

AN EVALUATION OF THE MEDIATION AND ARBITRATION  
PROGRAM IN THE SOUTHERN DISTRICT OF  
NEW YORK (IN COOPERATION WITH  
THE AMERICAN ARBITRATION ASSOCIATION)

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## ABSTRACT

### ALTERNATIVE DISPUTE RESOLUTION IN A FEDERAL DISTRICT COURT

#### PURPOSE OF STUDY

The purpose of the study is to evaluate the Southern District of New York's Mediation and Arbitration Program, which operates in cooperation with the American Arbitration Association. The goal is to evaluate the program's efficiency and effectiveness and to make a report to the Court and the Federal Bar.

#### BACKGROUND

Local rules providing mandatory, nonbinding arbitration of certain classes of civil actions were instituted on an experimental basis in three federal district courts in 1978. Since then, eight additional courts have adopted similar rules providing for a forum of alternative dispute resolution (ADR) -- arbitration, mediation, conciliation or mini-trials. One of the eight courts instituted a voluntary ADR program without a local rule.

Alternative dispute resolution has been in existence within state court systems and, in some forms, in federal courts for many years. It was not, however, until 1984 that Congress funded ADR on a pilot basis in federal courts. Seventeen federal courts applied for funding, and ten received appropriations, of which 2 of the 1978 charter courts were recipients. It is unknown whether those courts which did not receive funding adopted an ADR

program.

#### TARGET POPULATION

The target population includes all individuals engaged in civil litigation in the United States District Court for the Southern District of New York which has adopted an alternative dispute resolution program and who qualify for the program. Secondary beneficiaries include federal judges, attorneys and citizens in this jurisdiction.

#### SCOPE OF INTENDED BENEFITS

The goals are stated in procedures or policy statements, adopted by the Court and instituted as an ADR program. The benefits from using ADR include the following:

1. To reduce the time and expense required to dispose of civil litigation.
2. To deliver the same actual or perceived quality of justice.
3. To provide a speedier disposition of civil cases by early settlement or by terminating most civil cases directed into the program by accepting an arbitration award.
4. To allow judges to spend more time on complex, protracted litigation.

#### RESEARCH METHODOLOGY

Information has been obtained through systematic inspection of case-related data and questionnaires submitted to judges and practicing attorneys. Questionnaires were administered to experimental and control groups composed of attorneys and judges.

The attorneys in both groups were those individuals whose contract, tort and other cases were referred by federal district judges to the AAA Regional Director's office. The experimental group included those attorneys whose cases went forward through ADR procedures while the control group included the attorneys who did not use ADR after the required initial meeting at the AAA. The (11) judges who referred cases to the AAA are part of the experimental group while (11) randomly selected judges who have not referred cases are part of the control group. The results are intended to reveal the types of cases referred, their suitability for referral and attorney and judge reactions to the program, and to allow the Court a mechanism to determine if the program should be continued, relieved of its pilot status, and made permanent.

#### HYPOTHESES

1. There is a positive relationship between the types of cases referred to ADR and the final resolution of the cases.
2. Certain characteristics of civil cases will make them less suitable for resolution by ADR.
3. Attorneys will prefer ADR, because it is a speedier and a less costly means of resolving disputes.
4. Attorneys representing parties with continuing relationships will prefer to

resolve disputes through ADR.

#### FINDINGS AND RECOMMENDATIONS

The evidence supports the hypotheses, that, using ADR does:

1. Result in reduction of time and expense in connection with civil litigation.
2. Maintain the same level of satisfaction with justice.
3. Result in the speedier resolution of cases.
4. Allow judges more time for complex, protracted litigation.

In light of the findings, it is recommended that the program be continued and a local rule be put into place relieving the program of its pilot status, making it a permanent part of the Court's procedures.



## INTRODUCTION

### Background

In September, 1984, the United States District Court for the Southern District of New York established a court-annexed arbitration and mediation program. The concept was developed by Chief Judge Constance Baker Motley and the Committee on Planning and Pilot and Educational Programs (henceforth referred to as the Planning Committee), chaired by Judge Leonard B. Sand, responding to a growing backlog of cases and a need to divert appropriate cases to Alternative Dispute Resolution (ADR). In the year ending June 30, 1986, civil and criminal filings for the Southern District reached a record high of 11,828 filings. Filings have increased thirty-two percent during the last six years. A news release issued recently by the District Court Executive's Office on behalf of the Chief Judge stated:

The result of the lengthy trials and the unfilled vacancies has been that individual judges are being tied up for significant periods, the number of pending criminal cases has increased by 11% in the 1985-86 period and the civil trial dockets have been affected despite the extra efforts of the judges in closing more cases than were filed. (News Release, District Court Executive's office, February 26, 1987)

The Southern District of New York is the only federal district court operating a case referral system in conjunction with the American Arbitration Association (AAA). The district judges, in designated appropriate cases can require (within 30 days of the date of the Order of Referral) the attorneys and the parties to confer before either the Regional Director, the

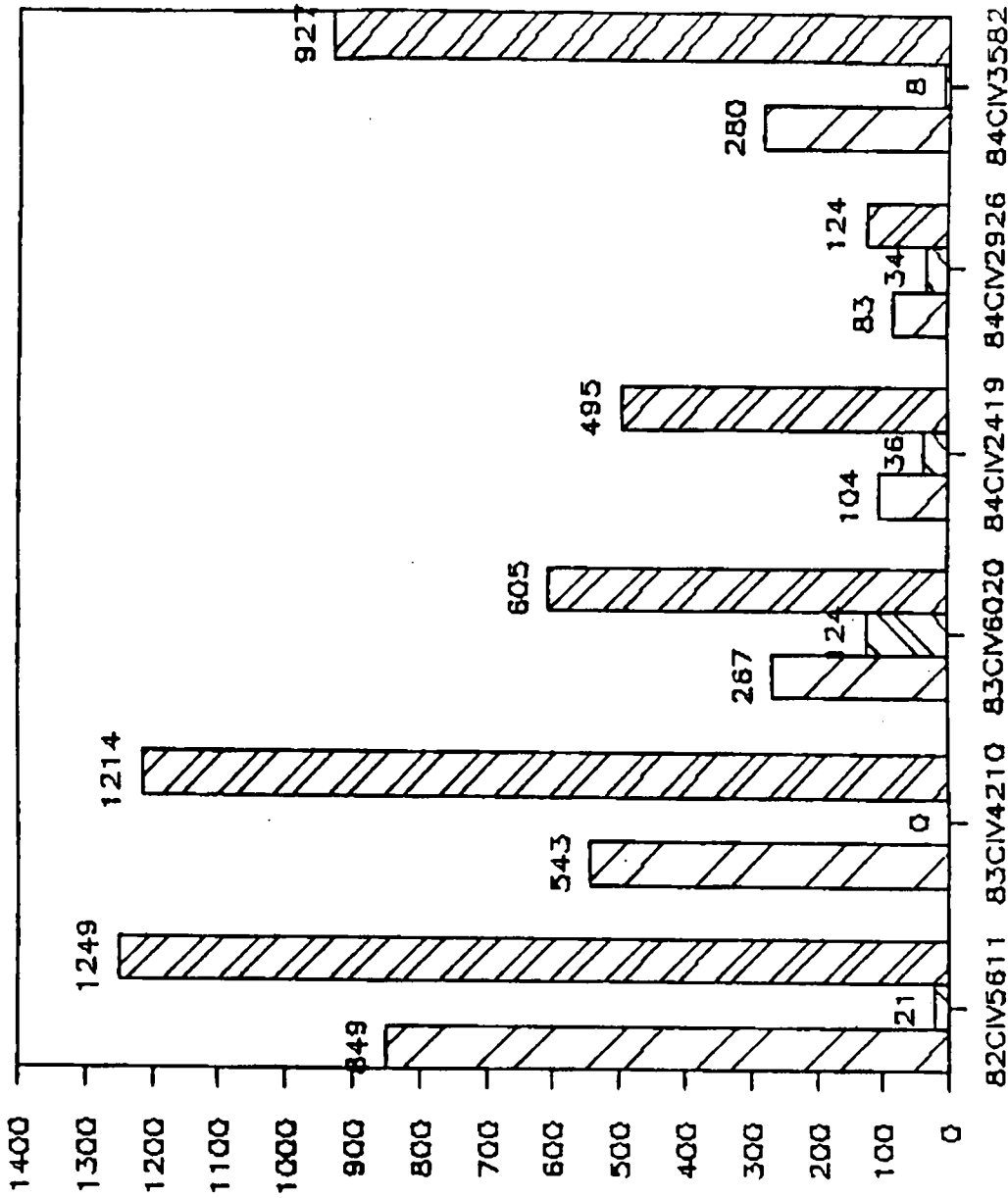
Associate General Counsel, the Associate General Counsel's staff or other available AAA staff. Although different types of ADR exist, this paper will focus on arbitration and mediation.\* The cases generally have completed the discovery phase of litigation before they are diverted. At this time, the issues have been clarified (see Figures 1 through 3), and the district judge considers arbitration or mediation appropriate. Figures 1-3 show the "ripeness" of the cases for referral -- specifically, all pretrial activities has been completed including discovery and interrogatories, and the case is ready for trial.

[FIGURES 1-3]

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\* Different types of ADR are abitration, mediation, factfinding, conciliation, mini-trial, advisory arbitration, summary jury trial, etc.

