WORKSHOP A

MECHANICS OF MEDIATION

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TIPS TO BE AN EFFECTIVE MEDIATOR OF EMPLOYMENT DISPUTES

By Ruth D. Raisfeld

Mediation has become an integral process in the life of labor and employment disputes. Each of the federal courts and an increasing number of state courts not only have ADR programs but may require mediation of pending cases right out of the wheel or later during a litigation. More and more attorneys have an opportunity to serve as a mediator, either through court-annexed appointments, volunteer assignments or when retained by parties who believe they can help serve as an honest broker in a private or pending matter.

The bridge from being a litigator to becoming an effective mediator, however, is neither straight nor short! It is essential to be mindful about the transition from the role of advocate to that of a neutral, third party dedicated to resolving the dispute. Here are some tips that may help in making it easier to wear the hat of "mediator."

1. BE NEUTRAL: The mediator's role is to facilitate negotiations leading to a settlement of a pending litigation. It is not to be the lawyer for one side or the other or both. This is true even if you would handle the case differently for one side or the other or believe that the attorneys who have appeared are not as prepared or thoughtful as you would be. Strive to be neutral!

2. RESPECT THE ATTORNEY-CLIENT RELATIONSHIPS: The mediator is there to help, not to commandeer the negotiations. It is important not to criticize or critique the performance of each side's lawyer or to do anything that would undermine the lawyer in front of his/her client. If you believe a lawyer is an obstacle to effective negotiations, in certain circumstances, you might consider talking to the lawyer outside the presence of the client or calling for an "all lawyers" meeting and attempt to put the lawyers on a more productive and constructive path, but it is rarely appropriate to diminish the lawyer in the eyes of his/her client.

3. BE PREPARED: The parties should provide submissions in advance of the mediation. Read them in advance. You can also call each attorney in advance especially if you have an inkling that they haven't prepared. This does not mean you need to do extensive research: ask them to send you cases they think you should read. Further, encourage counsel to get you important documents or testimony before the mediation: it is very hard to get the essence of the argument when reading things for the first time at the mediation.

4. ENCOURAGE PARTIES TO CALCULATE BEST CASE/WORST CASE DAMAGE SCENARIOS: If the parties haven't done this in advance, work with each side separately prior to and during the mediation to do damage estimates depending on the nature of the case, remedies available, whether plaintiff has lost employment or become reemployed, out-of-pocket expenses, medical expenses, emotional distress,

attorneys' fees, etc. This helps to get the parties "reality testing" on their own before the mediation so some of the hard work of getting to a settlement zone is done without you.

5. DO NOT PUT A VALUE ON THE CASE: Sometimes inexperienced counsel and clients will turn to the mediator and say *"What do you think the case is worth?"* This is not your job: whatever you say, one side will think you don't believe them or you are taking sides. While at some point you might offer a mediator's proposal to break impasse, you should be careful to say "This is not what I think the case is worth, but this is what I think both sides can agree to and live with."

6. LISTEN: Be sure to give both sides an opportunity to share their side of the story with you before you start to reality test. Remind the participants that you are not the judge or the jury but simply there to discuss some of the strengths and weaknesses that they may wish to factor into their settlement analysis. Be sensitive to the needs of the parties and remember that there are potential emotional issues on both sides. A plaintiff's emotional state will probably be different in a sexual harassment case then it would be in a wage case. Similarly a large employer will often have different needs and requirements than a small employer. Don't size up the situation without fully listening and letting participants speak.

7. MIX IT UP: Be creative in conducting joint and separate sessions. Sometimes it is helpful to speak with counsel separately from their clients; it is never appropriate to speak with clients without counsel present. Sometimes it may be helpful to reconvene a joint session or to allow clients to speak with each other privately.

8. KEEP TRACK OF TIME: Do not burn through the entire day discussing the facts and the law. At some point, state "well, it sounds like the parties can agree to disagree" and move to a discussion of the future. With a plaintiff ask questions such as: Have you found a job? Are you getting emotional support and/or medical attention? Do you understand how long and complicated lawsuits can be? With a defendant ask questions such as: Has the employee and/or supervisor been replaced? Are potential witnesses available? Do you have access to documents? Does the defendant understand how much time, effort and expense goes into defending an employment decision?

9. **BE PERSISTENT:** Do not give up on settling just because the parties are far apart at 2 p.m. Mediation of employment disputes takes a long time but MOST disputes do settle within one day.

10. **IT AIN'T OVER TIL IT'S OVER:** If the parties come to an agreement, assist in the preparation of a terms sheet or if there is time, an agreement. If the parties do not sign a final agreement in your presence, then set a schedule for drafting the agreement, notifying the court, and filing a stipulation. After the mediation, follow up. Many settlements are derailed by delay and remorse.

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Provocative, Human, Eclectic

In This Issue:

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In the Courts

Making the Most of Automatic Mediation

By Rebecca Price

I have been assured by some illustrious members of the bar that if I tell you in this first sentence that approximately 60 percent of cases referred to mediation in the U.S. District Court for the Southern District of New York settle you will keep reading this article. How about the oft-cited statistic that fewer than two percent of federal civil cases go to trial? Might that also inspire you to think of mediation – early mediation in particular – as a useful adjunct to litigation?

The Southern District has had a mediation program for over 30 years. Judges may refer any civil case (except tax, Social Security, and habeas) to mediation at any point in the litigation process. Starting in 2011, the court instituted two programs of early automatic referral to mediation – one in counseled employment discrimination cases and the other for counseled 42 U.S.C. § 1983 misconduct cases against the New York City Police Department.

The automatic programs recently have been expanded to include counseled Section 1983 police cases in the White Plains courthouse, and Fair Labor Standards Act cases assigned to seven of the court's judges, two in White Plains and five in Manhattan.

There are a number of principles driving the court's adoption and expansion of automatic mediation referrals. A substantial number of cases may be settled at an early stage, particularly with limited pre-mediation disclosures and the assistance of a trained neutral. (In 2015, our lowest rate of settlement was in counseled employment discrimination cases, approximately 50 percent of which settled through mediation.) A cornerstone of mediation is that it serve the needs of mediation participants. Although the early automatic referral programs come with discovery and other protocols, mediators and participants may modify the process and/or seek judicial relief to insure that a particular process is applicable and useful in each specific case.

Even when cases do not settle, early mediation is likely to streamline the next stages of the litigation process by narrowing and focusing the issues in dispute, clarifying differences in views of the facts and legal postures, and by setting the stage for effective communication between and among counsel and clients. A deep dive at the start can be a constructive way to get to the facts early and assess how best to advise a client over the long term. Of course, reaping these benefits depends upon active engagement, collaboration, and feedback between litigants and mediators.

No process is universally appreciated, and the Southern District's mediation program is no exception. The primary concern I have heard is with the quality of mediators on the court's panel. Quality, for most litigants, typically refers to knowledge of substantive law and, secondarily, to mediation process skills. Everyone – the court, the mediation program, the mediators, and surely the lawyers and parties – wants every mediation to be of the highest quality. We have undertaken a number of initiatives to support that goal. The mediator evaluation program, developed in collaboration with the New York City Bar Association Committee on Alternative Dispute Resolution, sends specially trained evaluators (themselves mediators) to observe and assess their peers as they mediate actual cases. The feedback provided by the evaluators enables panel mediators to reflect upon and improve their mediation skills and enables the mediation program to provide training and support and, where necessary, to remove mediators who demonstrate significant deficiencies. New applicants to the mediation panel must have had mediation skills training and meet live observation and co-mediation requirements before being assigned matters. Since last year, the court also has hosted practice groups where mediators meet every other month to discuss and strategize about mediation challenges in Southern District cases. In the last three years we have offered mediator trainings in a number of areas including employment discrimination, Section 1983, mediation skills, and implicit bias.

