

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2018

Judge Victor Marrero's Challenge to the Legal Profession: A 'Little Rebellion Now and Then'

John Feerick

Fordham University School of Law, JFEERICK@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

John Feerick, *Judge Victor Marrero's Challenge to the Legal Profession: A 'Little Rebellion Now and Then'*, 40 *Cardozo L. Rev.* 147 (2018)
Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/927

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

JUDGE VICTOR MARRERO’S CHALLENGE TO THE LEGAL PROFESSION: A “LITTLE REBELLION NOW AND THEN”

John D. Feerick[†]

TABLE OF CONTENTS

INTRODUCTION	148
I. OVERVIEW: <i>THE COST OF RULES, THE RULE OF COSTS</i>	150
A. <i>Introduction</i>	150
B. <i>The Legal Market and Law Firm Culture: Why Vexatious Litigation Exists</i>	150
C. <i>How and Where Over-Litigation Exists: Practice Style and Motion Practice</i>	152
1. Excessive and Deficient Pleadings.....	153
2. Motions to Dismiss.....	154
3. Discovery	154
4. Summary Judgment.....	155
5. Disproportionate Litigation	156
D. <i>Fee Shifting</i>	156
II. COMMENTARIES AND RESPONSES.....	157
A. <i>Individual Judicial Practices</i>	157
1. Initial Discovery Protocols.....	159
2. My Limited Survey	160
B. <i>An Overview</i>	164
C. <i>ADR as a Remedy and Solution</i>	165

[†] I acknowledge with great gratitude the considerable assistance I have received in preparing these remarks from Catherine Tremble of the Fordham Law School class of 2018. I express to Fordham Professor Daniel Capra my debt for his sharing with me his enormous learning and experience in all the areas commented on by Judge Marrero. I also wish to give special thanks to Professor Martin Gelter of Fordham Law School for his comments on fee sharing. I thank Thomas A. Moore, Esq. and former judge Barbara S. Jones for their invaluable assistance, as well as other colleagues in the practicing and academic bars, with whom I conversed concerning Judge Marrero’s provocative Article. I also thank Professor Linda Gerstel for her support and assistance, as well as Olga Tomasello for her copy-editing and other assistance on this Article.

1. Federal Court Mediation Programs	166
2. New York State Courts	168
D. <i>Collaborations and Education</i>	171
CONCLUSION.....	174

INTRODUCTION

This is in response to the invitation from U.S. District Court Judge Victor Marrero and the *Cardozo Law Review* to offer perspectives on Judge Marrero's Article, *The Costs of Rules, the Rule of Costs*.¹

Judge Marrero's Article is no ordinary Law Review Article. To begin with, it is ninety pages in length, written with passion and intensity. Its title targets practicing lawyers, but its content, upon close examination, challenges all parts of the legal profession. The problems involve rising costs and resulting abuses caused by expansive discovery and expensive motion practice, supported by and embedded in the Federal Rules of Civil Procedure and modern-day law practice. The problems discussed, however, are not simply those of practicing lawyers engaged in civil justice litigation. Courts have their responsibilities, too, since judges can make significant differences in dealing with the problems raised, and many do, through the exercise of their case management authority and judicial powers. In a very real sense, the challenges presented by the civil litigation costs and abuses identified by Judge Marrero need to be addressed by the entire legal profession.

Judge Marrero, a recent recipient of the Federal Bar Council's Emory Buckner Award for Outstanding Public Service, has given much of his life to public service in a variety of roles.² Through the lens of a thoughtful and able jurist, *The Cost of Rules, the Rule of Costs* takes a hard look at the civil justice system. Thankfully, Judge Marrero's concerns and alarms are being taken seriously by his colleagues on the bench and by the organized bar of New York. This special issue of the

¹ Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599 (2016)

² Judge Marrero served in many government positions before joining the bench of the Southern District in 1999. Some of these roles include serving as Undersecretary of the U.S. Department of Housing and Urban Development; as U.S. Ambassador on the Economic and Social Council of the United Nations; as Chairman of the New York City Planning Commission; as Commissioner and Vice Chairman of the New York State Housing Finance Agency; as Chair of the New York State Chief Judge's Committee to Improve the Availability of Legal Services; and as Counsel to the Governor of New York State and Comptroller of New York City. While in private law practice, he co-founded the Puerto Rican Legal Defense and Education Fund and served on boards and committees of the New York Public Library, the State University of New York, and the Association of the Bar of the City of New York. See *Marrero, Victor*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/marrero-victor> [<https://perma.cc/55JK-AX7W>] (last visited Sept. 5, 2018); *Hon. Victor Marrero*, PRACTISING L. INST., https://www.pli.edu/Content/Faculty/Hon_Victor_Marrero/_/N-4oZ1z136ui?ID=PE464456 [<https://perma.cc/Q562-X8FR>] (last visited Sept. 5, 2018).

Cardozo Law Review, as well as the 2016 Issue where the Article appeared, speaks well of current law students wanting to see the challenges addressed. Thomas Jefferson once noted, “I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical. . . . It is a med[icine] necessary for the sound health of government.”³ Judge Marrero, who a long time ago stirred such a revolution by calling for mandatory pro bono lawyers in New York State, may well have ignited another such revolution. The recommendations of that earlier Committee stirred the legal profession and law schools to lift their commitment to helping those in need of legal services who were unable to afford counsel.⁴

Upon receiving Judge Marrero’s request, I asked how I qualified to comment on his study’s treatment of pleadings, discovery, and motions in modern day law practice and the remedies he proposed. My initial hesitation was due to the fact that, for the last thirty-six years, I have been in academia as a law school dean and then a professor in the classroom, preceded a long time ago by the active practice of law as an associate and partner in a New York firm. Throughout all these years, however, I have been active in the work of the organized bar and have responded to requests to serve as a neutral in the resolution of conflicts in alternative dispute resolution (ADR). I have formed a view from my total life experiences that judges can make a major difference in addressing the problems described by Judge Marrero and that the world of ADR, especially that of mediation, offers models and remedies worthy of consideration.

I set forth in Part I a summary of Judge Marrero’s Article. Part II contains commentaries and responses by me concerning individual practices of judges under the Federal Rules of Civil Procedure, comments of others I surveyed, possible ADR remedies that are available, and the potential that inheres in collaborations by courts with the organized bar and the many law schools with experienced teachers, scholars, and educated and trained students in the field of ADR. I conclude with gratitude to Judge Marrero for sharing his insights on modern day civil justice and inspiring me and others to reflect on the civil justice system.

³ *Letter from Thomas Jefferson to James Madison* (Jan. 30, 1787), <https://founders.archives.gov/documents/Jefferson/01-11-02-0095> [<https://perma.cc/VB7N-4YA4>].

⁴ VICTOR MARRERO, COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES: FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (Apr. 1990), *reprinted in* 19 HOFSTRA L. REV. 755, 756 (1991).

I. OVERVIEW: *THE COST OF RULES, THE RULE OF COSTS*A. *Introduction*

Judge Marrero begins his Article with reference to 1938, when the Federal Rules of Civil Procedure (the Federal Rules) became effective. He points to Rule 1 as the mantra for a newly organized federal judicial system intended to “secure the just, speedy, and inexpensive determination of every action and proceeding”⁵ and juxtaposes those aims with the reality of the previous unworkable system. He notes that the Federal Rules were intended to promote efficiency through the creation of a more fulsome factual record that would focus pretrial work on the disputed areas, make the strengths and weaknesses of each case more evident to both parties, and avoid certain evidentiary disputes. The Federal Rules were also intended to limit unfair ambushes and promote general cooperation.⁶

Judge Marrero posits that the original intent of the Federal Rules is not being realized in modern practice. He cites to surveys in which practicing attorneys come out against the expansive rules of discovery as too costly,⁷ and he identifies attorneys’ abuse of these rules as a major reason for the cost.⁸ He further notes that these costs are not limited to the parties in individual disputes. The excessive discovery and motion practice “exact[s] a high economic and social price which must be borne by everyone who relies on the justice system to protect and promote vital interests as well as individual and collective values.”⁹

Having first identified the problem of costs, Judge Marrero then seeks to identify causes other than the discovery rules. The issues identified include the Federal Rules themselves, the courts, and the new data-gathering practices that have significantly increased the amount of information available. But, the one issue that Judge Marrero identifies as the root of the problem is the “professional styles and actions of lawyers themselves.”¹⁰

B. *The Legal Market and Law Firm Culture: Why Vexatious Litigation Exists*

Judge Marrero goes into detail about how the changes that occurred in the size and structure of law firms in the 1960s and 1970s

⁵ FED. R. CIV. P. 1.