# AAA CASE TIME SCALE

ADR



Case Docket Numbers

File Date—Ord. Date

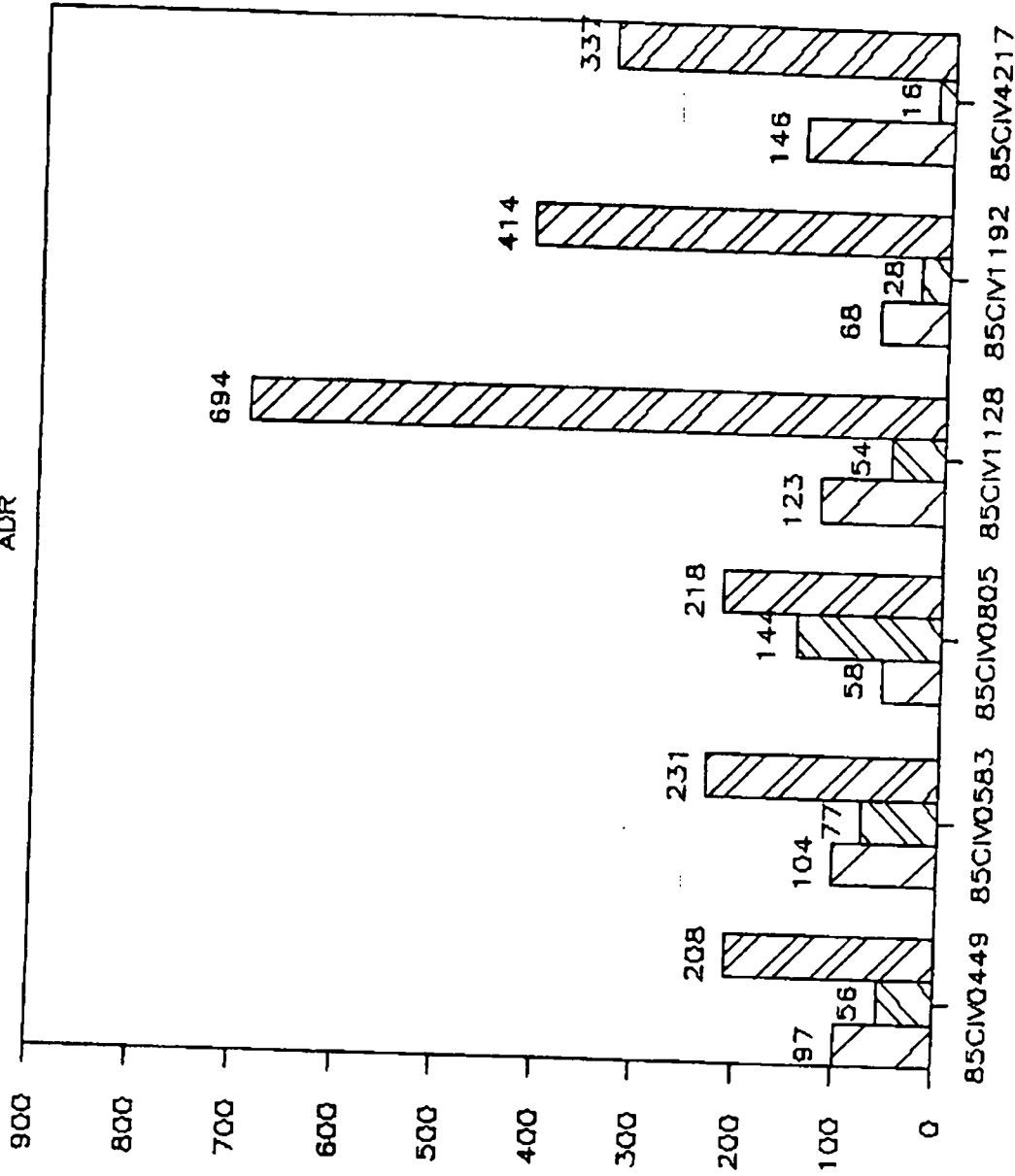
File Date—Closing

Ord. Date—Meet Date

Total Number Of Days

# AAA CASE TIME SCALE

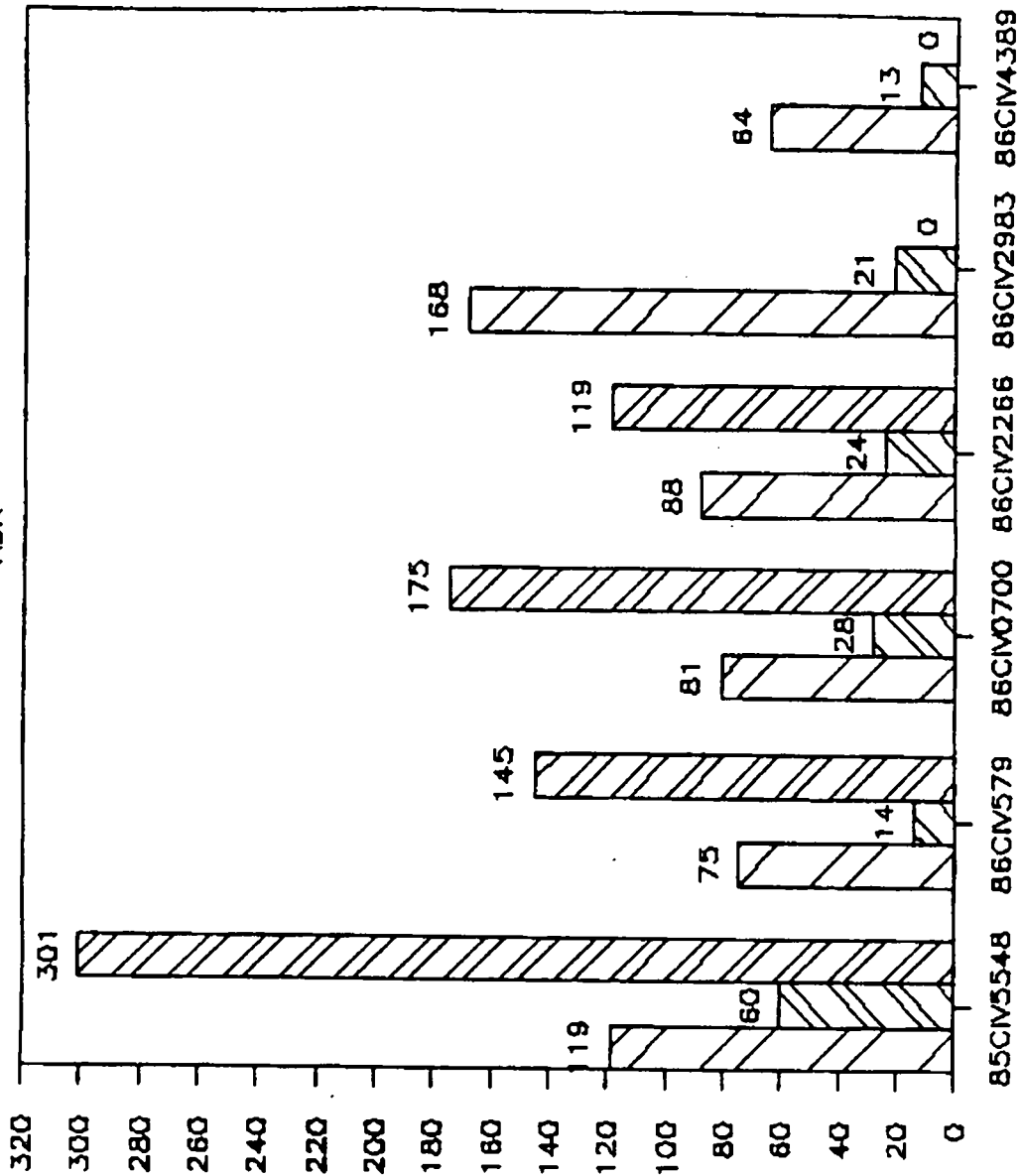
ADR



File Date-Ord. Date      Case Docket Numbers       File Date-Meet Date  
 Ord. Date-Meet Date

# AAA CASE TIME SCALE

ADR



File Date-Ord. Date

Ord. Date-Meet Date

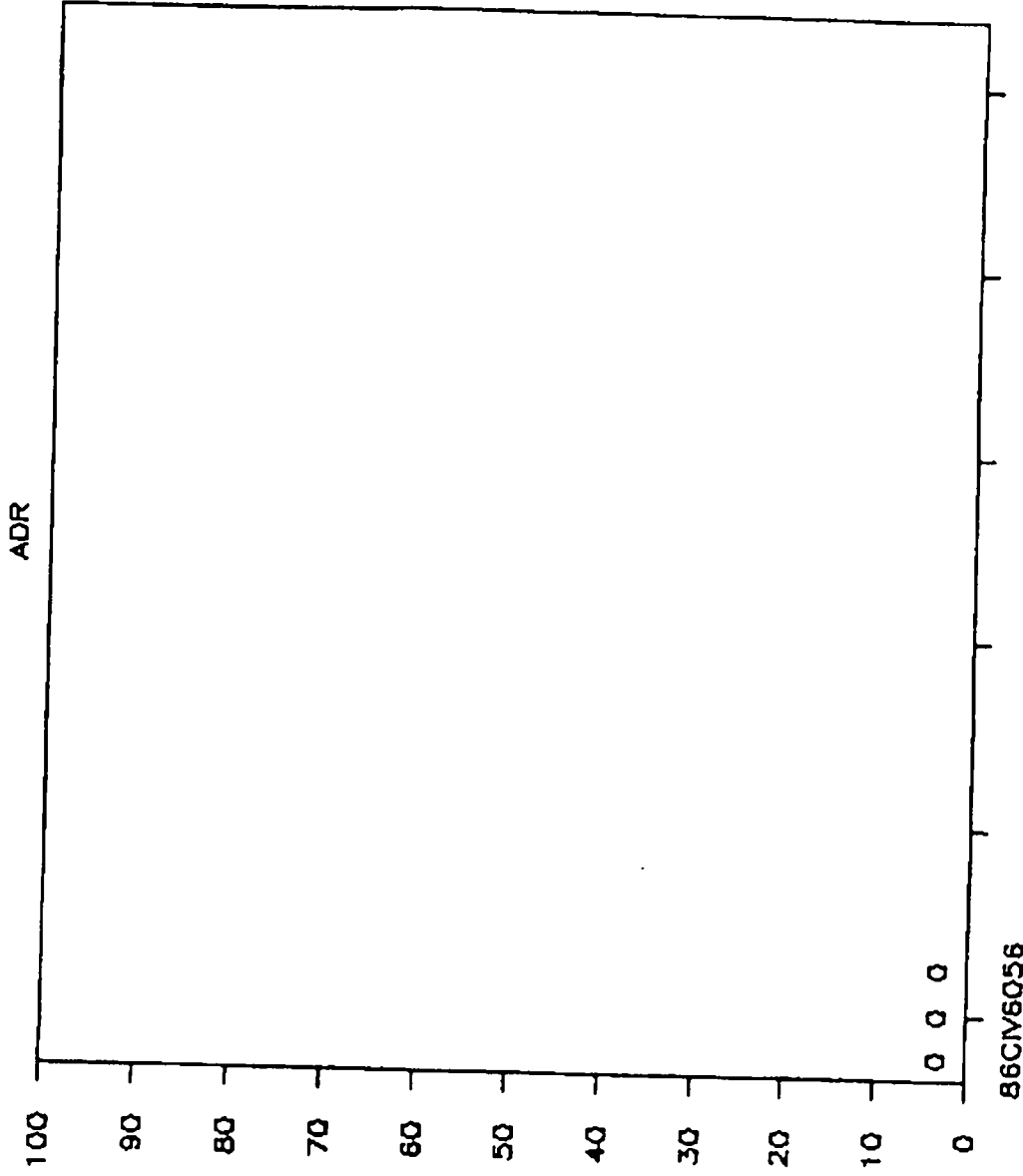
Case Docket Numbers

File Date-Closing

Ord. Date-Meet Date

Total Number Of Days

# AAA CASE TIME SCALE

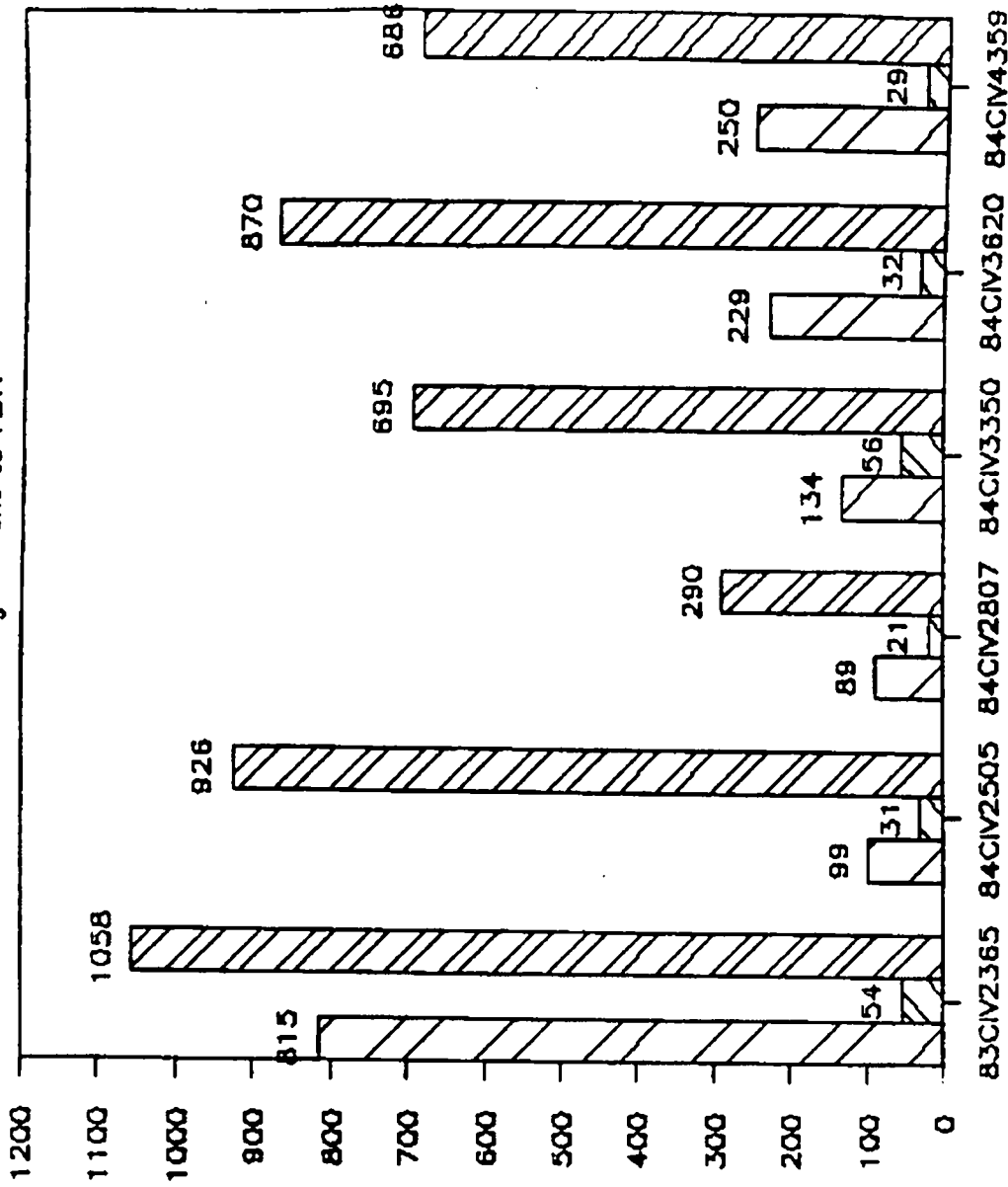


Total Number Of Days

☐ File Date—Ord. Date      Case Docket Numbers      ☐ File Date—Closing  
☐ Ord. Date—Meet Date