I also must say that although the court's programs for mediator

education and training are an asset, the mediator panel itself includes a large number of extraordinarily talented people, all of whom serve as volunteers. Although the mediation program assigns a mediator based on the nature of the case, litigants may contact the program with specific requests or needs for a mediator. These requests might include areas of legal experience or knowledge, or other traits such as an ability to work with high conflict parties, or comfort with family disputes, or a sensitivity to ethnic or cultural issues. With a panel of over 300 mediators, chances are high that we can satisfy your requests.

Even when cases do not settle, early mediation is likely to streamline the next stages of the litigation process by narrowing and focusing the issues in dispute, clarifying differences in views of the facts and legal postures, and by setting the stage for effective communication between and among counsel and clients.

Some members of the bar may be reluctant or outright refuse to engage in mediation, particularly when the referral comes early in a case. This opposition comes with many messages: a case can only be assessed once discovery is complete; an openness to mediation is a sign of weakness (to one's adversary or one's client); or early settlement means a change in anticipated revenue. There is no question that, along with the advent of electronic discovery and the reduction in civil trials, the integration of mediation and other means of alternative dispute resolution into the civil litigation process creates pressures to change the way many of us practice law. I would encourage those who have these concerns to express them, and then to make the most of the mediation process if you find yourself in it. The right mediator will assist you in developing clarity about the best path forward in any given case. In some situations, that path could include an application to the presiding judge to be removed from mediation if that is necessary and appropriate.

A final request, if I may. If you are in mediation in the Southern District of New York and the assigned mediator or the mediation process do not meet your expectations, please let us know. The court sends post-mediation surveys to counsel of record on every mediated case. The mediation program also welcomes comments by phone, e-mail, fax, or regular mail. There is nothing more disheartening than hearing anecdotally that someone has had a bad experience, without any means for us to investigate and improve. We are a public program, a service of the court, and we are (continually) a work in progress.

Editor's Note: Rebecca Price is director of the ADR program in the Southern District of New York.

Decisions

Ballot Selfies

By Charles C. Platt

In a tumultuous election process that has included everything from the offensive use of social media to claims of "rigged" election outcomes, a new (albeit smaller) battleground has emerged: "ballot selfies." These are photographs that are taken by voters with a mobile device in a voting booth, often show the voters with their marked ballots, and are published widely across the internet.

Proponents of ballot selfies argue that such photographs are more than just the narcissistic

Mediation Program

Annual Report

January 1, 2015 - December 31, 2015
(As of July 28, 2016)

Rebecca Price
Director, ADR Program

Introduction

The United States District Court for the Southern District of New York ("SDNY") is a trial-level federal court encompassing the counties of New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan. The Court hears cases in Manhattan, White Plains, and Poughkeepsie, New York. It has had an Alternative Dispute Resolution ("ADR") program since the early 1990s which has almost exclusively focused on mediation. ADR in the SDNY is managed by the Director of the ADR Program and the staff of the Mediation Program. More information about the program is available at: http://nysd.uscourts.gov/mediation.

In 2015, a total of 1,094 cases were referred into the SDNY Mediation Program. At the time of the writing of this report 1,030 of the cases have closed with the following rates of settlement.

Automatic Employment: 46%
Pro Se Employment: 66%
Judge-referred (non-*pro se* employment): 63%
Local Civil Rule 83.10 (the § 1983 Plan): 64%

In 2015, 393 of the mediation referrals were from individual judges, an increase of 119 non-automatic referrals compared to 2014. Of those referrals, 104 were through the Mediation Referral Order for Pro Se Employment Discrimination Cases. This program is run in collaboration with the Court's Office of Pro Se Litigation and with a number of law school clinics and private practitioners who undertake limited scope representation of *pro se* plaintiffs for the mediation process.

Cases enter the Mediation Program either through a process of automatic referral or by referral of a specific case from the assigned judge ("judge-referred"), who may direct cases to mediation on his or her own initiative or at the request of counsel, or parties if *pro se*. Since 2011, the SDNY has also had "automatic" referrals of non-*pro se* employment cases and certain § 1983 civil rights cases against the New York City Police Department. Both of these programs allow for mediation at the early stages of the litigation process before formal discovery has occurred. In both types of "automatic" cases, pre-session document and information exchanges are required so that parties and counsel will have sufficient information to have productive conversations.

In 2015, there were approximately 361 mediators on the SDNY roster. Mediator selection is done by the Mediation Program. The Mediation Procedures require mediators to accept at least two cases per year. On average, panel mediators were offered seven cases over the course of the year and mediated four. Some mediators were offered as many as 20 cases and mediated as many as 17. The range in the amount of cases offered to mediators is due to many variables such as the location in which the mediator is available (Manhattan, White Plains, or both), whether or not the mediator accepts employment or § 1983 cases, and the number and types of areas of expertise.

Following are more detailed statistics about the functioning of the Mediation Program and some of the initiatives undertaken in 2015.

Statistical Reports

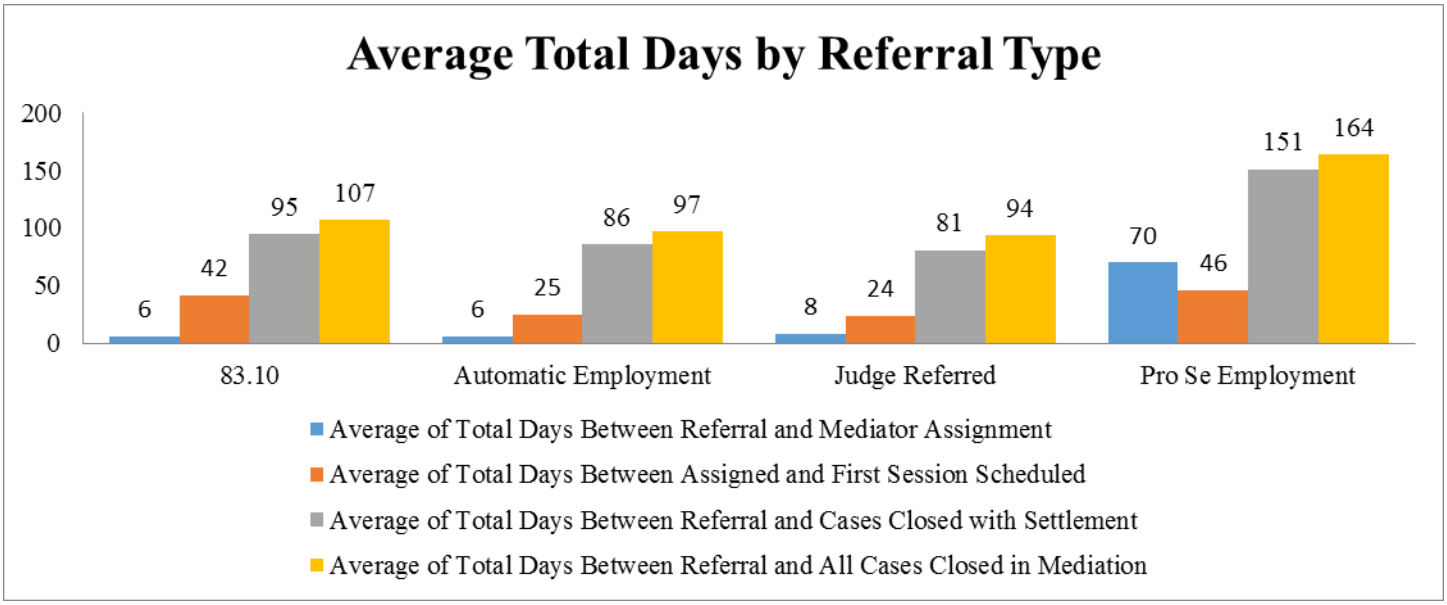
1. **General Information about Referrals and Timing**: The Mediation Program Rules (Local Civil Rules 83.9 and 83.10) and Procedures contain specific timelines for assigning mediators and scheduling cases.

a. Mediators should generally be assigned within 10 days of the referral to mediation. For *pro se* employment cases the mediator is typically assigned within 10 days of the appearance of counsel for both the plaintiff and the defendant.

