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SIMPLIFIED PROCEDURE FOR COURT DETERMINATION OF DISPUTES UNDER NEW YORK'S CIVIL PRACTICE LAW AND RULES

Jay C. Carlisle*

INTRODUCTION

The introduction of the Individual Assignment System (IAS)¹ in 1986, and recently enacted laws addressing tort reform² and alternative dispute resolution³ have heightened the debate between the bar and judiciary as to the most appropriate method of managing efficiently⁴ the high volume of cases in New

* Professor of Law, Pace University School of Law; J.D. University of California at Davis, A.B. University of California at Los Angeles. The author is grateful to John Mulligan and Gail Matthews for their research assistance. He dedicates this article to Professor Peter J. O'Connor, who is a true dean of New York Civil Practice.

¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3(a) (1986). See notes 237-39 and accompanying text *infra*. See generally Brodsky, *Civil Practice*, 37 SYRACUSE L. REV. 264, 288 (1986); Carlisle, *Annual Survey of New York Civil Practice*, 38 SYRACUSE L. REV. 67, 83-85 (1987); *The Uniform Rules Take Effect (January 6, 1986), Part I: The Individual Assignment System*, 312 N.Y. ST. L. DIG. 1 (Dec. 1985) [hereinafter *Individual Assignment System*]; *Text of Review Panel's Report on IAS* (IAS Study Report by Office of Court Administration), N.Y.L.J., Feb. 24, 1987, at 5, col. 1. "Plaintiffs are 'far more successful' in the 1980's than they were in the previous 20 years, a Rand Corp. study of civil verdicts in California and Cook County, Ill., discovers. In Cook County, plaintiffs moved from winning one fourth of products liability and malpractice cases in the 1960s to winning half such trials in the 1980's; the average malpractice award more than tripled." '87 EVENTS: March, Nat'l L.J., Jan. 4, 1988, at S-6, col. 2.

² See notes 7-13 and accompanying text *infra*. ABA's House of Delegates on March 2, 1987 "approves a tort reform policy that rejects caps on damages recovered by injured plaintiffs for pain and suffering, but recommends greater judicial scrutiny of damage awards. '87 EVENTS: March, Nat'l L.J., Jan. 4, 1988, at S-6, col. 2.

³ Ch. 156, [1984] N.Y. Laws (McKinney) (makes the Community Dispute Resolution Centers Program a permanent component of the New York Unified Court System); Ch. 91, [1985] N.Y. Laws 405 (McKinney) (chapter 91 allows Community Dispute Resolution Centers to make monetary awards equal to the monetary jurisdiction of the Small Claims Part of Justice Courts); Ch. 837, [1986] N.Y. Laws 1967 (McKinney) (allowing selected felony cases to be referred to an alternative dispute resolution center with the consent of the people, the defendant and the victim).

⁴ See Wise, *IAS 'Effective' in First Year But Needs Some Improvement*, N.Y.L.J., Feb. 20, 1987, at 1, col. 3 [hereinafter Wise, *IAS 'Effective'*]; Johnson, *New York Court Study Says System is Faster*, N.Y. Times, Feb. 20, 1987, at B1, col. 2; Baetich, *IAS 'Unworkable'* (letter to the editor), N.Y.L.J., Feb. 4, 1987, at 2, col. 6; Bellacosa, *Alternative Dispute Plan Improves Justice System*, N.Y.L.J., Jan. 28, 1987, at 25, col. 1. See

York state courts.⁵ Although the IAS has reduced court congestion, an estimated eighteen percent of the cases now pending before the courts have been in the judicial system longer than fifteen months.⁶ In addition, changes relating to the statute of limitations for products liability actions,⁷ joint and several liability,⁸ itemized verdicts,⁹ periodic payments of awards,¹⁰ payments

generally Broder, *Trial Tactics, Techniques: Sauce for the Gander*, N.Y.L.J., Oct. 9, 1986, at 1, col. 1; McLaughlin, *New Joint, Several Liability Law: Problems for Lawyers and Judges*, N.Y.L.J., Oct. 1, 1986, at 1, col. 3; Cook, *N.Y. Law Likely to Spur Filings of Toxic-Tort Claims*, Nat'l L.J., Sept. 22, 1986, at 16, col. 1; Connors, *An Analysis of New York's Medical Malpractice Reform*, N.Y.L.J., Aug. 15, 1986, at 1, col. 3; Mollen, *Bar's Cooperation Urged for New I.A.S. to Succeed*, N.Y.L.J., Jan. 15, 1986, at 29, col. 1; Wise, *Individual Assignment System Begins Operations Today*, N.Y.L.J., Jan. 6, 1986, at 1, col. 2. See generally Wise, *Battle Lines Are Being Drawn In Fight Over Toxic Tort Law*, N.Y.L.J., Aug. 4, 1986, at 1, col. 3; Law Signed to Extend Time for Filing Toxic-Tort Suits, N.Y.L.J., July 31, 1986, at 1, col. 3; Rheingold, *The New Statute of Limitations in Tort Actions in New York*, N.Y.L.J., July 29, 1986, at 1, col. 3; Hoenig, *More on Tort Reform — The New Statutes*, N.Y.L.J., July 24, 1986, at 1, col. 1; Marlin & Levy, *New York Adopts Discovery Rule for Latent-Disease Cases*, N.Y.L.J., July 7, 1986, at 1, col. 3; Fox, *Interim Report by Governor's Commission: Reforms in Liability Insurance Urged by State Advisory Panel*, N.Y.L.J., Apr. 8, 1986, at 1, col. 3; Memorandum of Sen. Stafford (this memorandum by Senator Ronald B. Stafford of the New York State Senate accompanied Senate Bill 9391A and discussed the purpose of a discovery statute of limitation rule) (available in files of the Brooklyn Law Review).

⁵ Over 3.5 million actions were filed in New York state courts during 1987. CASELOAD ACTIVITY REPORTING SYSTEM OF THE OFFICE OF COURT ADMINISTRATION OF THE UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK (1987) (statistical breakdown of actions filed in New York state courts) (available in the files of the Brooklyn Law Review). See also The Hon. Chief Judge Sol Wachtler, Remarks at the Annual Dinner of the New York State Bar Association (Jan. 17, 1986) (available in the files of the Brooklyn Law Review). Judge Wachtler notes that the number of cases disposed of each year by New York state courts is ten times the number of cases disposed of each year by the entire federal judiciary. See also REPORT TO THE CHIEF JUDGE AND CHIEF ADMINISTRATIVE JUDGE OF THE REVIEW COMMITTEE ON 1986 INDIVIDUAL ASSIGNMENT SYSTEM OPERATIONS 6-8 (1987) [hereinafter REPORT TO THE CHIEF JUDGE]; EIGHTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 2-1 (1986) [hereinafter CHIEF ADMINISTRATOR'S REPORT] (available in the files of the Brooklyn Law Review).

⁶ See note 248 and accompanying text *infra*.

⁷ N.Y. CIV. PRAC. L. & R. § 214-c (McKinney Supp. 1988), as enacted by Ch. 682, [1986] N.Y. Laws 1565 (McKinney) (significantly alters the three year statute of limitations for personal injury and property damage cases by providing that the period starts to run from the date of discovery, and thus revives certain causes of action that would have been time barred).

⁸ N.Y. CIV. PRAC. L. & R. § 1600-1603 (McKinney Supp. 1988), as enacted by Ch. 682, [1986] N.Y. Laws 1565 (McKinney) (transforms the law of joint and several liability in tort cases by limiting the liability of persons jointly liable).

⁹ N.Y. CIV. PRAC. L. & R. § 4111(f) (McKinney Supp. 1988), as enacted by Ch. 682, § 7, [1986] N.Y. Laws 1569 (McKinney) (requires that upon a finding of damages, courts must instruct the jury to specify the applicable elements of special and general damages

from collateral sources,¹¹ health care arbitration,¹² and court-imposed sanctions for frivolous claims¹³ are placing additional burdens on an already overworked judiciary.¹⁴

Although concern over increasing court congestion has led to the adoption of several simplified means of resolving disputes,¹⁵ many commentators argue that more efforts should be made to divert court cases into both formal and informal statutory dispute resolution areas.¹⁶ They champion methods such as

on which the award is based and the amount assigned to each element).

¹⁰ N.Y. CIV. PRAC. L. & R. § 5041 (McKinney Supp. 1988), as enacted by Ch. 682, [1986] N.Y. Laws 1570 (McKinney) (requires that the jury render a verdict that itemizes damages between past special, past general, future special, and future general damages).

¹¹ N.Y. CIV. PRAC. L. & R. § 4545 (McKinney Supp. 1988), as enacted by Ch. 220, § 36, [1986] N.Y. Laws 386 (McKinney) (applicable to personal injury, property damage or wrongful death actions where a plaintiff seeks to recover economic losses — if the court determines that any past or future expense will be indemnified in whole or in part from any collateral source, it must reduce the plaintiff's recovery).

¹² N.Y. CIV. PRAC. L. & R. § 3045 (McKinney Supp. 1988), as enacted by Ch. 266, § 3, [1986] N.Y. Laws 472 (McKinney) (defendant may demand that plaintiff consent to arbitration upon a cession of liability in medical and dental malpractice cases).

¹³ N.Y. CIV. PRAC. L. & R. § 8303-a (McKinney Supp. 1988), as enacted by Ch. 220, § 35, [1986] N.Y. Laws 386 (McKinney) (applicable to actions for personal injury, property damage or wrongful death cases and provides that in the event any party files a frivolous claim or defense, courts may award reasonable costs and attorney fees). For a discussion of the new laws, see Carlisle, *supra* note 1, at 79-82.

¹⁴ See note 5 *supra*, and notes 149-56 and accompanying text *infra*.

¹⁵ See 9 U.S.C. § 3 (1982) (Arbitration Act); N.Y. INS. LAW § 5106(b) (McKinney 1985) (compulsory arbitration of no-fault claims at option of insured); N.Y. LAB. LAW § 716(2) (McKinney 1977) (compulsory arbitration of labor grievance against non-profit hospital); N.Y. CIV. PRAC. L. & R. § 3405 (McKinney Supp. 1988) (permitting chief judge of Court of Appeals to promulgate rules for arbitration of claims not exceeding \$6,000 pending in any court). See generally Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611 (1981); Goldstein, *Alternatives for Resolving Business Transaction Disputes*, 58 ST. JOHN'S L. REV. 69 (1983).

¹⁶ Bellacosa, *supra* note 4, at 28, col. 4. See H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* (2d ed. 1978); Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983); see also Breger, *The Justice Conundrum*, 28 VILL. L. REV. 923, 952-55 (1983); Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 501 (1978); *Neighborhood Justice of Chicago — The Success and the Challenge*, 18 DISPUTE RESOLUTION 1, 16 (1986) (prepared by the American Bar Association Special Committee on Dispute Resolution); Zinman, *Mediation or Arbitration of Insurance Claims*, 12 WESTCHESTER BAR JOURNAL 151 (1985); Lewin, *Business and the Law: The Big Debate Over Litigation*, N.Y. Times, May 13, 1986, at D2, col. 1; Metaxas, *Alternatives to Litigation are Maturing*, Nat'l L.J., May 12, 1986, at 1, col. 3; *Judges End Cases Faster Using Trial Alternatives*, N.Y. Times, Jan. 3, 1986, at A8, col. 1; Danforth, *A Need for Uniform Laws, Faster Trials*, N.Y. Times, Sept. 1, 1985 § 3, at 2, col. 3; Brodeur, *Annals of Law: The Asbestos Industry on Trial*, THE NEW YORKER, July 1, 1985, at 36; *Coca-Cola General Counsel Praises Mini-Trial*, Arbitration Times, Winter 1986, at 5, col. 1 (American Arbitration Association Dispute Resolution

arbitration,¹⁷ administrative proceedings,¹⁸ summary jury trials,¹⁹ mini-trials,²⁰ mediation,²¹ screening,²² private trials,²³ and

News); *Chief Justice Supports Arbitration*, *Arbitration Times*, Fall 1985, at 1, col. 1; *ADR Theme of New York Arbitration Day*, *Arbitration Times*, Summer 1985, at 1, col. 4 (remarks on May 10, 1985 at eighth annual Arbitration Day of AAA); Sander, *Report on the National Conference on Minor Disputes Resolution* (May 1977) (ABA Report on Dispute Resolution) (available in the files of the Brooklyn Law Review); *CBS Evening News Special Report*, Sept. 6, 1985 (over one million workers each year are being fired and many of them seek redress in courts of law).

