

Mediation Program



Annual Report

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

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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.

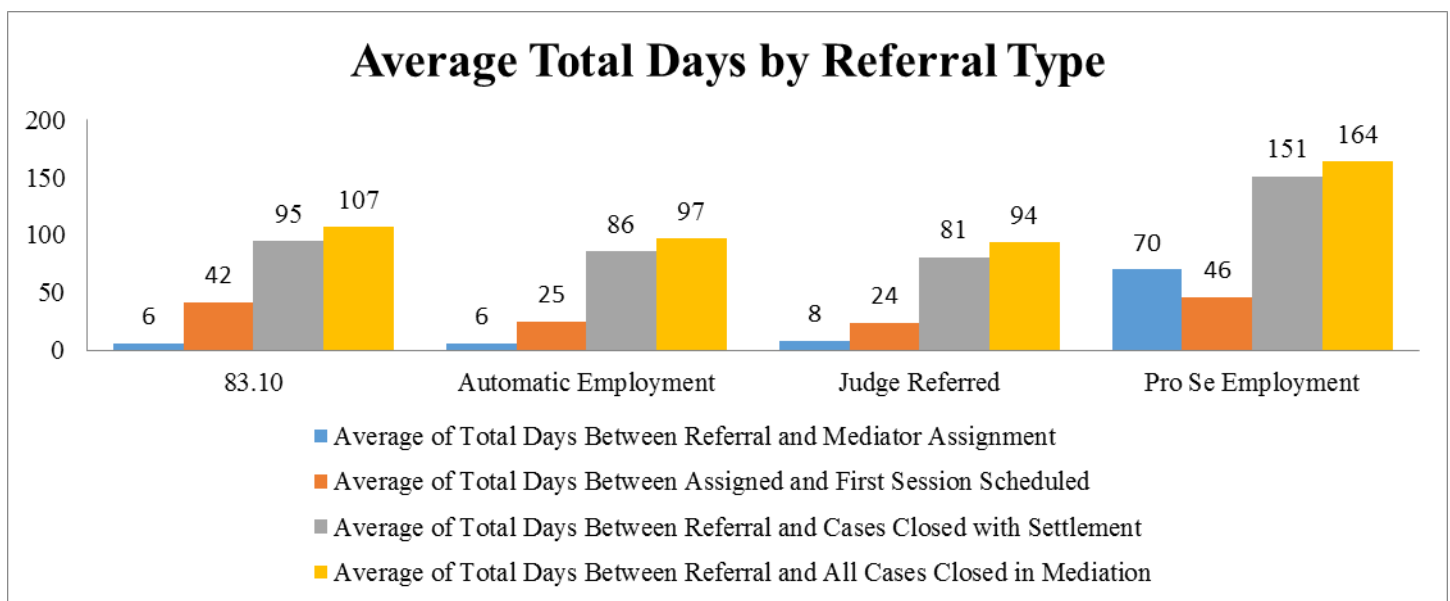
Statistical Reports

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.

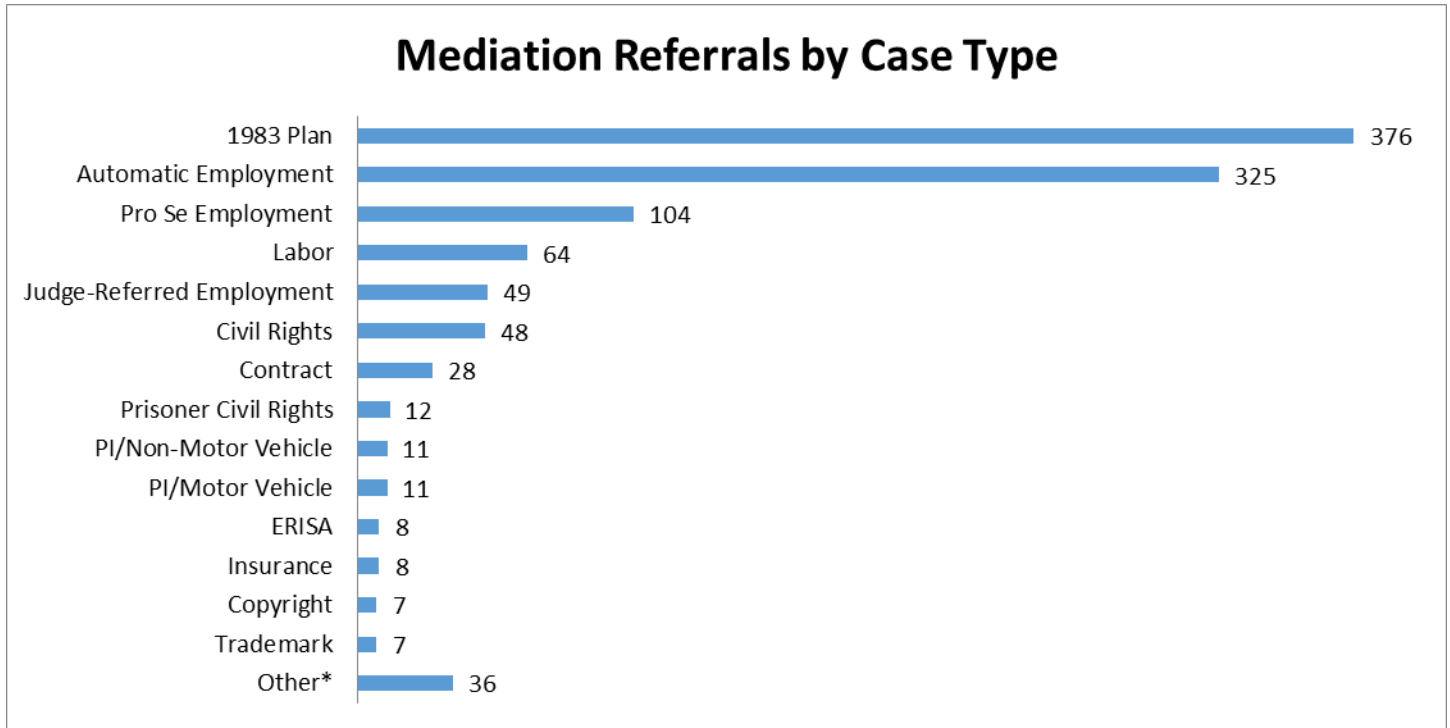
- a. Mediators should generally be assigned within 10 days of the referral to mediation. For *pro se* employment cases the mediator is typically assigned within 10 days of the appearance of counsel for both the plaintiff and the defendant.
- b. Scheduling deadlines depend on the type of referral to mediation.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