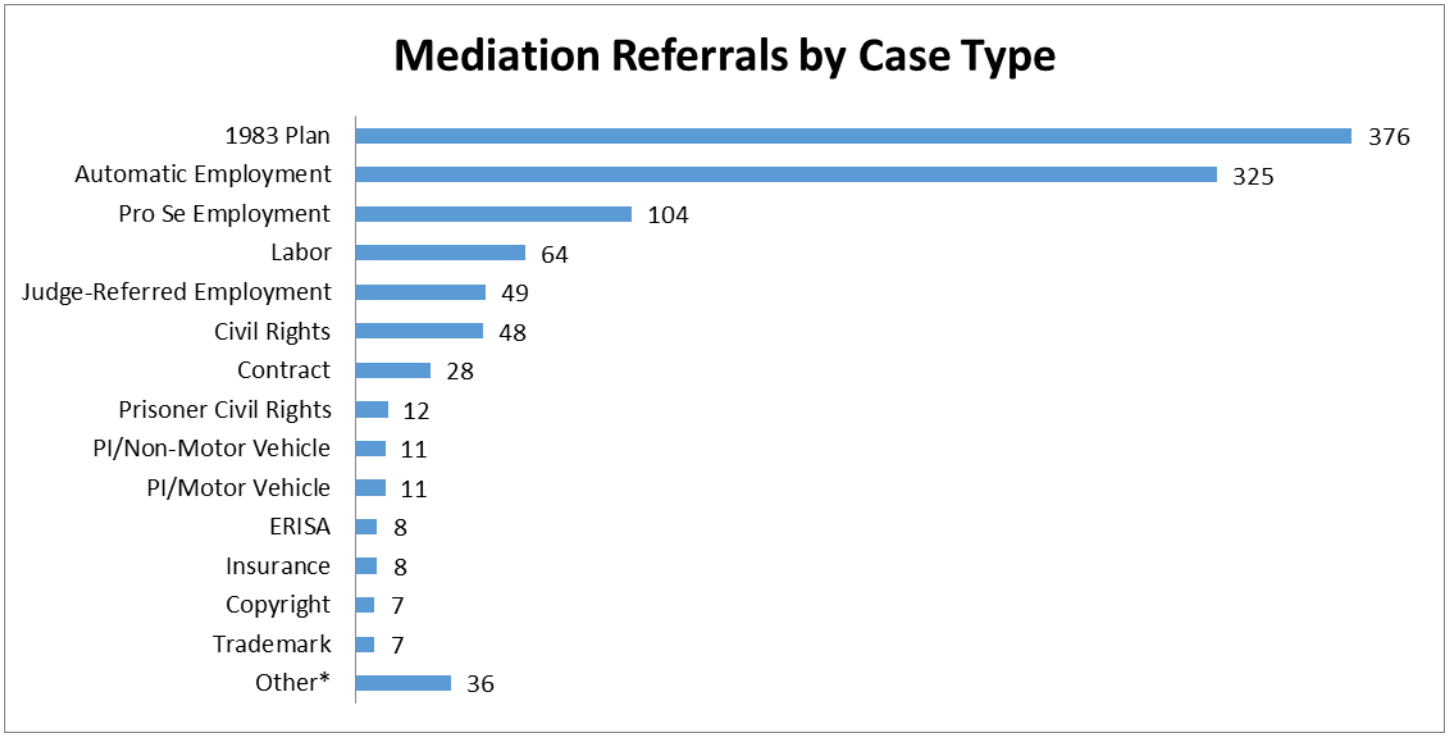
b. Scheduling deadlines depend on the type of referral to mediation. Cases that enter mediation through Local Civil Rule 83.10 (the § 1983 Plan) have a 60-day deadline for scheduling the first session. On October 1, 2015 the Court implemented a pilot standing order for automatic referral of counseled employment cases. This new protocol has a 60-day deadline for scheduling the first session to allow for limited pre-mediation discovery. Judge-referred cases have a 30-day deadline for scheduling the first session. *Pro se* employment referrals have a deferred deadline for scheduling of 30 days from the appearance of counsel for both the plaintiff and the defendant.

2. **Information about Judge-Referred Cases (non-automatic/non-*pro se* employment)**: A common concern for judges making mediation referrals is that the referral to mediation will cause an unnecessary delay in the case. In 2015, the average time for finalizing the assignment of mediators in judge-referred cases was eight days. Except in referrals where judges ordered specific timelines for holding the mediation, the average time to schedule the initial session was 24 days from referral. The average total time in mediation for fully counseled judge-referred cases was 92 days. In order to ensure specific timelines for the mediation process, in 2015 a number of judges were proactive in embedding in the Mediation Referral Order specific timelines for the mediation or even a date certain on which the initial session must be held. These practices were very helpful both to the mediators and the Mediation Program in facilitating timely scheduling of mediation sessions. In addition, judges have occasionally indicated specific mediator specialties that may not be evident from the information on the docket (e.g. "although this is a contracts case a mediator with experience in technology would be useful" or "experience working with families is a plus"). This additional information further helped the Mediation Program identify the pool of mediators for a particular case.

3. The chart below shows average timelines for each stage of the mediation process in 2015 by referral type, including the average total days in the Mediation Program for all cases (settled/not settled), and the average total days in the Mediation Program for only those cases that settled through mediation.

