



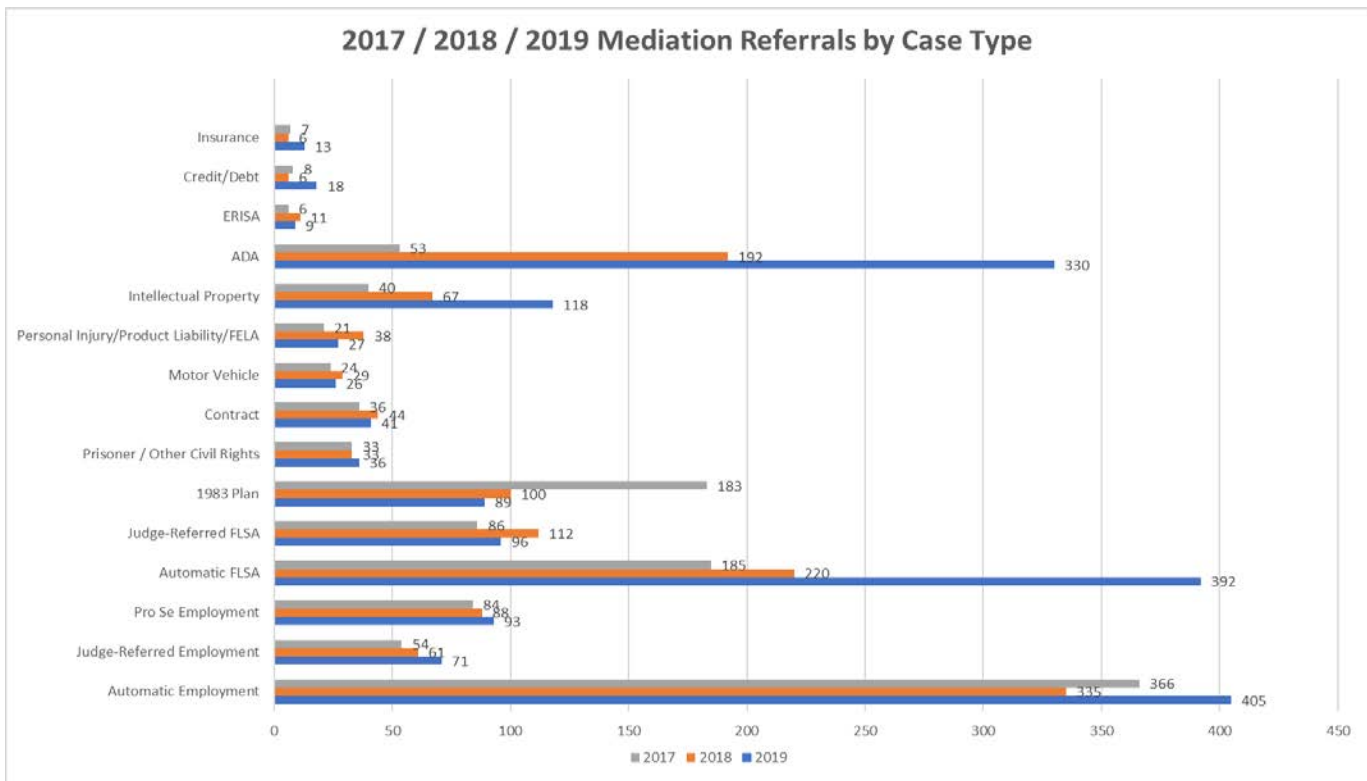
## Mediation Program Report for 2017-2018 with Preliminary Information for 2019 as of January 21, 2020

### OVERVIEW

The SDNY Mediation Program continued to grow in 2017 and 2018, and 2019 saw even more robust growth (see snapshot on p. 4). In addition to automatic referrals of employment discrimination and § 1983 Plan cases, which began in 2012, cases filed under the Fair Labor Standards Act (“FLSA”) assigned to certain of the Court’s judges began to be automatically referred in 2016. Court-wide, filings of cases under the Americans with Disabilities Act (“ADA”) and copyright laws proliferated. Mediation referrals for those cases, and others outside of the automatic protocols, continued to grow as well. From 2017 to 2018, mediated cases referred directly by judges increased from 39% to 53%. In 2019, just over 50% of the referrals to mediation were non-automatic referrals.