# AAA CASE TIME SCALE

No Agreement to ADR



Case Docket Numbers

File Date—Ord. Date

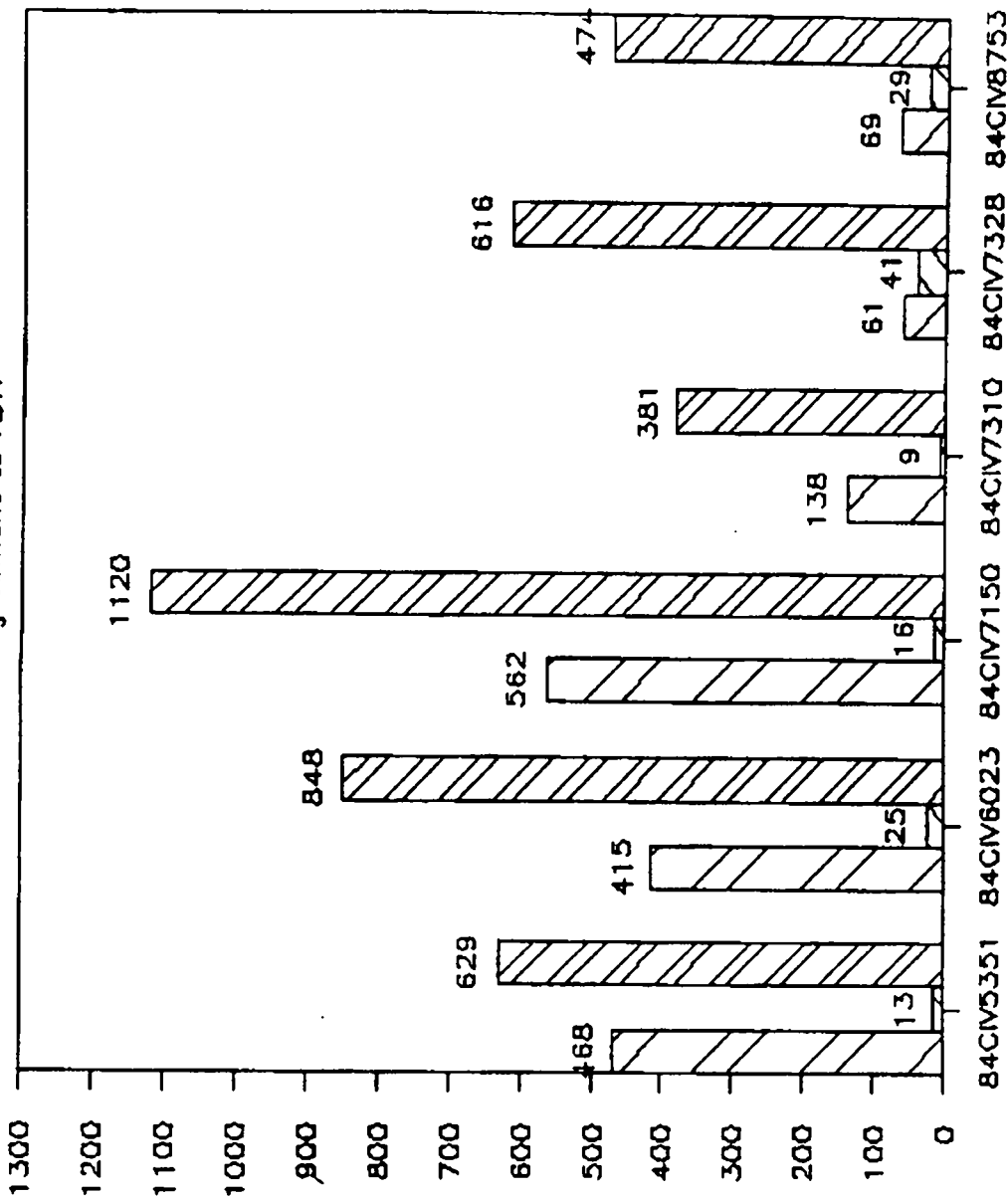
Ord. Date—Meet Date

File Date—Closing

Total Number Of Days

# AAA CASE TIME SCALE

No Agreement to ADR



Case Docket Numbers

File Date—Ord. Date

File Date—Closing

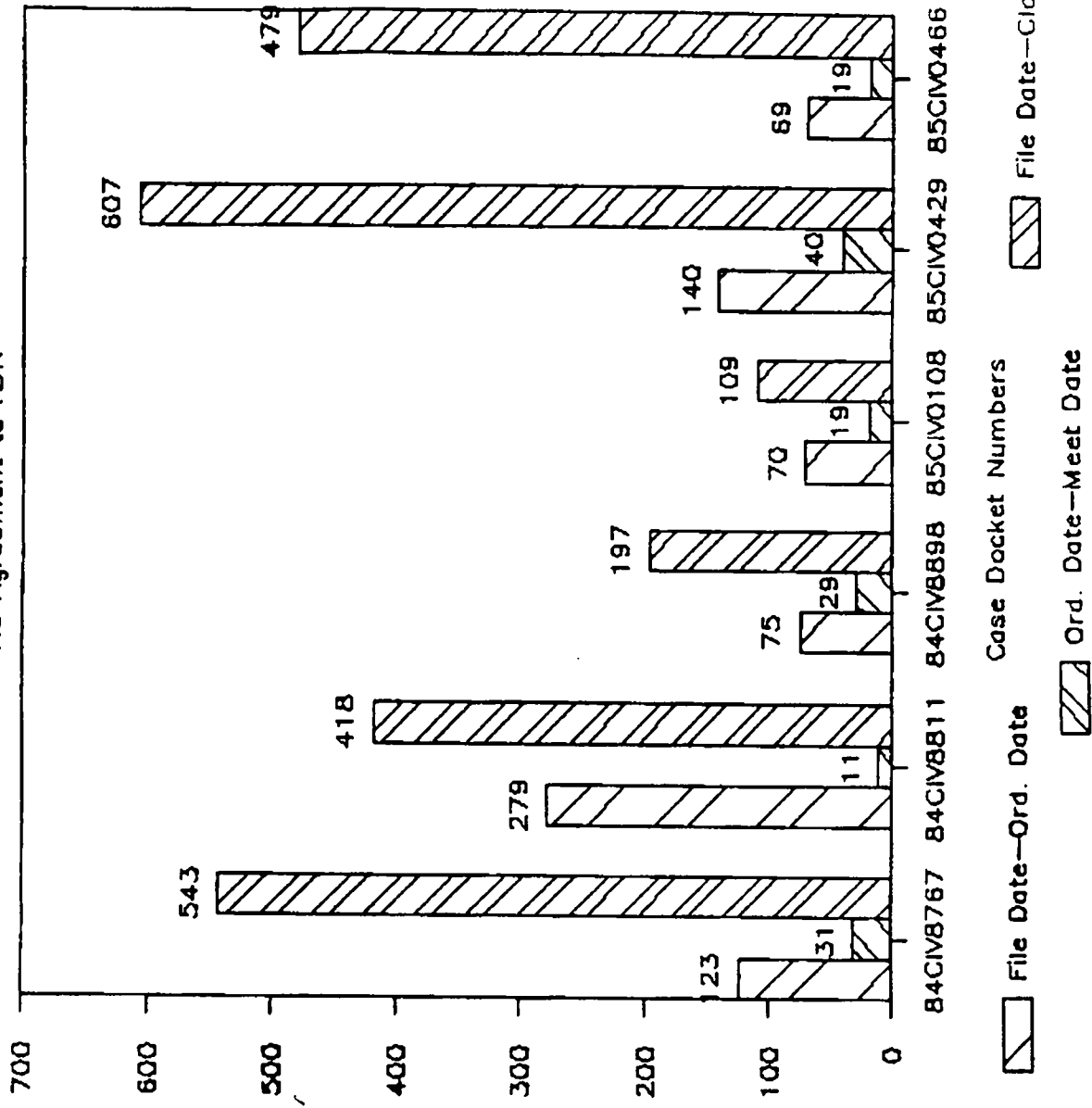
Ord. Date—Meet Date

Total Number Of Days



# AAA CASE TIME SCALE

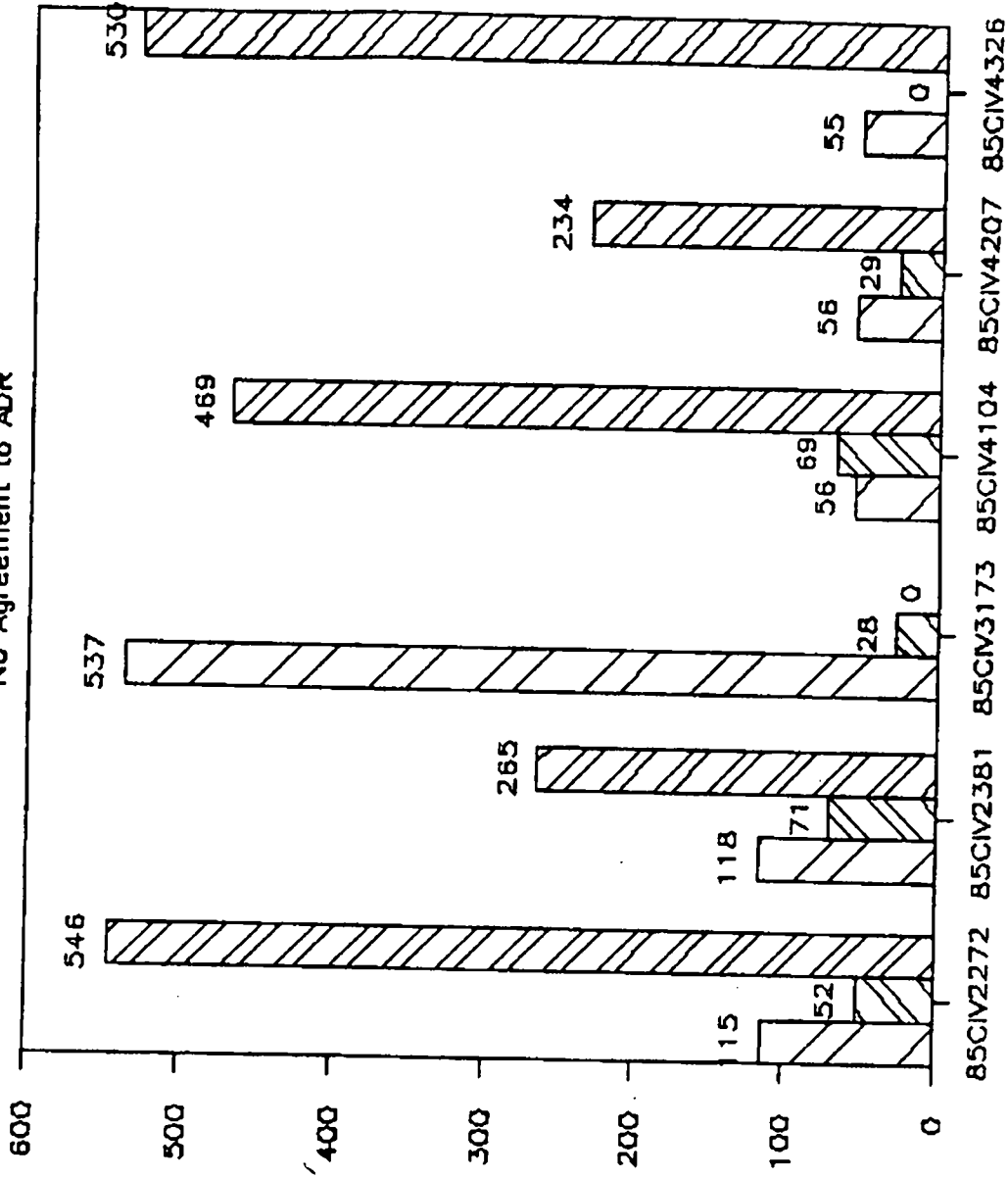
No Agreement to ADR



Total Number Of Days

# AAA CASE TIME SCALE

No Agreement to ADR

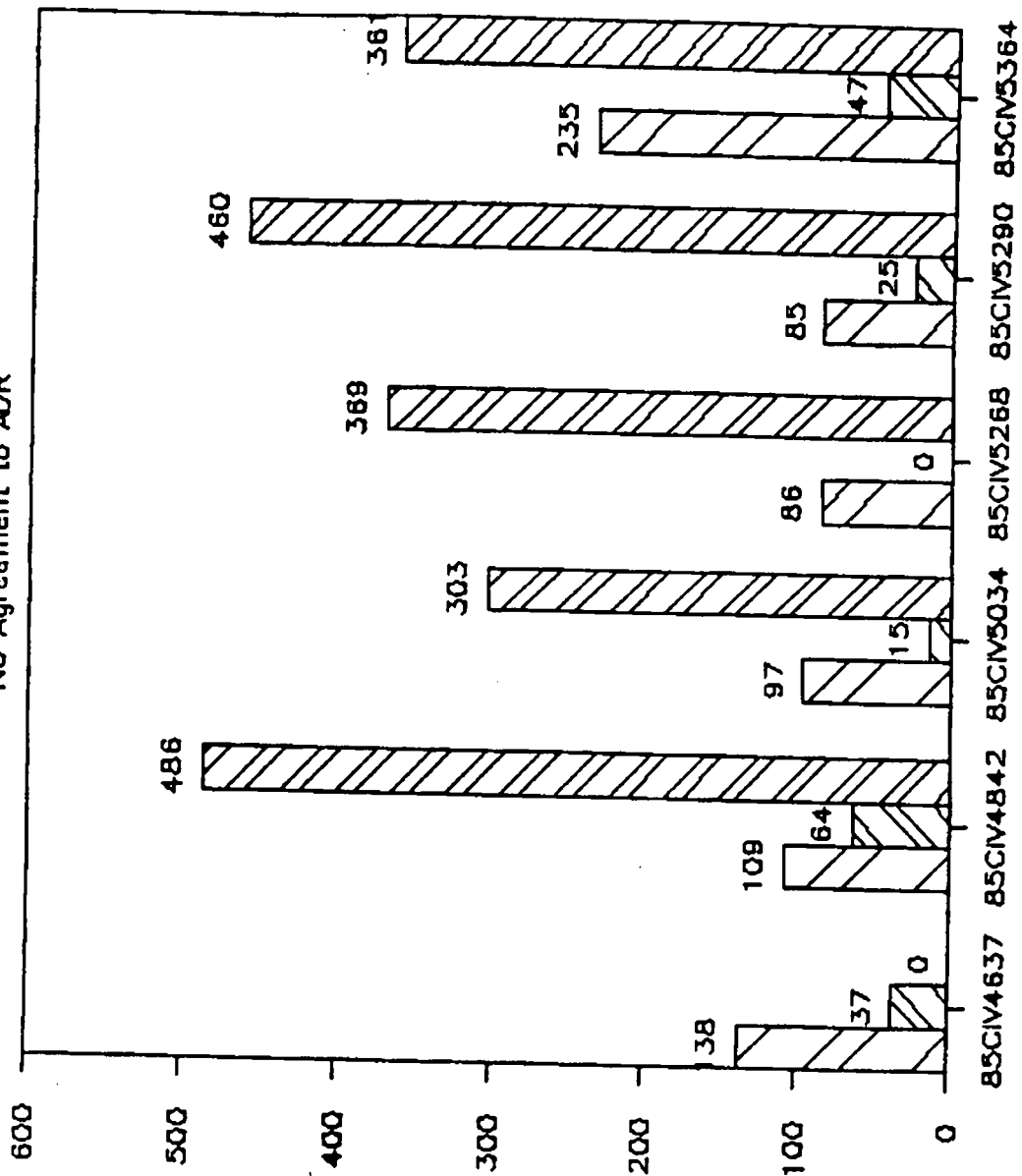


Case Docket Numbers

File Date-Ord. Date    Ord. Date-Meet Date    File Date-Closing

# NON VAUL TIME SCALE

No Agreement to ADR



File Date—Ord. Date

Case Docket Numbers

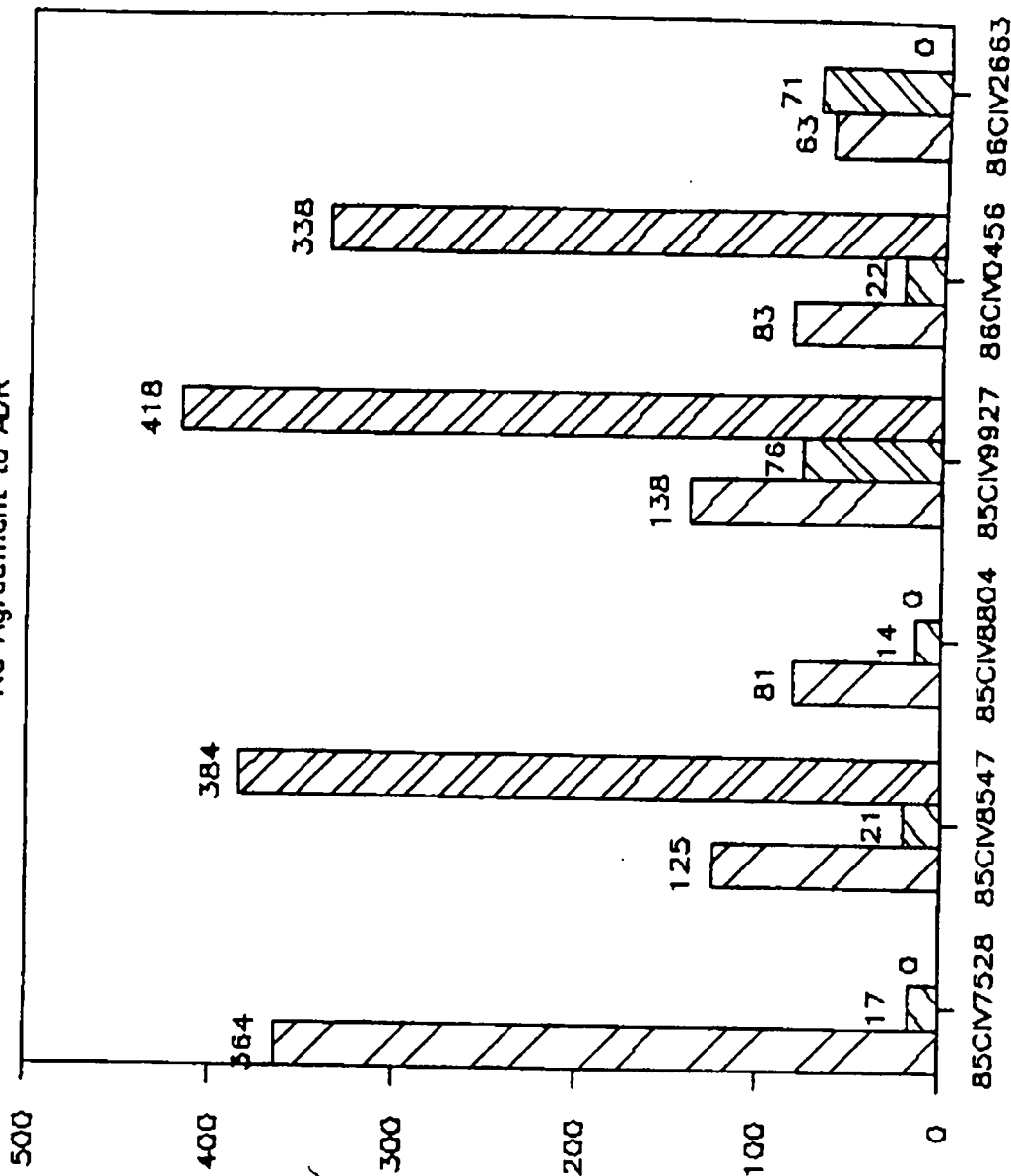
File Date—Closing

Ord. Date—Meet Date

Total Number Of Days

# AAA CASE TIME SCALE

No Agreement to ADR



Case Docket Numbers

File Date--Ord. Date

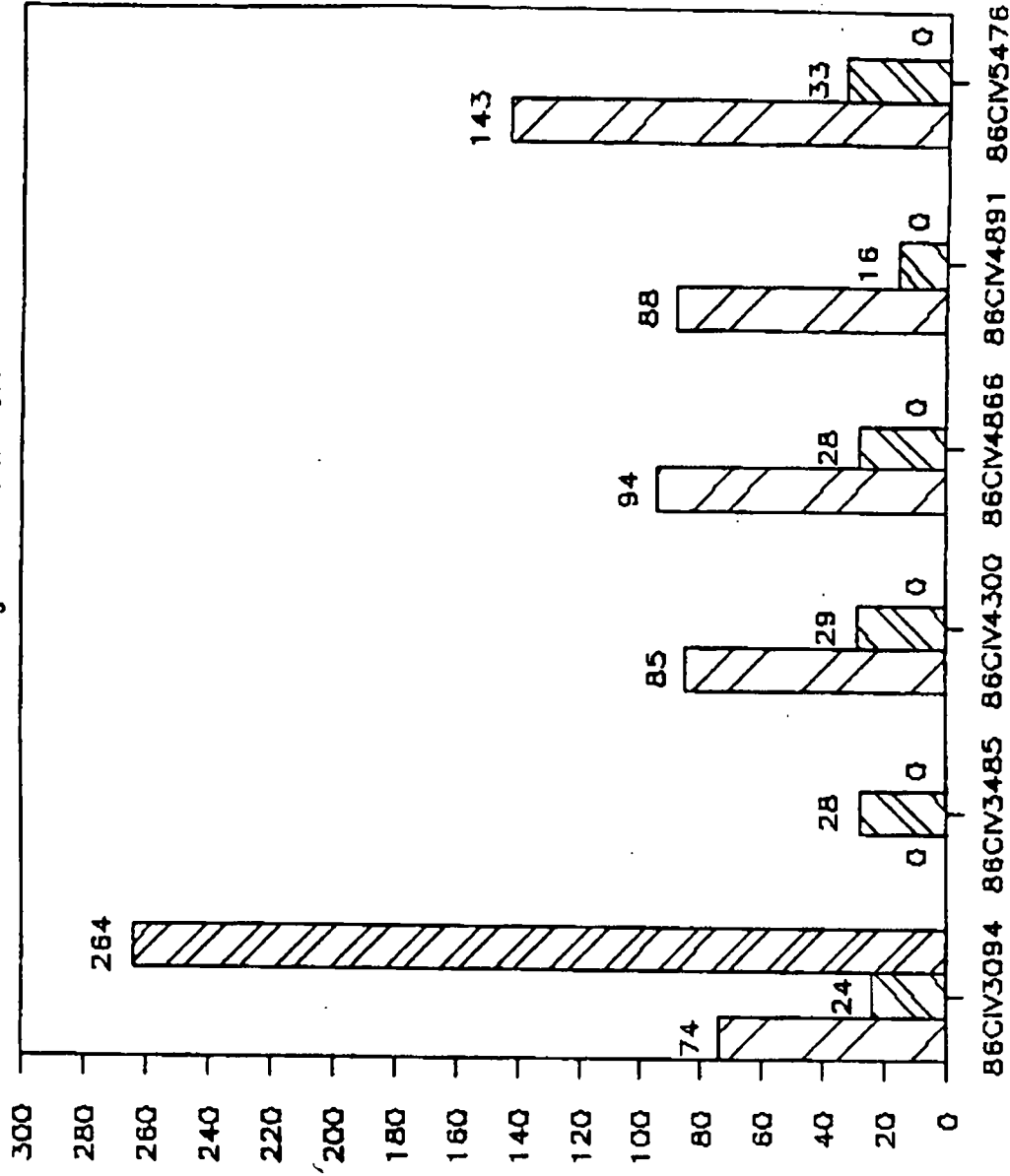
File Date--Closing

Ord. Date--Meet Date

Total Number Of Days

# AAA CASE TIME SCALE

No Agreement to ADR



Case Docket Numbers

File Date—Ord. Date

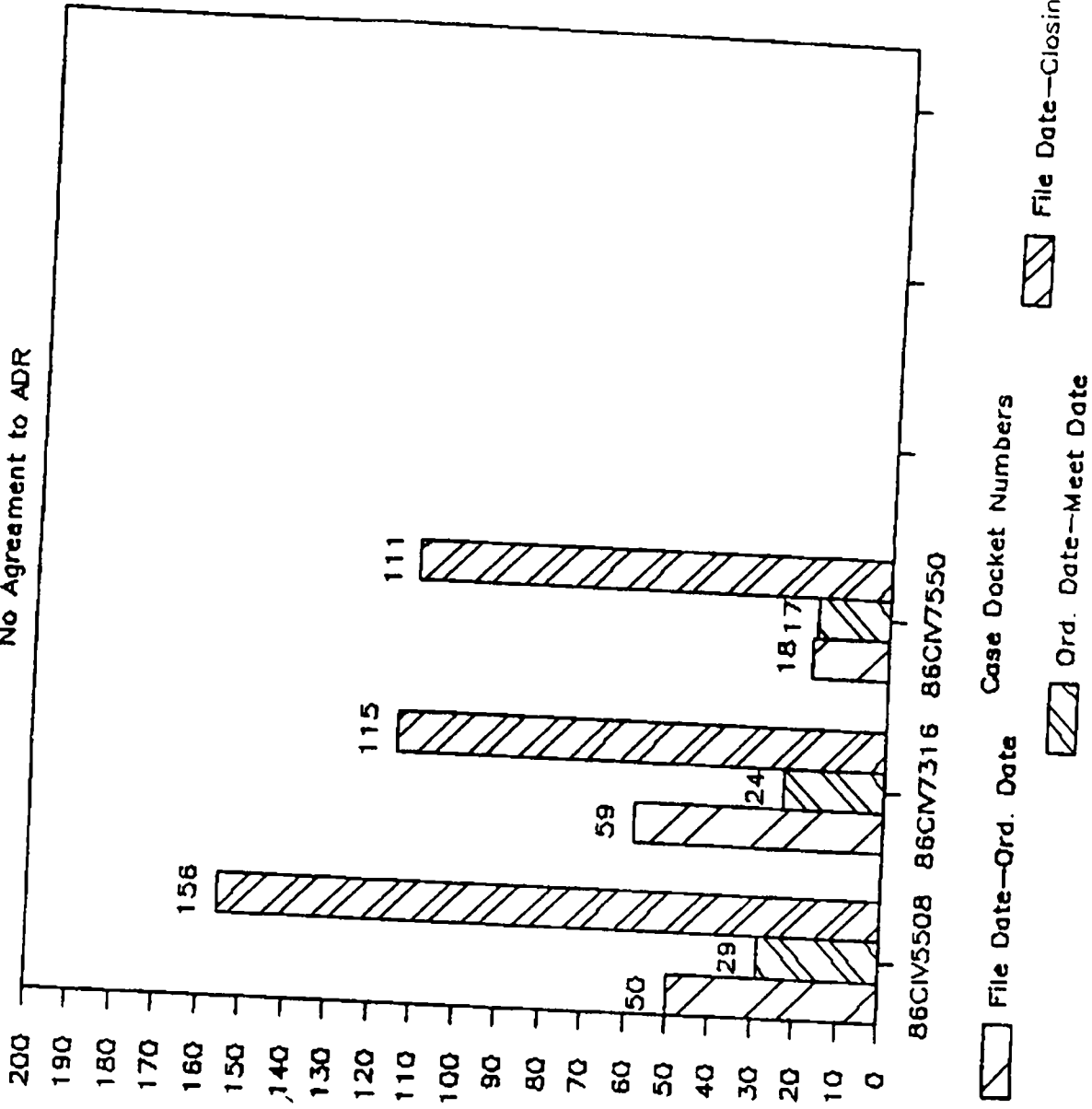
File Date—Closing

Ord. Date—Meet Date

Total Number Of Days

# AAA CASE TIME SCALE

No Agreement to ADR



# AAA CASE TIME SCALE

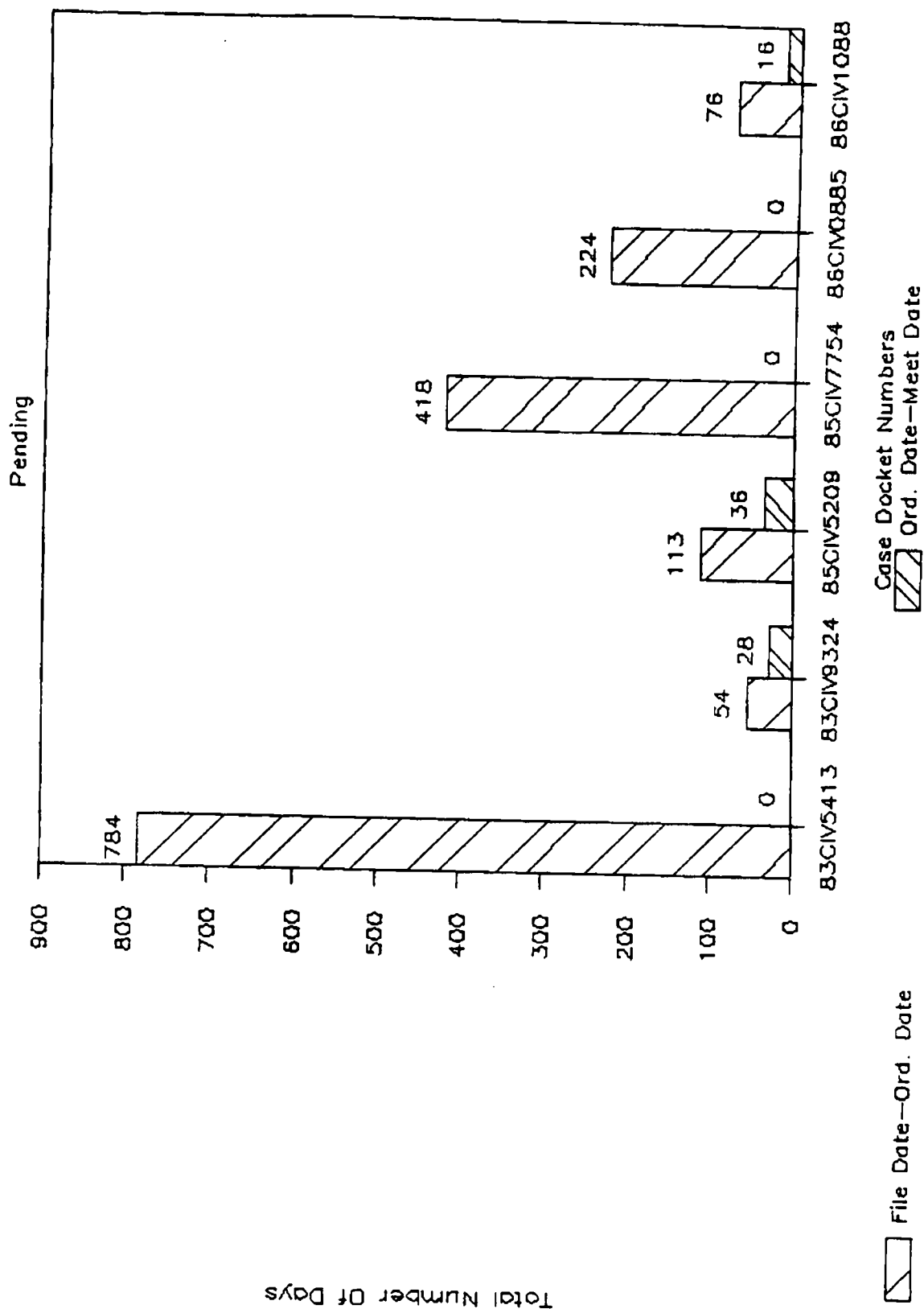
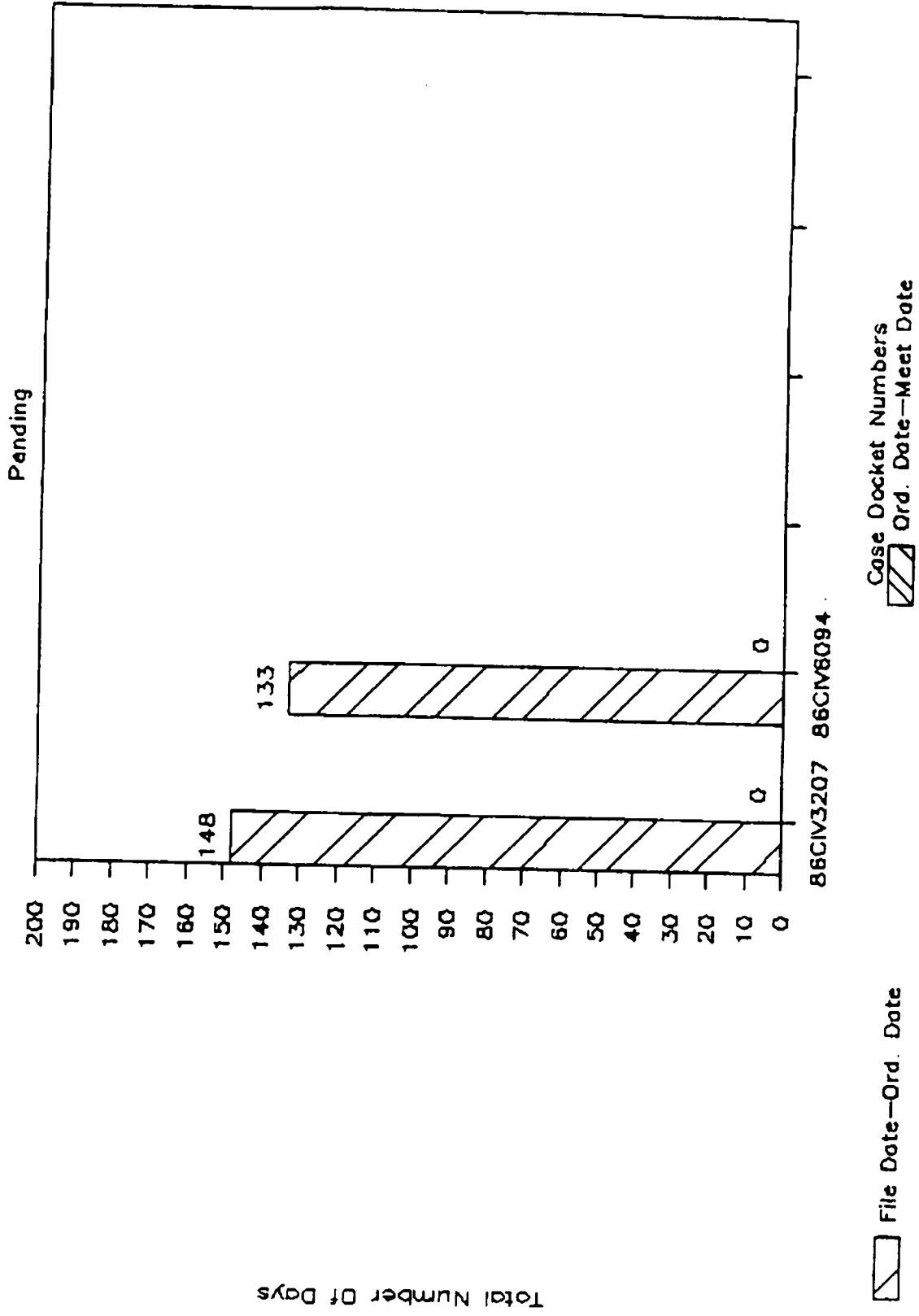


FIGURE 3-1

# AAA CASE TIME SCALE





A "Submission of the Action to ADR" form, developed jointly by the AAA, the Planning Committee and the District Court Executive's Office, is used when the parties agree at the AAA conference to ADR. In addition, a "Stipulation for Dismissal of Action" is executed on the same document. This advises the court that the parties have agreed voluntarily to dismiss the action with prejudice, and the case is terminated on the judge's docket. Attendance at the initial conference with AAA staff is the only requirement of the program. If the parties do not agree to some form of ADR at the AAA conference, the case remains on the judge's docket and runs the normal course of the litigation. The program differs from other federal district court-annexed arbitration programs, because ADR is not compulsory. Also, it does not depend on the disputed dollar amount and is suggested by the judge as an alternative at his or her discretion.