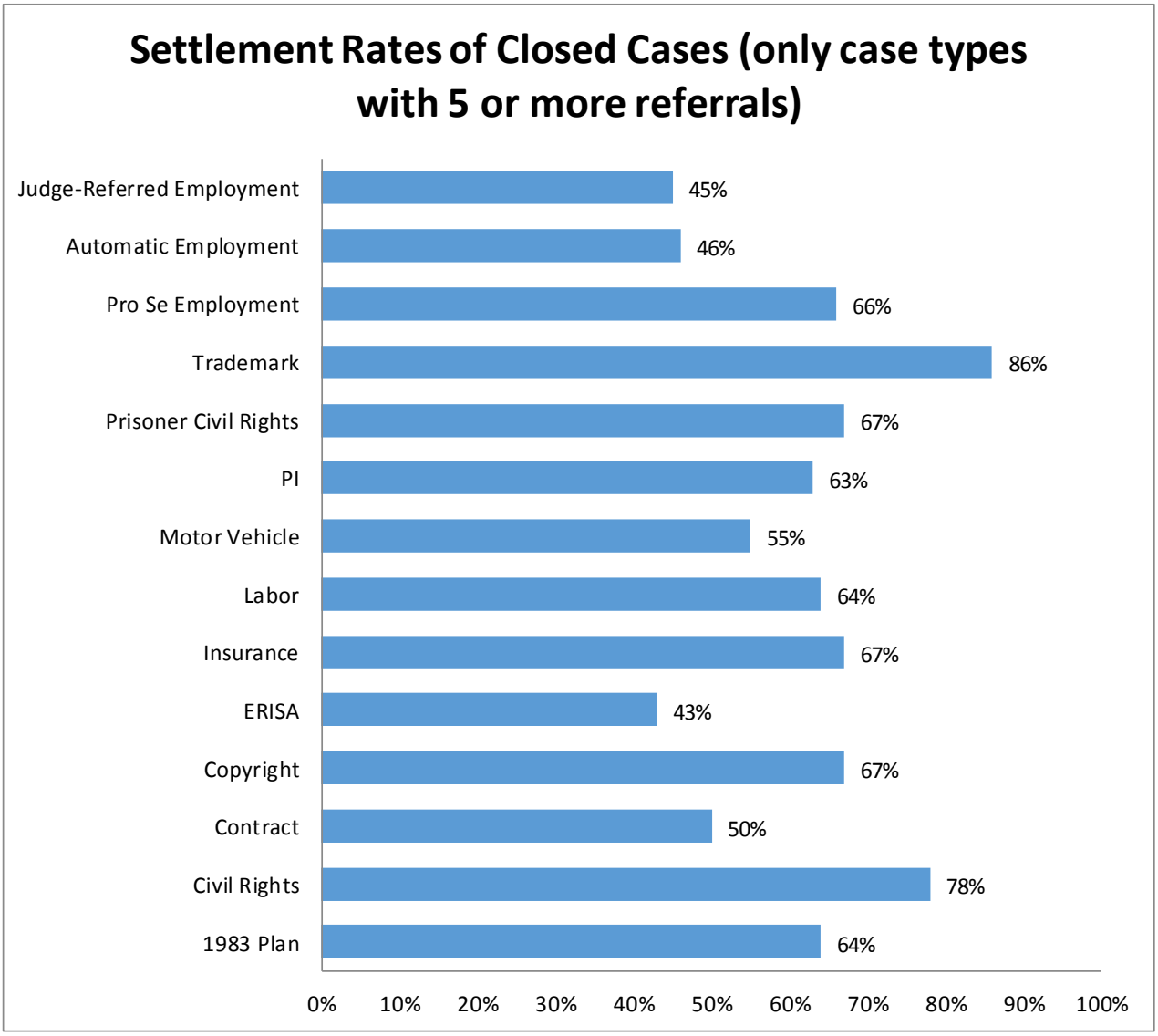


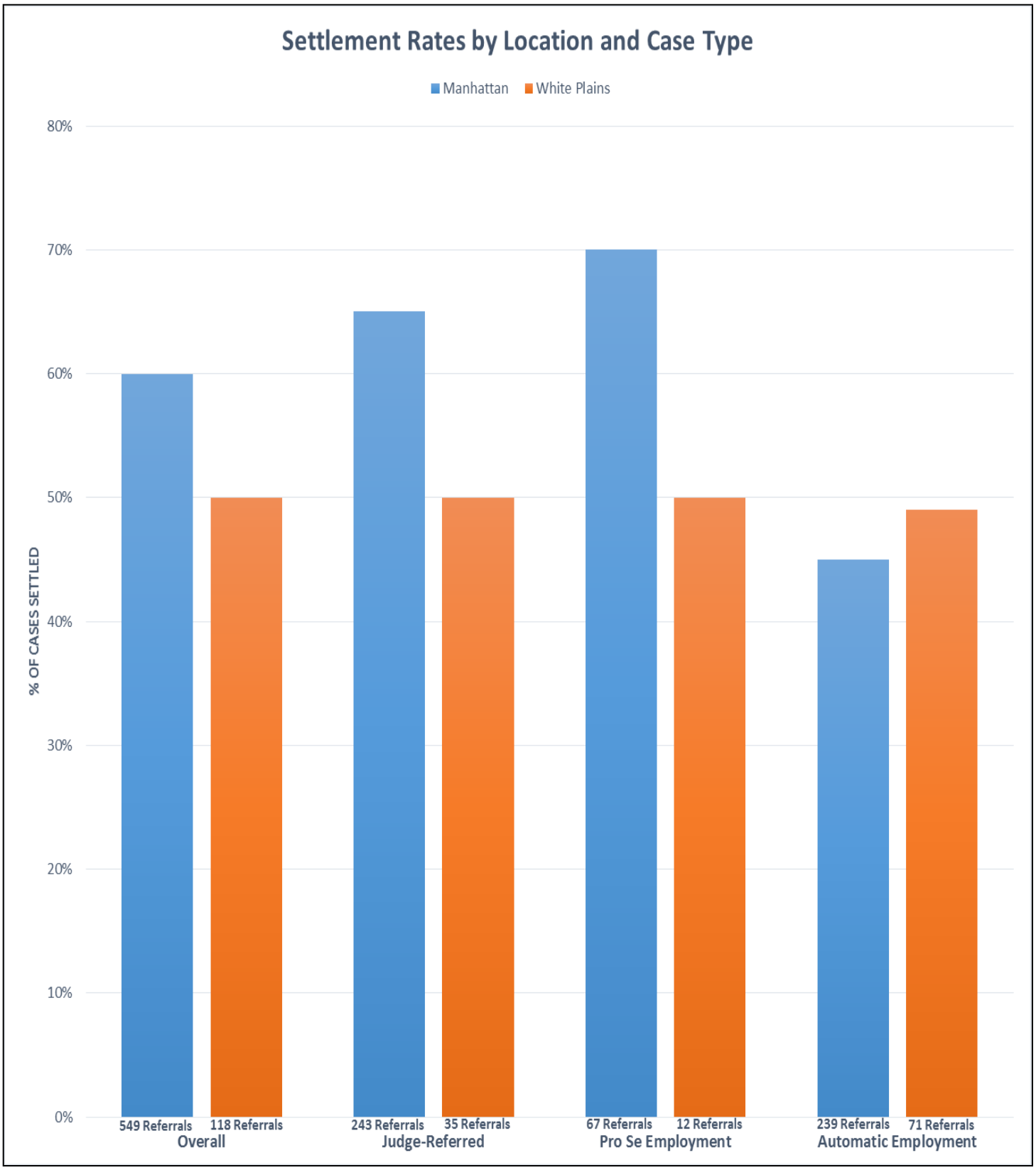
4. The following chart provides information about the numbers and types of cases referred to mediation.



* "Other" consists of case types in which fewer than five referrals were made to mediation including: Securities, Racketeering, Intellectual Property, Fraud, Federal Communications Act, Fair Credit Reporting Act, Patent, Product Liability, Consumer Credit, Interstate Commerce, Maritime, Antitrust, Environmental, Admiralty, and Medical Malpractice.

5. The following charts provide information about settlement rates by case type and location.




Settlement Rates by Location and Case Type
Manhattan
White Plains
80%
70%
60%
50%
40%
30%
20%
10%
0%
% OF CASES SETTLED
549 Referrals
118 Referrals
Overall
243 Referrals
35 Referrals
Judge-Referred
67 Referrals
12 Referrals
Pro Se Employment
239 Referrals
71 Referrals
Automatic Employment

Selected Initiatives 2015

Outreach: Mediation Program staff coordinated and participated in many events to increase awareness about mediation and the Court's program.