¹⁷ See E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 39 (1977) [hereinafter JOHNSON, KANTOR & SCHWARTZ] ("Arbitration is the most significant alternative forum which has developed in the United States."); Ferguson, *The Adjudication of Commercial Disputes and the Legal System in Modern England*, 7 *BRIT. J. L. & SOC'Y* 141, 145 (1980) ("The present-day position is that arbitration is firmly established as the most used adjudicative mechanism."); Green, Marks & Olson, *supra* note 16, at 494-95 ("Arbitration stands as almost the only well-developed alternative to full-scale litigation for entities which find themselves embroiled in disputes which cannot be solved through normal business negotiations."); Nader & Singer, *Law in the Future: What Are the Choices?*, 51 *CAL. ST. B.J.* 281, 284 (1976) ("Arbitration has developed without the aid of the judicial system — in fact, despite its early opposition."). See generally M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* §§ 1.01-1.03 (1968); S. LAZARUS, J. BRAY, L. CARTER, K. COLLINS, B. GIEDT, R. HOLTON, P. MATTHEWS & G. WILLARD, *RESOLVING BUSINESS DISPUTES: THE POTENTIAL OF COMMERCIAL ARBITRATION* 35-40 (1965).

¹⁸ See B. SCHWARTZ, *ADMINISTRATIVE LAW* (2d ed. 1984); Breger, *The APA: An Administrative Conference Perspective*, 72 *VA. L. REV.* 337 (1986); Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 *WIS. L. REV.* 385 (1984); *Symposium on Administrative Law*, 19 *NEW ENG. L. REV.* 693 (1984). See also Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon Its Structure and Legislative History*, 26 *BUFFALO L. REV.* 589 (1977). See notes 100-13 and accompanying text *infra*.

¹⁹ Metaxas, *supra* note 16, at 1, col. 3. See Wikinson, *Alternative Dispute Resolution — The Summary Jury Trial*, *N.Y.L.J.*, Apr. 13, 1987, at 1, cols. 3-4. See notes 126-31 and accompanying text *infra*.

²⁰ See Dalton, *Benefits of Mini-Trials Discussed by Attorneys*, *Arbitration Times*, Fall 1986, at 7, col. 1; Green, Marks & Olson, *supra* note 16. See also notes 144-48 and accompanying text *infra*.

²¹ W. SIMKIN & N. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 23-35 (2d ed. 1986) (mediation is defined as active intervention from a neutral third party who employs non-adversarial techniques in attempting to reach a negotiated settlement). See generally Silberman & Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 *N.Y.U. REV. L. & SOC. CHANGE* 741, 741-42 nn.4 & 5 (1986).

²² Cratsley, *Community Courts: Offering Alternative Dispute Resolution Within the Judicial System*, 3 *VT. L. REV.* 1, 6-7 (1978) (screening is an informal process in which a third party narrows the issues for trial).

²³ In private trials, disputes are resolved by non-government private courts, presided over by former judges and experts in the contested matter. Areas of dispute resolution handled by private tribunals include "personal injury claims, uninsured and underinsured motorist insurance coverage, first party automobile insurance claims, tort litigation, commercial disputes, labor and employment rights litigation, domestic relations is-

community dispute resolution centers.²⁴ Other commentators argue that the perception of crisis in the courts is overblown and that alternative dispute resolution forums needlessly duplicate functions that should be performed by courts.²⁵ This debate has focused primarily on when the judicial decisionmaking process should be replaced by alternative dispute resolution forums. No commentator has yet addressed the issue of whether New York's Simplified Procedure for Court Determination of Disputes (SPCDD),²⁶ enacted in 1956,²⁷ offers an acceptable method for minimizing court congestion.²⁸

The SPCDD is available for the resolution of any justiciable

sues and intra-professional disputes." Castro, *Public Service, Private Profits*, TIME, Feb. 10, 1986, at 64 (describes phenomenon in justice system known as "privatization," which is becoming increasingly commonplace across the United States). See Silas, *Costly Law Suits*, 72 A.B.A. J., July 1, 1986, at 19, col. 1; De Sando, *Rented Scales of Justice Ends Wait for Day in Court*, Asbury Park Press, June 23, 1986, at A1, col. 1; Tolchin, *Private Courts With Binding Rulings Draw Interest and Some Challenges*, N.Y. Times, May 12, 1985, at 38, col. 1 (private courts thrive because people do not have access to congested public courts).

Concerns exist that private courts short-cut procedural guarantees that make up our concept of fairness. See JUDICATE, INC., ANNUAL REPORT 1985 (brochure describing a national private court system) (available in the files of the Brooklyn Law Review); see notes 120-29 and accompanying text *infra*.

²⁴ Christian, *Community Dispute Resolution: First-Class Process or Second-Class Justice?*, 14 N.Y.U. REV. L. & SOC. CHANGE 771 (1986). See notes 149-52 and accompanying text *infra*. See also Bellacosa, *supra* note 4, at 28, col. 4.

²⁵ *Study Shows No Litigation Explosion in America*, 19 DISPUTE RESOLUTION 3 (1986) (referring to study released by National Center for State Courts indicating that current growth of litigation is due primarily to population growth). See Motley, *Why We are a Nation of Litigators*, 6 U. BRIDGEPORT L. REV. 9, 17 (litigation tide that currently engulfs us is healthy and has its roots in American judicial system); Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 942 (1984) (numbers other than filing rates must be examined to account for increased litigation); Metaxas, *supra* note 16, at 8, col. 3 (time saving contemplated by alternative dispute resolution less than anticipated). See also Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, 23 JUDGES J. 8, 11 (1984) ("[I]t is difficult to isolate and weigh accurately the actual effect (if any) of managerial judging on the speed of trial court disposition.").

²⁶ See N.Y. CIV. PRAC. L. & R. §§ 3031-3037 (McKinney 1974).

²⁷ Ch. 219, [1956] N.Y. Laws 249 (McKinney).

²⁸ For a general discussion of New York's Simplified Procedure for Court Determination of Disputes (SPCDD), see Goldstein, *supra* note 15, at 83-87; *The Quarterly Survey of New York Practice*, 46 ST. JOHN'S L. REV. 355, 373-74 (1971); *Legislation*, 28 BROOKLYN L. REV. 133 (1961); Jaffe, *Simplified Procedure for Determination of Disputes Compared with Arbitration and Ordinary Litigation*, N.Y.L.J., Dec. 14, 1961, at 4, col. 1; Tripp, *Simplified Procedure for Court Determination of Contract Disputes: Judicial "Arbitration" in New York*, N.Y.L.J., Oct. 25, 1961, at 4, col. 1; Callahan, *New Simplified Procedure Act*, N.Y.L.J., Oct. 24, 1961, at 4, col. 1.

controversy, provided both sides agree to its application.²⁹ The procedure has been utilized in a variety of contexts, including commercial, matrimonial, real property, and collective bargaining disputes;³⁰ however, its application has yet to be extended into the area of tort law.³¹ The SPCDD offers a simplified procedure³² that dispenses with summonses and complaints,³³ pre-

²⁹ See 3 J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 3031.02 (1986) [hereinafter WEINSTEIN, KORN & MILLER]; D. SIEGEL, *HANDBOOK ON NEW YORK PRACTICE* § 609, at 876 (1978) ("[The SPCDD] is apparently available for any subject matter . . ."); O. CHASE, *CIVIL LITIGATION IN NEW YORK* § 23.05 (1983) ("Any justiciable controversy, regardless of subject matter, may be submitted to the court."). See also FIFTH ANN. REP. N.Y. JUD. CONFERENCE 103 (1960) [hereinafter FIFTH ANNUAL REPORT], which states in material part:

While it may be expected that this new procedure will be used most frequently by the business community, because of its peculiar needs, there is no provision barring its use by other persons in cases not connected with commerce. Indeed, there is no reason why this procedure should not be available to any parties who feel they would like to use it, in any type case, even in negligence actions. It is also felt that any attempt to limit the use of the procedure to "merchants" in "commercial disputes" would be unwise. A great deal of unnecessary litigation might be caused in the attempt to work out a final definition of these terms.

Id.

³⁰ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.02 n.13 (citing *Soffer v. Elmerdorf*, 108 A.D.2d 954, 484 N.Y.S.2d 941 (3d Dep't 1985) (action by attorneys for legal fees due); *Aloi v. Bd. of Educ. of W. Babylon*, 81 A.D.2d 874, 439 N.Y.S.2d 169 (2d Dep't 1981) (action for declaratory judgment and money damages for breach of collective bargaining agreement); *Gerstein v. 532 Broad Hollow Rd. Co.*, 75 A.D.2d 292, 429 N.Y.S.2d 195 (1st Dep't 1980) (action for monies due based on breach of contract for first refusal in sale of real property); *Kessler v. Kessler*, 24 A.D.2d 601, 262 N.Y.S.2d 288 (2d Dep't 1965), *aff'd*, 17 N.Y.2d 796, 218 N.E.2d 299, 271 N.Y.S.2d 250 (1966) (actions for an accounting and declaration of rights of parties arising out of real estate venture); *Eagle Star Ins. Co. of America v. Gen. Accident, Fire & Life Ins. Co.*, 100 Misc. 2d 792, 420 N.Y.S.2d 83 (Sup. Ct. N.Y. Cty. 1979) (action to apportion liability between two insurers who agreed to total settlement amount); *Gutman v. Sal-Vio Masons, Inc.*, 72 Misc. 2d 729, 339 N.Y.S.2d 562 (Sup. Ct. Bronx Cty. 1972) (action for purchase price of construction materials sold and delivered); *Hammerstein v. Woodlawn Cemetery*, 21 Misc. 2d 42, 194 N.Y.S.2d 385 (Sup. Ct. N.Y. Cty. 1960) (dispute over burial rights)).

³¹ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.02 (citing *N.Y. Kandy Kard Corp. v. Barton's Candy Corp.*, 32 A.D.2d 513, 298 N.Y.S.2d 562 (1st Dep't 1969) (although contract provided for use of SPCDD, the court found that issues sounding in tort did not come under that provision; that defendant had waived use of SPCDD by participating in litigation; and that it would be wasteful to use different procedures in the same case)).

³² The SPCDD developed from a suggestion in 1955 by the Hon. David W. Peck, Presiding Justice of the Appellate Division, First Department, to John B. Johnson, State Administrator of Courts, that a simplified means of handling court cases might be feasible. See SEVENTH ANN. REP. N.Y. JUD. CONFERENCE 88 (1962) [hereinafter SEVENTH ANNUAL REPORT].

trial disclosure,³⁴ trial by jury,³⁵ most of the ordinary rules of evidence,³⁶ interlocutory appeals from nonfinal orders,³⁷ and

The impetus for the enactment of the simplified procedure was the desire to provide an expeditious means of hearing and determining commercial controversies that the business community had increasingly resolved through arbitration, however, the statutory provisions have never been restricted to commercial disputes. FIFTH ANNUAL REPORT, *supra* note 29, at 103. The original proposal by the Judicial Conference for broadening the provisions was based on the simplified procedure promulgated for the British Commercial Court and would have specifically limited application of this procedure to commercial disputes. FIFTH ANNUAL REPORT, *supra* note 29, at 96-106. That proposed statute was found to be "cumbersome and formidable in appearance." SEVENTH ANNUAL REPORT, *supra*, at 88. Because section 218-a was available only to parties to a current dispute, who could agree to submit their controversy to the courts pursuant to the SPCDD, it was of limited use to the business community. The Judicial Conference recognized this and recommended that the applicability of the simplified procedure be broadened to permit parties to a contract to provide that any future disputes be litigated pursuant to the SPCDD. THIRD ANN. REP. N.Y. JUD. CONFERENCE 104-06 (1958). Thereafter, the Conference proposed amendments to clarify section 218-a and expand the procedure by adding two additional sections. FIFTH ANNUAL REPORT, *supra* note 29, at 96-97. These sections and the rules promulgated to govern them were incorporated into the draft of the Civil Practice Law and Rules which was to replace the C.P.A., after the final Report of the Advisory Committee was issued. They became sections 3031 through 3037 of the New York Civil Practice Law and Rules (CPLR). 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.01.

³³ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.03 (citing *Hammerstein v. Woodlawn Cemetery*, 21 Misc. 2d 42, 194 N.Y.S.2d 385 (Sup. Ct. N.Y. Cty. 1960)). See generally *Legislation*, 25 FORDHAM L. REV. 563 (1956) ("[A]ll that is necessary is a simple statement, signed by the parties or their attorneys, specifying the claims and defenses . . . and the relief requested.").

³⁴ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.07. CPLR section 3036(5) gives the court discretion to order whatever pretrial disclosure is necessary to promote a speedy hearing. The SPCDD has a significant advantage over arbitration in this respect. See *In re Katz*, 3 A.D.2d 238, 160 N.Y.S.2d 159 (1st Dep't 1957).

³⁵ The right of parties to a trial by jury is waived when a controversy is submitted pursuant to the SPCDD, except where the existence of a contractual provision authorizing use of the SPCDD is in question. See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3034.03.