This research project's objective is to study the Southern District of New York's pilot arbitration and mediation program success in improving caseload management and reducing the backlog. Appropriate justice system mechanisms affecting the final outcomes of the cases will be identified. Although status reports on the cases referred to the AAA are provided regularly by the AAA's General Counsel, a more in-depth study will delineate the potential advantages and disadvantages of alternative processes and the issues in our adversarial system. There is little research available using ADR methods in connection with contract, tort and other cases (see Table 1) in

connection with contract, tort and other cases (see Table 1) in the Southern District of New York program. Additional analysis of this phenomenon is required.

[TABLE I]

TABLE 1

## SOUTHERN DISTRICT OF NEW YORK

## CASES REFERRED TO AMERICAN ARBITRATION ASSOCIATION BY TYPE OF CASE

(Cases Referred Between September 1, 1984 and December 31, 1986)

<u>Type of Case</u>	<u>Number</u>	<u>Percent of Total</u>
110 Contract: Insurance	4	5.13
120 Contract: Marine	3	3.85
190 Other Contract	43	55.12
195 Contract Product Liability	1	1.28
310 Airplane Personal Injury	1	1.28
330 Federal Employers Liability	1	1.28
350 Motor Vehicle	5	6.41
360 "Other" Personal Injury	3	3.84
362 Medical Malpractice	1	1.28
370 Personal Property/Other Fraud	1	1.28
380 Other Personal Property Damage	5	6.41
442 Civil Rights/Employment	1	1.28
470 Racketeer Influenced & Corrupt Organization Act (RICO)	1	1.28
830 Property Rights/Patent	1	1.28
840 Property Rights/Trademark	4	5.13
850 Other Statutes/Securities/Commodities/Exchange	1	1.28
890 Other Statutory Actions	<u>2</u>	<u>2.56</u>
TOTAL	78	99.97