Presentations and panels included:

- the New York State Dispute Resolution Association annual conference;
- New York State's Mediation Settlement Day;
- the annual American Bar Association ADR conference;
- the New York State Bar Association's Dispute Resolution Section Meeting;
- the New York City Bar Association's ADR Committee meetings;
- the annual conference for the Association of Conflict Resolution of Greater New York;
- the New York Women's Bar Association; and
- programs for groups of foreign judges and mediators who visited the Court.

Participation in educational programs included:

- coaching at the Basic and Advanced Commercial Mediation Trainings at the New York City Bar;
- presenting at schools including Columbia Law School, Brooklyn Law School, City University of New York School of Law, New York Law School, and City College;
- an interview for the American Bar Association's Dispute Resolution magazine.

The Mediation Program also worked to increase information to judges and Court staff including:

- mediation lunches with law clerks, courtroom deputies, and judges;
- assisting judges in their preparation for national and international mediation trainings and events.

Mediator Training: The Mediation Program offered a number of formal and informal mediator training opportunities in 2015.

- Mediator Practice Groups were convened (two in Manhattan and one in White Plains). These groups of mediators meet every other month for two hours to discuss common issues in SDNY mediations. Because of the enthusiasm of the attendees in these initial groups, additional practice groups will begin in the Fall of 2016.
- Lunchtime trainings were offered on working in joint session, pre-mediation communication, and impasse breaking.
- J. Anderson Little presented two half-day CLEs on money negotiations titled "Making Money Talk."

Mediator Evaluation: Following a pilot program developed and implemented with the New York City Bar Association's ADR Committee, the Mediator Evaluation Protocol was institutionalized. The SDNY is the only federal district court with live peer-to-peer evaluation of panel mediators to assure the quality of services provided to parties and counsel, and for mediator professional development. All panel mediators will undergo a mandatory evaluation process conducted by a trained evaluator using an evaluation tool. Additional information and the evaluation protocol and documents can be found on the Court's ADR website.

Mediator Advisory Committee ("MAC"): The MAC meets monthly and MAC members work in subcommittees to advance goals that are set annually. In 2015, MAC activities included:

- increasing diverse applicants to the mediation panel and to the MAC;
- increasing mediation referrals;
- identifying mediator training opportunities;
- providing advice on ethical issues;
- participating in continuing initiatives including a pilot protocol to increase referrals to mediation in FLSA cases and expanding § 1983 referrals in White Plains; and
- providing training to outside organizations such as the New York City Commission on Human Rights.

Diversity Efforts: A central focus in 2015 was to increase the number of diverse applicants to the mediation panel. These efforts resulted in an increase in diverse applicants to the mediation panel for the period ending in Spring 2016. Approximately 42% were women (up from 26% last year) and approximately 17% were racially/ethnically diverse (up from 1% in the year before). Diversity efforts included:

- outreach to various affinity bar associations and committees;
- participation in panel discussions;
- participation in an ABA Webinar on diversity in court mediation;
- encouraging the City and State Bar Associations to develop scholarships for diverse applicants to the basic and advanced mediation trainings hosted by those organizations;
- working with Cornell ILR to present a training/mentoring program on mediation advocacy to junior attorneys with prior exposure to mediation. The dual goals of this program were to increase the number of attorneys who might serve as limited scope mediation counsel to pro se employment plaintiffs and to create an opportunity for mentoring of junior (and possibly more diverse) attorneys who might one day apply to serve on the SDNY or other court mediation panels.

Rulemaking/Program Expansions: 2015 saw a revision in Local Civil Rule 83.9 to include Magistrate Judge settlement conferences in the Court's ADR plan. In addition, on October 1, 2015 the Court expanded its program for automatic referral of counseled employment cases to include a pilot discovery protocol. This new protocol has a 60-day deadline for scheduling the first session to allow for limited and expedited pre-mediation discovery.

For more information about the Mediation Program:

Mediation Program
U.S. District Court, SDNY
40 Foley Square, Suite 120
New York, NY 10007
MediationOffice@nysd.uscourts.gov
212-805-0643
http://nysd.uscourts.gov/mediation

PLAINTIFF'S CONFIDENTIAL MEDIATION STATEMENT

[REDACTED]

I. PRELIMINARY STATEMENT

This action is brought as a class action (the "Action") under Article 9 of the NY CPLR by [ ] ("Plaintiff") on behalf of all current and former hourly paid home healthcare workers employed in New York by defendants [ ] ("Defendants"), for work performed from November [ ] through the present (the "Class" and "Class Period"). The Complaint, filed on [ ], asserts violations of New York labor laws.

Defendants are providers of home health care for the elderly and infirm in and around New York City. That Class members are entitled to overtime at one and one half times minimum wage and spread of hours compensation under the New York labor law is undisputed.

Plaintiff has obtained discovery and with the assistance of an outside consultant has converted the hundreds of thousands of PDFs produced by Defendants into electronic format enabling Plaintiff to calculate Defendants' damage exposure. Class members are owed roughly $[ ] in unpaid overtime wages. Because of the deficiencies in Defendants' record keeping and production, Plaintiff cannot at this time calculate unpaid spread of hours compensation. Pre-judgment interest for the overtime claims alone would total roughly $[ ] million when computed from the mid-point of the class period. These figures exclude attorneys' fees.[1]

Defendants' claimed defenses to liability include the doctrine of unclean hands, and a Stipulation of Settlement with the [Administrative Agency]. As discussed below, these defenses are without merit.

[1] In order to bring the Action as a class action, Plaintiff waived her right to penalties in the form of liquidated damages.

In the event that this matter is not resolved through mediation, Plaintiff intends to pursue discovery, press issues concerning Defendants' failure to keep and/or preserve statutorily required documents reflecting hours worked and wages paid to their employees, and to seek class certification.

II. THE CLASS CLAIMS

Plaintiff and the class have claims for unpaid overtime wages and spread of hours pay (Counts I and II). Plaintiff's claims for unpaid overtime wages are made pursuant to New York Labor Law Article 19 §650 *et seq.*, and 12 NYCRR § 142-2.2, which mandate overtime pay of not less than 1 and ½ times New York State minimum wage for each hour worked in excess of 40 hours a week. Minimum wage has varied over the course of the Class Period.

Plaintiff's claims for spread of hours pay are made under 12 NYCRR § 142-2.4, which provides that for any day in which an employee works more than ten hours (or works a split shift) employers must pay at least one hour's additional pay at the minimum hourly wage rate in addition to the wage required by New York's minimum wage law.

Employees who earn at or near the minimum wage are entitled to both overtime payments and spread of hours payments because the payments serve two distinct purposes; spread of hours payments compensate employees for long days, while overtime compensates employees who work many hours in one week. Courts routinely award unpaid wages on both types of claims. *See, e.g., Padilla v. Manlapaz*, 643 F. Supp. 2d 302 (E.D.N.Y. 2009).[2]

[2] [Administrative Agency] and the courts have excused employers from making separate spread of hours payments only if employees' base rate of pay is so much more than the minimum wage that the spread "bonus" has essentially already been included in employees' hourly wages. *Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048 (GEL), 2006WL851749, at *21 (S.D.N.Y. Mar. 30, 2006) ("If the total compensation is equal to or greater than the minimum wages due, including compensation for an additional hour for each day in which the spread of hours exceeds

III. PERTINENT PROCEDURAL BACKGROUND

Plaintiff initiated this action with a Summons and Notice served on Defendants on 201[ ], informing them that Plaintiff was seeking full payment for overtime, spread of hours pay, and time spent in mandatory "in service" training sessions for herself and for all current and former hourly paid home health care workers employed by Defendants during the Class Period. At that time, Plaintiff informed Defendants that she would not file a complaint in this action if Defendants could demonstrate that they had paid her all of the monies to which she was entitled under New York labor laws, including overtime and spread of hours pay. Defendants produced Plaintiff's pay records but failed to demonstrate that they had paid Plaintiff properly.