³⁶ CPLR section 3035(b) renders inapplicable "the technical rules of evidence" to the extent provided by CPLR section 3036. CPLR section 3036(1) provides that the rules for the admissibility of evidence shall not apply to the taking of testimony or the adducing of proof in an action tried under the SPCDD. Exceptions to this rule should be noted: (1) The court may order that rules of evidence be applicable; and (2) that the usual rules with respect to privileged communications apply (i.e., CPLR sections 4501-4506). 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.02. The court may *sua sponte* order expert testimony. N.Y. CIV. PRAC. L. & R. § 3036(2) (McKinney Supp. 1974).

³⁷ N.Y. CIV. PRAC. L. & R. § 3037 (McKinney 1974). See generally 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3037.01:

In order to prevent the subversion of the economies in time and expense effected by the Simplified Procedure, CPLR 3037 eliminates the right of appeal from an intermediate order of the court except with the permission of the court trying the action or the appellate court and, thus, supersedes CPLR

normal appellate review of judicial findings of fact.³⁸ Unlike other informal methods of dispute resolution, substantive principles of New York law govern under the SPCDD.³⁹

Although the SPCDD is not often utilized,⁴⁰ its potential for alleviating crowded court dockets merits a critical review. Part I of this Article discusses the history of the SPCDD and describes its provisions. Part II compares the SPCDD with alternative methods of dispute resolution in New York and Part III offers suggestions as to why lawyers are reluctant to take advantage of the simplified procedure. Part IV evaluates the ways in which the SPCDD is particularly compatible with the IAS and suggests methods for the SPCDD's full implementation.

I. THE SPCDD: ITS HISTORY AND PROVISIONS

The adoption of the SPCDD in 1956⁴¹ represented a desire on the part of the legislature to take a "fresh approach to dispute resolution by combining aspects of arbitration and formal

5701. A party may only appeal as of right from a judgment or an order that determines whether a contract or submission was made or complied with. Review of the intermediate orders is preserved, however, and can be obtained on appeal from the judgment.

Id. (citing N.Y. Civ. Prac. L. & R. § 5501(a) (McKinney 1978) (scope of review from final judgment)); *Cohen v. Cohen*, 3 N.Y.2d 339, 144 N.E.2d 355, 165 N.Y.S.2d 452 (1957).

³⁸ N.Y. CIV. PRAC. L. & R. § 3037 (McKinney 1974) provides in pertinent part: "A decision of the trial judge on the facts shall be final if there is any substantial evidence to support it." *Id.*

The scope of review of the factual findings in an action tried under the SPCDD is the same as the scope of judicial review of findings of fact by administrative bodies pursuant to CPLR section 7803(4). Under the latter provision, a court is limited in re-examining evidence to whether the factual findings of a body or officer are "supported by substantial evidence." N.Y. CIV. PRAC. L. & R. § 7803(4) (McKinney 1981). *See also* 8 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 7803.04. Generally, the appellate division is free to review questions of law and questions of fact. N.Y. CIV. PRAC. L. & R. § 5501(c) (McKinney 1987 & Supp. 1988). The "standard on appeal is whether the judgment below was against the weight of the evidence (see CPLR 5522 and CPLR 5712)." 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3037.02. The substantive law of New York governs on appeal. D. SIEGEL, *supra* note 29, § 609, at 876.

³⁹ *See* O. CHASE, *supra* note 29, at § 23.05; D. SIEGEL, *supra* note 29, § 609, at 876; 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.

⁴⁰ D. SIEGEL, *supra* note 29, § 609, at 876. *See also* notes 156-68 and accompanying text *infra*.

⁴¹ Ch. 219 [1956] N.Y. Laws 249 (McKinney). For background on the SPCDD, *see* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.01. For a general description of procedure, *see* O. CHASE, CPLR MANUAL § 31.16 (1980); O. CHASE, *supra* note 29, at § 23.05; Goldstein, *supra* note 15, at 83-86, nn.49-62; D. SIEGEL, *supra* note 29, at § 609.

litigation for use within the existing judicial system.”⁴² The procedure applies to any justiciable controversy over which a court has jurisdiction.⁴³

The SPCDD is applicable where parties to an existing controversy agree to commence an action under the procedure,⁴⁴ or to continue an action without pleadings after a summons has been served,⁴⁵ or where parties to a contract provide for its use in future controversies.⁴⁶ An action is commenced by filing a single clear and concise statement, signed by the parties, which sets forth their claims, defenses, and the relief sought.⁴⁷ Once the

⁴² 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.01. The SPCDD was intended to be the beginning of a process that would take a new and imaginative view of other aspects of New York procedure that were in need of simplification. Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1434 (1962).

⁴³ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.02; *see also* FIFTH ANNUAL REPORT, *supra* note 29, at 103. *See* notes 29-31 and accompanying text *supra*.

⁴⁴ N.Y. CIV. PRAC. L. & R. § 3031 (McKinney 1974). An action under the SPCDD is consensual in nature and cannot be commenced unilaterally. 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.03. If the parties cannot agree on whether there was a consent agreement, the party wishing to use the SPCDD must move to settle the term of the statement in question. *Id.* (citing *Perritano v. Town of Mamaroneck*, 102 A.D.2d 854, 476 N.Y.S.2d 625 (2d Dep’t 1984) (article 78 proceeding dismissed as inappropriate to compel agreement to an SPCDD statement); *Time Writers, Inc. v. Coleman*, 67 Misc. 2d 258, 323 N.Y.S.2d 862 (Sup. Ct. Onondaga Cty. 1971) (motion for default judgment denied where plaintiff had attempted to commence action unilaterally by mailing a signed statement to adversary).

⁴⁵ N.Y. CIV. PRAC. L. & R. § 3031 (McKinney 1974).

⁴⁶ N.Y. CIV. PRAC. L. & R. § 3033(1) (McKinney 1974) (provides that parties may enter into a contract to submit any existing or future controversy to the court for determination under the SPCDD). CPLR section 3033 does not specify any particular language that must be inserted in contracts. CPLR section 3031 suggests that a reference to the “New York Simplified Procedure for Court Determination of Disputes” is sufficient. 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3033.01 (citing *Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp.*, 696 F.2d 315 (4th Cir. 1982) (preliminary injunction against commencement of action under SPCDD should not have been granted where contract contained provision for submission, which was *prima facie* valid, and no showing was made either of grounds to vitiate contract or of such serious inconvenience that party would be deprived of opportunity to defend)). *See also* *Copeland Planned Futures, Inc. v. Obenchain*, 9 Wash. App. 32, 510 P.2d 654 (Ct. App. 1973) (where clause providing “that any dispute arising out of this note shall be governed by the New York Supreme Court in and for the County of Onondaga, pursuant to ‘New York Simplified Procedure for Determination of Disputes,’ NYCPLR 3031-3037, with personal jurisdiction hereby consented to for that purpose, and New York law to govern,” found valid, and default judgment based on clause given full faith and credit by another state). *See* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3033.01.

⁴⁷ N.Y. CIV. PRAC. L. & R. § 3031 (McKinney 1974). “By commencing the action in this fashion, the parties consent to the application of the procedure set forth in CPLR 3034, CPLR 3035, and CPLR 3036 and waive their right to jury trial.” 3 WEINSTEIN,

statement is agreed to or settled by the court,⁴⁸ it is filed with the court accompanied by a note of issue.⁴⁹ Amended or supplemental statements may be served or filed at any time during the proceeding, within the court's discretion.⁵⁰

The SPCDD permits the court to hold a pre-trial conference as a means of encouraging an expeditious disposition of the action on issues of law without resorting to a trial.⁵¹ The court has discretion at the pre-trial conference, or at any other time during the proceeding, to: (1) order or allow service of an additional or amended statement; (2) direct pre-trial disclosure and discovery; (3) permit the taking of depositions; (4) limit the number of expert witnesses; (5) clarify and define the issues to be tried; (6) stay or consolidate related actions; and (7) grant summary judgment.⁵² A default judgment can be entered if a party fails to serve a statement within the time set by the court or fails to appear after proper notice.⁵³ By agreeing to have controversies resolved pursuant to the SPCDD, the parties waive their right to trial by jury.⁵⁴ The statute provides, however, that if there is a substantial question as to the existence or validity of a contract provision to utilize the procedure, either party may demand a jury trial on this issue.⁵⁵ Should the jury conclude that a valid

KORN & MILLER, *supra* note 29, at ¶ 3031.03. Under some circumstances the statement can be waived. *See, e.g.,* *Stell Mfg. Corp. v. Century Indus.*, 23 A.D.2d 281, 260 N.Y.S.2d 547 (1st Dep't), *aff'd*, 16 N.Y.2d 1020, 213 N.E.2d 313, 265 N.Y.S.2d 902 (1965) (when no objection made as to absence of required statement, service of statement deemed waived).

⁴⁸ If the parties have agreed contractually to submit a dispute to the court under the SPCDD, yet cannot agree on the contents of the statement of claims and defenses, CPLR section 3033(2) provides that either party can then move to have the court "settle" the terms of the statement. 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3033.03.

⁴⁹ N.Y. CIV. PRAC. L. & R. § 3031 (McKinney 1974). *See* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.03 ("The signing of the statement constitutes a certificate that the issues are genuine and the filing of the statement and a note of issue acts as a joinder of issues."); N.Y. CIV. PRAC. L. & R. § 3036(b) (McKinney 1974) (describes requirements for filing of notice of issue); *See* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.08.

⁵⁰ N.Y. CIV. PRAC. L. & R. § 3032 (McKinney 1974). For a discussion of the court's discretion to permit amendments under CPLR section 3032, *see* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3032.02.

⁵¹ N.Y. CIV. PRAC. L. & R. § 3035(a) (McKinney 1974).

⁵² *Id.* at § 3036(5).

⁵³ *Id.* at § 3036(4).

⁵⁴ *Id.* at § 3033(1).

⁵⁵ *Id.* at §§ 3033(2), 3034(3).

contract to adopt the SPCDD exists, "the jury must be discharged, and the controversy determined by the court as provided in section 3036."⁵⁶ Should the jury conclude that there is no valid contract between the parties to use the SPCDD, the court must order the case to proceed as an ordinary action.⁵⁷

The SPCDD permits the court to fashion a procedure to be followed at trial to fit the particular circumstances of each case. To expedite the hearing of an action, the court may follow a simple and informal procedure.⁵⁸ The statute provides that the court may dispense with the usual rules of evidence and procedure, and these rules shall not be used to exclude or restrict the taking of testimony and adducing of proof.⁵⁹ The court may, however, exercise its discretion to apply the ordinary rules of evidence.⁶⁰ In addition, the court may direct the parties to obtain the advice of an impartial expert if it determines that this advice would be material in deciding the action, and may direct the parties to share in the payment of the expert's fees and ex-

⁵⁶ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3034.03.

⁵⁷ *Id.* (citing *Kores Mfg. Corp. v. Standard Packaging Corp.*, 31 A.D.2d 622, 295 N.Y.S.2d 862 (1st Dep't 1968) (plaintiff's motion to settle terms of statement denied with leave to renew, if available, upon determination in a plenary action of question of fraud in the inducement; order of lower court referring issues to referee and staying action by defendant for rescission and damages reversed)). See FIFTH ANNUAL REPORT, *supra* note 29, at 98.

⁵⁸ CPLR section 3036 implements the authorization in CPLR section 3035 to provide a simplified procedure for SPCDD actions. The nine paragraphs of CPLR section 3036 provide only an outline of the practice that courts may follow. Courts may also tailor the procedure to fit the particular facts of each case. 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.01.

⁵⁹ *Id.* at ¶ 3036.02 ("Paragraph (1) of the CPLR 3036 provides that the rules for the admissibility of evidence . . . shall not apply . . . in an action tried under the Simplified Procedure."). See also *id.* at § 3035.03 ("Subdivision (b) renders inapplicable 'the technical rules of evidence' to the extent provided by paragraph (1) of CPLR 3036.").

There is an exception for privileged communications. N.Y. CIV. PRAC. L. & R. § 3036(1) (McKinney 1974). See N.Y. CIV. PRAC. L. & R. § 4501-4506 (McKinney 1963 & Supp. 1988); FIFTH ANNUAL REPORT, *supra* note 29, at 101 (The supporting study of the Judicial Conference stated that "all the technical rules of evidence be dispensed with except such fundamental rules as the statutory provisions relating to privileged communications."). See generally 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at § 3036.02 (discussing question of whether the CPLR section 4519 "Dead Man's Statute" is a rule relating to privileged communication).