### Purposes and Goals of the Project

The project's purposes are to determine more precisely which type of cases are diverted to the AAA and how well the ADR process is suited to those cases. It should be pointed out again that this study does not seek to analyze the reasons why certain cases are being referred. There is no intent to evaluate the reasons for the selection of certain types of cases. See Hypothesis 2 on page 14. Rather, a goal of the study is to explain a relationship between the program as a method of intervention and the eventual outcome of the case under the ADR program. Outcomes which would indicate a positive relationship are a speedy resolution of issues and a cutback in the caseload backlog. A second goal is to ascertain if contract and tort cases are particularly well suited to the approaches made available through the program. Finally, the study will measure the participants' levels of satisfaction with the program -- specifically, the achievement of satisfactory resolutions of disputes.

### Project Scope

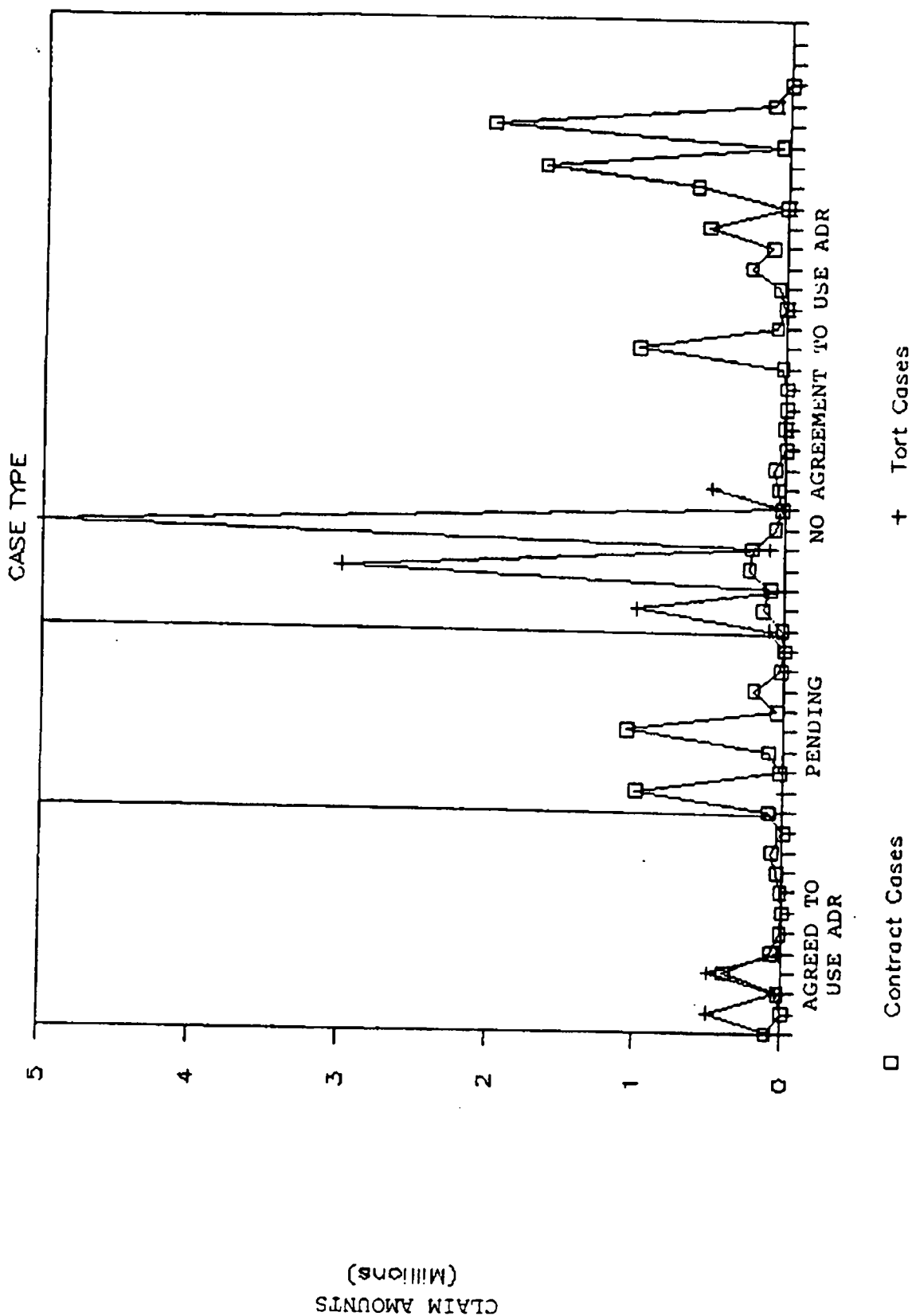
Between September 1984 through December 1986, the program handled 78 case referrals --- 45% (or 35 cases) were resolved through ADR or settlement between/among parties with or without court approval. Thirty-six (46%) cases were reinstated on the Court's docket after the AAA conference, while seven cases (9%) are still pending at the AAA. The most commonly cited reason by the attorneys in AAA arbitrator and mediator's records for

abandoning AAA guidelines was a party's reluctance to use ADR. Jessica Pearson (1982) observed that the use of nonadversarial mechanisms depended on the receptivity of attorneys trained to use adversarial techniques.

A wide range of claim and counterclaim amounts existed in all the cases referred to the AAA by the Southern District judges.

[FIGURE 4]

# CASES REFERRED TO AAA BY



In fact, no ceiling to the amount of damages of the claims or counterclaims existed. This contrasts all other existing ADR programs in federal district courts. Other programs set a threshold on the amount in controversy for eligibility in a program.

## METHODOLOGY

### Population

The project's methodology involves, examining cases referred, developing questions and surveying all of the attorneys both agreeing and refusing to commit the case to an ADR method. In addition, the eleven district judges using and the eleven district judges not using the program, were surveyed as well.