In [ ], 201[ ], Defendants filed a Notice of Appearance and a demand for a complaint. Thereafter Plaintiff filed her complaint, and Defendants moved to dismiss the action based upon purported documentary evidence demonstrating that Plaintiff had been paid in full, and for failure to state a cause of action. Justice [ ] denied the motion on [ ] and Defendants answered the Complaint on [ ]. Defendants amended their answer in [ ].

Plaintiff served document requests in [ ], but Defendants did not begin producing class member documents until 18 months later, in [ ]. Defendants claimed to be unable to produce documents for various reasons during this 18-month period, including an extended period during the [ ], when purportedly no one at [Defendants] had authority to produce documents [ ] In consequence

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ten, no additional payments are due."); *Seenaraine v. Securitas Sec. Servs. USA Inc.*, 830 N.Y.S.2d 728 (2d Dept. 2007). Here, Plaintiff and the Class frequently earned far less than they would have received if they had received the minimum wage plus the required spread of hours "bonus." Thus, Plaintiff and the Class are still owed unpaid spread of hours compensation.

of the delay in the document production, Plaintiff has obtained repeated extensions of her time to move for class certification. Even now, more than 2 and ½ years after the first document requests were served, Plaintiff's time to move for class certification remains tied to Defendants' completion of their document production.

Document production has dragged on in dribs and drabs for the last seven months. Though Defendants repeatedly advised that they had produced everything, on being pressed, additional documents were produced on various occasions. To date, the production is still incomplete in a variety of ways. For example, Plaintiff is advised that at least two years of data is missing and no data sufficient to estimate unpaid spread of hours has been produced. As recently as [ ], after repeated assurance that all documents had been produced, Defendants produced [ ] that included information on daily hours worked for each employee, identified by name, for the time period beginning [ ] through [ ] this document contained no information about wages paid or wage rates.

At a [ ] court conference, the parties agreed to pursue class mediation. Since that time and in an effort to proceed with this mediation, Plaintiff has retained an outside consultant to assess Class damages based on the incomplete records maintained and produced by Defendants.

IV. DEFENDANTS' FAILURE TO PRODUCE DOCUMENTS LESSENS PLAINTIFF'S BURDEN

Pursuant to 12 NYCRR 142-2.6 employers are required to "establish, maintain and preserve for not less than six years, weekly payroll records" that include, among other things, "wage rate" and "the number of hours worked daily and weekly, including the time of arrival and

departure of each employee working a split shift or spread of hours exceeding 10." Defendants received Plaintiff's Summons and Notice on [ ], and at that time were required under the law to have maintained records for the prior six years. Plaintiff's suit put Defendants on notice that they needed to preserve the weekly payroll records for the class period, and Defendants' failure to do so may result in a spoliation finding. *See Adrian v. Good Neighbor Apt. Assoc.*, 277 A.D.2d 146, 717 N.Y.S.2d 99 (1st Dept. 2000) (authorizing imposition of sanctions for negligent destruction of evidence); *Sage Realty Corp. v. Proskauer Rose*, 275 A.D.2d 11, 713 N.Y.S.2d 155 (1st Dept. 2000) (same).

Moreover, as the United States Supreme Court explained in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946), a collective action brought under the Fair Labor Standards Act ("FLSA"), an employer's failure to keep proper records lessens the showing its employees must make in order to recover for improperly compensated work. The Court in *Mt. Clemens* explained that:

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson v. Mt. Clemens Pottery Co., 328 U.S. at 687, 66 S.Ct. at 1192 (1946). *See also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (reaffirming the vitality of *Mt. Clemens* and holding that even though the verdict for employees required inferences from their representative proof, such inference is allowable under *Mt. Clemens* to fill the evidentiary gap created by the employer's failure to keep adequate records.).

V. DEFENDANTS' AFFIRMATIVE DEFENSES ARE WITHOUT MERIT

A. Defendants' Settlement with the [Administrative Agency] Is Not A Defense To This Action

Defendants were investigated by the [Administrative Agency] for violations of Labor Law § 652.1 and entered into a Stipulation of Settlement with the [Administrative Agency] in [ ] regarding underpayment of wages to [#] specific employees. Defendants attempt to use that Stipulation of Settlement to bar, in whole or in part, Plaintiff's claims and the claims of the purported class by asserting that the [Administrative Agency] Settlement "cover[ed] the investigation of payment of wages from [ ], through [ ]." Amended Answer at ¶65. Defendants have further represented to Plaintiff that the [Administrative Agency] reviewed all current and former employee pay records for the time period [_____]. Defendants' assertions are plainly without merit.

The Stipulation of Settlement, attached hereto as Ex. A, refutes Defendants' contention on its face showing that it covers only the time period [_____], and that the Settlement is limited to those [_____] employees included in the attached Recapitulation Sheets. The Stipulation expressly states that the [Administrative Agency] reserves the right to investigate any claims of wages due to other employees during any time period, or the wages due

to the [ ] employees named on the Recapitulation Sheets for time periods not covered under the Stipulation:

> WHEREAS the [Administrative Agency] has determined that the Employer has failed to pay a total of [$] underpayment in wages and/or wage benefits to current and/or former employees *[ ]* as set forth in the attached Recapitulation sheets; and ….. the [Administrative Agency] has assessed an additional amount of [$]in liquidated damages pursuant to Labor Law §663(2)….
>
> IT IS HEREBY AGREED: … ***This Stipulation is intended as settlement only of the wages and/or wage benefits found to be due to the employees set forth in the attached Recapitulation Sheets for the time periods set forth therein.*** [Administrative Agency] states that it will not issue future assessments against the Employer for unpaid wages and/or wage benefits due to any of the employees included in the Recapitulation Sheets for the periods covered therein, ***but reserves the right to investigate any claims of wages and/or wage benefits due to: other employees during any time period; or, the employees set forth in the attached Recapitulation Sheets for time periods other than those set forth therein.*** (emphasis added)

Clearly, the Stipulation of Settlement does not affect the claims of Plaintiff, who is not mentioned in the Recapitulation Sheets, or the claims of a majority of class members. Moreover, Defendants' inability to produce complete payroll records here, the years of delay in their making production and the deficiencies in such production seriously undermine their unsupported contention that the [Administrative Agency] reviewed all the pay records for the period [ ].

That Defendants have succeeded in besting the [Administrative Agency] with its limited resources in no way supports the notion that they properly paid their employees. Defendants' counsel's website is informative: the employee profile for [ ], Senior Compliance Administrator and Paralegal in [ ] Labor and Employment Practice Group and a "[ ]," represents that she assisted [ ] client with a $[ ] exposure for unpaid wages in a [Administrative Agency] investigation and

that [ ] herself "[r]esolved a New York state Department of labor matter on the administrative level for under $[ ] where exposure was approximately $4 million dollars (sic)." [insert Labor and Employment Practice Group'website]. Plaintiff notes that Defendants paid just $[ ] to resolve the [Administrative Agency] investigation.

