individual (e.g., a corporation, association, partnership, governmental agency) shall satisfy this attendance requirement if it is represented at the session by a person (other than counsel) with authority to bind the party to terms of a settlement. Failure of any party to participate in the mini-trial in good faith shall be reported to the assigned judge by the magistrate and may result in the imposition of sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

d. Confidentiality. All proceedings of the mini-trial, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and confidential, and shall not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission against interest. No party shall be bound by anything done or said at an evaluation session unless a settlement is entered into, in which event the settlement agreement shall be reduced to writing and shall be binding upon all parties.

e. The Mini-Trial Presentations. Counsel for each party shall give an oral presentation of his or her client's affirmative case to a panel consisting of the magistrate and the party representatives. Counsel shall also be permitted to present a rebuttal case and give a summation. The session shall proceed informally and the Federal Rules of Evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. The magistrate shall establish a time limit for the presentations and shall have considerable discretion in structuring all other necessary procedural rules.

f. Settlement Discussions. At the conclusion of the presentations, the magistrate shall meet with the party representatives and counsel to attempt to arrive at a settlement. The magistrate shall review

the strengths and weaknesses of the parties' positions and, where appropriate, suggest a dollar range for settlement.

g. Settlement. If the mini-trial results in a settlement, the settlement agreement shall be reduced to writing and shall be executed by the parties together with a stipulation of discontinuance. The stipulation shall be presented by the parties to the assigned judge for approval, and the action shall be dismissed with prejudice.

h. Return to Court Calendar. If no settlement is reached following the conclusion of the mini-trial, the magistrate shall file with the Clerk a notice indicating that a mini-trial has been conducted but that no settlement has been reached. The Clerk shall place the action on the court calendar and the action shall be treated for all purposes as if it had not been referred for a mini-trial.

5. Summary Jury/Non-Jury Trial

a. Selection of the Presiding Judge. The Clerk shall assign the action for purposes of conducting a summary trial to a judge other than the assigned judge. The Clerk shall promptly notify the parties of the assignment.

b. Summary Trial Procedure. Upon notification to the parties of the presiding judge, the parties shall provide to the judge copies of their respective pleadings. The judge shall schedule the summary trial to commence approximately 180 days from the date the action was referred for summary trial. Any party may request a continuance from the judge based upon a showing that sufficient discovery has not been conducted to enable the party to present its case. If the parties have waived their right to a jury trial, then the summary trial shall be conducted before the presiding judge who shall render the advisory verdict. If the parties have preserved their right to jury trial, then the summary trial shall proceed before the presiding judge and a six-member jury selected in the usual manner from the court's jury pool, and the jury shall render the advisory verdict.

c. Attendance. Counsel for each party and the parties themselves shall attend the summary trial, consistent with the purpose of the summary trial to afford litigants an opportunity to articulate their position and to hear, first hand, an abbreviated presentation of each party's best case. A party other than an individual (e.g., a corporation, association, partnership, governmental agency) shall satisfy this attendance requirement if it is represented at the session by a person (other than counsel) with authority to bind the party to terms of a settlement. Failure of any party to participate in the summary trial in good faith may result in the imposition of sanctions by the presiding judge pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

d. Confidentiality. All proceedings of the summary trial, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and confidential, and shall not be reported, recorded, placed in evidence, made known to the assigned judge, or construed for any purpose as an admission against interest in a subsequent *de novo* trial. No party shall be bound at a *de novo* trial by anything done or said at the summary trial.

e. The Summary Trial Presentations. The attorney presentations shall be organized in the manner of a typical trial, except that no witness testimony will be allowed. First, plaintiff's counsel shall present an opening statement, followed immediately by defense counsel's opening statement. Next, counsel shall present their affirmative cases in turn by providing the fact-finder with a narrative overview of the evidence, including the identity of witnesses and their anticipated testimony and a description of documentary evidence. Next, counsel shall present their rebuttal cases and make closing arguments. The presiding judge shall establish a time limit for the presentations and shall have considerable discretion in structuring all other necessary procedural rules.

f. The Advisory Verdict. In a summary non-jury trial, the presiding judge shall render a verdict shortly after the conclusion of the presentations. The verdict need not contain findings of fact or conclusions of law. In a summary jury trial, the presiding judge shall give an abbreviated charge to the jury following the presentations by counsel. Consensus verdicts shall be encouraged, but the jurors shall be permitted to render individual verdicts. The verdict rendered shall be purely advisory.

g. Post-Trial Discussions. After the verdict is rendered in a summary jury trial, the attorneys and parties shall be given an opportunity to discuss the case with the jurors and to solicit the jurors' reactions to particular positions and evidence. The parties and their counsel shall also meet with the presiding judge to discuss settlement. The presiding judge shall review the strengths and weaknesses of the parties' positions and, where appropriate, suggest a dollar range for settlement.

h. Settlement. If the summary trial results in a settlement, the settlement agreement shall be reduced to writing and shall be executed by the parties together with a stipulation of discontinuance. The stipulation shall be presented by the parties to the presiding judge for approval, and the action shall be dismissed with prejudice.

i. Return to Court Calendar. If no settlement is reached following the conclusion of the summary trial, the presiding judge shall file with the Clerk a notice indicating that a summary trial has been conducted but that no settlement has been reached. The Clerk shall place the action on the court calendar and the action shall be treated for all purposes as if it had not been referred for a summary trial.

Appendix 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CERTIFICATION
OF COUNSEL
RE: RECOVERABLE DAMAGES

----------x

I, _____, counsel for _____ do hereby certify pursuant to the Local Arbitration Rule, that to the best of my knowledge and belief the damages recoverable in the above-captioned civil action exceed the sum of $100,000 exclusive of interest costs, fees and punitive damages.