This study is divided into a "control" and an "experimental" group. The control group consists of 11 judges not referring cases to ADR\*\* and the attorneys who declined to use ADR. The experimental group consists of 11 judges who referred cases to ADR and the attorneys who used ADR.

Some attorneys have cases still pending at the AAA, i.e., either the required meeting has not been scheduled, or a decision to choose a method of ADR has not been made. The attorneys whose cases were referred, attended the mandatory AAA meeting and

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\*\*Please note that the judges in the control group were selected by lot from a total number of 26 judges who have not referred cases to ADR.

ultimately returned to the court for further traditional adjudicative processing, are part of the control group. The responses of the attorneys whose cases were solved through ADR (the experimental group) will be compared with those attorneys who rejected ADR after the initial required meeting at the AAA and whose case was returned to the court (the control group). It should be noted that 10 cases in the control group are still open matters on the court's docket.

#### Causal Model

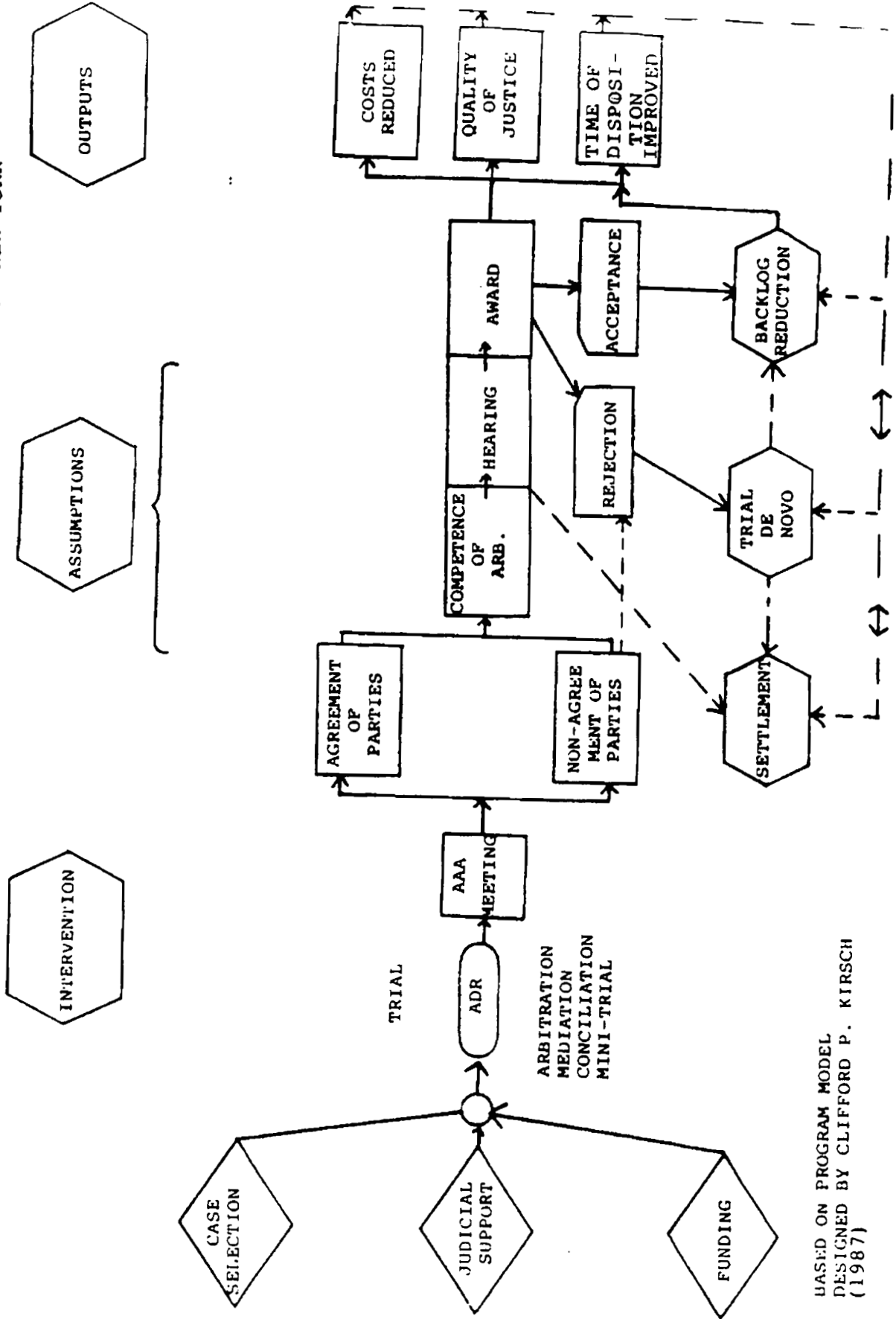
A model has been constructed to represent the sequence of events when a case is referred to the AAA and a scheme which links the variables together.

[FIGURE 5]



CAUSAL MODEL

Figure 5  
ADR PROGRAM IN THE SOUTHERN DISTRICT OF NEW YORK



BASED ON PROGRAM MODEL  
DESIGNED BY CLIFFORD P. KIRSCH  
(1987)

The independent variable consists of individuals including attorneys who represent parties who have filed contract, tort and other cases in federal district court on the basis of diversity of citizenship and judges who have participated or not participated in the case referral program. The pilot arbitration and mediation program influences the judge's decision to refer the particular case to the AAA. The case referral program forces an attorney to choose either a method of ADR, traditional adjudicative processing or settlement discussion after the initial mandatory meeting at the AAA. If the award is accepted, the potential positive effects are financial and timesaving.

#### Pre-testing

An Attorney Questionnaire (See Appendix I) composed of 9 closed questions was pretested (see Appendix II) on a randomly selected group of 20 attorneys from the control group, the experimental group, and attorneys who fall into the "pending at AAA" group. The pretest's intent was to help formulate the final questionnaire. A separate set of questionnaires, henceforth referred to as the Judge Questionnaires, were pretested and completed by the judges in the control and experimental groups (See Appendices III and IV). The questions in the Attorney and Judge Questionnaires focus on whether the Southern District of New York's court-annexed arbitration program has had a negative or positive effect on caseload management techniques exercised by the judges.

### Sampling Errors

Responses have been sought from all attorneys in the case referral program. This includes those attorneys rejecting a method of ADR and opting out of the case referral program. Each attorney whose case was successfully resolved through a method of ADR received a questionnaire. This group is not very large, because the program has been in existence only since September, 1984, on a pilot basis.

Similarly, responses are being solicited from the judges -- both participants and non-participants -- in the case referral program.

### Data Collection

Questionnaire results have been collected by trained telephone interviewers.

Analysis of the (78) cases referred to the AAA reveals that the cases are predominantly contract cases followed by tort cases.

Seventy-five percent of the cases referred to the AAA, during the period September 1984 through December 1986, have been filed in federal district court on the basis of diversity of citizenship. This compares to 30% of the overall civil caseload filed in New York Southern based on diversity of citizenship for the statistical year ending June 30, 1986.

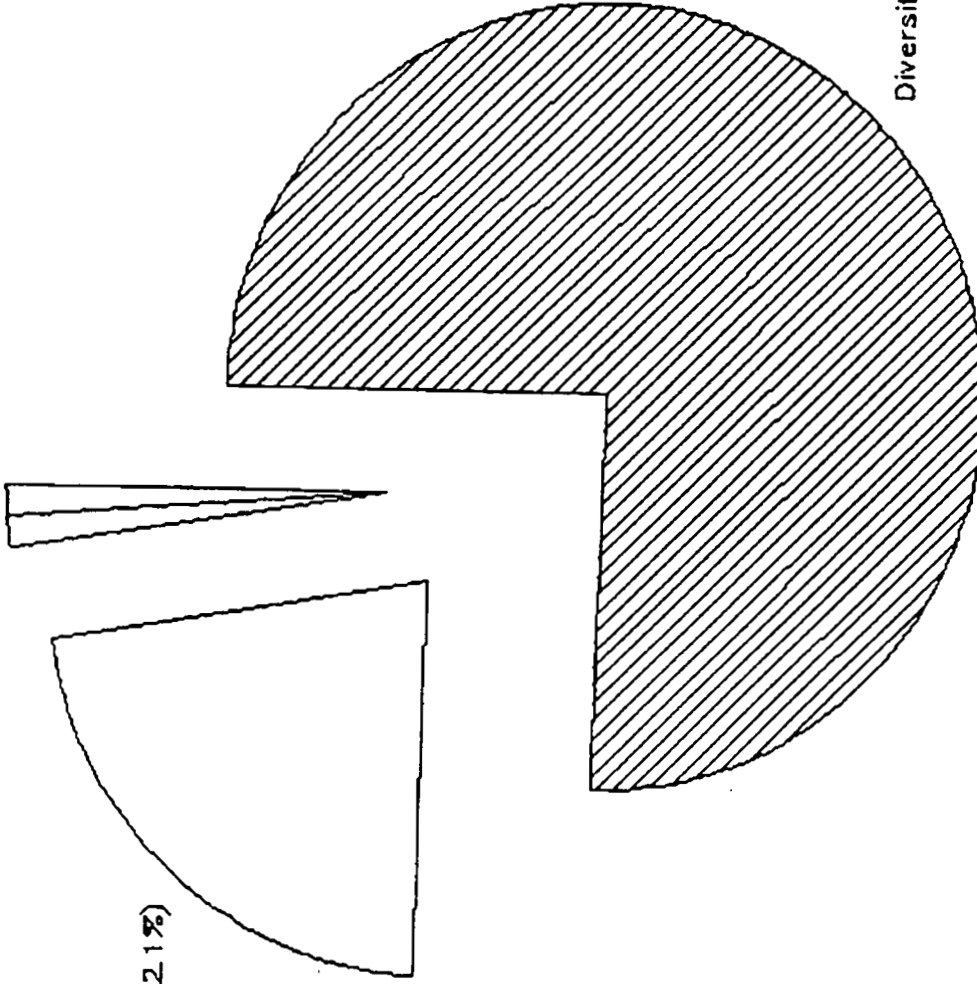
[FIGURES 6-9]

# CASES REFERRED TO AAA BY SDNY

Overall

U.S. Gov't(P&D) (2.6%)

Federal Question (22.1%)



Diversity of Citizenship (75.3%)