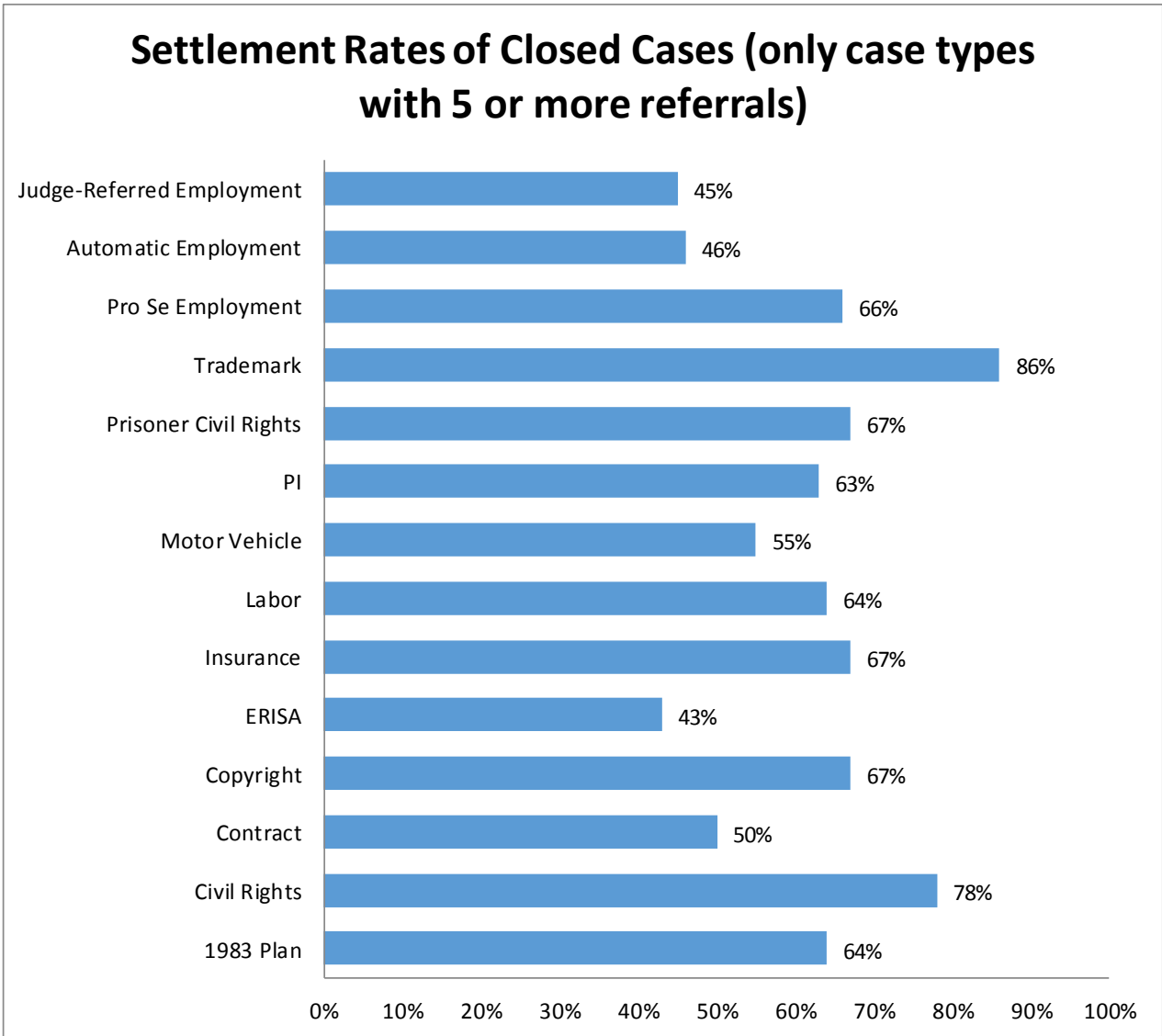


4. The following chart provides information about the numbers and types of cases referred to mediation.



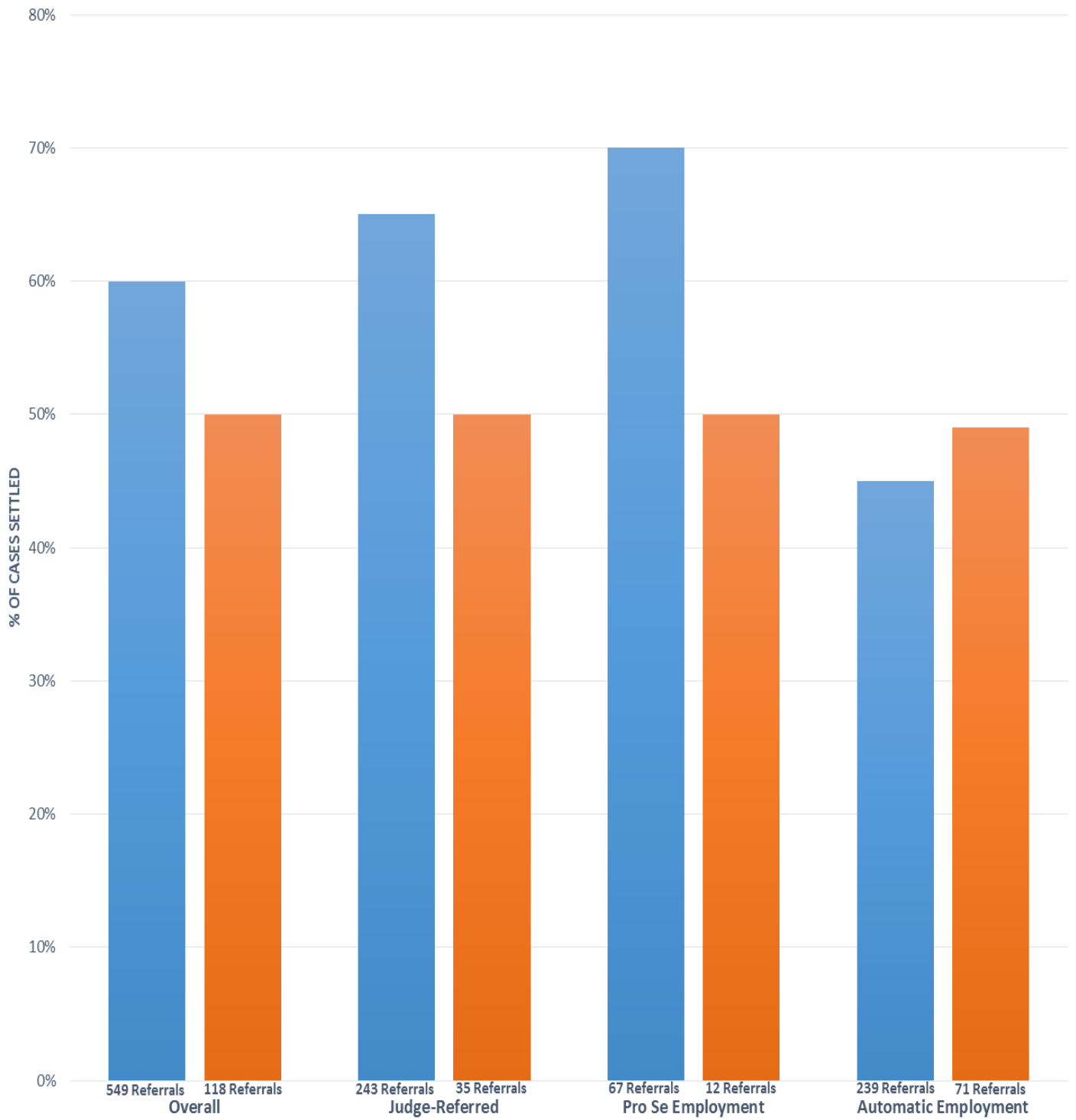
* “Other” consists of case types in which fewer than five referrals were made to mediation including: Securities, Racketeering, Intellectual Property, Fraud, Federal Communications Act, Fair Credit Reporting Act, Patent, Product Liability, Consumer Credit, Interstate Commerce, Maritime, Antitrust, Environmental,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



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:

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