⁶⁰ N.Y. CIV. PRAC. L. & R. § 3036(1) (McKinney 1974). Professor Siegel suggests that permitting a judge to summarily curtail the applicability of the SPCDD rules may be one of the reasons for the unpopularity of the SPCDD amongst the practicing bar. See note 165 and accompanying text *infra*.

penses.⁶¹ This does not prevent the parties from using their own expert witnesses at trial.⁶² The court also has the discretion to award costs and disbursements.⁶³ A judgment in an SPCDD action is entered and enforced pursuant to the regular provisions of the CPLR.⁶⁴

Under the SPCDD, there is an appeal as of right only from an order determining the issue of the existence or validity of the contract to submit a controversy pursuant to the simplified method, or from a final judgment.⁶⁵ An intermediate order may be appealed only with leave of the trial or appellate court;⁶⁶ however, review of an intermediate order is preserved and can be obtained on appeal from the final judgment.⁶⁷ The standard for reviewing factual determinations under the SPCDD is whether there was substantial evidence to support the finding.⁶⁸

⁶¹ N.Y. CIV. PRAC. L. & R. § 3036(2) (McKinney 1974). See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.03 ("In complicated or technical disputes, the availability of an impartial expert may assist in simplifying and expediting the trial.").

⁶² 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.03 ("CPLR 3036(5)(d) gives the court the right to limit the number of experts to be heard at trial, which presupposes that the parties have the right to use experts.").

⁶³ CPLR section 3036(a) provides that "[c]osts and disbursements in an action under the [SPCDD] are matters of judicial discretion and are not to be awarded as a matter of course." N.Y. CIV. PRAC. L. & R. § 3036(a) (McKinney 1974). 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.11. Presumably sanctions may be awarded under CPLR section 8303. See Carlisle, *supra* note 1, at 79-82.

⁶⁴ N.Y. CIV. PRAC. L. & R. § 3036(8) (McKinney 1974) See also 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3035.02 (discussing some of the problems raised in determining the details of the procedure to be applied on matters specified in CPLR section 3036(8)).

⁶⁵ N.Y. CIV. PRAC. L. & R. § 3037 (McKinney 1974).

⁶⁶ *Id.* "In order to prevent the subversion of the economies in time and expense effected by the Simplified Procedure, CPLR 3037 eliminates the right of appeal from an intermediate order of the court except with the permission of the court trying the action or the appellate court and, thus supersedes CPLR 5701." 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3037.01.

⁶⁷ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3037.01 (citing N.Y. CIV. PRAC. L. & R. § 5501(a) (McKinney 1978)) (scope of review from final judgment); Cohen v. Cohen, 3 N.Y.2d 339, 144 N.E.2d 355, 165 N.Y.S.2d 452 (1957)).

⁶⁸ N.Y. CIV. PRAC. L. & R. § 3037 (McKinney 1974) (decision of trial judge on facts final if any substantial evidence exists to support it). Thus, the scope of appellate review under the SPCDD is the same as judicial review of findings of fact by administrative bodies under CPLR section 7803(4). 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3037.02. "In ordinary litigation the Appellate Division is free to review questions of law and questions of fact . . . The usual standard on appeal is whether the judgment below was against the weight of the evidence . . . and not whether 'there is any substantial evidence to support it' as provided in this section." *Id.* See also D. SIEGEL, *supra* note 29, § 609, at 876 ("The substantial evidence test of CPLR 7803(4) . . . has been borrowed by

New York substantive law governs on appeal, as it does in all phases of actions brought under the SPCDD.⁶⁹

II. ALTERNATIVE DISPUTE RESOLUTION DEVICES AS CONTRASTED TO THE SPCDD

The formality that characterizes court proceedings has led to disadvantages prompting some to conclude that courts are not the best available forum for the resolution of disputes.⁷⁰ Thus, methods such as arbitration, private trials, negotiated settlements, mediation, neighborhood justice centers, and mini-trials have been suggested as alternative dispute resolution (ADR) devices.⁷¹

Both the SPCDD and ADR systems reflect a dissatisfaction with the judicial process,⁷² and are designed to dispense low cost justice as quickly as possible. Both systems stress informality⁷³ by limiting or abolishing pretrial disclosure,⁷⁴ motion practice,⁷⁵ trial by jury,⁷⁶ and other technical requirements associated with

the Simplified Procedure for appellate review of the trial judge's fact findings.").

⁶⁹ D. SIEGEL, *supra* note 29, at 876. Arbitration differs in this respect. For a discussion of the rules applicable to arbitration, see notes 81-98 and accompanying text *infra*.

⁷⁰ See D. SIEGEL, *supra* note 29, at § 609; O. CHASE, *supra* note 29, at § 23.05. See generally 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.

⁷¹ See notes 15, 17-24 and accompanying text *supra*. See generally AMERICAN BAR ASSOCIATION, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (Jan. 3, 1987) Appendix D (available in the files of the Brooklyn Law Review) [hereinafter ABA REPORT] (describing various forms of alternative dispute resolution).

⁷² The imperfections of the judicial process most frequently noted as reasons for movement away from the courts are: (1) crowded calendars and attendant delay; (2) limitations on the scope of permissible evidence because of the exclusionary rules applied by the courts; (3) protracted trials; (4) unwanted publicity; (5) harassment of witnesses during cross examination; (6) lack of confidence in the ability of judges to determine . . . disputes; and (7) high cost of counsel fees resulting from the length of the litigation process.

3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.01. See also Bellacosa, *supra* note 4.

⁷³ See GOLDBERG, GREEN & SANDER, DISPUTE RESOLUTION 189-91, 525-39 and references cited at 538-39 (1985); Goldstein, *supra* note 15, at 76-87.

⁷⁴ ABA REPORT, *supra* note 71.

⁷⁵ *Id.*

⁷⁶ Janofsky, *Reducing Court Costs and Delay*, 71 ILL. B.J. 94 (Oct. 1982) ("These infamous twin evils — delay and cost — contribute to a climate of public cynicism and mistrust of the legal profession, the judiciary, and our judicial system."). See also D. SIEGEL, *supra* note 29, at § 609; O. CHASE, *supra* note 29, at § 23.05. See generally 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.

litigation.⁷⁷ Despite these general similarities, however, significant differences remain between the SPCDD and ADR mechanisms. Unlike most ADR's, the SPCDD provides for: (1) resolution of disputes by a fact-finding judge whose decisions are subject to appellate review;⁷⁸ (2) the application of substantive principles of New York law to the proceeding;⁷⁹ and (3) judicial discretion to use other provisions of the CPLR to render speedy justice with minimal cost to litigants.⁸⁰

A. Arbitration

Arbitration is among the oldest and most commonly used of the ADR methods.⁸¹ Applicable rules, the selection of arbitrators, and the binding effect of the proceeding are generally decided by the parties pursuant to agreement.⁸² Typically, each side presents evidence and arguments to one or more arbitrators, who then render a decision, usually called an "award."⁸³ This decision need not be based on any particular body of substantive law.⁸⁴ Agreements to arbitrate, as well as arbitral awards, are enforceable in the courts.⁸⁵

In some cases, arbitration is required by statute or by rules of court.⁸⁶ For example, in counties subject to the Chief Judge's plan under Part 28 of the Rules of Court, claims of under \$6000 must be submitted to arbitration.⁸⁷ Automobile insurance company claims for contribution against other insurance companies

⁷⁷ D. SIEGEL, *supra* note 29, at §§ 586, 609.

⁷⁸ N.Y. CIV. PRAC. L. & R. § 3037 (McKinney 1974).

⁷⁹ D. SIEGEL, *supra* note 29, § 609, at 876.

⁸⁰ 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at § 3036.01. *See also* Bellacosa, *supra* note 4. *See generally* note 16 and accompanying text *supra*.

⁸¹ *See* JOHNSON, KANTOR & SCHWARTZ, *supra* note 17, at 39. *See also* Hoellering, *Alternative Dispute Resolution and International Trade*, 14 N.Y.U. REV. L. & SOC. CHANGE 785; note 17 *supra*.

⁸² Hoellering, *supra* note 81, at 785-86.

⁸³ *See* Goldstein, *supra* note 15, at 76-80.

⁸⁴ *See* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.01.

⁸⁵ *Id.* *See also* Goldstein, *supra* note 15, at 76-77. *See also* 9 U.S.C. § 4 (1982).

⁸⁶ *See* N.Y. INS. LAW §§ 5105(b) and 5106(b) (McKinney 1985); N.Y. LABOR LAW § 716(2) (McKinney 1977); N.Y. CIV. PRAC. L. & R. §§ 3405, 7551, and 7556 (McKinney Supp. 1988). *See also* note 15 *supra*; notes 87-90 and accompanying text *infra*.

⁸⁷ N.Y. COMP. CODES R. & REGS. tit. 22, § 28.2(b) (1986); N.Y. CIV. PRAC. L. & R. § 3405 (McKinney Supp. 1988) (authorizes the Chief Judge of the Court of Appeals to promulgate rules for the arbitration of money claims of \$6000 or less).

are also subject to mandatory arbitration,⁸⁸ as are medical malpractice claims brought by members of health maintenance organizations against health care providers.⁸⁹ In addition, automobile insurance claimants can choose arbitration of their no-fault claims.⁹⁰

Despite the many advantages of arbitration, its deficiencies have caused dissatisfaction in some quarters.⁹¹ "It is recognized . . . that the likelihood of a dispute being settled according to generally recognized and predictable rules of substantive law . . . is greater when the decision is made by a judge."⁹² This determination results from the fact that often nonjudicial personnel are not sufficiently trained to hear and determine disputes.⁹³ Moreover, judicial review of decisions reached by arbitration is highly circumscribed, and courts frequently refuse to enjoin arbitration.⁹⁴ Thus, there is a strong possibility that serious errors go uncorrected.⁹⁵

Furthermore, in cases of claims under \$6,000, or where automobile insurance claimants opt for arbitration, the parties are afforded a full opportunity for trial *de novo*.⁹⁶ The same holds true if the arbitration is otherwise nonbinding.⁹⁷ In such cases, either side can choose to litigate the entire action in court after the conclusion of the arbitration proceedings. This results in substantial duplication of effort.

By contrast, the SPCDD provides for judicial decisions on New York law that are subject to appellate review, yet made on a less formal basis.⁹⁸ There is no duplication of effort, and less uncertainty about results. Moreover, errors of fact and law are more likely to be corrected. Thus, the SPCDD retains many of

⁸⁸ N.Y. INS. LAW § 5105(b) (McKinney 1985).

⁸⁹ N.Y. CIV. PRAC. L. & R. §§ 7551, 7556 (McKinney Supp. 1988).

⁹⁰ N.Y. INS. LAW § 5106(b) (McKinney 1985).

⁹¹ See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.01.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ N.Y. CIV. PRAC. L. & R. § 3405 (McKinney Supp. 1988); N.Y. COMP. CODES R. & REGS. tit. 22, § 28.12 (1986) (claims under \$6,000); N.Y. INS. LAW § 5106(b) (McKinney 1985) (arbitration of no-fault claims at option of insured).

⁹⁷ N.Y. CIV. PRAC. L. & R. § 3405 (McKinney Supp. 1988).

⁹⁸ D. SIEGEL, *supra* note 29, at § 609.

arbitration's advantages, while avoiding its pitfalls.⁹⁹

B. *Administrative Proceedings*

There is great emphasis today on resolving disputes by administrative adjudication.¹⁰⁰ Commentators agree, however, that there are four basic problems with the administrative determination of disputes.¹⁰¹

First, there is a conflict of interest problem. It is frequently difficult to combine the investigating, litigating, rulemaking, and adjudicating functions of an agency with the goals of assuring fairness and impartiality to all parties.¹⁰² The system of internal separation of agency functions has always been viewed with great suspicion by the private bar:¹⁰³

Many hearing officers and administrative law judges are employed by the same agencies that promulgate the regulations that these officials are supposed to be applying in an impartial manner. Unlike judicial forums, agencies have tasks other than resolving judicial disputes. Thus, agency determinations are influenced by the policies, aims, personalities, and sources of power sustaining the agency.¹⁰⁴

Second, administrative tribunals follow differing rules of procedure.¹⁰⁵ Also, it is frequently difficult to differentiate between rule-making and adjudicative determinations.¹⁰⁶ Although both the state and federal administrative procedure acts were designed to create uniform rules of procedure for administrative bodies, uniformity has not occurred in actual practice.¹⁰⁷ The federal act, passed in 1946,¹⁰⁸ has been altered indirectly by changes in substantive law and in agency enabling acts.¹⁰⁹ The

⁹⁹ See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031.

¹⁰⁰ See Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111, 114, 118-19 (1976).

¹⁰¹ See Breger, *supra* note 18, at 338.

¹⁰² *Id.* at 352-53.

¹⁰³ *Id.* at 352.

¹⁰⁴ Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 87-88 (1986).

¹⁰⁵ See Breger, *supra* note 18, at 344-45; Carlisle, *supra* note 104, at 85-87.

¹⁰⁶ Carlisle, *supra* note 104, at 94 n.198.

¹⁰⁷ See Breger, *supra* note 18, at 344-45.