FIGURE 7

CASES REFERRED TO AAA BY SDNY  
No Agreement to Use ADR

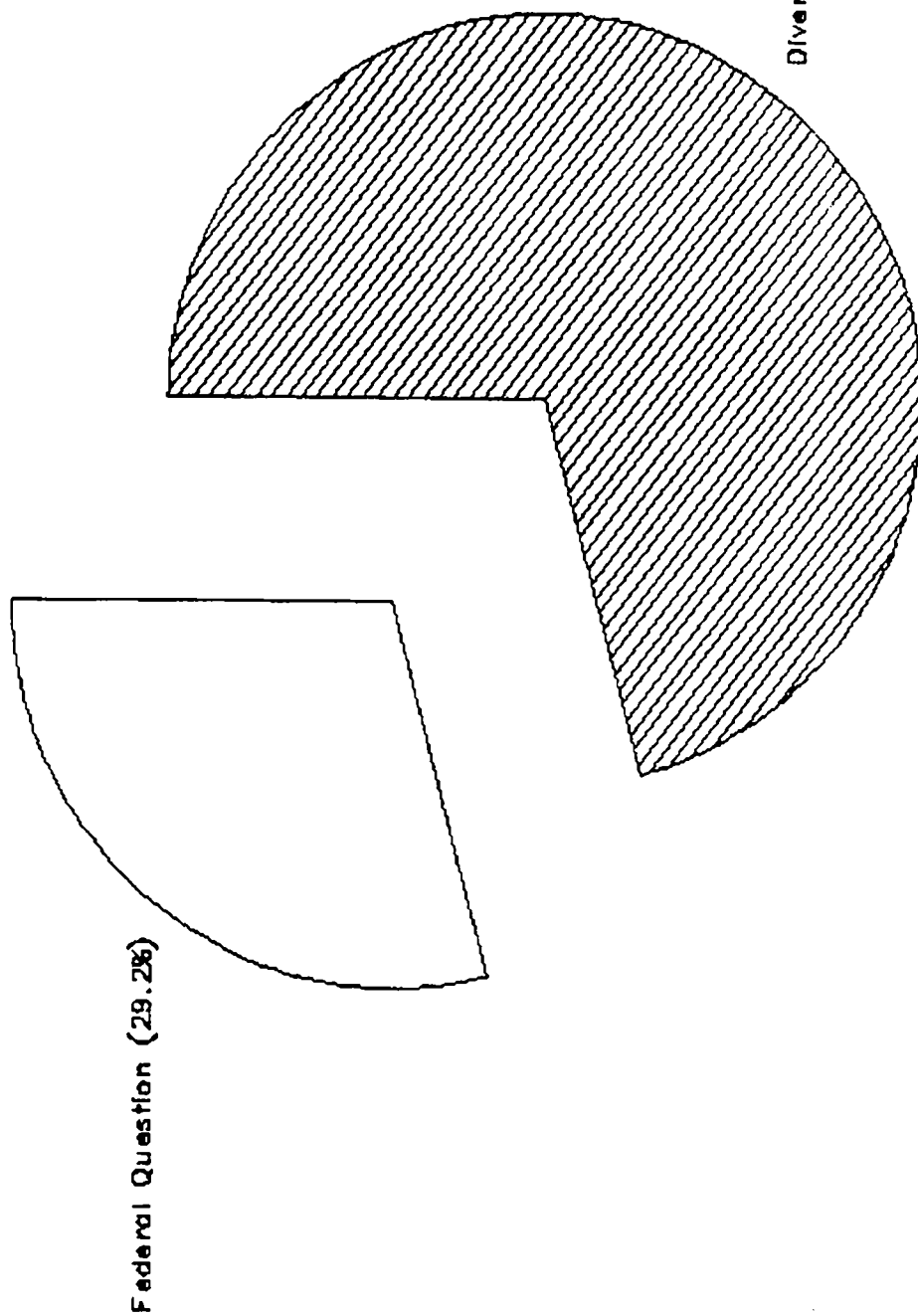


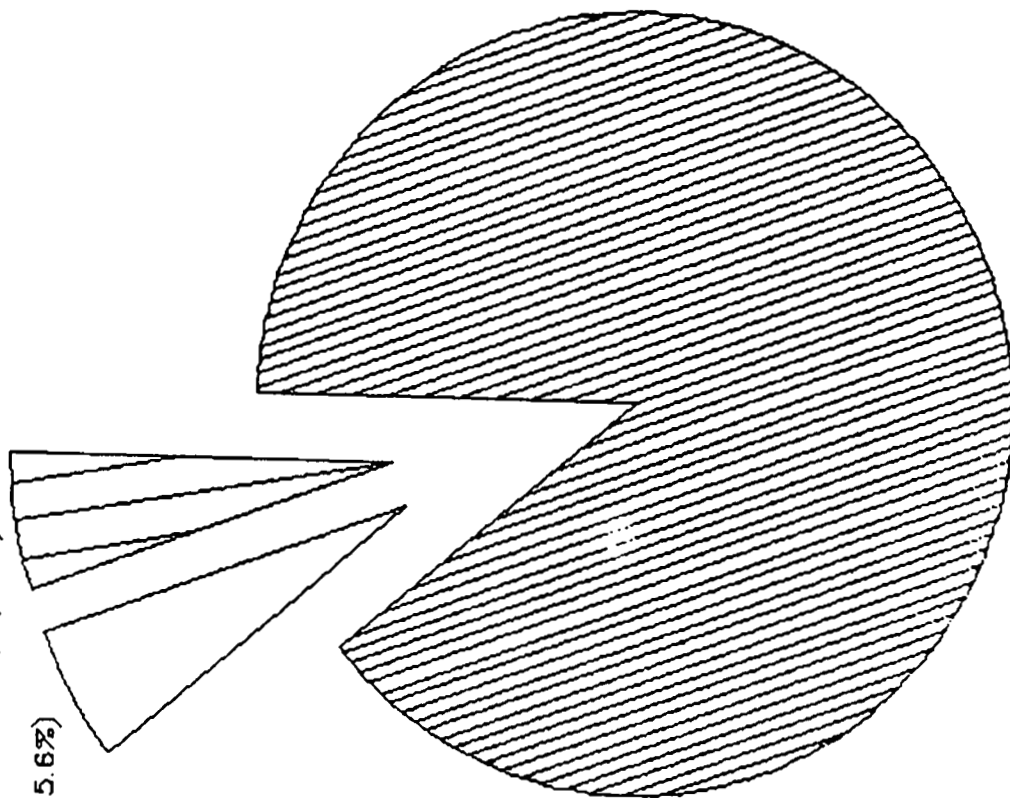
Figure 8

## CASES REFERRED TO AAA BY SDNY

Agreed to Use ADR

U.S. Gov't(P&D) (5.6%)

Federal Question (5.6%)

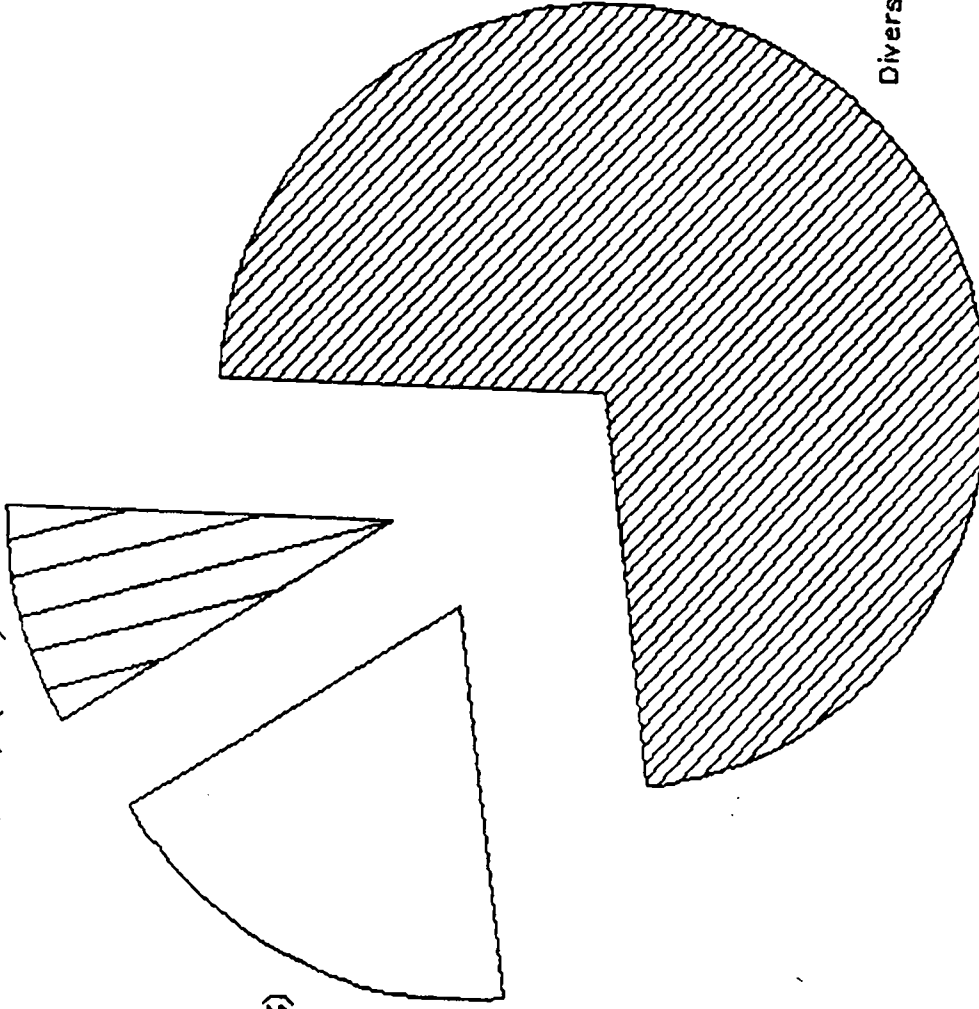


Diversity of Citizenship (88.9%)

# CASES REFERRED TO AAA BY SDNY

Pending

U.S. Gov't(P&D) (9.1%)



Federal Question (18.2%)

Diversity of Citizenship (72.7%)

### Type of Case

From September 1984 to December 1986, sixty-five percent of the cases referred to the AAA Regional Director by the Southern District judges are contract actions, while 22% are tort actions. In statistical year 1985-1986, 3,651 or 34% of the total number of civil actions filed (10,647), were contract actions. Of the 533 jury and nonjury civil trials conducted during the twelve month period ending June 30, 1986, 30% were the kinds of contract actions which were referred to the AAA (See Table 1).

In the 1985-1986 period, 904 tort actions were filed constituting 9% of the total number of civil filings (10,647). Of the 533 jury and nonjury civil trials, 116 or 22% were the type of tort actions referred to the AAA (See Table 1).

### Costs

The average daily cost of an 8 person jury civil trial is \$1,326.31 (including judicial salaries, costs of empanelling the jury, jurors' fees and expenses, deputy clerk and law clerks' salaries, including benefits on pro-rated basis, marshal's salary including benefits, operating costs, depreciation costs, rental costs, docket and file clerks' salaries including benefits on pro-rated basis, district court reporter services and overhead). (Source: District Court Executive's Office, Southern District of New York, 1986). This is 3 times higher than \$490, the average total cost of AAA administrative fees charged to respondents and claimants whose cases went forward through ADR after the mandatory AAA meeting.



### Timing

Time frames from one event to the next (case filing date to AAA order date; AAA order date to AAA meeting date; case filing date to closing date) show very similar time frames for the cases which were resolved by ADR and those which were referred to the AAA but did not proceed through the AAA forum (see Figures 1 through 3-1 and Table 2). In fact, the median elapsed time from filing to disposition is 301 days or approximately 10 months for the cases settled through ADR and 471.5 days or approximately 15.7 months for the cases which were returned to the court after the AAA meeting as shown in Table 2.

This figure can be compared with the median time of 17 months for all contract cases and 14 for all tort cases from issue to trial in the Southern District of New York (Source: 1986 Statistical Year End Report for the Administrative Office of the U.S. Courts).

[TABLE 2]

TABLE 2

LAPSED TIME (IN MEDIAN NUMBER OF DAYS) FROM FILING DATE TO ORDER DATE FROM AAA ORDER  
DATE TO AAA MEETING DATE, AND FROM DATE TO DISPOSITION OR CLOSING DATE

1. Civil Cases Disposed of Through ADR
2. Civil Cases Referred to AAA and Returned to Court  
September 1984 - December 1986

TOTAL CASES AGREED TO ADR	PERCENT OF TOTAL CASES	TIME FROM FILING DATE TO ORDER DATE	MEDIAN # OF DAYS	TIME FROM ORDER DATE TO MEETING	MEDIAN # OF DAYS	TIME FROM FILE DATE TO CLOSING	MEDIAN # OF DAYS
1) 25	31%	3787	88	968	28	9890	301
TOTAL CASES NO AGREEMENT TO ADR							
2) 45	58%	7237	120.5	1391	29	16,845	471.5

## SURVEY OF LITERATURE

Although a plethora of information about ADR programs exists, there is no analysis of commercial contract and tort cases that were referred to AAA guided arbitration and mediation under federal court sponsorship.

The landmark study by Lind and Shepard (Federal Judicial Center, 1981) found a significant decrease from filing to disposition in arbitration cases in two of three federal district courts tested. The Lind and Shepard study formed the cornerstone for subsequent studies.

Pearson (1982) reviews existing literature and suggests in connection with savings in time and money that the success of ADR may be related to the particular suitability of certain types of cases.

Kritzer and Anderson (1983) report on an empirical comparison of AAA styled arbitration procedures and traditional adjudication in federal and state courts. While they conclude that AAA contract and tort cases are processed faster than federal and state court cases, the study loses its overall impact by insisting on comparing arbitration to adjudication ignoring the empirical evidence on extrajudicial or alternative dispute resolution theories.

Metrick (1984) makes a strong case for understanding 1) the dynamics of the court environment and 2) the importance of evaluating a civil case referral program by its relationship to the two key variables -- environment and legal culture. The

Attorney and Judge questionnaire results will capture the aspects of these variables by measuring the negative and positive perspectives of the ADR program.

Macaulay (1984) views the contract as a living, breathing document which binding people and organizations. Consequently, the individuals and institutions bond together by this instrument make every attempt to preserve their continuing relations with each other. When there is a dispute, Macaulay contends they will "avoid, suppress and resolve [contract] disputes little influenced by academic contract law" (p. 465, Wisconsin Law Review, 1985). This suggests that the forum that arbitration provides is more suited to contract disputes.

Finally, McDermott (1986) asks how arbitration relates to litigation. He states the Southern decision (Southland Corp. v. Keating, Jan. 23, 1984, 465 U.S. 1) gives credence to arbitration agreements in connection with interstate commerce contracts. However, he concludes that the Supreme Court gives little or no direction on the problems that alternative methods of dispute resolution pose in connection with commercial contract cases.

#### HYPOTHESES

1. There is a positive relationship between the types of cases referred to ADR and the final resolution of the cases.
2. Certain characteristics of civil cases will make them less suitable for resolution by ADR.

3. Attorneys will prefer ADR, because it is a speedier and a less costly means of resolving disputes.
4. Attorneys representing parties with continuing relationships will prefer to resolve disputes through ADR.

#### FINDINGS AND DATA PRESENTATION

[ATTORNEY QUESTIONNAIRE RESULTS ARE  
CONTAINED IN TABLES 3-9]

TABLE 3

DEGREE OF APPROVAL BY ATTORNEYS OF PILOT CASE  
 REFERRAL PROGRAM: AN ARBITRATION AND MEDIATION  
 PROGRAM IN SOUTHERN DISTRICT OF NEW YORK (IN  
 COOPERATION WITH THE AMERICAN ARBITRATION ASSOCIATION)

Response	TOTAL NUMBER OF ATTORNEYS MENTIONING RESPONSE	EXPERIMENTAL		CONTROL		PENDING		PERCENTAGE OF ATTORNEYS MENTIONING RESPONSE	
		GROUP	%	GROUP	%	GROUP	%		
Strongly Approve	20	5	20%	13	26%	2	29%	24%	
Approve	50	15	60%	31	62%	4	57%	61%	
Disapprove	7	3	12%	4	8%	0	0%	9%	
Strongly Disapprove	2	1	4%	1	2%	0	0%	2%	
No Opinion	3	1	4%	1	2%	1	14%	4%	

TABLE 4

ATTORNEYS' VIEWS OF THE REASONS FOR  
CASES BEING REFERRED TO AAA

<u>Factor</u>	<u>Most Influential Reason</u>		<u>Degree of Influence</u>					
			<u>Some Influence</u>	<u>%</u>	<u>Least Influence</u>	<u>%</u>	<u>No Influence</u>	<u>%</u>
Nature of Action	28	32%	19	22%	8	9%	2	2%
Suitability of Case for ADR	15	17%	25	29%	11	13%	5	6%
Agreement by all Parties concerned	15	17%	16	18%	12	14%	12	14%
Don't Know	14	16%	0	0%	0	0%	3	3%

NOTE: Total # of Attorneys Mentioning One or More Factors = 87

\*In this context, influence signifies the effect certain factors have on the thinking of the participants towards ADR.