B. **Defendants' Unclean Hands Defense Is Without Merit**

Defendants also assert as an affirmative defense that certain members of the purported class have unclean hands because they obtained fraudulent certifications, and did not meet the necessary requirements to perform their jobs, and are thus barred from pressing claims regarding inadequate wage payments they received while working under false pretenses. Amended Answer ¶70. Given Defendants' own unclean hands, as described below, this defense has no merit. [ ]

As the wrongdoer in the foregoing matters, Defendants are hardly in a position to hide behind any equitable defenses.

Plaintiff was not one of the improperly certified workers, nor of course were a majority of class members. Regardless, this is not a valid defense to the claims of the improperly certified employees, as these employees worked the hours for which they billed Defendants and are entitled to the minimum compensation mandated under New York law.

C. Defendants' "Settlement Only" Documents Demonstrate They Failed to Pay Spread of Hours Compensation

The records produced by Defendants are insufficient to determine whether Plaintiff and the Class received the spread of hours pay to which they are entitled. Given the evidentiary gap with regard to spread of hours pay created by Defendants' failure to keep adequate records,

Plaintiff and the Class are entitled, under *Mt. Clemens* and its progeny, to estimate damages on this claim.

VI. KEY ISSUE FOR MEDIATION

A class representative owes fiduciary duties to the class. In the context of a negotiated settlement of a class action, plaintiff is the proponent of any such settlement and has the burden of demonstrating the fairness of such settlement. Class counsel has the burden of making the showing to the court as to the fairness of a settlement. *See, e.g., Pressner v. MortgageIT Holdings, Inc.,* 841 N.Y.S.2d 828 (Sup. Ct. N.Y. Cnty. 2007). The factors a court considers include but are not limited to: "(1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through trial, (7) the ability of defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Id.* at 828 n.2.

The parties first began to discuss settlement of this action in [ ]. Defendants appear to understand and even concede that the question is not whether Defendants owe money but rather how much money is owed. Because Defendants do not deny that they owe Plaintiff and Class overtime and spread of hours compensation, Plaintiff must evaluate the risk of Defendants' inability to satisfy a judgment if Defendants' liability is resolved at trial compared to the value of any settlement proposed by Defendants.

If Defendants are pleading poverty, they will need to made a demonstration of that condition. No such documentation as to their *current* financial condition has been provided.

Plaintiff will be prepared to make a demand for damages at or before the mediation currently scheduled for [ ].

[Date]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: FLSA PILOT PROGRAM	MEDIATION REFERRAL ORDER FOR CASES THAT INCLUDE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT 29 U.S.C. § 201 *et seq.*

, United States District Judge:

As part of a pilot program for cases involving claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, the Clerk of Court is directed to enter this order in all newly filed FLSA cases on my docket. Since cases involving FLSA claims often benefit from early mediation, it is hereby

ORDERED that prior to the case management conference pursuant to a Fed. R. Civ. P. 16(b) the Court is referring this case to mediation under Local Civil Rule 83.9 and that mediation shall be scheduled within sixty days.

IT IS FURTHER ORDERED that to facilitate mediation the parties shall, within four weeks of this Order, confer and provide the following:

1. Both parties shall produce any existing documents that describe Plaintiff's duties and responsibilities.
2. Both parties shall produce any existing records of wages paid to and hours worked by the Plaintiff (e.g., payroll records, time sheets, work schedules, wage statements and wage notices).
3. Plaintiff shall produce a spreadsheet of alleged underpayments and other damages.
4. Defendants shall produce any existing documents describing compensation policies or practices.
5. If Defendants intend to assert an inability to pay then they shall produce proof of financial condition including tax records, business records, or other documents demonstrating their financial status.

IT IS FURTHER ORDERED that in the event the parties reach settlement, pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), they shall prepare a joint statement explaining the basis for the proposed settlement, including any provision for attorney fees, and why it should be approved as fair and reasonable. The settlement agreement and joint statement shall be presented to the assigned District Judge, or to the assigned Magistrate Judge should the parties consent to proceed for all purposes before the assigned Magistrate Judge (the appropriate form for which is available at http://nysd.uscourts.gov/file/forms/consent-to-proceed-before-us-magistrate-judge).

IT IS FURTHER ORDERED that, in the event the parties do not reach a settlement, they shall promptly meet and confer pursuant to Fed. R. Civ. P. 26(f) in preparation for their initial

pretrial conference with the Court.

Counsel who have noticed an appearance as of the issuance of this order are directed to notify all other parties' attorneys in this action by serving upon each of them a copy of this order. If unaware of the identity of counsel for any of the parties, counsel receiving this order must send a copy of this order to that party directly.

SO ORDERED.

_____

United States District Judge

Dated: January 7, 2017
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: Counseled Employment Discrimination Cases Assigned to Mediation by Automatic Referral

Second Amended Standing Administrative Order
M10-468

----------X

LORETTA A. PRESKA, Chief United States District Judge:

This Court's Standing Administrative Order of May 24, 2015, requires all counseled employment discrimination cases, except cases brought under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq., to be automatically referred to the Southern District of New York's Alternative Dispute Resolution program of mediation upon the filing of an Answer. Effective November 2, 2015, unless otherwise ordered by the judge in the particular case, within 30 days of the filing of an Answer in such cases, the parties must produce the information specified in the Pilot Discovery Protocols for Counseled Employment Cases ("Discovery Protocols"), attached as Exhibit A. Within 60 days of the filing of an Answer, or as soon thereafter as it can be scheduled, the parties and their counsel must participate in a mediation session.

The Discovery Protocols require the early exchange of targeted, core discovery, and are intended to frame issues for resolution through mediation and to assist the parties in planning for additional discovery in the event the case is not promptly resolved through mediation. If any party believes that there is good cause why a particular case should be exempted from the Discovery Protocols, in whole or in part, or from mediation, that party must raise the issue promptly with the Court.

The Discovery Protocols do not modify any party's rights under the Federal Rules of Civil Procedure or the Local Civil Rules, but they do supersede the parties' obligations under Fed. R. Civ. P. 26(a)(1). The Protective Order attached as Exhibit B is deemed issued in all cases governed by this Standing Order. All documents and information produced under the Discovery Protocols will be deemed part of discovery under the Federal Rules of Civil Procedure. The parties' responses to the Discovery Protocols are subject to Fed. R. Civ. P. 26(e) regarding supplementation, Fed. R. Civ. P. 26(g) regarding certification of responses, and Fed. R. Civ. P. 34(b)(2)(E) regarding the form of production for documents and electronically stored information.

SO ORDERED:
DATED: New York, New York
October 1, 2015

_____
LORETTA A. PRESKA
Chief United States District Judge

Exhibit A

PILOT DISCOVERY PROTOCOLS
FOR COUNSELED EMPLOYMENT CASES

The use of the term "documents" below includes electronically stored information ("ESI").

(1) Documents that the plaintiff must produce to the defendant.

a. The plaintiff's employment contract.

b. If the claims in this lawsuit include a failure to hire or a failure to promote, the plaintiff's application for the position and any documents the plaintiff sent or received concerning the defendant's decision.

c. If the claims in this lawsuit include the wrongful termination of employment, any documents the plaintiff sent or received concerning the defendant's decision.

d. If the claims in this lawsuit include a failure to accommodate a disability, any requests for accommodation and responses to such requests.

e. If the plaintiff's employment was terminated, any documents demonstrating the plaintiff's efforts to obtain other employment. The defendant shall not contact or subpoena a prospective or current employer absent agreement or leave of court.

f. Any application for disability benefits or unemployment benefits after the alleged adverse action and documents sufficient to show any award.