⁶ Marrero, *supra* note 1, at 1602.

⁷ *Id.* at 1603.

⁸ *Id.* at 1606.

⁹ *Id.* at 1606–07.

¹⁰ *Id.* at 1609.

created a need to emphasize litigation as the primary fee generator at large law firms.¹¹ He attributes this shift from corporate work to litigation to the creation of larger, more sophisticated in-house teams that were able to accomplish many tasks traditionally left to law firms. The growth of in-house counsel resulted in a loss of some corporate work, and the remaining work tended to be discrete or highly specialized by nature. As projects became more interchangeable, law firms experienced increased scrutiny from current clients and increased competition for new business among law firms. This increased pressure crafted a law firm culture that emphasizes extreme competitiveness.¹² The Article then turns to the increased volume of litigation that has served firms' bottom lines even with the loss of a substantial amount of corporate work to in-house teams. It emphasizes, however, "litigation abuse may function as a boon to the bottom line, a financial engine working to sustain a growing share of the legal profession's profitability."¹³

After noting the potential of law firms to increase their billings through over-litigating, Judge Marrero begins a discussion of how the prices at the top of the market and the "longer delays of court proceedings involving wealthy litigants can hinder justice at the bottom of the economic scale."¹⁴ He notes that the complexity of disputes between wealthy parties that command the attention of the most adept lawyers unduly congest the courts at the expense of those who have cases that are too "financially unappealing" to attract attorneys.¹⁵ As such, the courts have been faced with a greater number of pro se litigants, which increase the burden on public resources of the courts as it takes more time to construe complaints and arguments that have been drafted by non-lawyers.¹⁶

The Article concludes Part I by stating that it is evident "abusive lawyering remains pervasive under the existing rules" and "it is not the procedural rules themselves that account for the litigation extremes and inefficiencies they encounter in court proceedings."¹⁷ Judge Marrero finds it more likely that the "interaction of economic and professional forces, combined with lawyers' own practice styles and the methods they

¹¹ See generally *id.* at 1610–23.

¹² *Id.* at 1616–18.

¹³ *Id.* at 1624.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1624–25.

¹⁷ *Id.* at 1632. In 1983, in an attempt to curtail vexatious litigation, Rule 11 was introduced. *Id.* at 1630–31. However, this was seen as a double-edged sword where filings of Rule 11 sanctions became commonplace and were themselves abusive. *Id.* at 1631. Citing to cases where judges evaluate excessive costs, Judge Marrero notes that when opposing counsel objects to prevailing parties' application for fee reimbursement, judges reduce the fee award by 33.5% on average. *Id.* at 1631 n.89.

employ in applying the rules, . . . better explain the excess.”¹⁸ Judge Marrero points to “inherent inefficiencies, as well as disincentives for improvement, [which] are fundamentally embedded in the justice system,” as the unnamed culprit to excessive fees and litigation.¹⁹

C. *How and Where Over-Litigation Exists: Practice Style and Motion Practice*

After outlining *why* the structure of the legal market has generated vexatious litigation tactics in Part I, the second part of Judge Marrero’s Article discusses *how* two distinct forces—lawyers’ personalities and litigation strategies—drive litigation abuse. The Article also outlines proposed next steps or solutions to alleviate the stated problems.

The Article details litigation styles that perpetuate waste through hasty and overblown action, and notes that over-litigation more generally is caused by lawyers who “ignore or downplay a vital facet of their role in the legal system: the public dimension.”²⁰ Lawyers’ abdication of their public duties, Judge Marrero suggests, taxes society by causing “inconvenience to witnesses and third parties; disruption of business operations and personal affairs;”²¹ and the imposition on courts of “ancillary disputes that counsel should not have escalated to the judge in the first place.”²² Ultimately, Judge Marrero identifies the largest offender in this cycle of waste as the “deep-rooted culture of widespread, routine inefficiencies and condoned extremes.”²³

Judge Marrero offers a mini-antidote by suggesting a culture shift away from lawyers’ focus on personal gain and to a more client- and society-focused view of the profession. He adds that stronger economic sanctions for “excess and abuse” and more “disciplinary actions” should be deployed to help with this culture shift.²⁴ Ultimately, he posits that the “nuclear option” should also be available to deploy against abuse: “shifting the obligation to pay counsel’s fees and costs to a client or attorney that a court formally finds has engaged in serious abuse of the rules through frivolous, dilatory, or disproportionately extreme litigation tactics.”²⁵

Additionally, because hourly rates incentivize spending more time on cases, he comments, lawyers are likely to ignore, rather than address, problems caused by over-litigation. To combat willful blindness, Judge

¹⁸ *Id.* at 1632.

¹⁹ *Id.*

²⁰ *Id.* at 1641.

²¹ *Id.*

²² *Id.* at 1642.

²³ *Id.* at 1644.

²⁴ *Id.* at 1645.

²⁵ *Id.*

Marrero suggests conducting empirical studies to identify particularly cost-intensive areas of litigation that may be dispensed with altogether.²⁶

1. Excessive and Deficient Pleadings

Judge Marrero begins his assessment of over-litigation with the problem of excessive and deficient pleadings. While the Federal Rules often allow for the claims made, he states, they are often unnecessary or misdirected. He highlights the problem of fishing expeditions in complaints that target harms and wrongdoers with little discretion or regard for merit.²⁷ These complaints are frequently met with hiding or withholding of information instead of a good-faith production of relevant information. The dragnet complaint begets the massive collateral expense of jurisdictional fights, especially where many different entities are involved. Judge Marrero suggests avoiding these delays by including only the most well-founded claims in the pleadings and allowing other claims to be preserved by stipulated agreements or by withdrawal without prejudice.²⁸

To further curtail excessive and deficient pleadings, Judge Marrero advocates for a rule that would discourage surprise court filings and reduce the likelihood of nonsensical or inadequate pleadings. He proposes that plaintiffs verify that they have contacted defendants in an effort to discuss the dispute before filing the complaint.

[S]uch disclosure should describe: any notice they gave about the substance of their claims before resorting to litigation; the defendants' response; and whether there is any action the defendants should take or information or documents they should produce prior to the parties' appearance in court at the initial conference, that might induce the plaintiffs to resolve all or part of the lawsuit.²⁹

In this regime, Judge Marrero notes that “defendants should state whether there is any action plaintiffs should take or information or documents they should produce, that might persuade the defendants to drop all or parts of their responses or counterclaims.”³⁰ The resulting complaint would either reach the court with certain issues resolved or highlight certain issues for resolution.

²⁶ *Id.* at 1674.

²⁷ *Id.* at 1648.

²⁸ *Id.* at 1651.

²⁹ *Id.* at 1675–76.

³⁰ *Id.*

2. Motions to Dismiss

Judge Marrero argues that defendants often respond to any complaint with a motion to dismiss out of habit. In his view, “defendants should . . . admit allegations in a complaint and furnish particulars upon request about uncontroversial and undisputable facts . . . [taking] such issues out of contention rather than prolong[ing] the conflict.”³¹ He acknowledges that “[r]egrettably, the most straightforward, speedy, and economical resolution of a dispute is not always what many litigants and counsel—plaintiffs’ and defendants’—perceive as advancing their interests.”³² And that, as a result, defendants’ answers tend to be formalistic, “volunteering as little as possible.”³³ Judge Marrero states the model defendant would “disclose facts that in the exercise of candor and good faith they should readily admit.”³⁴ He laments that the Federal Rules allow defendants to operate without requiring a discussion with the plaintiffs and with no prior communication with the court.³⁵

Judge Marrero states that the motion to dismiss has a mixed rate of success, achieving complete victory in 25% to 30% of cases.³⁶ He also notes that often these dismissals are not with prejudice and as such give life to new complaints, or worse, appeals. The Article also notes that procedural tidiness, such as motions to strike duplicative actions or specific allegations, contribute to delay while producing very little in the way of justice.³⁷

Judge Marrero suggests instituting procedurally required plaintiff-defendant interaction to curtail the problems of blanket motions to dismiss. Before filing a motion to dismiss, the defendant should “alert plaintiffs about the specific defects in the pleadings—whether procedural, jurisdictional, or substantive—that constitute the grounds” upon which the defendant will object.³⁸ This would allow plaintiffs the chance to amend the complaint before the judge is required to decide the motion submitted by the defendant.³⁹

3. Discovery

The next area of practice addressed is discovery. Judge Marrero

³¹ *Id.* at 1652.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1653.