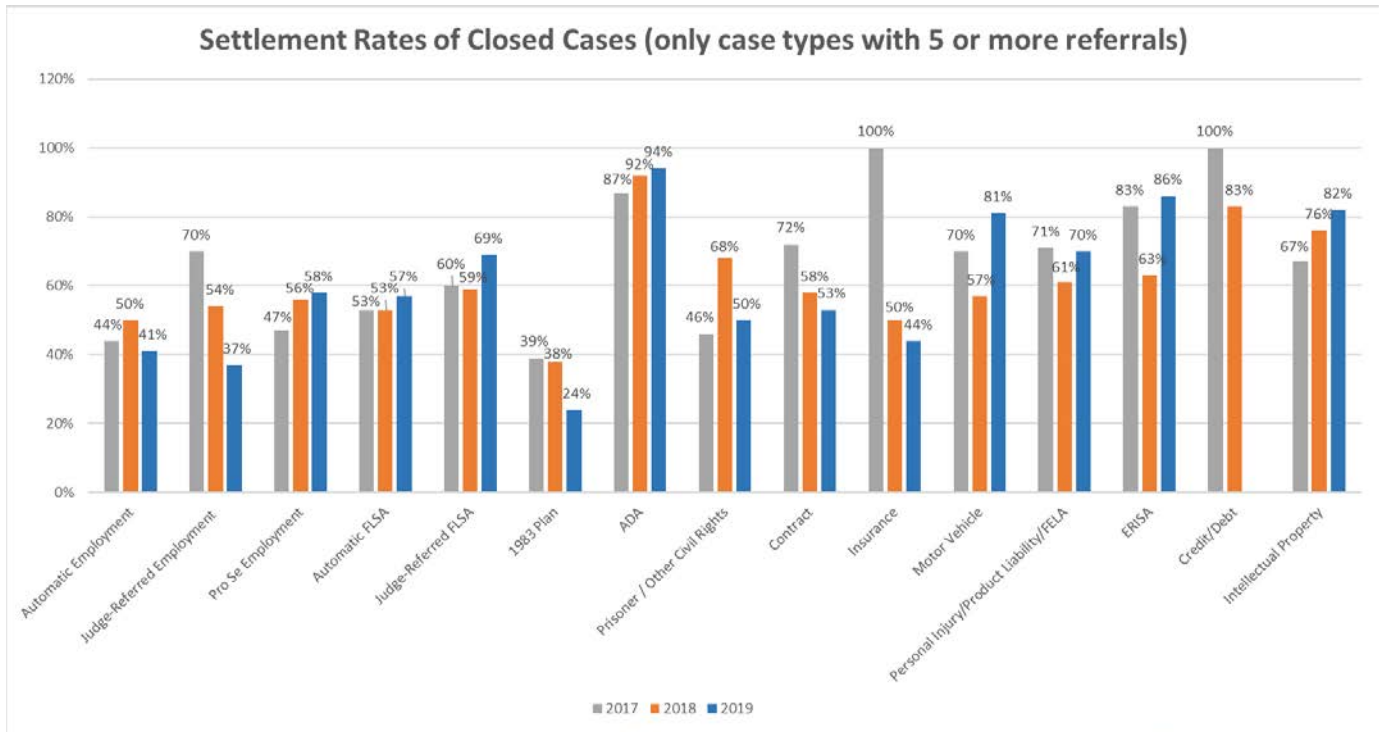
Total # of Referrals
<b>2017:</b> 1,209
<b>2018:</b> 1,375
<b>2019:</b> 1,800

The distribution of cases across different natures of suit shifted from 2017 to 2019. Mediation referrals of intellectual property cases increased from 40 to 67 to 118. ADA Title III referrals increased from 53 to 192 to 330. Referrals of FLSA cases increased from 271 to 332 to 488. Conversely, § 1983 Plan cases declined from 183 referrals in 2017, to 100 in 2018, to 89 in 2019. Referral numbers for specific natures of suit can be found in the following graphic (there is a larger version of this chart on p. 5).



## SETTLEMENT RATES BY CASE TYPE

In 2017, a total of 1,209 cases were referred into the SDNY Mediation Program. Approximately 1,200 of those referrals have closed with an overall settlement rate of 53%. In 2018, total referrals increased to 1,375. Of those, approximately 1,367 have closed with an overall settlement rate of 60%. In 2019, a total of 1,800 cases were referred to mediation. Though 442 cases are still open, the current settlement rate is 61%. Settlement rates for specific natures of suit can be found in the following graphic (there is a larger version of this chart on p. 6).



### SPOTLIGHT ON PRO SE EMPLOYMENT CASES

In 2017 and 2018 combined, approximately 172 pro se employment cases were referred into mediation with appointment of limited scope counsel. The settlement rate for both 2017 and 2018 averaged at 52%. White Plains judges referred 21 of these matters to mediation with a settlement rate of 39%, and Manhattan judges referred 151 with a settlement rate of 53%. 93 pro se employment cases were referred to mediation in 2019. Because it takes some additional time to locate pro bono counsel, too few of these matters have closed to report settlement statistics for 2019.