¹⁰⁸ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (1982)).

¹⁰⁹ See Breger, *supra* note 18, at 343-45.

state statute, which became effective in 1976,¹¹⁰ does not provide consistent procedures for all administrative adjudication.¹¹¹ For example, the state statute is inapplicable to the State Insurance Fund and the Workmen's Compensation Board,¹¹² two administrative agencies that have displaced court determination of disputes.¹¹³

A third problem is that neither the federal nor the state administrative procedure act guarantees litigants access to pretrial disclosure.¹¹⁴ Similarly, administrative tribunals are not bound by the rules of evidence.¹¹⁵

The fourth and final problem is that agencies that follow formal adjudicative procedures to administer benefit, entitlement, and other compensation programs have experienced a vast increase in caseloads.¹¹⁶ Thus, it seems virtually impossible to use the administrative process to resolve essentially private disputes without expanding an already vast bureaucratic structure.

These problems suggest that the substitution of administrative determinations for judicial decisions will only duplicate functions that should be performed by courts, making today's overloaded court system tomorrow's overworked administrative agency.¹¹⁷ Moreover, since most administrative proceedings are subject to judicial review,¹¹⁸ the appellate process will remain backlogged. Viewed in this light, the administrative process will play a role in solving disputes involving the government and other areas of substantial public interest, but not in the resolution of essentially private disputes.

Unlike administrative adjudication, the SPCDD works well for private disputes. The SPCDD works within the court system, rather than duplicating it, and streamlines the complex litiga-

¹¹⁰ Ch. 167 [1975] N.Y. Laws 226 (McKinney).

¹¹¹ N.Y. A.P.A. LAW § 305 (McKinney 1984). *See also* Carlisle, *supra* note 104, at 95 n.198.

¹¹² N.Y. A.P.A. LAW § 102(1) (McKinney 1984).

¹¹³ Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982).

¹¹⁴ Carlisle, *supra* note 104, at 86.

¹¹⁵ *Id.* at 87.

¹¹⁶ *See* Breger, *supra* note 18, at 353.

¹¹⁷ *See* Resnick, *Precluding Appeals*, 70 CORNELL L. REV. 603, 620 (1985). Resnick reveals that, "[i]nvestigations of agencies, such as the New York Human Rights Division and the Social Security Administration, reveal inadequate processes, erratic decision-making, lack of resources, and administrative malfunctioning." *Id.*

¹¹⁸ N.Y. CIV. PRAC. L. & R. §§ 7803, 7804 (McKinney 1981 & Supp. 1988).

tion and trial processes that are the main cause of congestion within our courts.¹¹⁹

C. *Private Trials*

One of the more innovative ADR techniques is the private trial. This form of dispute resolution combines many of the aspects of a public trial with certain aspects of arbitration. As in arbitration, parties to a private trial must agree on whether the procedure will be binding.¹²⁰ In most other respects, the private trial is similar to a public trial, with a few important exceptions.

The private trial is conducted by nongovernmental entities, and the proceedings are closed to the public unless the parties agree to have them open.¹²¹ Decisions are made by retired judges who apply principles of substantive law as they would in a public trial.¹²² These decisions are appealable to a three judge appellate review panel.¹²³ Certain procedural rules, such as those involving discovery, are the same as in a public trial.¹²⁴ Simplified rules of evidence allow for the presentation of witness testimony in written documentary form, and the introduction of bills and other financial documents without need for authentication or identification. Motion practice is limited to purely essential matters.¹²⁵

The private trial mode of Alternative Dispute Resolution has been severely criticized as highly duplicative of court proceedings, and, in effect, creating a private court system available only to those with adequate financial resources.¹²⁶ Its opponents also fear that procedural guidelines will be ignored and, as a result, fairness to litigants will be compromised.¹²⁷ Moreover, the proceedings are usually closed, and thus not subject to public

¹¹⁹ See notes 78-80 and accompanying text *supra* (for a discussion of the merits of the SPCDD).

¹²⁰ See Castro, *supra* note 23, at 64.

¹²¹ De Sando, *supra* note 23, at A1, col. 1.

¹²² Tolchin, *supra* note 23, at 38, cols. 1-4.

¹²³ DeSando, *supra* note 23, at A2, col. 4.

¹²⁴ See JUDICATE, INC., JUDICATE RULES OF PROCEDURE (1984) (available in the files of the Brooklyn Law Review). See also Tolchin, *supra* note 23.

¹²⁵ See JUDICATE RULES OF PROCEDURE, *supra* note 124 (Rule 13 states that "motion practice shall be limited to those matters absolutely necessary to a final resolution of the issues and not determined during the initial prehearing conference.").

¹²⁶ See Tolchin, *supra* note 23, at 38.

¹²⁷ *Id.*

scrutiny.¹²⁸ Technical problems in the private trial method of dispute resolution include the lack of compulsory powers over third parties,¹²⁹ and, as with other ADR systems, the fact that litigants must resort to public courts for enforcement of decisions.¹³⁰

The SPCDD has the advantages of the private trial without sharing its problems. For example, the SPCDD eliminates burdensome and unnecessary disclosure and motion practice without depriving the litigants of third party practice or their right of access to the courts.¹³¹

D. *Summary Jury Trial*

A summary jury trial is a nonbinding procedure in which both parties present arguments to a jury of laymen.¹³² The jury's determination highlights the strong and weak points of each party's case and thereby encourages settlement. No witnesses testify; a summary of their testimony and all other evidence is presented to the jury in the form of documents, depositions, stipulations, and affidavits by the lawyers for each party. The advantage of this method is that a summary jury trial can compress a long, protracted trial into a very short time.¹³³

This procedure, however, has numerous disadvantages. For one, the procedure is nonbinding. Second, the procedure requires more preparation by counsel than is required for a conventional trial,¹³⁴ which may actually frustrate settlement.¹³⁵ A third disadvantage is that the summary jury trial impedes the jury's ability to make a decision based upon due deliberation, for the jury is bombarded with voluminous amounts of information in a very short period of time.¹³⁶ Fourth, a primary function per-

¹²⁸ *Id.*

¹²⁹ It is, after all, a private court. See DeSando, *supra* note 23, at A1, col. 1.

¹³⁰ *Id.*

¹³¹ See N.Y. CIV. PRAC. L. & R. § 3031 (McKinney 1974). See also notes 70-80 and accompanying text *supra*. See also note 261 *infra*.

¹³² Wilkinson, *supra* note 19, at 1, cols. 3-4.

¹³³ *Id.*

¹³⁴ *Id.* at 5, col. 1.

¹³⁵ *Id.*

¹³⁶ *Id.* The jury may be overwhelmed especially where complex issues and many parties are involved. In addition, "[i]f one believes that jurors' views evolve over time during a full-scale trial of a complex case, then one must be dubious, at best, about the fundamental premise on which a [summary jury trial] is based, i.e., the notion that a

formed by a jury is to evaluate the witnesses' testimony.¹³⁷ The elimination of this live testimony in favor of summary testimony submitted by the attorneys defeats this primary role and tends to underplay the role of witnesses and the facts of the case and to overvalue the dramatics and theatrics of the lawyers.¹³⁸

The summary jury trial procedure resembles the medical malpractice panel, in which arguments by attorneys are presented to a panel, consisting of a physician, a lawyer, and a judge, which makes a nonbinding determination as to the liability of the defendant.¹³⁹ The panel's findings can be introduced into evidence if the case goes to trial.¹⁴⁰ In theory, it was believed that the medical malpractice panel procedure would encourage settlement and reduce the number of trials.¹⁴¹ In practice, however, these panels have tended to hinder rather than accelerate case disposition.¹⁴² Thus, the summary jury trial is likely to be a costly, time-consuming, and ineffective method of

passing splash of information can somehow be equated with a full length trial of difficult issues." *Id.*

¹³⁷ See Hart, *Shall the Jury System be Sacrificed on the Altar of Economy?*, 27-28 N.Y. ST. B. BULL. 146, 148 (1956).

¹³⁸ See Wilkinson, *supra* note 19. In the average lengthy trial, the jury gradually disregards the theatrics of lawyers and in exchange properly emphasizes the facts and the witnesses. This is impossible in the summary jury trial. *Id.*

¹³⁹ The summary jury trial procedures resembles the medical malpractice panel, another innovative technique used to avoid long, inefficient trials. Many of the disadvantages inherent in these panels are also found in the summary jury trial procedure.

In medical malpractice panels, attorney's arguments are presented to a panel consisting of a physician, a lawyer, and a judge. The panel makes a non-binding determination as to the liability of the defendant. See N.Y. JUD. LAW §§ 148-(a)(2) & 148-(a)(8) (McKinney 1983 & Supp. 1988). See also Sohn, *Examination of Alternatives to Suit in Doctor-Patient Disputes*, 48 ALB. L. REV. 669, 681 (1981). If the case proceeds to trial, the panels' findings can be introduced in evidence. N.Y. JUD. LAW § 148-(a)(8) (McKinney 1983 & Supp. 1988). See also Sohn, *supra*, at 683. If not, the panel determination is used to expedite settlement by using the panel's recommendation as leverage in the negotiation. Because the summary jury trial closely resembles the medical malpractice panel, it can be expected to share its problems.

¹⁴⁰ N.Y. JUD. LAW § 148-a(8) (McKinney 1983). See also Sohn, *supra* note 139.

¹⁴¹ Sohn, *supra* note 139, at 683-84.

¹⁴² *Id.* at 684. The use of panels has slowed down the disposition of cases because very often it results in two trials — one before the panel and one before the court. A trial before a court is often demanded because "plaintiffs who have received a unanimous panel recommendation have been notorious in demanding extremely high settlements and in proceeding to trial with increased determination to carry the case to verdict or costly settlement." *Id.* at 684 (quoting N.Y. Times, Feb. 27, 1983, § 1, at 40, col. 3). Thus, the parties must bear the expenses of two trials instead of just one.

dispute resolution as compared to the SPCDD.¹⁴³

E. *Mini-Trials*

The mini-trial is a mediation technique designed to bring about a settlement between the parties. Both parties attend a conference before an impartial third party, called an advisor.¹⁴⁴ After hearing presentations from both sides, the advisor assists the parties in formulating a voluntary settlement to the dispute. The procedure is typically used in corporate and commercial disputes, with executives from both sides present.¹⁴⁵

The chief disadvantage of a mini-trial is that the settlement reached is nonbinding.¹⁴⁶ The chief advantage, however, is that a mini-trial is a very simple and informal procedure, only slightly more cumbersome than an ordinary settlement conference.¹⁴⁷ Thus, the procedure would be highly compatible with the SPCDD, particularly under the IAS system.¹⁴⁸ For example, the court could first refer the parties to a neutral advisor for a mini-trial, or could structure settlement conferences to incorporate features of the mini-trials, thereby making the mini-trial a viable part of the SPCDD process rather than just another non-binding ADR technique.

F. *Community Dispute Resolution Centers*

The Community Dispute Resolution system is an innovative and popular mediation technique. This system is a voluntary process whereby both parties meet with a neutral mediator, and together attempt to fashion an acceptable resolution for their dispute.¹⁴⁹ Most of the disputes handled by the centers are re-

¹⁴³ N.Y. CIV. PRAC. L. & R. §§ 3033, 3036(8) (McKinney 1974).

¹⁴⁴ See Dalton, *supra* note 20, at 7, col. 1.

¹⁴⁵ *Id.*

¹⁴⁶ See Burger, *supra* note 113, at 277. Chief Justice Burger suggests that when non-binding procedures are used, sanctions should be imposed to discourage litigants from taking the case further without sanctions, non-binding mediation techniques tend to be ineffective. *Id.*

¹⁴⁷ See Dalton, *supra* note 20, at 7, col. 1.

¹⁴⁸ See text accompanying notes 243-51 *infra*.

¹⁴⁹ See Christian, *supra* note 24, at 772. The Community Dispute Resolution Centers Program (CDRCP) was created in 1981 under the direction of the Office of Court Administration of the Unified Court System of the State of New York. *Id.* (citing N.Y. JUD. LAW § 849-b (McKinney Supp. 1988)).

ferred by courts and public agencies.¹⁵⁰ The disputes customarily involve minor civil, criminal, and family matters that do not need formal adjudication.¹⁵¹ Examples include small claims, consumer-merchant disputes, simple assault, and certain domestic violence matters.¹⁵² While these centers perform a valuable social service, they are designed to handle a small and very specific class of disputes that typically do not end up in full-blown litigation. Thus, the existence of these centers is not likely to alleviate court congestion. By contrast, the SPCDD is designed to resolve disputes that require formal adjudication.