³⁶ *Id.*

³⁷ *Id.* at 1653–56.

³⁸ *Id.* at 1677–78.

³⁹ *Id.*

notes that lawyers struggle with two main issues: first, how much discovery is actually necessary for the case, and second, what amount of resources are justified for the desired end.⁴⁰ Consuming anywhere from 50% to 90% of the litigation cost, discovery is the area in which over-litigation can be most significantly reduced.⁴¹ This is especially the case where a defendant's potential liability is massive or unbound.

The Article notes that discovery can be used as a tool of abuse to impose large costs on opponents in order to compel settlement, to hold hearings where parties air animosity toward each other, and to over-prepare as a means of hitting billable hours.⁴² The specific discovery tools employed in over-litigation are "demands for production of documents, depositions, written interrogatories, and admission of facts."⁴³ The efforts to create a fulsome record for trial, he argues, are almost always for show, however, as only 2% of these disputes ever utilize the depositions taken and documents produced for trial.⁴⁴

In this area, Judge Marrero advocates for the judge to take both a more active and more informal role in management. In this informal role, the judge could advise the parties as to his view of the request and allow the parties to modify accordingly. Should parties continue on what the judge deems an inappropriate or wasteful course, the judge could employ sanction-type remedies available under 28 U.S.C. § 1927.⁴⁵

4. Summary Judgment

At the end of discovery, another potentially wasteful practice emerges: motions for summary judgment. The Article notes that many summary judgment motions are filed prematurely or are entirely frivolous. These create needless delays in resolution and drain court resources. According to a study by the Federal Judicial Center (FJC), these motions increase the cost of litigation from 22% to 24%⁴⁶ and increase the length of litigation by anywhere from nine to fifteen months.⁴⁷ Despite the time and mixed success of these motions, they are almost always on the litigation schedule, suggesting that most lawyers believe that there will be no genuine issues of material fact in their proceedings.⁴⁸ The time and expense of these motions, Judge Marrero

⁴⁰ *Id.* at 1656–59.

⁴¹ *Id.* at 1656.

⁴² *Id.* at 1658.

⁴³ *Id.* at 1659.

⁴⁴ *Id.* at 1660.

⁴⁵ *Id.* at 1630 (noting that "judges may require practitioners who multiply judicial proceedings unreasonably and vexatiously to personally pay the excess attorneys' fees and costs that adversaries incur by reason of such misconduct").

⁴⁶ *Id.* at 1665.

⁴⁷ *Id.*

⁴⁸ *Id.*

notes, is magnified by the fact that judges frequently do not address them at all, or deny them in whole or in part—making a substantial amount of time and work relatively useless.⁴⁹

Judge Marrero, viewing unfounded or premature motions for summary judgment as one of the largest problems facing our courts' efficient administration of justice today, proposes a multi-tiered solution to the issue. He maintains that the litigants should not have the ability to file as a matter of right. Instead, he suggests that the parties should have to schedule a conference with the court to discuss the basis for the motion. Before granting leave for the conference, the court should request pre-conference letters, which set forth the legal and factual support for the prospective motion.⁵⁰

If there are genuine issues, the judge should ask the parties to “proceed directly to a trial on an expedited schedule . . . [where] after the presentation of the plaintiff's direct case, the court . . . can apply what amounts to a trial equivalent of summary judgment procedure . . . under Federal Rule 50.”⁵¹ In addition, judicial action could be utilized to discourage baseless summary judgment practice in two other ways. First, “[t]he court could deny a party's request to schedule a pre-motion conference,” signaling that the judge sees the motion as inappropriate for this stage of litigation.⁵² Second, if a motion already has been filed and “presents novel, complicated questions, the judge could postpone ruling on all or parts of it and proceed to trial—thereby effectively denying the motion without prejudice.”⁵³

5. Disproportionate Litigation

Judge Marrero briefly concludes that where the damages listed in the complaint are modest compared to the cost of the action for both parties, the judge should refer the case to settlement with mediation professionals or a magistrate judge.⁵⁴

D. *Fee Shifting*

The final Section of the Article suggests a move toward the English model of shifting the prevailing party's costs to the losing party. While the idea may not be novel, new problems have arisen in areas such as discovery that fee shifting might be able to more effectively address.

⁴⁹ *Id.* at 1667.

⁵⁰ *Id.* at 1678–79.

⁵¹ *Id.*

⁵² *Id.* at 1679.

⁵³ *Id.* at 1679–80.

⁵⁴ *Id.* at 1682.

Judge Marrero suggests that over-litigation now “derives not so much from deliberate misconduct by practitioners—practices that are already unlawful—but from less visible though more extensive and pivotal forces: counsel’s subterranean actions that governing rules do not explicitly proscribe.”⁵⁵ He notes,

In the modern age of digital communication, electronically stored information, commercial globalization, and Big Law, the problem as it really exists exceeds by many orders of magnitude the concerns over the types and incidence of offensive conduct that underlie the attorney fee shifting regimes now in place and that initially prompted their adoption.⁵⁶

The amount of data sought in discovery and the increasing billable hour quotas from Big Law have driven up the cost of litigation substantially, with the Federal Rules permitting most actions, and the public should no longer have to shoulder the burden of increasing court gridlock and unaffordable justice.

Judge Marrero finally posits that the “time has come for American legislatures and courts to accord even broader recognition to the English rule. At minimum . . . in connection with attorneys’ fees generated by the losers in connection with discovery disputes, as well as by motions that the presiding judge finds were needlessly, prematurely, or improvidently filed.”⁵⁷

II. COMMENTARIES AND RESPONSES

A. *Individual Judicial Practices*

The Federal Rules contain within them provisions that can greatly alleviate the problems identified by Judge Marrero. Judges Preska, Buchwald, and Koeltl, for example, deal with pre-motion requirements by incorporating Local Civil Rule 37.2 into their individual rules.⁵⁸ This rule requires counsel to request an informal conference with the court before making a discovery motion.⁵⁹ The court must rule on the motion

⁵⁵ *Id.* at 1686.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1691.

⁵⁸ See Hon. Loretta A. Preska, *Individual Practices of Judge Loretta A. Preska*, S.D.N.Y. (May 1, 2017), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1398 [<https://perma.cc/8437-52C2>]; Hon. Naomi Reice Buchwald, *Individual Practices of Naomi Reice Buchwald*, S.D.N.Y. (May 2017), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1406 [<https://perma.cc/83TL-VL66>]; Hon. John G. Koeltl, *Individual Practices of Judge John G. Koeltl*, S.D.N.Y. (Mar. 2018), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1517 [<https://perma.cc/FE9S-2MDD>].

⁵⁹ BD. OF JUDGES OF THE E.D.N.Y. & THE S.D.N.Y., LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK 40 (2018), <http://>

or find that the dispute cannot be resolved at the conference before counsel may proceed with the formal motion. On non-discovery matters, Judges Preska and Buchwald both require pre-motion conferences in civil cases, with certain exceptions.⁶⁰ Judge Koeltl only requires such conferences “before making a motion to dismiss, motion to amend or a motion for summary judgment.”⁶¹ Judges Preska and Buchwald require the moving party to submit a three-page letter that includes “the basis for the anticipated motion.”⁶² The non-moving party has three days to send a three-page response. Judge Preska allows the moving party to submit a reply that is no longer than two pages within the next day.⁶³ On initial pretrial conferences, Judge Koeltl makes it explicit that “[t]he parties are expected to confer with each other pursuant to Rule 26(f) of the Federal Rules of Civil Procedure before the initial conference with the Court. The parties are expected to provide a Rule 26(f) report to the Court before the initial conference.”⁶⁴ What is expected to occur at the conference is excerpted from Rule 26(f) in part below:

In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.⁶⁵

These rules resemble practices that I have experienced in the field of arbitration, both as an advocate and neutral, throughout my career as a lawyer. They have been effective and efficient in moving matters along.