TABLE 5  
ATTORNEYS' PREFERENCES AS TO WHO SHOULD  
HEAR THE CASE

Response	Total Number of Attorneys Mentioning Response	Experimental Group	%	Control Group	%	Pending Group	%	Percentage of Attorneys Mentioning Response
Judge	16	5	19%	10	20%	1	14%	19%
Arbitrator	13	3	12%	10	20%	0	0%	16%
Mediator	1	0	0%	1	2%	0	0%	1%
Jury	5	2	8%	2	4%	1	14%	6%
Nature of Suit	41	15	58%	21	42%	5	71%	49%
No Preference	7	1	4%	6	12%	0	0%	8%
	<u>83</u>							



TABLE 6

EFFECT OF ATTORNEY VIEWS ON THE AAA  
MEETING ON SPEED OF DISPOSITION

Effect	Total Number of Attorneys Mentioning Effect	Experimental Group	%	Control Group	%	Pending Group	%	Percentage of Attorneys Mentioning Effect
Yes-Case Speeded Up	21	12	46%	8	16%	1	14%	25%
No-Case Slowed Down	15	5	19%	10	20%	0	0%	18%
No Appreciable Effect	30	5	19%	23	46%	2	29%	36%
Case Pending	7	1	4%	4	8%	2	29%	8%
Don't Know	9	3	12%	5	18%	1	14%	11%
No Opinion	1	0	0%	0	0%	1	14%	1%
	<u>83</u>							

TABLE 7

ATTORNEY VIEWS OF COST TO LITIGANT AS  
A FACTOR IN CHOOSING ADR OR ADJUDICATION

Was Cost A Factor?	Total Number of Attorneys Mentioning Perception	Experimental		Control		Pending Group	Percentage of Attorneys Mentioning Perception
		Group	%	Group	%		
Yes	50	15	58%	31	62%	4	57%
No	9	5	19%	4	8%	0	0%
Depends on Whether you represent the plaintiff or defendant	6	2	8%	3	6%	1	14%
Depends on type of case (e.g., personal injury)	13	2	8%	10	2%	1	14%
No Opinion	5	2	8%	2	4%	1	14%
	83						6%

TABLE 8

ATTORNEY PERCEPTION OF TIME SAVINGS TO  
LITIGANT AS A FACTOR IN CHOOSING ADR  
OR ADJUDICATION

Was Time Savings a factor?	Total Number of Attorneys Mentioning Perception	Experimental Group	%	Control Group	%	Pending Group	%	Percentage of Attorneys Mentioning Perception
Yes	57	17	65%	35	70%	5	71%	69%
No	18	6	23%	11	22%	1	14%	22%
No Opinion	8	3	12%	4	8%	1	14%	10%
	83							

TABLE 9  
ATTORNEYS' LEVELS OF SATISFACTION WITH ADR METHODS

Response	Total Number of Attorneys Mentioning Response	Experimental Group	%	Control Group	%	Pending Group	%	Percentage of Attorneys Mentioning Response
Very Satisfied	6	2	8%	4	8%	0	0%	7%
Satisfied	40	15	58%	20	40%	5	71%	48%
Not Satisfied	14	6	23%	8	16%	0	0%	17%
No Experience	14	3	12%	10	20%	1	14%	17%
No Opinion	9	0	0%	8	16%	1	14%	11%
	83							

Table 3 shows overwhelming approval (85%) of the attorneys in the case referral program which supports hypothesis 4. There appears to be a high level of satisfaction in all groups exposed to the process.

Table 4 demonstrates that the attorneys view the following factors in descending order of importance: the nature of the action (54%), suitability of the case for ADR (46%) and agreement by all parties concerned (35%). The Attorney Questionnaire results as summarized in Table 4 support hypotheses 1 and 2. Some factors which may have impinged on this finding are: dissatisfaction with ADR methods (17%, Table 9), disapproval with the Program (11%, Table 3), and the perception that the AAA meeting has no appreciable effect on the speed of disposition (36%, Table 6).

Table 5 reveals convincing evidence to support hypotheses 1 and 2. While 19% of the attorney respondents prefer a judge to hear the case, and 16% prefer an arbitrator, 49% indicated that their preference as to who should hear the case should be based on the nature of the suit.

Table 6 indicates that 25% of the respondents overall believed that the AAA meeting had the effect of speeding up the process; 18%, that the meeting slowed down the process; and 36%, that the meeting had no appreciable effect on the speed of disposition. The responses of the control and experimental groups in Table 6 are in fact "mirror images" of one another; in other words, there are as many respondents in both groups who

believe that the meeting resulted in time savings as those who did not have that perception. However, the analysis of the case data shows that while the control group attorneys declined to pursue a method of ADR, the data points to 10 settlements (out of 45 cases which were returned to the court) soon after both the AAA meeting and the case's return to the court docket. The "speeding up" perception suggests that the AAA meeting itself may have had some influence over certain decisions made by members of the control group on the part of 16% of the control group respondents. This could be interpreted to mean that after the AAA meeting, the parties were able to focus on the issues which led to settlement. The factors which may have affected these settlements, generally involve attorney perception of costs and time savings: e.g., 16% (see Table 7) indicated that in connection with cost considerations, the type of case was a factor in the decision while 7% (see Table 7) said it depended on whether the client was a plaintiff or a defendant; and 69% (see Table 8) were generally in favor of giving consideration to time savings when making a decision to choose ADR or adjudication.

Tables 7 and 8 show that the attorney respondents consider cost savings (time, money, etc.) to the litigant when deciding to choose ADR or adjudication, thus offering some confirmation of hypothesis 3.

According to Table 9, 55% of the attorney respondents are generally satisfied with ADR methods, supporting hypotheses 1 and 3.

Seven judges who have referred cases to the program (the experimental group), responded to the questionnaire; eight of the 11 randomly selected judges who had not referred cases (the control group) responded. The 15 respondents represent about 40% of the members of the Southern District of New York bench.

Of the 15 judges who responded overall, 3 strongly agreed with the statement that "the Alternative Dispute Resolution (ADR) program serves an essential function in the judicial system", 3 simply agreed, 3 agreed with the qualification that the word "essential" be removed or changed to "useful", 2 disagreed, 1 strongly disagreed, and finally, 3 had no opinion. Nine or 60% of the judge respondents endorsed the use of alternative methods of dispute resolution.

In response to the question, "Do you approve of the Pilot Case Referral Program?," there appears to be overwhelming approval among 14 of the 15 judges. Four strongly approved -- while 10 indicated approval. One judge did not respond but offered the following response: "A judge who wishes to participate should be free to do so."

On both of the experimental and control group questionnaires, the judges were asked: "Do you have a preference as to whom a case should be referred?" The overwhelming consensus in each group -- 5 of 7 judges in the control group and 5 of 8 judges in the experimental group (10 or 67% of the total number of respondents) -- is that the decision to refer a case is dependent upon the nature of the action or type of case. Two

members of the control group (25%) indicate they prefer to refer a case to an arbitrator or a mediator. One judge in the experimental group responded with the following statement: "I use a magistrate for non-jury cases where parties request settlement assistance. I use AAA when the nature of action suggests litigation is a poor dispute resolution vehicle". Another member of the experimental group did not respond to the question.

In reference to Mr. Mecham's statement regarding the Judicial Conference's proposed elimination of diversity of citizenship as a basis of federal court jurisdiction in his communication to Mr. Rodino on March 4, 1987:

"The increasing volume of diversity of citizenship actions being filed is an unwarranted diversion of the limited resources of the Federal courts from their primary responsibility to determine issues of Federal law. The Judicial Conference believes that the time has arrived to eliminate, at least substantially reduce, the impact of diversity litigation on the workloads of the Federal courts."

11 of the 15 respondents (73%) agreed or strongly agreed, while the remaining 4 (27%) disagreed or strongly disagreed.

There was significant agreement among 11 (73%) of the judges respondents with 3 having no opinion, and 1 in disagreement, with the statement: "Referral of certain civil actions to ADR have a positive effect on the costs of litigation." This seems to be consistent with the judges' general approval of alternative methods of dispute resolution.

Similarly, there is general agreement (12 of 15, or 80%)



with Chief Justice Rehnquist's supporting remarks in his 1986 year-end report in connection with Chief Justice Burger's efforts to encourage the federal judicial to experiment with court-annexed arbitration and to be aware of alternative dispute resolution mechanisms. Two judges indicated that they had no opinion with respect to Chief Justice Rehnquist's comments. One judge disagreed with them, explaining:

Parties are perfectly free to agree among themselves to arbitrate or have some other form of ADR. If they come to court, presumably this means that at least one of the parties to a dispute wishes to exercise his legal right to avail himself of the judiciary, established by constitution and statute. An exception to this, of course, is where the bringing of the lawsuit violates an arbitration agreement. If the parties have not agreed to arbitrate, it seems to me that the court should fulfill its function and handle the lawsuit. I do not see that it is a legitimate activity of the court to shunt cases off to ADR. (Source: Confidential Response to Control Group Questionnaire For Randomly Selected Judges Who Have Not Referred Cases - see Appendix IV).

The control group judges were asked to indicate whether they agreed or disagreed with several statements. Of the 8 control group respondents, the majority (5 of 8) agreed that "litigants should have the privilege of having the disputes handled by a judge rather than a designee", with 2 in disagreement, and 1 not understanding the proposition. The majority of the respondents (6 of 8) agreed with the proposition that "there are circumstances when you would consider referring a matter to an appointee for resolution", with one in strong disagreement and

one having no opinion. One judge, who agreed, explained the type of circumstances when case referral is appropriate -- specifically, to paraphrase that judge's words, when it is clear that an early resolution would result if handled by an arbitrator or a magistrate. One half of the control group respondents disagreed with the statement that "the quality of justice is affected by the use of ADR" with one judge strongly agreeing, and the remaining three having no opinion. A majority of the control group respondents (6 of 8) agreed that "certain types of cases that do not involve extended or complex proceeding can be considered for ADR" with one judge in strong disagreement, and one having no opinion. Five judges in the control group regarded an unsatisfactory level of pending cases as a cause for requiring the court to consider ADR, with 3 in disagreement (2 of the 3 in strong disagreement) with the statement.

The experimental group of judges were asked to respond to a separate set of questions (see Appendix III). Of the 7 respondents, there was overwhelming satisfaction with ADR methods generally. When asked to rank the importance of certain factors in a decision to refer a case to the AAA, the suitability of the case for ADR ranked the highest, agreement by all parties concerned ranked second; and the nature of the action, third. One judge emphasized that the suitability of the case for ADR and agreement by all parties concerned are both of equal importance and ranked them equally.

In response to how a case should be treated statistically

when it is referred to the AAA, 3 would put the case in suspense, 3 would maintain the case on their docket, and 1 would terminate it on the docket with leave to reopen. The responses reveal a range of ways in which the cases could be or are to be treated statistically.

As to whether the mandatory AAA meeting affected the speed of disposition, 2 judges believe it did speed up the process, 1 indicated it slowed down the process, 2 felt it had no appreciable effect, and 2 had no opinion. When asked to recall what happened after the AAA meeting, 3 judges indicate that the cases usually settle, 1 indicates that the parties select a method of ADR, and another that the cases usually proceed to jury or court trial, (with 2 having no observation).

Overwhelmingly, however, the judges in the experimental group concur that cost and time savings to the litigants are factors in the decision to choose a method of ADR or adjudication. One judge indicated that cost considerations depend on the type of case (e.g., personal injury).

#### CONCLUSIONS AND RECOMMENDATIONS

It appears that the AAA case referral program offers an expedited framework. Reflecting on the causal model, it is clear that the backlog has been reduced by accepting the ADR award, and some settlements resulted from the mandatory AAA meeting. Those cases using an ADR method were resolved more speedily than those that did not. However, it is not clear whether the AAA meeting influenced the speed of disposition, or whether as the attorneys

seem to indicate, has more to do with the nature of suit and its "ripeness" for settlement.

The evidence supports the hypotheses that using ADR does:

1. Result in reduction of time and expense in connection with civil litigation.
2. Maintain the same level of satisfaction with justice.
3. Result in the speedier resolution of cases.
4. Allow judges more time for complex, protracted litigation.

In light of the findings, it is recommended that the program be continued and a local rule be put in place relieving the program of its pilot status and making it a permanent part of the court's procedures.

#### SELECTED READINGS

1. Kritzer, Herbert M. and Anderson, Jill F., "The Arbitration Alternative: A comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts", The Justice System Journal, Volume 8, #1, 1983.
2. Lind, A. and J. Shepard. Evaluation of Court-Annexed Arbitration in Three Federal District Courts. Washington, D.C.: Federal Judicial Center, 1981.
3. Macauley, Stewart. "An Empirical View of Contract," Wisconsin Law Review, 1985, p. 465.
4. McDermott, John T., "Arbitration and the Courts", The Justice System Journal, Volume 11, #2, 1986, p. 248.
5. Metrick, Dennis L. "The Benefits of Research for Management: The Case of a Civil Arbitration Program", The Justice System Journal, Volume 9, #1, 1984, p.111.
6. Pearson, Jessica, "An Evaluation of Alternatives to Court Adjudication", The Justice System Journal, Volume 7, #3, 1982, p.420.

March 20, 1987

Dear ,

On behalf of the Court, I am conducting an evaluation of the Southern District of New York's Pilot Arbitration Mediation Program. According to the record, you entered an appearance in an action which was referred to the American Arbitration Association to consider an alternative method of dispute resolution (ADR). Every attorney who participated in the program is being asked to complete the enclosed questionnaire.

Please complete the questionnaire, and return it to me. If I have not heard from you by return mail within one week of the date of this letter, I will contact you by telephone. I would greatly appreciate it if you could take a few minutes of your time to answer these questions.

You may be assured that your answers will be kept in strictest confidence.

Thanking you in advance for your cooperation.

Sincerely yours,

Hallie B. Stephenson  
Administrative Assistant  
to the District Court Executive  
(tel.212-791-9326)