### SPOTLIGHT ON CASES FILED UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT

In 2017, 53 ADA Title III cases were referred to mediation with a settlement rate of 93%. In 2018, the number of referrals increased to 192 cases with a settlement rate of 91%. In both 2017 and 2018, over 60% of the cases referred were settled before an initial in person session, often with telephone and email assistance from the mediators. In 2019, the number of referrals increased to 330. The current settlement rate so far is 94%.

## SPOTLIGHT ON CONTRACT CASES

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In 2017, judges referred approximately 36 contract cases to mediation with a settlement rate of 70%. In 2018, 44 contract cases were referred to mediation with a settlement rate of 60%. In 2019, 41 contract cases were referred to mediation. 31 of the 2019 cases have closed, and the current settlement rate is 55%.

## MEDIATORS

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In 2017 and 2018, there were approximately 280 mediators on the SDNY roster, including 27 new mediators who were added to the roster in those years. Panel mediators have substantial expertise in a variety of practice areas, including: Antitrust (45 mediators), Intellectual Property (60 mediators), Entertainment/Media (37 mediators), Corporate/Business (105 mediators), Product Liability (42 mediators), Securities (65 mediators), and Environmental Law (21 mediators).

### Mediator Evaluation

*The SDNY began in person peer evaluation of mediators in 2014. We have completed evaluations for approximately 40% of the panel mediators.*

The Mediation Program continues to evaluate current and prospective panel mediators using a 2014 protocol developed in collaboration with the New York City Bar Association’s ADR Committee. Approximately 40% of the panel mediators have been evaluated.

The mediation procedures require mediators to accept at least two cases per year. Panel mediators were offered an average of ten cases over the course of a year and mediated four. Some mediators were offered as many as twenty-five cases and mediated as many as thirteen. The range in the number of cases offered to mediators can be attributed to several variables, such as the location in which the mediator was available (Manhattan, White Plains, or both), whether or not the mediator accepted cases in the automatic referral programs, and the number and types of areas of expertise.

The Mediation Program continues to offer monthly mediator practice groups during which small groups of mediators meet to discuss common challenges in mediation. Seventy-five mediators are registered for these groups which take place in both the White Plains and Manhattan courthouses, as well as an office in Midtown.

In both 2017 and 2018, mediators were offered a variety of training opportunities, from the game show inspired “FLSA Mediation MythBusters” to a one-day NYLL/FLSA training, to two lunchtime trainings on the topics of ADA mediation and mediating in joint sessions. We also invited mediators and members of the bar to a panel discussion on the similarities and differences between mediation and judicial settlement conferences. Panel mediators participated in training for staff at the City Commission on Human Rights.

## 2017/2018 SELECTED INITIATIVES

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**Outreach:** In 2017-2018, Mediation Program staff and mediation panel members participated in several events to increase awareness about the Court’s program, and mediation in general. These included meetings with foreign judges and members of foreign bars, and presentations at local law schools, bar association committees, conferences, and mediation trainings.

**Diversity:** As part of ongoing efforts to increase diversity in our mediation roster, the Mediation Program partnered with the Harvard Negotiation and Mediation Clinical Program for a semester long study of the challenges in attracting diverse

### Diversity

*“The perception of prestige at the SDNY attracts some mediators and discourages others.”*

Harvard Negotiation and Mediation  
Clinical Program Report on Mediator  
Diversity

neutrals. The study found that the barriers included: the uncertainty of making mediation/alternative dispute resolution a sustaining career path; the amount of training required to serve as a neutral; the lack of support from some firms for mediation as a pro bono endeavor; and the prestige of the SDNY (which caused some to feel that service as a neutral would be unattainable).

**Mediator Advisory Committee (“MAC”):** MAC members have been instrumental in supporting all aspects of the Mediation Program. They developed and implemented strategies for increasing mediation referrals, identified topics for training, provided advice on questions of mediation practice and ethics, participated in efforts to increase the numbers of diverse applicants to the mediation panel, and evaluated both new applicants and existing panel mediators.

## SNAPSHOT OF 2019

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### Mediation Referrals

1,800 cases were referred to mediation in 2019. Though many matters are still open, the current overall settlement rate is 61%. In 2019, just over 50% of the referrals to mediation were direct referrals from a judge (non-automatic) and the resolution rate for those referrals is currently 75%. Of the 821 non-automatic referral orders issued in 2019, 777 were from judges in Manhattan and 44 were issued by judges in White Plains. 2019 saw huge increases in referrals of intellectual property cases (118) and ADA Title III cases (330). Referrals under the § 1983 Plan dropped to 89 cases.

### Mediators

In 2019 approximately ten new mediators were added to the roster, and an additional eight are currently going through our on-boarding process.

### Training

Along with outreach to schools, bar associations, and mediation organizations, Mediation Program staff conducted trainings for panel mediators in the Western District of New York and New York State Surrogate’s Court. In addition, our history of developing and providing CLEs to attorneys and mediators qualified the SDNY as an accredited CLE provider. This accreditation lasts for three years and is renewable.