I am reminded of the commercial and civil matters in which I have been privileged to serve as an arbitrator, sometimes alone or as a member of a panel of three, and at times as a panel chair. In these matters, pursuant to ADR provider rules, counsel, and at times a client representative, appear at the pre-hearing conference where decisions are made by the arbitrator concerning documents, discovery requests, interrogatories, stipulations, motions, and other pre-hearing subjects (e.g., expert reports, briefs and memoranda, and the hearing schedule), to facilitate the arbitrable process with the goal of the arbitrator(s)

www.nysd.uscourts.gov/rules/rules.pdf [https://perma.cc/3X7R-2WBM] (Rule 37.2).

⁶⁰ Preska, *supra* note 58, at 2 (Rule 2(A)); Buchwald, *supra* note 58, at 2 (Rule 2(B)).

⁶¹ Koeltl, *supra* note 58, at 2 (Rule 2(B)).

⁶² Preska, *supra* note 58, at 2 (Rule 2(A)); Buchwald, *supra* note 58, at 2 (Rule 2(B)).

⁶³ Preska, *supra* note 58, at 2 (Rule 2(A)).

⁶⁴ Koeltl, *supra* note 58, at 2 (Rule 2(A)).

⁶⁵ FED. R. CIV. P. 26(f)(2).

issuing a pre-hearing order, thus setting the framework for the arbitration. Motions are often discouraged at an early stage and, when and if made, if dispositive in nature, they are not infrequently taken under consideration until the end of the hearing. Document and discovery issues are relegated to the parties in the first instance to attempt resolution within a certain time period, with a process of resolution if differences remain after counsel confer with each other. At times, in my experience, counsel have been encouraged to consider settlement or mediation, a practice that now has become a routine part of the American Arbitration Association's (AAA) widely used and modeled Commercial Arbitration Rules, thereby removing the psychological fear of appearing weak by raising it unilaterally.⁶⁶

I have found, both as an advocate and neutral, ADR processes to be efficient in the handling of the most difficult and complex of matters. ADR-trained neutrals, working under the rules and practices of ADR institutions, have made a significant contribution to the justice system of the country.⁶⁷ Indeed, many of these neutrals are former judges and litigators now committed to an ADR practice.

1. Initial Discovery Protocols

At the request of the Advisory Committee on Civil Rules, the FJC prepared the 2018 document *Initial Discovery Protocols* for the handling of Fair Labor Standards Act cases (not pleaded as collective actions), which offers a very useful template for civil justice cases. The FJC was inspired by protocols developed for employment cases that, upon implementation, led to less motion activity and a greater likelihood of

⁶⁶ R-9. Mediation:

In all cases where a claim or counterclaim exceeds \$75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 14 (2013, amended 2016), <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf> [<https://perma.cc/DZV5-P4T3>].

⁶⁷ See *Commercial Arbitration Training for Arbitrators and Counsel*, N.Y. STATE B. ASS'N 3, <http://www.defenseassociationofnewyork.org/resources/Documents/NYSBA%20Commercial%20Arbitration%20Training%20Program.pdf> [<https://perma.cc/TYC3-GLMT>] (last visited Sept. 11, 2018).

settlement.⁶⁸ The intent of the *Initial Discovery Protocols* was “to encourage the parties and their counsel to exchange information and documents early in the case, help frame the issues to be resolved, and plan for more efficient and targeted discovery.”⁶⁹ Lawyers and judges participated in the development of the protocols.⁷⁰ The FJC report states that

[the] discovery is provided automatically by both sides within 30 days of the defendant’s responsive pleading or motion. While the parties’ subsequent right to discovery . . . is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship.⁷¹

The FJC’s 2016 report noted “that judges have applied the Employment Protocols ‘more widely than one would expect given the parameters in the pilot materials’”⁷² The protocols give evidence of the ability of the judiciary and bar, working together, to effectively address injustices in the civil justice system. The accompanying Essay in this special issue of the *Cardozo Law Review* by John Kiernan, Esq. offers many constructive ideas as to general methods of improving efficiency, with courts playing a major role in spurring institutional cultural change. He identifies four main areas as ripe mechanisms for change by advocates and clients, and five in which courts can increase judicial efficiency and stem over-litigation.⁷³

2. My Limited Survey

Beyond perspectives offered in this special issue of the *Cardozo Law Review*, a broad survey of the bar of New York is likely to yield other ideas as to improving the administration of justice. My own very limited survey of a few colleagues at the bar produced these comments:

⁶⁸ FED. JUDICIAL CTR., INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS 1 (2018), https://www.fjc.gov/sites/default/files/materials/12/Initial_Discovery_Protocols_FLSA_Jan_2018.pdf [https://perma.cc/XK9N-G4KN].

⁶⁹ *Id.* (internal quotation marks omitted).

⁷⁰ *Id.* at 2–3.

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ See generally John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187 (2018). Among the points he made that caught my attention are engagement by advocates and judges in seeking creative ways to resolve portions of a dispute early and to streamline discovery and other litigation processes; enlisting courts in preventing conduct by opposing counsel that will impose undue burden or delay; enforcing concepts of proportionality for the entire dispute, not just discovery, and thereby managing adaptation of the scale of permitted processes before a decision to the dispute’s scale; and effectively employing the power to urge parties to mediate or negotiate when settlement seems like a potentially promising route. *Id.* at 190–91.

- (i) The 2015 amendments to the Federal Rules, with a particular emphasis on proportionality, show promise in reining in some of the abuses cited in the Article by Judge Marrero. Many costs of discovery are attributed to reviewing data for privilege and work product purposes in order to avoid waiver. If a court enters an order under Federal Rule of Evidence 502, this will eliminate many of those costs by providing that disclosure in discovery is not a waiver either in the instant proceeding or any other.⁷⁴
- (ii) A colleague experienced in the handling of large cases noted that, since the Sedona Conference⁷⁵ and as a result of discovery rule changes, there has been a far more cooperative discourse occurring in the discovery process than was the case ten years ago. He adds that innovations like predictive coding, with its reliance on party cooperation, are taking hold and will substantially limit the costs of searching electronic data for information. It is not unreasonable to think that discovery abuse, as described in Judge Marrero's Article, may be going through a passing phase because of technological advances that will allow production to be made with an algorithm and a push of a button.
- (iii) As to motions to dismiss, court cases, including from the United States Supreme Court, have invited the best of lawyers to test an adversary's complaint at the 12(b)(6)⁷⁶ stage, leading to an increase in such motions.⁷⁷
- (iv) As to summary judgment, the Supreme Court's Trilogy⁷⁸ in the 1980s signaled to trial courts, according to a colleague, that they

⁷⁴ Rule 502 establishes a presumption against subject matter waiver, resolves the issue of inadvertent disclosure, provides for confidentiality orders, and supports party agreements, among other issues. See *Federal Rule of Evidence 502 (Introduction and Overview)*, FED. EVIDENCE REV., <http://federalevidence.com/Resources502> [<https://perma.cc/2JEZ-7TNF>] (last visited Sept. 11, 2018).

⁷⁵ See generally THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), http://www.ncjfcj.org/sites/default/files/Opening_Grossman_Maura.pdf [<https://perma.cc/4EXP-CS3E>].

⁷⁶ Rule 12:

Defenses and Objections: when and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing . . .

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted[.]

FED. R. CIV. P. 12(b)(6).

⁷⁷ See Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2273 (2012); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁷⁸ The Trilogy is discussed in more detail in footnote one of the following report, excerpted here:

should be scrutinizing such motions more closely and granting them more freely. The colleague, however, adds that the United States District Court for the Southern District of New York's requirement of Rule 56.1 statements⁷⁹ creates an enormous cost for the parties.

- (v) Suggestions for meeting and conferring hold promise and should be encouraged. Thomas Moore, an eminent trial lawyer, recently opined that if counsel had more opportunity to speak with each other before making motions, the chances are enhanced that a lot of issues traditionally brought to court could be eliminated or truncated. Encouraging and requiring client presence in certain parts of the pretrial process may allow clients to learn more about what motions are frivolous and as such prevent lawyers from pursuing them. More client involvement might also help contain costs through a fuller understanding of effective advocacy.
- (vi) If a defendant is required to provide an advance critique on the plaintiff's complaint, as suggested by Judge Marrero,⁸⁰ a colleague noted that in order not to advantage unfairly the

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (clarifying the burden placed on the party moving for summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (holding that a motion for summary judgment must be measured against the standard of proof at trial, and making the standard of proof for summary judgment the equivalent of the standard for a directed verdict); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding that a plaintiff with an inherently implausible claim must support it with more persuasive evidence than would otherwise be necessary to defeat a motion for summary judgment). A thorough consideration of federal summary judgment practice is found in EDWARD BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* (3d ed. 2006).