G. *Trial by Referee*

Article 43 of the CPLR permits a judge to refer a case for trial before a referee.¹⁵³ The referee decides only those matters the court instructs him to decide, in their order of reference.¹⁵⁴ The court can limit the referee's power by limiting the order of reference. This greatly limits the utility of trial by referee as an ADR technique, as some matters will likely be tried to the referee, while others will be tried by the court or jury. This also creates the potential for duplication of judicial effort. Moreover, under ordinary circumstances, the cost of the referee must be borne by the parties, thus adding cost to the dispute resolution process.¹⁵⁵

A trial by referee with a sufficiently broad order of reference, however, would be highly compatible with the SPCDD, and would conserve judicial resources. For example, simple actions under the SPCDD could be tried by a referee, while more complex cases could be tried by a judge. Similarly, a trial by referee could be used to narrow the issues to be tried by the judge in the SPCDD action, also reducing court time.

¹⁵⁰ *Id.* at 772.

¹⁵¹ *Id.* at 771.

¹⁵² *See generally id.*

¹⁵³ N.Y. CIV. PRAC. L. & R. §§ 4301-4321 (McKinney 1963).

¹⁵⁴ N.Y. CIV. PRAC. L. & R. § 4311 (McKinney 1963). *See also* L.H. Feder Corp. v. Bozkurtian, 48 A.D.2d 701, 368 N.Y.S.2d 247 (2d Dep't 1975) (referee may not decide issues not before him in the order of reference).

¹⁵⁵ N.Y. CIV. PRAC. L. & R. § 4321 (McKinney 1963 & Supp. 1988). The only exception is when the referee is a judicial hearing officer. In that case, his compensation is determined pursuant to the Judiciary Law. *See* N.Y. JUD. LAW 852 (McKinney Supp. 1988).

III. WHY LAWYERS HAVE NOT USED THE SPCDD

In view of the high volume of cases filed in the trial courts of the Unified Court System of New York,¹⁵⁶ it would appear that the SPCDD is underutilized. For example, almost one-third, or 1,021,218, of the cases filed in New York in 1987 were in civil courts.¹⁵⁷ The number of civil cases disposed of in 1987 totaled 952,354.¹⁵⁸ Included in these dispositions were 12,220 civil-case trials brought in the supreme court. Of this number, 56% were tried by a judge.¹⁵⁹ Similarly, although thirty-one counties operate a mandatory arbitration program for cases involving claimed damages of \$6,000 or less, only 12,473 cases were received for arbitration in 1987.¹⁶⁰ Of the cases disposed of in the arbitration program, there were 1,607 demands for trial *de novo*.¹⁶¹ Cases received under the Community Dispute Resolution Centers Program in 1987 totaled 101,851, but only 19,801 of these cases were disposed of.¹⁶² These statistics, and the sparse case law generated under the SPCDD, indicate a general reluctance by the bar to take advantage of New York's simplified procedure.¹⁶³

Many reasons exist for the underutilization of the SPCDD. Obviously, some members of the bar are not aware of its existence,¹⁶⁴ while others are wary of the judge's discretionary powers under the SPCDD.¹⁶⁵ Also, lawyers generally dislike surren-

¹⁵⁶ During 1987, there were 3,581,911 filings in the trial courts of the Unified Court System, including 886,614 parking tickets. Of the 2,695,297 remaining cases, 41% (1,113,752) were filed in criminal courts, 38% (1,021,218) in civil courts, 16% (439,130) in the Family Courts and 5% (121,197) in the Surrogates' Courts. CHIEF ADMINISTRATOR'S REPORT, *supra* note 5, at 2-1.

¹⁵⁷ Tort actions, including medical malpractice, accounted for 58% of the civil filings in the supreme court. *Id.* at 2-11. Statewide 180,110 new civil cases were filed in the supreme court. *Id.* at 2-10. In the Civil Court of the City of New York there were 252,475 civil action summonses filed in 1987. *Id.* at 2-15. For landlord/tenant calendars, 336,191 notices of petition were issued in summary proceedings. *Id.* The remainder of civil cases were filed in city and district courts outside New York City and in county courts and the court of claims. *Id.* at 2-2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2-11.

¹⁶⁰ *Id.* at 2-16.

¹⁶¹ *Id.*

¹⁶² *Id.* at 2-26.

¹⁶³ See D. SIEGEL, *supra* note 29, § 609, at 874.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Professor Siegel suggests that one of the factors accountable for the unpopularity of the SPCDD is that CPLR section 3036(1) states that the "rules . . . of proce-

dering their right to pre-trial disclosure¹⁶⁶ and to trial by jury.¹⁶⁷ Finally, some decisional law has been interpreted to suggest that the SPCDD is not applicable to tort actions.¹⁶⁸ Each of these impediments to the expanded use of the SPCDD is worthy of analysis.

A. *Pretrial Disclosure*

The benefits of pretrial disclosure under Article 31 of the CPLR¹⁶⁹ are well known; it encourages settlements and usually improves the efficiency of a trial or hearing and the quality of a court decision.¹⁷⁰ Yet extensive disclosure is not necessary for most civil cases.¹⁷¹ The high cost of discovery and discovery abuses with their attendant delay have prompted great concern among the bar, the judiciary, and the legislature.¹⁷²

CPLR 3126, and the recently amended CPLR 8303-a, were

sure shall be dispensed with," but adds, "unless the court shall otherwise direct." *Id.* (citing N.Y. CIV. PRAC. L. & R. § 3036(1) (McKinney 1974)). However, another distinguished commentator argues that this section is beneficial to the purposes of the SPCDD because it permits the trial judge to maintain control over the procedure. *See* Goldstein, *supra* note 15, at 85 n.58 (citing *De Benedictis Rules Restricting Civil Procedures Takes Effect Friday*, L.A. Daily J., June 27, 1983, at 1, col. 6). *See also* notes 212-15 and accompanying text *infra*.

¹⁶⁶ *See* notes 169-81 and accompanying text *infra*.

¹⁶⁷ *See* notes 182-92 and accompanying text *infra*.

¹⁶⁸ *See* N.Y. Kandy Kard Corp. v. Bartons Candy Corp., 32 A.D.2d 513, 298 N.Y.S.2d 562 (1st Dep't 1969); notes 200-04 and accompanying text *infra*. *See also* 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3033.01. Provisions requiring submission of disputes under the SPCDD have also been utilized in separation agreements, *see, e.g.*, Hunter v. Hunter, 57 A.D.2d 797, 394 N.Y.S.2d 692 (1st Dep't 1977); Kleiner v. Sanjenis, 46 A.D.2d 617, 359 N.Y.S.2d 791 (1st Dep't 1974); Goldenberg v. Goldenberg, 25 A.D.2d 670, 268 N.Y.S.2d 383 (2d Dep't 1966), as well as various types of community contracts, *e.g.*, Castagna & Son Inc. v. Alan Michel Plumbing, Inc., 61 N.Y.2d 841, 462 N.E.2d 139, 473 N.Y.S.2d 962 (1984) (construction contract); Hurlbut v. Christiano, 63 A.D.2d 1116, 405 N.Y.S.2d 871 (4th Dep't 1978) (contract to purchase a nursing home); Freund v. Washington Square Press, Inc., 41 A.D.2d 371, 343 N.Y.S.2d 401 (1st Dep't 1973), *rev'd on other grounds*, 34 N.Y.2d 379, 357 N.Y.S.2d 857 (1974) (contract to publish a book). *See also supra* note 30.

¹⁶⁹ N.Y. CIV. PRAC. L. & R. §§ 3101-40 (McKinney 1976 & Supp. 1988).

¹⁷⁰ *See* O. CHASE, *supra* note 41, at § 20.01; *see generally* D. SIEGEL, *supra* note 29, at § 343.

¹⁷¹ *See* Green, Marks & Olsen, *supra* note 16, at 501-11; *see also* Note, *California's Pilot Project in Economical Litigation*, 53 SO. CAL. L. REV. 1497, 1502 & n.98 (1980).

¹⁷² *See* D. SIEGEL, *supra* note 29, § 367, at 465. "The present system . . . is too tolerant of the deliberately evasive and dilatory litigant, increasing the expense of litigation in money, time, trouble, and feeling, and, consequently, helping to undermine public confidence in the courts." *Id.*

enacted to minimize abusive pre-trial practices.¹⁷³ Similarly, the New York Uniform Rules of the Court¹⁷⁴ which govern the new Individual Assignment System¹⁷⁵ were designed, in part, to require judges to exercise more supervisory control over discovery.¹⁷⁶ Consequently, many of the tactical advantages and litigation strategies long associated with pretrial disclosure no longer apply and thus should no longer dissuade lawyers from using the SPCDD. Also, under the SPCDD, a judge can order whatever disclosure he deems necessary.¹⁷⁷

In addition, the SPCDD assures that attorneys' fees and discovery costs will not prohibit plaintiffs from making use of

¹⁷³ N.Y. CIV. PRAC. L. & R. § 3126 (McKinney 1970 & Supp. 1988). This provision states in pertinent part:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made, . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, . . . the court may make such orders with regard to the failure or refusal as are just

Id.

See also N.Y. CIV. PRAC. L. & R. § 8303-a (McKinney Supp. 1988), as enacted by Ch. 220, § 35, [1986] N.Y. Laws 386 (McKinney). For a discussion of the new law, see Carlisle, *supra* note 1, at 67.

¹⁷⁴ The New York Uniform Rules incorporate the individual assignment system. Effective 1986, these rules are codified in various sections of title 22 of the New York Compilation of Codes, Rules and Regulations, N.Y. COMP. CODES R. & REGS., tit. 22 § 202 (1986). See also Fox, *Comment on McLoughlin v. Henke*, N.Y.L.J., Feb. 19, 1986, at 1, col. 3.

¹⁷⁵ See *The Individual Assignment System*, *supra* note 1 (describing the IAS system in the county and supreme courts); *The Uniform Rules Take Effect, Part II: Papers and Motion Practice*, 313 N.Y. ST. L. DIG. 1, 1-3 (Jan. 1986) (describing how to file papers in court and how motion practice is accomplished under the IAS system); *The Uniform Rules Take Effect, Part III: The Preliminary Conference*, 314 N.Y. ST. L. DIG. 1, 1-3 (Feb. 1986) [hereinafter *The Preliminary Conference*] (describing the required preliminary conference under the IAS system); *The Uniform Rules Take Effect, Part IV: A Brief Overview and a Few Observations*, 315 N.Y. ST. L. DIG. 1, 1-3 (Mar. 1986) (describing in detail a number of rules under the IAS system). See also notes 237-50 and accompanying text *infra*. See generally Brodsky, *supra* note 1, at 288-90 (how motion practice is changed under the IAS system).

¹⁷⁶ See Uniform Rule 202.12(g), which states in material part:

In the discretion of the court, failure of a party to comply with the order or transcript resulting from the preliminary conference, or the making of unnecessary or frivolous motions by a party, shall result in the imposition upon such party of costs or such other sanctions as are authorized by law.

COMP. CODES R. & REGS. tit. 22 § 202.12(g) (1986). See also *Lawyer in Case under IAS Penalized for Delay of Trial*, N.Y.L.J., Feb. 19, 1986, at 1, col. 3 (lawyer penalized by judge for failure to comply with the "new rules of the game" under individual assignment system).

¹⁷⁷ See N.Y. CIV. PRAC. L. & R. § 3036(1) (McKinney 1979). See also note 165 *supra*.

the courts.¹⁷⁸ Similarly, the SPCDD guarantees defendants that disclosure will not be utilized to extract substantial settlements by forcing them to consent to a disposition solely to avoid years of litigation.¹⁷⁹ Under the SPCDD, disputes can be resolved with or without disclosure, depending upon the type of case and the necessity to formulate issues for trial by a judge.¹⁸⁰ Furthermore, the SPCDD is particularly useful under the new Individual Assignment System where one judge handles a case from beginning to end.¹⁸¹

B. *Trial By Judge*

Approximately fifty-six percent of all civil supreme court trials in New York are nonjury trials.¹⁸² This reflects a long-standing realization by the bar that experienced fact-finding judges often render better decisions than juries.¹⁸³ The principal function of a jury is to evaluate the credibility of witnesses, and attempt to reach a decision based on which witnesses the jury believes are telling the truth. The jury then renders its verdict in accordance with instructions from the court. Neither the jury, in rendering its verdict, nor a judge, when rendering a decision in a bench trial, pretends to know what actually happened at the time of the incident upon which the cause of action is predicated. An experienced judge, however, can resolve most disputed

¹⁷⁸ See Loggins, *How the Plaintiff's Counsel Views ELP*, 20 JUDGES J. 11 (1981). The SPCDD in New York closely resembles the simplified procedure enacted by the California courts. The Economical Litigation Program (ELP) has demonstrated that minimizing pleadings and discovery reduces the time an attorney spends on each individual case, thereby reducing attorney costs. *Id.* Similarly, CPLR section 3031 limits pleadings, and CPLR section 3036(5) limits disclosure. Thus, New York can expect the positive results experienced by the California courts. N.Y. CIV. PRAC. L. & R. §§ 3031, 3036(5) (McKinney 1974 & Supp. 1988). See also notes 251-55 and accompanying text *infra*.