Dated:_____

_____
Counsel for

_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ORDER REFERRING CASE
TO ARBITRATION

----------x

The above-captioned matter having been designated by the Clerk as eligible for arbitration is hereby referred to arbitration pursuant to the Local Arbitration Rule of the Southern District of New York.

You will be notified by the Clerk at a later date of the date, time and place of the hearing and the name of the arbitrator. If all parties desire to arbitrate before a panel of three arbitrators, an appropriate stipulation must be submitted to the Clerk within ten (10) days from the date of this order.

Dated: _____

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

NOTICE OF
ARBITRATION HEARING

- -x

Please take note that the above-captioned civil case will be arbitrated pursuant to the Local Arbitration Rule of the Southern District of New York.

The arbitration hearing has been scheduled for _____ at _____ before _____, who has been selected at random from the SDNY's panel of certified arbitrators. You are expected to substantially complete discovery prior to the hearing date. The Judge may refer the case to a magistrate for purposes of discovery.

The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except those intended solely for impeachment, must be marked for identification and delivered to adverse parties at least ten (10) days prior to the hearing.

A party may have a recording and transcript made of the arbitration hearing, but that party shall make all necessary arrangements and bear all expenses thereof.

In the event that the parties agree that this case will be ready for an arbitration hearing prior to the above date, you should advise me in writing within the next fifteen (15) days; I will schedule the arbitration hearing for an earlier date.

Very truly yours,

CLERK OF COURT

By:_____
Arbitration Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

STIPULATION TO
APPOINT THREE
ARBITRATORS

----------x

It is hereby stipulated by and between counsel in the above-captioned matter that the arbitration hearing will be held before a panel of three arbitrators.

Dated: _____

_____
Counsel for

_____
Counsel for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TO: ARBITRATOR APPOINTED UNDER THE SOUTHERN DISTRICT OF NEW YORK LOCAL ARBITRATION RULE

You have been appointed to serve as an arbitrator pursuant to the provisions of the Local Arbitration Rule of the Southern District of New York. The appointment shall remain in effect until the termination of the arbitration proceeding.

Please note the following points regarding the arbitration process:

1. The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Relevance and efficiency shall be the primary considerations.

2. The arbitrator shall have the power to issue subpoenas for the attendance of witnesses and the production of documentary evidence in accord with Rule 45 of the Federal Rules of Civil Procedure.

3. The arbitration hearing may proceed in the absence of any party who, after due notice, fails to appear, but an award shall not be based solely upon the absence of any party.

4. A party may transcribe or record the proceeding at his own expense. Such a recording or transcript must be furnished to any other party, unless the parties otherwise agree.

5. The arbitrator shall utilize the Form of Award adopted by the Court. No findings of fact or conclusions of law shall be issued.

6. The SDNY arbitration clerk is your liaison with the Court in the event of any questions you may have regarding your assignment. He (she) may be reached at _____.

MAXIMUM COMPENSATION FOR ARBITRATOR

$225.00 Per Case*

Note: The arbitrator shall not be reimbursed for actual expenses incurred in the performance of his or her duties.

In referring to your assigned case please identify it by its caption, docket number and assigned Judge.

*If parties have stipulated to a panel of three arbitrators, maximum compensation is $75.00 per arbitrator per case. The arbitrator may petition the Court for additional compensation if the hearing is protracted.

TO: ARBITRATORS APPOINTED PURSUANT TO LOCAL SDNY ARBITRATION RULE

OATH OF ARBITRATORS

"I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as arbitrator according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

_____
Signature

Sworn to and subscribed before me this _____ day of _____, 19____, at

_____, _____.

_____ _____
Signature Title

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OATH OF WITNESS
AT ARBITRATION HEARING

YOU DO SWEAR (OR AFFIRM) THAT THE TESTIMONY YOU ARE ABOUT TO GIVE ON THE MATTER NOW BEFORE THE ARBITRATION PANEL OF THIS COURT IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

REPORT OF SETTLEMENT
FOLLOWING THE ARBITRATION

----------x

I, the undersigned arbitrator, having been duly certified and sworn, and having heard the above-captioned civil action on _____ 19____, hereby declare that on _____, 19____ this action was reported SETTLED by counsel for the parties.

_____
Arbitrator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ARBITRATION
AWARD

----------x

I, the undersigned arbitrator, having been duly certified and sworn and having heard the above-captioned civil action on _____, 19____ do hereby make the following award pursuant to the Local Arbitration Rule of the Southern District of New York.

_____
Arbitrator

NOTICE

This award will become a final judgment of the court, without the right of appeal, unless a party files with the court a demand for trial *de novo* within thirty (30) days after the entry of the arbitration award.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JUDGMENT

----------x

An arbitration award having been filed on _____, 19____, and thirty (30) days having elapsed from the entry of the award without any party demanding a trial *de novo*, it is hereby

ORDERED and ADJUDGED in accordance with the Local Arbitration Rule of the Southern District of New York that the arbitration award be entered as the judgment of the court.

By:_____
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DEMAND FOR
TRIAL *DE NOVO*

----------x

I, _____, counsel for _____, hereby demand a trial *de novo* in the above-captioned matter wherein an arbitration award was filed with the Clerk on _____, 19____.

I have deposited with the Clerk of Court an amount equal to the arbitration fees of the arbitrator as provided in the Local Arbitration Rule. I understand that this sum so deposited will be returned in the event my client obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award. If my client does not obtain a more favorable result after trial, the sum so deposited shall be paid by the Clerk to the arbitrator.

Dated: _____

_____
Counsel for