JOE S. CECIL ET AL., *FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000* 2 n.1 (2007), <https://www.fjc.gov/sites/default/files/2012/TrSJPR07.pdf> [<https://perma.cc/8MCA-UWTL>].

⁷⁹ Local Civil Rule 56.1, titled “Statements of Material Facts on Motion for Summary Judgment,” requires:

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

BD. OF JUDGES OF THE E.D.N.Y. & THE S.D.N.Y., *LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK*, *supra* note 59, at 50 (Rule 56.1); *see also* FED. R. CIV. P. 56(c).

⁸⁰ *See* Marrero, *supra* note 1, at 1677.

- plaintiff, the critique should be made without prejudice to later arguments by the defendant after the complaint is actually filed.
- (vii) Judge Marrero suggests that, where the actual amount in controversy is grossly disproportionate to the costs, the judge should promptly refer the matter to settlement.⁸¹ While such an option might work in certain types of cases, there is concern about closing the door of the court to plaintiffs who appear pro se, or by pro bono counsel, with small monetary claims that for these parties represent a matter of “life and death” in terms of human needs.⁸² Some colleagues point out that abusive consumer practices have been identified and eradicated because of small claims.
- (viii) As to Judge Marrero’s Article’s suggestion of a broader use by the courts of the English rule that the loser pays the winner’s attorney fees,⁸³ this could have a negative effect on plaintiffs who are not wealthy, closing the door to many plaintiffs. Moreover, contingent fee lawyers would need to factor it in to their risk analysis, with the result that they might encounter a case they would want to take but decline to do so because of the risk of paying the defendant’s fees, which when added to everything else, outweighs the benefit. A colleague, familiar with international practice, is of the view that the effects of such shifting are often exaggerated in deterring litigation, as fees are usually limited to what are reasonable, set by a bar association, or limited to court costs only in some foreign jurisdictions.⁸⁴
- (ix) In a recent conversation with the former federal judge, Barbara Jones, she said that she used effectively, as did other colleagues, practices such as those employed by Judges Preska, Buchwald, and Koeltl in their individual court rules. She added that it was helpful at times to call lawyers into chambers to talk to them about settlements and mediation because “lawyers cannot evade each other at conferences in front of a judge.” She also mentioned the opportunity present at such a conference to discourage motions that essentially were “silly.” In a much

⁸¹ *Id.* at 1682.

⁸² The Seventh Amendment to the Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rule of the common law.

U.S. CONST. amend. VII; *see also infra* Conclusion.

⁸³ Marrero, *supra* note 1, at 1684–90.

⁸⁴ *See* Stephen M. Bainbridge, *Fee-Shifting: Delaware’s Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851 (2016). Delaware’s Supreme Court upheld a fee shifting bylaw for reasons of sound public policy, but the legislature subsequently banned the change due to the influences of the state bar, according to Bainbridge. *Id.* at 2, 19.

earlier conversation I had with the late Judge Milton Pollack, he shared with me his view of the importance of a judge setting an early trial date while providing the parties with a timeline for document exchanges, discovery, and if necessary, motions. His reputation for helping parties achieve settlements was outstanding. When inquiring of former federal judge Kevin Duffy of his strong reputation for achieving settlements, he mentioned a time period when he had an unusually large workload as a result of the illness of another federal judge and sent a number of those cases to Judge Pollack for handling. In other words, he said, he inherited Judge Pollack's reputation!

B. *An Overview*

In the last three decades of the twentieth century, as criticisms escalated over the costs of civil litigation and the client-warrior adversarial approach to justice resolutions, the dawn of a new field was emerging as a possible remedy called alternative dispute resolution. While new to civil litigation, it was not new to lawyers like me who practiced in the field of labor law. As I pursued my career in the early 1960s in civil litigation, and the whirlwind of motion practice in the lower courts of New York City, I became involved with firm clients, both labor and management, where major industries could be shut down. I was struck by the different ways disputes were handled. My first civil justice litigation experience involved assisting a firm partner in drafting a motion to separately state and number the causes of action present in a ninety-page complaint. I worked night and day researching that motion's history and the available precedents, concluding that six causes of action were present, as the partner believed at the very beginning of the project. We spent many hours discussing the complaint and drafting the motion papers. I am sure the client was billed for this time. We lost the motion and in time the case was settled. Had there been a meet and confer approach before making a motion, we may well have never made that motion after a discussion by counsel with the judge.

Concurrently, I found myself involved in grievances and collective bargaining negotiations for employers and a printing union. As to grievances, multi-step resolution processes were prescribed by the collective bargaining agreements, and many such grievances were disposed of at the first stage through amicable resolution by the parties themselves; some were resolved at the second stage with the help of counsel; and fewer went to the final stage of arbitration. At every point we were forced to talk to each other and doing so made all the difference in the world. Our arbitrators were experienced and effective in assuring

a fair and timely hearing and conclusion to each matter. They were trained and served under ethical standards and good practice guidelines, not unlike the citizens of an ancient civilization who took an oath of office before undertaking service as an arbitrator.⁸⁵ When our collective bargaining agreements ended and new ones had to be negotiated, federal, state, and sometimes private mediators were available for when impasses occurred. Sometimes the mediation effort was unsuccessful, and a work stoppage or strike occurred. However, we knew we had to “live” with each other and we worked bilaterally to solve such differences—and we did. The earnings from this practice area paled in financial significance to the revenue from civil justice litigation, but the firm was proud to have a labor and employment practice area to offer its general clients.

The applicability of the labor management dispute resolution structure led the late Frank E.A. Sander to opine in 1976 that the civil justice system would benefit enormously from offering parties in dispute other options for securing a fair, inexpensive, and timely resolution of their disputes,⁸⁶ to which I now turn.

C. *ADR as a Remedy and Solution*

The field of ADR owes a large part of its ascendancy to the courts themselves and to the groundbreaking Pound Conference in 1976, the event that led to the birth of modern dispute resolution,⁸⁷ and the thought-provoking speech of Professor Frank Sander. He advocated for the creation of a “multi-door courthouse” where a court official would examine the nature of each new dispute during intake and decide on the optimal dispute resolution process.⁸⁸ He argued, in a published 1990 debate, that “our mission is to help clients find the best way to handle their disputes,” asking “why shouldn’t it be part of our explicit professional obligation to canvass those options with clients? How

⁸⁵ The oath of the citizens of Delphi provided:

Every question in the judgement relating to the moneys and boundaries of Apollo I will decide as is true to the best of my belief, nor will I in any wise give false judgments for the sake of favour or friendship or enmity; and the sentence passed in accordance with the judgment I will enforce to the best of my power with all possible speed, and I will make just restoration to the god.

MARCUS NIEBUHR TOD, *INTERNATIONAL ARBITRATION AMONGST THE GREEKS* 116 (1913).

⁸⁶ Frank E.A. Sander, *Varieties of Dispute Processing*, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), in 70 F.R.D. 79, 111–34 (1976).

⁸⁷ *Id.*

⁸⁸ *In Memoriam: Frank E.A. Sander ’52, a Pioneer in the Field of Alternative Dispute Resolution (1927–2018)*, HARV. L. TODAY (Feb. 27, 2018), <https://today.law.harvard.edu/memoriam-frank-e-sander-52-pioneer-field-alternative-dispute-resolution-1927-2018> [https://perma.cc/89ZH-XXXM].

would we feel about a doctor who suggested surgery without exploring other possible choices?"⁸⁹

Also empowering of the ADR option was the expansive application of the Federal Arbitration Act⁹⁰ and the passage of federal statutes calling for the federal courts to develop cost and delay reduction plans including ADR.⁹¹ Even before some of these statutes, the United States Court of Appeals for the Second Circuit embraced the notion of an appellate court promoting settlements and it added staff to assist in that effort.⁹² Law schools followed suit, adding courses to educate students on ADR methods from negotiation to mediation to arbitration. In the 1990s, with a vision of a broader system of civil justice resolutions, bar associations added sections and committees to educate and train practicing lawyers. ADR provider programs and organizations grew to assist in these developments, associating as they did so with bar associations and law schools.