#### Mediator Compensation Survey

52% of those who responded thought that the SDNY should change its mediation rules to require parties to compensate the mediator. 44% of respondents had concerns or objections to making such a change.

### Compensation Survey

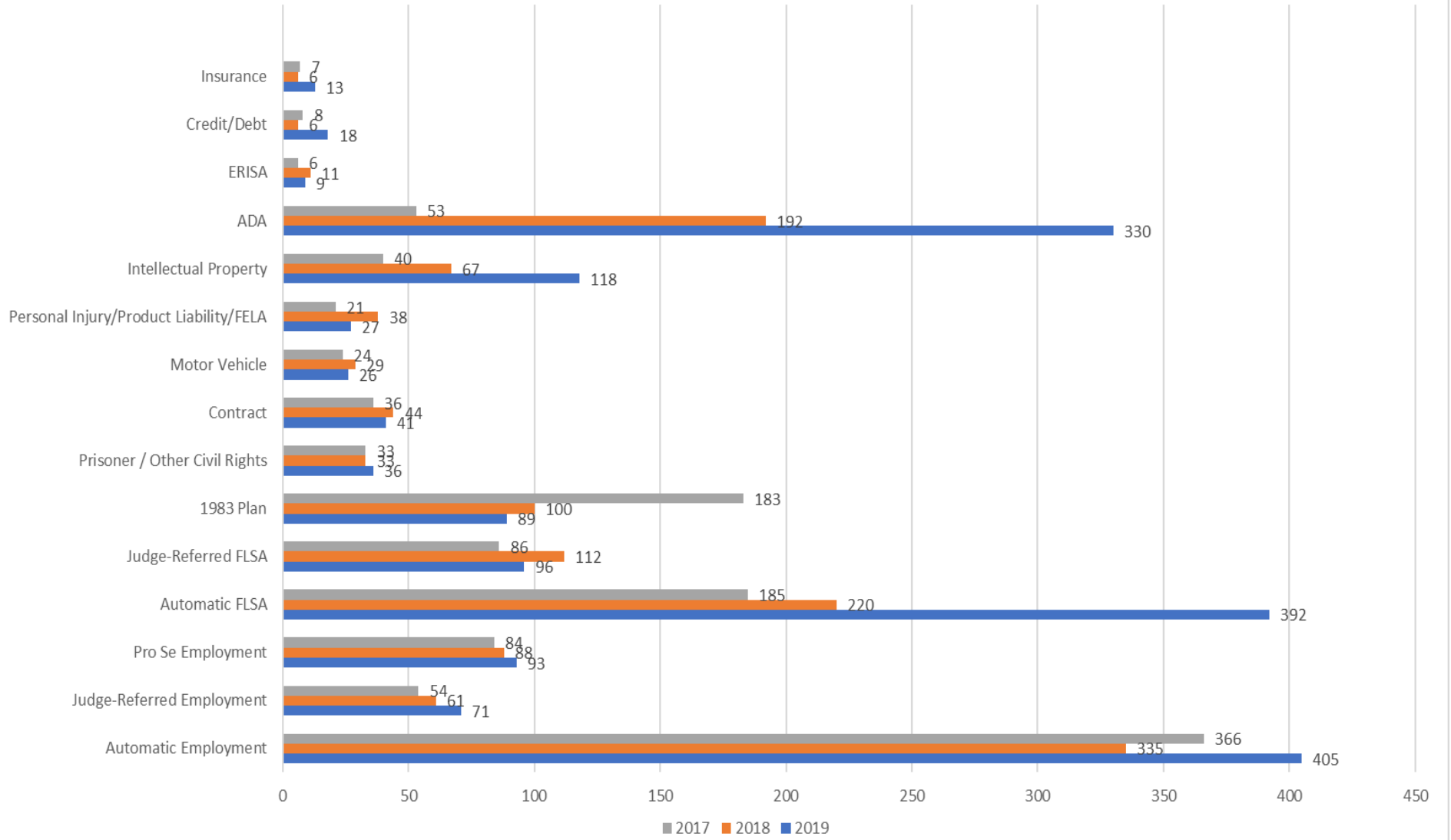
In 2019, the Mediation Program, with assistance from the Federal Judicial Center, developed a survey to explore the views of panel mediators on the topic of mediator compensation. The survey was sent to all current panel mediators (approximately 280) of whom 213 responded. 52% of those who responded thought that the SDNY

should change its mediation rules to require parties to compensate the mediator. 44% of respondents had concerns or objections to making such a change.

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## 2017 / 2018 / 2019 Mediation Referrals by Case Type



## Settlement Rates of Closed Cases (only case types with 5 or more referrals)