(2) Information that the plaintiff must produce to the defendant.

a. If the plaintiff is relying on any oral comments that the plaintiff alleges were discriminatory or on any instances of harassment, identify the speaker or actor, the comment or action, and any witnesses to the comments or harassment.

b. A description of the categories and amounts of damages for the plaintiff's claims.

(3) Documents that the defendant must produce to the plaintiff.

a. The plaintiff's employment contract, job description, and documents sufficient to show plaintiff's compensation and benefits.

b. The plaintiff's personnel file.

c. For the most recent 5 years of employment, plaintiff's performance reviews and the file

created for any disciplinary actions taken against the plaintiff.

d. Any documents sent by the defendant to a government agency in response to government agency claims filed by the plaintiff in which the plaintiff relied on any of the same factual allegations as those in this lawsuit.

e. If the claims in this lawsuit include a failure to hire or a failure to promote, the plaintiff's application and any documents the defendant created that record the reasons the defendant rejected the plaintiff's application.

f. If the claims in this lawsuit include the wrongful termination of employment, any documents the defendant sent to or received from the plaintiff regarding the termination, and any documents that record the reasons for the termination decision.

g. If the claims in this lawsuit include a failure to accommodate a disability, any written requests for accommodation, written responses to such requests, and documents that record the reasons for rejection of a requested accommodation.

h. Written workplace policies relevant to the alleged adverse action.

(4) Information that the defendant must produce to the plaintiff.

Information concerning the ability to pay, including insurance coverage, if relevant to the mediation.

Exhibit B

PROTECTIVE ORDER

WHEREAS, on October 1, 2015, the Court issued the Second Amended Standing Administrative Order 11 Misc. 003 for the mediation of certain counseled employment cases;

WHEREAS, the Order requires the parties to exchange certain documents and information within 30 days of the filing of an Answer;

WHEREAS, the parties seek to ensure that the confidentiality of these documents and information remains protected; and

WHEREAS, good cause therefore exists for the entry of an order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, it is hereby

ORDERED that the following restrictions and procedures shall apply to the information and documents exchanged by the parties pursuant to the Discovery Protocol:

1. Counsel for any party may designate any document or information, in whole or in part, as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL."

2. The Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the action.

3. In the event a party challenges another party's designation of confidentiality, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party reserves the right to object to the use or admissibility of the Confidential Information.

4. The parties should meet and confer if any production requires a designation of "For Attorneys' or Experts' Eyes Only." All other documents designated as "CONFIDENTIAL" shall not be disclosed to any person, except:

    a. The requesting party and counsel, including in-house counsel;
    b. Employees of such counsel assigned to and necessary to assist in the litigation;
    c. Consultants or experts assisting in the prosecution or defense of the matter, to the extent deemed necessary by counsel; and
    d. The Court (including the mediator, or other person having access to any Confidential Information by virtue of his or her position with the Court).

5. Prior to disclosing or displaying the Confidential Information to any person, counsel must:

    a. Inform the person of the confidential nature of the information or documents;
    b. Inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of the information or documents to any other person; and
    c. Require each such person to sign an agreement to be bound by this Order in the form attached hereto.

6. The disclosure of a document or information without designating it as "confidential" shall not constitute a waiver of the right to designate such document or information as Confidential Information. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.

7. At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than 30 days after entry of final judgment no longer subject to further appeal) returned to the producing party or certified as destroyed, except that the parties' counsel shall be permitted to retain their working files on the condition that those files will remain protected.

Agreement

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled _____ have been designated as confidential. I have been informed that any such documents or information labeled "CONFIDENTIAL" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

DATED:

_____

Signed in the presence of:

_____

(Attorney)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Click here to enter text., Plaintiff(s), -against- Click here to enter text., Defendant(s).	Click here to enter text. MEDIATION REFERRAL ORDER FOR PRO SE EMPLOYMENT DISCRIMINATION CASES

Choose a judge's name, United States Choose an item. Judge:

IT IS ORDERED that this pro se case is referred for mediation to the Court's Mediation Program. Local Rule 83.9 and the Mediation Program Procedures shall govern the mediation. Unless otherwise ordered, the mediation will have no effect upon any scheduling order issued by this Court, and all parties are obligated to continue to litigate the case.

IT IS FURTHER ORDERED that the Clerk of Court shall locate pro bono counsel to represent the plaintiff at the mediation. The time to assign a mediator under Local Rule 83.9 and the Court's Mediation Program Procedures will be deferred until pro bono counsel has filed a Notice of Limited Appearance of Pro Bono Counsel. Pro bono counsel will represent the plaintiff solely for purposes of the mediation, and that representation will terminate at the conclusion of the mediation process.

IT IS FURTHER ORDERED that any objection by the plaintiff to either the mediation or to the appointment of pro bono counsel to represent the plaintiff in the mediation must be filed within 14 days of this order.

Dated: Click here to enter a date.
Choose an item., New York

Choose a judge's name
United States Choose an item. Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: FLSA PILOT PROGRAM	MEDIATION REFERRAL ORDER FOR CASES THAT INCLUDE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT 29 U.S.C. § 201 *et seq.*

Gregory H. Woods, United States District Judge:

As part of a pilot program for cases involving claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, the Clerk of Court is directed to enter this order in all newly filed FLSA cases on my docket. Since cases involving FLSA claims often benefit from early mediation, it is hereby

ORDERED that prior to the case management conference pursuant to a Fed. R. Civ. P. 16(b) the Court is referring this case to mediation under Local Civil Rule 83.9 and that mediation shall be scheduled within sixty days.

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2. Both parties shall produce any existing records of wages paid to and hours worked by the Plaintiff (e.g., payroll records, time sheets, work schedules, wage statements and wage notices).
3. Plaintiff shall produce a spreadsheet of alleged underpayments and other damages.
4. Defendants shall produce any existing documents describing compensation policies or practices.
5. If Defendants intend to assert an inability to pay then they shall produce proof of financial condition including tax records, business records, or other documents demonstrating their financial status.

IT IS FURTHER ORDERED that in the event the parties reach settlement, pursuant to *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015), they shall prepare a joint statement explaining the basis for the proposed settlement, including any provision for attorney fees, and why it should be approved as fair and reasonable. The settlement agreement and joint statement shall be presented to the assigned District Judge, or to the assigned Magistrate Judge should the parties consent to proceed for all purposes before the assigned Magistrate Judge (the appropriate form for which is available at http://nysd.uscourts.gov/file/forms/consent-to-proceed-before-us-magistrate-judge).

IT IS FURTHER ORDERED that, in the event the parties do not reach a settlement, they shall promptly meet and confer pursuant to Fed. R. Civ. P. 26(f) in preparation for their initial

pretrial conference with the Court.

Counsel who have noticed an appearance as of the issuance of this order are directed to notify all other parties' attorneys in this action by serving upon each of them a copy of this order. If unaware of the identity of counsel for any of the parties, counsel receiving this order must send a copy of this order to that party directly.

SO ORDERED.

Gregory H. Woods
United States District Judge

Dated: September 7, 2016
New York, New York