The burden and costs of civil justice litigation in New York, as described by Judge Marrero, strongly suggest to me that there should be a greater use of ADR processes offered to parties as options. As noted in a recent program of the New York State Bar Association held at Fordham Law School, empirical evidence over the past ten years has shown the success of various mediation programs in pilot projects in New York State, as well as in states outside of New York and internationally.⁹³

1. Federal Court Mediation Programs

By way of background, the Alternative Dispute Resolution Act of 1998 authorized federal courts to compel parties to participate in certain ADR processes, including mediation.⁹⁴ Although federal district courts started designing and testing ADR procedures as early as the 1970s, the biggest growth in ADR came in response to the Civil Justice Reform Act of 1990 (CJRA), which, as amended, required the federal district courts to develop cost and delay reduction plans including the adoption of six case management principles, the sixth of which was alternative dispute

⁸⁹ See Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189, 191 (2017).

⁹⁰ 9 U.S.C. §§ 1–16 (2012) (originally enacted in 1925).

⁹¹ See 28 U.S.C. § 652 (2012).

⁹² See ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 23 (2d ed. 2006), <https://www.fjc.gov/sites/default/files/2012/MediCon2.pdf> [<https://perma.cc/4EJN-WCGU>].

⁹³ See generally N.Y. STATE BAR ASS'N, THE LITIGATIVE DNA—THE UNDERUTILIZATION OF MEDIATION IN NEW YORK AND WHAT CAN BE DONE ABOUT IT (2018), <http://www.nysba.org/LitigativeDnaCoursebook> [<https://perma.cc/3Y94-22C5>].

⁹⁴ 28 U.S.C. § 652(a) (2012).

resolution.⁹⁵ Many of the ninety-four district courts developed ADR procedures in response to this statute. With regard to the federal courts generally, at least twenty-five districts—or a little more than a quarter of the courts—provide general authorization to use ADR, authorization for settlement conferences only, or authorization for both.⁹⁶

The range of the various mediation programs—even simply among the various districts in New York—offers experiences from which to learn and upon which to build. Beginning in 2006, the Western District of New York became the first federal court in New York to establish automatic mediation programs as the initial default process to be followed in almost all civil cases (with “opt-out provisions”⁹⁷ and exclusions for limited matters such as habeas corpus, extraordinary writs, bankruptcy, and social security appeals—cases that predominately implicate issues of public policy). The pilot was initially limited to the caseload of Judge William Skretny, who pioneered the program. The mediation program pilot in the Western District of New York has become a permanent part of the Court due to its success of resolving nearly 78% of the cases without court involvement.⁹⁸ Eight years later, the Northern District adopted a similar mandatory program with strong settlement results as well.⁹⁹

By contrast, the Southern and Eastern Districts of New York have adopted hybrid mediation programs, with some types of cases constituting discretionary referrals and some automatic. The Southern District has been in the forefront, as previously mentioned, in creating mediation pilots with accompanying discovery protocols with each new pilot, in establishing mediator advisory panels, and in assessing

⁹⁵ Civil Justice Reform Act of 1990, 28 U.S.C. § 471–482 (2012). The six principles that must be included in the plan are; (1) systemic, differential treatment of complex and simple cases; (2) early and ongoing control of the pretrial process by setting early firm trial dates, controlling the extent of discovery and deadlines for motion practice; (3) careful and deliberate monitoring of complex cases; (4) encouragement of cost-effective discovery and voluntary exchange of information; (5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by certifications of good faith efforts; and (6) authorization to refer appropriate cases to available ADR programs. § 473.

⁹⁶ DONNA STIENSTRA, FED. JUDICIAL CTR., ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT 6 (2011), <https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf> [<https://perma.cc/TC8Q-76K2>].

⁹⁷ Barry Radin, ADR Program Coordinator for the Western District of New York, stated recently at The Litigative DNA program that motions for “opt-outs” are rarely granted. Barry Radin, Discussion at the N.Y. State Bar Association’s Program: The Litigative DNA—The Underutilization of Mediation in New York and What Can Be Done About It (May 9, 2018).

⁹⁸ Gary Shaffer, *Automatic Court Annexed Mediation in New York’s Federal District Courts: Sometimes Numbers Don’t Lie*, N.Y. DISP. RESOL. LAW. (N.Y. St. Bar Ass’n, New York, NY), Spring 2018, at 2, <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82394> [<https://perma.cc/5E7G-89CC>].

⁹⁹ See *id.* at 2–3; N.D.N.Y., GENERAL ORDER NO. 47: MANDATORY MEDIATION PROGRAM 1 (2018), www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO47.pdf [<https://perma.cc/9SVS-VLTJ>]; *Mandatory Mediation Program Statistics*, N.D.N.Y., <http://www.nynd.uscourts.gov/mandatory-mediation-program-statistics> [<https://perma.cc/WKD4-EETU>] (last visited Sept. 11, 2018).

mediators on its panels.¹⁰⁰ The Eastern District has been in the forefront with the ADR processes of neutral evaluation and non-binding arbitration. What is particularly interesting about the statistics of both the Southern and Eastern Districts is how the number of cases handled through these programs have grown over the course of a relatively short time period.¹⁰¹ Other ADR initiatives by these District Courts have had similar positive results. Between 2009 and today, for example, super-storm Sandy became the impetus for an insurance mediation program both at the Eastern District and at the AAA. Over 6,000 such claims were resolved by the AAA with a 65% settlement rate, and 69 claims were resolved in the Eastern District with a similar settlement rate.¹⁰² Similarly, in 2009, the Southern District's Bankruptcy Court began a "Loss Mitigation" mediation program, which achieved loan modifications in 56% of the matters that were mediated.¹⁰³ The success of these mass disaster programs need not be so limited. With 98% of civil cases eventually settling,¹⁰⁴ are more pilots not warranted to address the problems identified by Judge Marrero?

2. New York State Courts

One of the great successes with ADR and problem-solving at the state level is to be found in the community dispute resolution programs of the New York State Unified Court System (NYSUCS). The NYSUCS offers parties access to free or reduced-fee mediation in family law, general civil, and commercial law disputes, with services available in almost all the New York State counties.¹⁰⁵ Any New Yorker, regardless of whether they have a case pending in court, may use services offered by the Community Dispute Resolution Centers (CDRCs) Program in

¹⁰⁰ For a discussion of the evolution of the Southern District mediation program, see generally Rebecca Price, *An Alternative Approach to Justice: The Past, Present, and Future of the Mediation Program at the U.S. District Court for the Southern District of New York*, 6 Y.B. ARB. & MEDIATION 170 (2014).

¹⁰¹ For example, annual reports show that in the Eastern District (which is only automatic for FLSA cases) there was a 38% increase in discretionary referrals. See E.D.N.Y., ALTERNATIVE DISPUTE RESOLUTION REPORT: JULY 1, 2016–JUNE 30, 2017 2 (2017), https://img.nyed.uscourts.gov/files/local_rules/2016-2017_ADR_Annual_Report.pdf [<https://perma.cc/XF5V-PSET>].

¹⁰² Statistics from the AAA were supplied by Jeffrey Zaino, Vice President of AAA. Statistics from the Eastern District available through the Court's website. E.D.N.Y., ALTERNATIVE DISPUTE RESOLUTION REPORT: JULY 1, 2015–JUNE 30, 2016 3–4 (2016), https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf [<https://perma.cc/NVA4-9BFE>].

¹⁰³ See Daniel Gill, *Bankruptcy Court's Mortgage Mediation Program a Success*, BANKR. ON BLOOMBERG L. (Feb. 24, 2017), <https://www.bna.com/bankruptcy-courts-mortgage-n57982084348> [<https://perma.cc/L2PQ-8DEU>].

¹⁰⁴ See Marrero, *supra* note 1, at 1659–60, 1660 n.122.