¹⁷⁹ Disclosure is limited by the judge, thus defendant's interests are protected from discovery abuses by plaintiff. See N.Y. CIV. PRAC. L. & R. § 3036(5).

¹⁸⁰ See note 177 and accompanying text *supra*.

¹⁸¹ See notes 237-50 and accompanying text *infra*.

¹⁸² See CHIEF ADMINISTRATOR'S REPORT, *supra* note 5, at 2-11.

¹⁸³ See generally 8. BOTEIN, TRIAL JUDGE 1, 142 (1952 & reprint 1974) (two distinguished jurists recognize that overall there is no reason to believe that determinations made by judges would be any different from those made by juries); Foster, *Jury Trial on Trial — A Symposium*, 28 N.Y. ST. B. BULL. 322 (Oct. 1956); Peck, *Report on Justice*, 25 N.Y. ST. B. BULL. 107, 116-18 (Apr. 1953).

issues of fact as well as a jury.¹⁸⁴ Also, under the SPCDD, a judge is permitted to seek the assistance of an impartial court-appointed expert to aid in the analysis of unusual facts.¹⁸⁵

Proponents of trial by jury agree that having a jury in the offing serves three purposes: (1) as a threat of an immediate jury trial against a plaintiff who wants too much, or against a defendant who won't pay enough, or perhaps against both;¹⁸⁶ (2) for counsel who has a poor case but believes he can persuade a jury to decide for his client;¹⁸⁷ and (3) assuming liability is established against the defendant, a jury is more likely to award the plaintiff a larger monetary amount than a judge.¹⁸⁸ These arguments in favor of trial by jury have not been embraced by the plaintiffs' or defendants' bar in jurisdictions where simplified procedures similar to the SPCDD are used.¹⁸⁹ These arguments are of even less concern to the plaintiffs' bar under the new IAS because one judge has a case from beginning to end.¹⁹⁰ Once a request for judicial intervention is filed¹⁹¹ and the case is assigned to a particular judge, both parties will be in a position to weigh the potential benefits of a trial by jury against the advan-

¹⁸⁴ See Peck, *supra* note 183, at 117.

¹⁸⁵ See N.Y. CIV. PRAC. L. & R. § 3036(2) (McKinney 1974); 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.03. See also note 61 and accompanying text *supra*.

¹⁸⁶ Foster, *supra* note 183, at 323.

¹⁸⁷ *Id.*

¹⁸⁸ See generally, Glaser, *Damages Update — 1986*, 18 TRIAL L.Q. 16 (1987).

¹⁸⁹ See Loggins, *supra* note 178, at 11; see also Mercy, *How the Defense Counsel Views ELP*, 20 JUDGES J. 12 (1981) (overall, they have been pleased with the results of simplified procedures). In these jurisdictions using simplified procedures, attorneys have found that non-productive court time is avoided by placing limits on discovery and the disallowance of demurrers to complaints. In addition, because recovery amounts are limited, plaintiffs are not likely to make excessive payment demands on defendants. Further, the work required to prepare a case under the simplified procedure is considerably less than that required for a full trial. *Id.*

¹⁹⁰ See notes 230-45 and accompanying text *infra*.

¹⁹¹ A Request for Judicial Intervention (RJI) is governed by Rule 202.6 of the Uniform Rules. Rule 202.6 requires that if a judge has not already been assigned to the case, an RJI must accompany any of the following: (1) a notice of motion; (2) an order to show cause; (3) an application for an *ex parte* order; (4) a notice of petition; (5) a note of issue; (6) a notice of medical or dental malpractice; (7) a statement of net worth as required by Domestic Relations Law section 236 for matrimonial actions; or (8) a request for the assignment of an action to a judge and a preliminary conference. The filing of the RJI gets the case assigned to a judge who supervises the case thereafter until the termination of the case. See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3(b) (1986). See generally *The Individual Assignment System*, *supra* note 1.

tages of the SPCDD.¹⁹² Hence, judicial familiarity with the facts and issues of a particular type of case, and the judge's ability to give issues measured consideration, may be more readily accomplished under the SPCDD. The third objection to the SPCDD, that juries render larger damage awards than judges, lacks merit because most cases under the SPCDD will have a value of less than \$100,000.¹⁹³ In any event, run-away jury damage awards are usually reduced by appellate courts.¹⁹⁴ In light of the advantages of a trial by judge, the lawyers' hesitancy to utilize SPCDD is misplaced.

C. Tort Cases

The majority of the civil cases filed in New York State courts are tort actions,¹⁹⁵ yet there is a widespread misunderstanding by the trial bar that the SPCDD cannot be used for these cases.¹⁹⁶ This misunderstanding stems from the bar's general unfamiliarity with the SPCDD, as well as case law suggesting that the SPCDD cannot be used for tort claims.¹⁹⁷ The sole case addressing the applicability of the SPCDD to tort claims is *New York Kandy Kard Corp. v. Barton's Candy Corp.*¹⁹⁸ where, shortly after the adoption of the CPLR,¹⁹⁹ the

¹⁹² See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3031. Both parties *must* consent to the use of SPCDD. One party cannot unilaterally decide to submit the case to the court under SPCDD. *Id.* at ¶ 3031.03. Under the former Master Calendar System it was difficult, if not impossible, to know which judge would be assigned to a case under the SPCDD. Similarly, once the case was assigned to a judge, it was not clear if it would remain with this judge through trial or be reassigned. See also notes 230-36 and accompanying text *infra*.

¹⁹³ See Foster, *supra* note 183, at 326 (juries do not necessarily render larger damage awards than judges).

¹⁹⁴ See, e.g., *Vialva v. New York*, 118 A.D.2d 710, 499 N.Y.S.2d 977 (2d Dep't 1986) (verdict of \$400,000 for conscious pain and suffering reduced to \$100,000); *Jandt v. Abele*, 116 A.D.2d 699, 498 N.Y.S.2d 17 (2d Dep't 1986) (\$100,000 jury verdict reduced to \$65,000); *Korman v. Pub. Serv. Truck Renting, Inc.*, 116 A.D.2d 631, 497 N.Y.S.2d 480 (2d Dep't 1986) (\$1,500,000 jury verdict reduced to \$200,000); *Morales v. New York*, 115 A.D.2d 439, 497 N.Y.S.2d 5 (1st Dep't 1985) (\$425,000 jury verdict for wrongful death and conscious pain and suffering reduced to \$200,000).

¹⁹⁵ See CHIEF ADMINISTRATOR'S REPORT, *supra* note 5, at 2-11 (tort actions accounted for 58% of the civil cases filed in 1987).

¹⁹⁶ See note 168 and accompanying text *supra*.

¹⁹⁷ See notes 156-68 and accompanying text *supra*.

¹⁹⁸ 32 A.D.2d 513, 298 N.Y.S.2d 562 (1st Dep't 1969).

¹⁹⁹ The CPLR was adopted in 1962 and became effective September 1, 1963. Ch. 308, [1962] N.Y. Laws 593 (McKinney). These laws repealed and replaced the Civil Prac-

Appellate Division for the First Judicial Department held that issues sounding in tort did not come under the clause of a contract agreed to by the parties, providing for the use of simplified procedure.²⁰⁰

Kandy Kard involved a contract between two parties that provided for the use of the SPCDD "as to any controversy arising thereunder."²⁰¹ An action arose sounding both in tort and breach of contract. The appellate division did not permit the issues to be disposed of pursuant to the SPCDD, holding that the parties did not intend the issue involving tort law to be decided under the contractual clause providing for the simplified procedure.²⁰² The appellate division based its decision on its observation that "it would be wasteful, inefficient, and, indeed a complicated rather than a simple procedure to try [the tort] issue alone and resort to simplified procedures for the issue of breach of contract."²⁰³ Consequently, both the tort and breach of contract issues were disposed of pursuant to full litigation procedures.²⁰⁴

The *Kandy Kard* decision, which has not been interpreted or applied by any other New York court,²⁰⁵ should be limited to its particular facts. A review of the legislative history reveals that there is no question that the legislature intended the SPCDD to apply to tort cases.²⁰⁶ The SPCDD would be particularly useful in automobile accident cases, which comprise a significant number of the total civil cases filed each year,²⁰⁷ for many of these cases require little pre-trial disclosure. Also, a judge could conduct the trial faster than, and as fairly as, a

tice Act and Rules of Civil Practice. See note 32 *supra*.

²⁰⁰ *Kandy Kard*, 32 A.D.2d at 514, 258 N.Y.S.2d at 564. See also N.Y. CIV. PRAC. L. & R. §§ 3031-3037 (McKinney 1974).

²⁰¹ *Kandy Kard*, 32 A.D.2d at 514, 258 N.Y.S.2d at 564.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3036.

²⁰⁶ See FIFTH ANNUAL REPORT, *supra* note 29, at 103 ("There is no reason why this procedure [SPCDD] should not be available to any parties who feel they would like to use it, in any type case, even in negligence actions."); see also D. SIEGEL, *supra* note 29, § 609, at 876 (1978) ("[The SPCDD] is apparently available for any subject matter, including tort. . . ." [citation omitted]); O. CHASE, *supra* note 29, § 230.05, at 904 ("Any justiciable controversy, regardless of subject matter, may be submitted to the court under the Simplified Procedure, but only if both sides agree.").

²⁰⁷ King, *Constitutionality of No Fault Jurisprudence*, 1982 UTAH L. REV. 797 (1983).

jury.²⁰⁸ The time saved by not impaneling a jury and by bypassing technical rules of evidence, bench conferences, and jury summations and instructions would cut a significant amount of trial time.²⁰⁹ Similarly, under the SPCDD, the prospects of an immediate trial would generate settlements in these negligence cases at an earlier date with less cost to the parties and to the court system.²¹⁰

D. *Judicial Discretion*

CPLR section 3036(1) of the SPCDD states that the rules of procedure "shall be dispensed with" but then adds, "unless the court shall otherwise direct."²¹¹ This section thereby permits a judge, without explanation, "to cancel out summarily the sole advantage of the Simplified Procedure."²¹² Professor David Siegel suggests that "the very existence of this power may be one of the factors accountable for the unpopularity of the Simplified Procedure."²¹³ He argues, in effect, that there is no guarantee that parties stipulating to use of the SPCDD can rely on its use.²¹⁴ Other commentators believe that CPLR 3036(1) merely gives a judge the flexibility to assure that the legislative intent of the SPCDD is implemented, while permitting resort to the normal rules of procedure in cases where it would be helpful.²¹⁵

Professor Siegel's concern may be applicable to matters that could otherwise be submitted to arbitration,²¹⁶ because if two parties agree to present an arbitral matter to the SPCDD, they do not want a judge to change their intent. Professor Siegel's

²⁰⁸ See notes 183-93 accompanying text *supra*.

²⁰⁹ See Epstein, *Reducing Litigation Costs for Small Cases*, 20 JUDGES J. 9, 65 (1981). See also ABA REPORT, *supra* note 71 (section G and Appendix C relating to Maricopa County, Arizona Fast Track System).

²¹⁰ See Epstein, *supra* note 209, at 66. In his evaluation of California's project for economical litigation, Epstein comments that "there is nothing more conducive to a settlement than the certainty that if there is no settlement, there will be trial within a short and specified number of days." *Id.*

²¹¹ N.Y. CIV. PRAC. L. & R. § 3036(1) (McKinney 1974). See generally notes 58-64 and accompanying text *supra*.

²¹² See D. SIEGEL, *supra* note 29, § 609, at 875.

²¹³ *Id.* See also note 107 and accompanying text *supra*.

²¹⁴ D. SIEGEL, *supra* note 29, § 609, at 875.

²¹⁵ Goldstein, *supra* note 165, at 85 n.58.

²¹⁶ D. SIEGEL, *supra* note 29, § 609, at 876.

concern, however, is less meritorious in tort cases. As many tort claims must be tried in courts that have jurisdiction to grant monetary relief in excess of \$25,000,²¹⁷ there are few forums available other than the SPCDD. Hence, the parties' expectations will not be disappointed if a judge uses the discretion and power granted him under the statute to employ normal court rules, while still making a decision pursuant to simplified procedure. In addition, under the IAS, judges have already established their own court rules, of which the parties will be aware prior to any agreement to submit a controversy to the court under the SPCDD.²¹⁸ These rules lessen the likelihood that a judge will arbitrarily frustrate the parties' expectations of the procedure to be followed under the SPCDD.