¹⁰⁵ N.Y. STATE UNIFIED CT. SYS., COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM, <http://www.nycourts.gov/ip/adr/Publications/Brochures/cdrpc.pdf> [<https://perma.cc/792W-3JLW>] (last visited Sept. 11, 2018).

their local area. Over one thousand professionally trained mediators volunteer their services for matters referred for arbitration and mediation including consumer–merchant disputes, matrimonial property division issues, and automobile Lemon Law cases.¹⁰⁶

As to the State’s commercial courts, a piloted program in 2014 was established for a two-year period whereby, each week, every fifth Commercial Division case in which a Request for Judicial Intervention (RJI) was filed was referred to a Mandatory Mediation Pilot Project, which for a variety of reasons was not as successful as was initially anticipated.¹⁰⁷ Another pilot was begun in 2017 to cure issues encountered in the prior pilot project. The cases in this new Non-Division Pilot Project are newly filed commercial cases (excluding pro se matters) assigned to a justice outside the Division, and in which the filer of the RJI designated the matter as a “Contract” case and sought a preliminary conference.¹⁰⁸ In adopting this mandatory mediation pilot project, the task force indicated that it was inspired by the positive track records of courts that had already required parties to mediate, noting similar programs were piloted in Florida, Texas, California, and New Jersey.¹⁰⁹ The earlier pilot, which failed to meet expectations, at least provided parameters for a new pilot, which will likely meet with better success. Pilots have also been initiated in Surrogates Court in New York county¹¹⁰ and in Westchester county.¹¹¹ Each pilot experience provides a guide as to how to improve ways to increase utilization of mediation in

¹⁰⁶ “During 2016, CDRCs served 67,118 people in 27,012 total cases. . . . Family matters, including child custody, visitation and support, accounted for 24 percent of these cases. . . . Cases mediated through the Collaborative Family Law Center have a 91 percent success rate[.]” N.Y. STATE UNIFIED COURT SYS., 2016 ANNUAL REPORT 11–12 (2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/16_UCS-Annual_Report.pdf [<https://perma.cc/8S2J-BMVY>].

¹⁰⁷ See Memorandum from Chris Stern Hyman to Panel Members participating in the March 22, 2018 Conference on Underutilization of Mediation in the Courts (Feb. 1, 2018), <http://www.nysba.org/DnaHyman> [<https://perma.cc/X8MS-JM9E>]; CHIEF JUDGE’S TASK FORCE ON COMMERCIAL LITIG. IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 25–28 (2012), <https://www.nycourts.gov/courts/comdiv/pdfs/chiefjudgestaskforceoncommerciallitigationinthe21stpdf.pdf> [<https://perma.cc/3YHU-XK25>].

¹⁰⁸ See *New York County—Manhattan: ADR Overview*, N.Y. STATE UNIFIED CT. SYS., https://www.nycourts.gov/courts/ComDiv/NY/ADR_overview.shtml [<https://perma.cc/XL9T-KWW3>] (last updated May 24, 2018) (subsection “Mandatory Mediation Pilot Project for Certain Commercial Cases Outside the Commercial Division”).

¹⁰⁹ See generally John D. Feerick & Linda Gerstel, *The Underutilization of Mediation in New York and What Should Be Done About It?*, 11 N.Y. DISP. RESOL. LAW. (N.Y. St. Bar Ass’n, New York, NY), Fall 2018, at 23–32.

¹¹⁰ See ALT. DISPUTE RESOLUTION COMM. OF THE N.Y. CITY BAR ASS’N, REVIEW OF THE NEW YORK COUNTY SURROGATE’S COURT PILOT MEDIATION PROGRAM (2016), https://s3.amazonaws.com/documents.nycbar.org/files/20073100-Surrogate_Project_Report_ALTDIS_10.3.16.pdf [<https://perma.cc/N75G-NFUT>].

¹¹¹ See Hon. Alan D. Scheinkman, *Rules of the Alternative Dispute Resolution Program*, COM. DIVISION SUP. CT. ST. N.Y., COUNTY OF WESTCHESTER (Aug. 2011), <https://www.nycourts.gov/courts/comdiv/PDFs/9th-ADR-Rules.pdf> [<https://perma.cc/2LWD-Y2CD>].

New York. As recently as April 20, 2018, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks announced a plan to revitalize the court system's commitment to ADR by building upon the courts' existing statewide programs and promoting the goals of the Chief Judge's Excellence Initiative to enhance the quality of justice.¹¹² An Advisory Committee has been formed, which is expected to consider the expansion of ADR programs in the Supreme Court, lower civil courts, Family Court, and Surrogates Courts, especially in the field of mediation.¹¹³

Infrastructure systems already in place provide quality assurance that future expansion in court programs will be professionally handled by educated and neutral mediators. The New York State ADR office promotes quality assurance through the approval of mediation courses pursuant to Part 146 of the Rules of the Chief Administrative Judge.¹¹⁴ A comparable mediation committee exists in the Southern District and a similar committee was recently established in the Eastern District.¹¹⁵ Court rosters have grown dramatically and there are also a wealth of mediation educational courses.¹¹⁶

In my view, mediation provides for a more complete rendering of justice in a great many situations. In the world of disputes, people seek less trauma, less expense, less delay, greater simplicity, fewer public embarrassments, and more options for securing a fair and just outcome. Mediation also offers solutions not otherwise obtainable in court litigation, as it allows for a greater consideration of the interests of the parties.¹¹⁷ Two of our greatest presidents, who expressed the values of our founding nation, embraced ADR: Washington employed a multi-step process for resolving disputes under his will, starting with an effort to achieve an amicable outcome and ending with arbitration;¹¹⁸ Lincoln, a courtroom lawyer by profession, weighed in heavily on compromise as a problem solving tool, noting that the nominal winner in a litigation is often the real loser—in fees, expenses, and waste of time.¹¹⁹ A century later, United States Chief Justice Warren Burger waded in with his view

¹¹² See Press Release, N.Y. State Unified Ct. Sys., New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice 1 (Apr. 20, 2018), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR18_10.pdf [<https://perma.cc/Z3XQ-YVSC>].

¹¹³ *Id.* at 2–3.

¹¹⁴ *ADR Neutrals & Mediation Trainers / Part 146*, N.Y. STATE UNIFIED COURT SYS., <http://www.nycourts.gov/ip/adr/Part146.shtml> [<https://perma.cc/H944-FWUT>] (last visited Sept. 11, 2018).

¹¹⁵ See Feerick & Gerstel, *supra* note 109.

¹¹⁶ *Id.*

¹¹⁷ See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

¹¹⁸ See THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY, TO WHICH IS APPENDED THE LAST WILL AND TESTAMENT OF MARTHA WASHINGTON 28 (John C. Fitzpatrick ed., The Mount Vernon Ladies' Ass'n of the Union 1939).

¹¹⁹ Brian D. Forrow, *The Last of the General Practitioners*, 59 A.B.A.J. 57, 58 (1973).

that “[o]ur system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”¹²⁰ Founder of the CPR Institute for Dispute Resolution James F. Henry agrees: “To be equitable and just, our civil system of resolving disputes—formal and informal—has to offer affordable options for parties of limited means.”¹²¹

D. Collaborations and Education

Over the past two decades, law schools in New York and elsewhere have demonstrated their capacity to be partners in the societal mission of providing access to justice to all through curricular offerings in clinical legal education and pro bono and volunteer activities of their students, faculty, and graduates. Law students, working in clinical programs under experienced faculty supervision and pursuant to court rules, have provided invaluable assistance in our civil justice system to many individuals unable to afford legal assistance. This outreach has extended to service by students, educated and trained in the field of mediation, as neutrals in the state courts of New York and in community resolution centers under the auspices of the NYSUCS. Students of many New York law schools participate in these programs, with Fordham University School of Law as a pioneer in the Small Claims Part of the Civil Court¹²² and the Benjamin N. Cardozo School of Law as a pioneer with community centers.¹²³ Indeed, federal courts in New York have availed themselves of this resource in unique ways, as exemplified by the development by former Chief Judge Loretta Preska of a collaboration with New Jersey’s Seton Hall Law School in providing representation to pro se parties in settlement mediations. According to the Seton Hall director of that program, David White, over the history of that program, 150 Seton Hall students have assisted 300 clients in mediation advocacy with a 68% success rate.¹²⁴ Students and faculty of other law schools as well have provided important assistance to the federal courts in New York in dealing with civil justice matters. Further harnessing of this resource, I suggest, could help immeasurably with the challenges described by Judge Marrero. This might be a good subject for a future Judicial Conference of the United States Court of Appeals for

¹²⁰ Warren E. Burger, *The State of Justice*, 70 A.B.A.J. 62, 66 (1984).

¹²¹ James F. Henry, *Lawyers as Agents of Change*, 19 ALTERNATIVES TO HIGH COST LITIG. 49, 50 (2001).

¹²² *Mediation*, FORDHAM U. SCH. L., <https://www.fordham.edu/info/23932/mediation> [<https://perma.cc/2QC8-4YVH>] (last visited Sept. 11, 2018).

¹²³ See *Mediation Clinic*, BENJAMIN N. CARDOZO SCH. L., <https://cardozo.yu.edu/clinics-professional-skills/clinics/mediation-clinic?action> [<https://perma.cc/Y3UF-AKUZ>] (last visited Sept. 11, 2018).

¹²⁴ Email from David Michael White, Dir., Seton Hall Univ. Sch. Law Conflict Mgmt. Program, to John Feerick, Fordham Univ. Sch. Law (Aug. 9, 2018, 05:48 EDT) (on file with author).

the Second Circuit.

The Bar Associations of New York are additional enormous resources for the courts in addressing the civil justice challenges at hand. They are mission-oriented to serve the needs of their members, and, at the same time, they are committed to the honor and dignity of the legal profession. These associations need to partner with the courts to address the excesses and abuses that Judge Marrero illuminates. Indeed, the courts require the assistance of the bar in assessing and considering the fairness of the justice system. A useful model that might be followed involves an initiative by the late Robert MacCrate.¹²⁵ Concerned by the lack of collaborations between the practicing bar and the academic bar, he created a national conference that led to an unprecedented gathering and dialogue by bar presidents and law school deans and professors to foster greater understanding of the respective work of the practicing and academic communities.¹²⁶ One byproduct of this conference was increased involvement of law professors in the work of the organized bar and of practicing lawyers in the work of the academy.

Ethics education of students and lawyers is another remedy of importance. The crisis of Watergate led to the creation of legal ethics as a required course in ABA-approved law schools.¹²⁷ Part of the hope was that such courses would help develop professional character, prompting the late Justice Tom Clark to remark: “[o]ur law schools, it seems to me, must shoulder the burden of ‘teaching’ honesty because there is simply no one else to do the job.”¹²⁸ The teachers of legal ethics have done a

¹²⁵ MacCrate spearheaded the *MacCrate Report*, the 1992 report of the ABA Task Force on Law School and the Profession, which called for practical skills training during and after law school.

The publication of the MacCrate Report set off a wide-ranging discussion among academics, practitioners, bar examiners, and the judiciary in a variety of contexts including: statewide conclaves, held in 25 states, that brought together local bar associations, representatives of local law schools, and the judiciary, to discuss means to improve the state’s legal educational continuum; meetings, in various law schools, of special faculty committees and sometimes the entire faculty to discuss reforms of the curriculum; law school conferences to discuss the Report; and numerous law review articles discussing the Report and/or issues identified by the Report.

COMM. ON THE PROF’L EDUC. CONTINUUM, AM. BAR ASS’N, TWENTY YEARS AFTER THE MACCRATE REPORT: A REVIEW OF THE CURRENT STATE OF THE LEGAL EDUCATION CONTINUUM AND THE CHALLENGES FACING THE ACADEMY, BAR, AND JUDICIARY 1–2 (2013), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013councilmeeting/2013_open_session_e_report_prof_educ_continuum_committee.authcheckdam.pdf [<https://perma.cc/URF6-7PXQ>].

¹²⁶ The conference was a February 11, 2000, ABA Conference in Dallas, Texas, called, “The Legal Education Continuum: We Are All in this Together,” which was chaired by this author.

¹²⁷ See Mark Hansen, *1965–1974: Watergate and the Rise of Legal Ethics*, ABA J. (Jan. 2015), http://www.abajournal.com/magazine/article/1965_1974_watergate_and_the_rise_of_legal_ethics [<https://perma.cc/A4M5-QJUS>].

¹²⁸ Hon. Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 252–53 (1975).

very good job of developing course materials and an active community of educators and scholars. As noted by Professor Bruce Green, the recipient of the 2018 ABA ethics medal, “scholars in the field look, for example, to history and philosophy, they conduct empirical research, and they draw on teachings of psychology, sociology, economics, and neuroscience, among others.”¹²⁹ He cautioned that “it is unrealistic to think that we will inoculate our students against ethical impropriety.”¹³⁰ What we can do, he said, is to help students “think deeply about what it means to be a legal professional and what kind of professional they want to be.”¹³¹ Ethics courses have a unique mission, he added, including “teaching rules, teaching students to identify and resolve ethics problems, and inculcating professional values.”¹³²

The late Mary Daly, another recipient of the Michael Franck ABA award and a role model for Professor Green, agreed with Professor Green on the importance of including the learning from other disciplines. By lifting the education of law students, said Daly, “it enables us to better know who we are, and to be ourselves as best we can be.”¹³³ She added: “[H]olding on to who you are and being yourself at all times as best as you can . . . strikes me as being at the heart of integrity.”¹³⁴ Daly said that the subject of integrity must be “exercised within a community” and treated as an institutional and personal virtue.¹³⁵ It involves, she said, looking beyond one’s self, beyond one’s community, and beyond one’s institution. As to other disciplines she said:

[O]rganizational and management theory can greatly contribute to our understanding of how integrity is exercised in a corporate or law firm setting. Behavioral theory can shed much light on why some lawyers who genuinely perceive themselves as persons of integrity are unaware of the wrongdoing around them. Cognitive science can show how human beings are hard-wired to respond differently to certain types of moral dilemmas.¹³⁶

¹²⁹ Bruce Green, *The Challenges and Rewards of Teaching Legal Ethics*, J. PROF. LAW. (forthcoming 2018) (manuscript at 4) (on file with author).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (manuscript at 5)

¹³³ John D. Feerick, *Michael Franck Professional Responsibility Award Remarks in Honor of Mary C. Daly, Chicago, Illinois May 28, 2009*, 2009 J. PROF. LAW. 121, 125; see also Mary C. Daly, *Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261, 268–69, 276–77 (2003).

¹³⁴ Daly, *supra* note 133, at 261.

¹³⁵ *Id.* at 263.

¹³⁶ *Id.* at 268–69.

CONCLUSION

As modern day civil litigation, as described by Judge Marrero, places enormous burdens on courts and judges, it diminishes the resources available to deal with the rising tide of pro se litigants who are entitled to the equal justice promised to all as an American ideal. Notwithstanding the growth of volunteering by lawyers in areas of legal services involving the poor and low-income earners, Bruce Green, in accepting the ABA award, stated the reality that “there will never be enough lawyers for most of the people who need them” and “self-help materials will never adequately substitute for lawyers.”¹³⁷ He asks whether there “isn’t [a] better strategy to change the legal system so that it does not depend so heavily on lawyers[.] In a profession of over one million lawyers, whose professional associations are dedicated to civil justice reform, are there not the resources and imagination to come up with alternatives?”¹³⁸

The bar of this country, populated with 1.4 million lawyers, active, registered, and retired, can make a dent in some of these statistics through increased volunteering and participation in programs of bar associations, courts, government departments, and law schools, and in activities of legal aid organizations and community groups. Consider the impact if every lawyer handled one matter for those disadvantaged and vulnerable. In addressing the problems of Big Law, to use Judge Marrero’s words, a balance must be struck to make sure that low-income earners and the poor are not left behind in the quest for justice.

In conclusion, if I were prescribing a required reading for anyone journeying through my “commentaries and responses,” it would be *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving, and ADR*. It was published by the CPR Institute for Dispute Resolution in 2001.¹³⁹ It begins with an informative piece on ADR in history by the late federal judge, Charles B. Renfrew and concludes with a reflective piece by P. Elpidio Villarreal, entitled, *ADR: The Stream Becomes a Flood*. All told, this sixty-nine-page book contains twenty-one essays by practitioners, commentators, teachers, judges, and public officials. It makes a compelling case for the adoption of ADR at all levels of the justice system. It deserves a wide reading at this time of crisis in areas of civil justice and of calls for major reforms in our civil justice system.

¹³⁷ Green, *supra* note 129 (manuscript at 7).

¹³⁸ *Id.*

¹³⁹ *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR*, 19 ALTERNATIVES TO HIGH COST LITIG. 1 (2001).