IV. COMPATIBILITY OF SPCDD WITH THE IAS SUGGESTIONS FOR THE IMPLEMENTATION OF THE SIMPLIFIED PROCEDURE

There is little doubt that the excessive cost of litigation in New York²¹⁹ and the high volume of civil cases swamping our state courts²²⁰ often make judicial decisionmaking cumbersome and inaccessible to many claimants.²²¹ Judges and juries are overworked.²²² In 1987 eighteen percent of all civil cases were not disposed of within the fifteen month period disposition stan-

²¹⁷ The supreme court is the court of general jurisdiction in New York. N.Y. JUD. LAW § 140-b (McKinney 1983 & Supp. 1988). County courts and district courts, and the New York City Civil Court can hear claims up to \$25,000. N.Y. JUD. LAW § 190 (McKinney 1983 & Supp. 1988); N.Y. CITY CIV. CT. ACT §§ 201, 213 (McKinney 1963 & Supp. 1988). The New York City Civil Court can hear claims up to \$15,000. N.Y. UNIFORM DIST. CT. ACT §§ 201-13 (McKinney 1963 & Supp. 1988).

²¹⁸ Under the IAS each judge issues "information sheets" with his or her own rules. See Carlisle, *supra* note 1, at 85.

²¹⁹ See Burger, *supra* note 16, at 296. Chief Justice Burger points out that the cost of lawyers fees to litigants has increased faster than the inflated cost of living. In addition, abuse of the pretrial process adds to the high cost of litigation. *Id.*

²²⁰ See note 5 and accompanying text *supra*.

²²¹ Cooke, *supra* note 15, at 612 n.4. See also Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 2, 8 (1978).

²²² E. JOHNSON, JR., PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 2 (1978); Bell, *The Law's Delays: Reforming Unnecessary Delay in Civil Litigation*, 8 J. LEGIS. 16 (1981) (If congestion in the courts is not diminished, the judicial system may deteriorate to the point where "laymen will be tempted to circumvent the legal process entirely."); Cooke, *supra* note 15, at 612 ("The conventional forum for dispute resolution, the court, has become a beleaguered institution."). See also CHIEF ADMINISTRATOR'S REPORT, *supra* note 5, at 2-1 (New York state courts disposed of 3,527,362 cases in 1987).

dard mandated by the Office of Court Administration.²²³ The Governor's Advisory Committee on Liability Insurance deems the tort crisis in New York serious enough to have recommended that the legislature amend the current statutory authorization of mandatory court-annexed arbitration of tort cases by raising the limit on case value from \$6,000 to \$25,000.²²⁴ Similarly, the Unified Court System in the state of New York has recently announced a five point plan to aggressively expand ADR use in New York.²²⁵ This means that many cases that should be heard by judges will be shifted to ADR forums,²²⁶ where citizens can resolve their own cases.

The SPCDD represents a solution to our state court litigation crisis.²²⁷ The procedure is well suited for resolving disputes where the actual amount in controversy is between \$25,000 and \$100,000.²²⁸ Full utilization of the SPCDD will enable litigants to obtain judicial decisions more economically, both in terms of time and litigation costs. It will also relieve crowded court dockets and permit judges and juries to devote more time to complex cases that require full-blown litigation. Similarly, use of the SPCDD will permit judges to more fully exercise their supervisory powers under the IAS.²²⁹

A. *IAS and SPCDD*

For many years New York courts used the Master Calendar System.²³⁰ Under this system, cases were before the court but not before any particular judge.²³¹ Motions were filed before "terms" and whichever judge was assigned to the term disposed of the motion. If numerous motions were filed in a dispute, as was often the case, many different judges had to become familiar

²²³ See CHIEF ADMINISTRATOR'S REPORT, *supra* note 5, at 2-4, 2-8, 2-11, 2-16.

²²⁴ See GOVERNOR'S ADVISORY COMM'N ON LIABILITY INSURANCE, INSURING YOUR FUTURE 178 (1986) [hereinafter JONES II].

²²⁵ See Bellacosa, *supra* note 4, at 34, col. 6.

²²⁶ *Id.*

²²⁷ See notes 157-68 and accompanying text *supra*. See generally JONES II, at 58-70 (describing tort litigation crisis that exists in New York). See generally *Tort Crisis Report*, A.B.A. J., Jan. 11, 1987, at 1-7 (describing general tort crisis in United States).

²²⁸ See 3 WEINSTEIN, KORN & MILLER, *supra* note 29, at ¶ 3033.

²²⁹ See 22 N.Y.C.R.R. 202.3(a) (a single judge has continuous supervision over a single case). See also REPORT TO THE CHIEF JUDGE, *supra* note 5, at 1, 6-15.

²³⁰ See *The Individual Assignment System*, *supra* note 1, at 1-2.

²³¹ *Id.*

with the facts underlying the dispute.²³² Then, if the case went on to trial, another judge would try it.²³³

The Master Calendar System made it difficult, if not impossible, to utilize the SPCDD. With managerial responsibility for a case resting in many hands, simplified procedures under the SPCDD could not be uniformly implemented.²³⁴ Moreover, litigation under the SPCDD, which contemplated judicial supervision by one judge, was not easily harmonized with a system that de-emphasized individual judicial accountability for control and disposition of disputes.²³⁵ Consequently, the SPCDD, as a means of resolving disputes, "languished at the very brink of atrophy."²³⁶

The enactment of the IAS on January 6, 1986 means that in all civil actions in the supreme court and county courts, the Master Calendar System has been replaced by an individual calendar system.²³⁷ New uniform rules provide that a "preliminary conference" may become a general part of litigation.²³⁸ A fundamental purpose of the conference is to establish a timetable for the completion of all disclosure proceedings.²³⁹ The objective is to have the case ready for trial within one year after the judge receives it.²⁴⁰ This goal contemplates the active supervision of cases by the judiciary.²⁴¹ If a party fails to comply with a judge's order pursuant to the preliminary conference, the court may im-

²³² *Id.*

²³³ *Id.*

²³⁴ See note 192 and accompanying text *supra*.

²³⁵ See note 230 and accompanying text *supra*.

²³⁶ See D. SIEGEL, *supra* note 29, § 609, at 874.

²³⁷ See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3 (1986). The IAS is also being applied in different levels of the trial courts. See *id.* at § 205.3 for the rules governing the Family Court. For rules governing the Court of Claims, see *id.* at §§ 206.3 & 210.3. The IAS is not used in the New York Civil Court or in the district courts. See *id.* at §§ 208.3, 212.3. See also note 175 and accompanying text *supra*.

²³⁸ See *id.* at § 202.12 (preliminary conference mandatory in most cases unless disclosure can be completed without court intervention). See also *The Preliminary Conference*, *supra* note 175, at 1. The court may order a conference as to any matter it finds necessary. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c) (1986). See also note 175 and accompanying text *supra*. Title 22 of the New York Codes, Rules and Regulations has been amended as of April 1, 1988 to make the mandatory preliminary conference optional.

²³⁹ See *The Preliminary Conference*, *supra* note 175, at 2.

²⁴⁰ *Id.*

²⁴¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3 (1986).

pose sanctions.²⁴² Thus, the increased discretionary managerial role of state court judges under the IAS is similar to that authorized by the SPCDD.²⁴³ The major difference is that under the SPCDD a judge is the fact finder²⁴⁴ and may order the parties to dispense with unlimited and burdensome disclosure.²⁴⁵

Recently, a distinguished panel appointed by the Chief Judge of the New York Court of Appeals found that the IAS is not working effectively because judges do not make enough effort to force litigants to settle their disputes before going to trial.²⁴⁶ Several modifications to the IAS constituting significant departures from the individual case method have been suggested.²⁴⁷ A primary concern is that in 1987 eighteen percent of civil cases lingered in the system longer than the fifteen month disposition standard.²⁴⁸ Cases linger under the IAS because judges do not have the time to actively supervise and facilitate settlement of complex matters.²⁴⁹ Full utilization of the SPCDD would enable judges to manage small claims more efficiently by limiting pre-trial disclosure and by participating more actively in settlement negotiations.²⁵⁰ Use of the SPCDD, then, would comply with the spirit and letter of the IAS by permitting judges to devote more time to larger cases worthy of their consideration.

B. *Implementation of the SPCDD*

In other jurisdictions, simplified procedural statutes such as the SPCDD have been successfully implemented where the bench and bar have cooperated to publicize the procedure through continuing legal education programs, law journal arti-

²⁴² See note 176 and accompanying text *supra*.

²⁴³ See N.Y. CIV. PRAC. L. & R. § 3036 (McKinney 1974).

²⁴⁴ *Id.* at § 3031.

²⁴⁵ *Id.* at § 3036. See generally notes 184-85 and accompanying text *supra*.

²⁴⁶ See CHIEF ADMINISTRATOR'S REPORT, *supra* note 5, at 1.

²⁴⁷ *Id.* at 8-19.

²⁴⁸ *Id.* at 7. See N.Y.S. UNIFIED COURT SYSTEM OFFICE OF MANAGEMENT SUPPORT, REPORT OF 1986 CASELOAD ACTIVATING THE SUPREME AND COUNTY COURTS UNDER THE INDIVIDUAL ASSIGNMENT SYSTEM, table CV6 (Feb. 1987) (available at State of New York Office of Court Administration).

²⁴⁹ See REPORT TO THE CHIEF JUDGE, *supra* note 5, at 8-9. See generally Wise, *IAS 'Effective'*, *supra* note 4, at 1, col. 3.

²⁵⁰ REPORT TO THE CHIEF JUDGE, *supra* note 5, at 10, 15.

cles, and judicial information sheets.²⁵¹ For example, the California Continuing Legal Education bar conducted programs throughout the state to alert lawyers to their Economic Litigation Program (ELP).²⁵² This program is similar in most respects to the SPCDD. The Los Angeles Law Journal devoted substantial portions of two of its weekly publications to the ELP. Several courts attached bright yellow notices on the original summonses and defendants' first papers calling attention to the program.²⁵³ Pennsylvania has undertaken similar steps to promote its Early Settlement Conferencing and Pretrial Evaluation (Escape) program.²⁵⁴

The New York State Bar Association has an active statewide continuing education office. Certainly programs similar to those used in California could be presented on a regional basis. Also, under the IAS each judge issues "information sheets" listing the particular rules of his or her court.²⁵⁵ These sheets could call attention to the SPCDD. Special forms calling attention to the SPCDD could also be attached for distribution whenever a lawyer is assigned to a judge under the IAS.

Recently, a distinguished judge of the New York Court of Appeals advocated the vigorous promotion of educational programs by law schools and bar associations to expand citizen awareness of ADR methods.²⁵⁶ New York's five point educational program to establish citizen justice centers will also increase awareness of ADR methods.²⁵⁷ Similar public relations efforts could be made on behalf of the SPCDD.

CONCLUSION

Over twenty percent of the nation's lawsuits will be filed in New York state courts.²⁵⁸ Last year New York state courts dis-

²⁵¹ Epstein, *supra* note 209, at 65.

²⁵² *Id.* The Los Angeles County Bar Association, the Lawyers Club, the Association of Southern California Defense Counsel and many other California bar groups have also conducted educational programs on the ELP. *Id.* See notes 189, 209-10 and accompanying text *supra*.

²⁵³ Epstein, *supra* note 209, at 65.

²⁵⁴ *Id.*

²⁵⁵ See Carlisle, *supra* note 1, at 85. See also note 218 and accompanying text *supra*.

²⁵⁶ Bellacosa, *supra* note 4, at 34, col. 5.

²⁵⁷ *Id.* See also note 225 and accompanying text *supra*.

²⁵⁸ See The Hon. Chief Judge Sol Wachtler, Remarks at the Annual Dinner of the New York State Bar Association (January 17, 1986) (available in the files of the Brook-

posed of more cases than the entire federal judiciary.²⁵⁹ Thus, it makes good sense to emphasize ADR methods. These methods, however, are often duplicative of functions performed by our overworked judiciary.²⁶⁰ If the purpose of our judicial system is to resolve disputes, litigants should not be cost-factored out of courts and forced to select ADR forums.

The SPCDD guarantees litigants access to efficient and inexpensive judge-rendered justice without compromising their rights under the federal and state constitutions.²⁶¹ It is particularly applicable to small tort cases, many of which do not require the full adjudicative process. It is also compatible with judicial management under the IAS and will serve as a worthwhile tool for judges who seek to control their court calendars. This author strongly encourages the implementation of programs designed to heighten the bar's awareness to this simplified method of resolving disputes.

lyn Law Review).

²⁵⁹ *Id.*

²⁶⁰ Metaxas, *supra* note 16, at 1 (distinguished commentators suggest that many ADR forums are "a duplicative process that adds layers to an already overly complex judicial system").

²⁶¹ A fundamental tenet of due process is access to the courts. See U.S. CONST. amend. XIV § 2. The proliferation of ADR systems appear to restrict such access. See *Procunier v. Martinez*, 416 U.S. 396 (1974) (prisoners guaranteed right of access to the courts).