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## I. LEGISLATION

### A. Article 21-A of the New York State Judiciary Law

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#### **§ 849-a. Definitions.** For the purposes of this article:

1. "Center" means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
2. "Mediator" means an impartial person who assists in the resolution of a dispute.
3. "Grant recipient" means any nonprofit organization that administers a community dispute resolution center pursuant to this article, and is organized for the resolution of disputes or for religious, charitable or educational purposes.

#### **§ 849-b. Establishment and administration of centers.**

1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.
2. Every center shall be operated by a grant recipient.
3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.
4. A center shall not be eligible for funds under this article unless:
  - (a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;
  - (b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;
  - (c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;

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- (d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;
  - (e) it does not make monetary awards except upon consent of the parties and such awards do not exceed the monetary jurisdiction of the small claims part of the justice court, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the criminal procedure law, a monetary award not in excess of five thousand dollars may be made; and
  - (f) it does not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging: (i) a class A felony, or (ii) a violent felony offense as defined in section 70.02 of the penal law, or (iii) any drug offense as defined in article two hundred twenty of the penal law, or (iv) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the penal law, or a felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of such law.
5. Parties must be provided in advance of the dispute resolution process with a written statement relating:
    - (a) their rights and obligations;
    - (b) the nature of the dispute;
    - (c) their right to call and examine witnesses;
    - (d) that a written decision with the reasons therefor will be rendered; and
    - (e) that the dispute resolution process will be final and binding upon the parties.
  6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

**§ 849-c. Application procedures.**

1. Funds appropriated or available for the purposes of this article may be allocated for programs proposed by eligible centers. Nothing in this article shall preclude existing resolution centers from applying for funds made available under this article provided that they are otherwise in compliance with this article.
2. Centers shall be selected by the chief administrator from applications submitted.

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3. The chief administrator shall require that applications submitted for funding include, but need not be limited to the following:
  - (a) The cost of each of the proposed centers components including the proposed compensation of employees.
  - (b) A description of the proposed area of service and number of participants who may be served.
  - (c) A description of available dispute resolution services and facilities within the proposed geographical area.
  - (d) A description of the applicant's proposed program, including support of civic groups, social services agencies and criminal justice agencies to accept and make referrals; the present availability of resources; and the applicant's administrative capacity.
  - (e) Such additional information as is determined to be needed pursuant to rules of the chief administrator.

**§ 849-d. Payment procedures.**

1. Upon the approval of the chief administrator, funds appropriated or available for the purposes of this article shall be used for the costs of operation of approved programs. The methods of payment or reimbursement for dispute resolution costs shall be specified by the chief administrator and may vary among centers. All such arrangements shall conform to the eligibility criteria of this article and the rules and regulations of the chief administrator.
2. The state share of the cost of any center approved under this section shall include a basic grant of up to twenty thousand dollars for each county served by the center and may include an additional amount not exceeding fifty per centum of the difference between the approved estimated cost of the program and the basic grant.

**§ 849-e. Funding.**

1. The chief administrator may accept and disburse from any public or private agency or person, any money for the purposes of this article.
2. The chief administrator may also receive and disburse federal funds for purposes of this article, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.
  - (a) A grant recipient may accept funds from any public or private agency or person for the purposes of this article.
  - (b) The state comptroller, the chief administrator and their authorized representatives, shall have the power to inspect, examine and audit the fiscal affairs of the program.

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(c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal cost.

**§ 849-f. Rules and regulations.**

The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article.

**§ 849-g. Reports.**

Each resolution center funded pursuant to this article shall annually provide the chief administrator with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, number of parties serviced, number of disputes resolved, nature of resolution, amount and type of awards, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information the chief administrator may require and the cost of hearings as the chief administrator requires. The chief administrator shall thereafter report annually to the governor and the legislature regarding the operation and success of the centers funded pursuant to this article. Such annual report shall also evaluate and make recommendations regarding the operation and success of such center.

**B. Section 1 of the CDRCP Enabling Legislation (Laws of 1981, Chapter 847)**

The resolution of certain criminal matters can be costly and complex in the context of a formal judicial proceeding. The involved procedures and the attendant constraints are not always conducive to affording the greatest assurance to the public and persons involved against the recurrence of such conduct. Each individual dispute, which is not adequately resolved may be of small social or economic magnitude, but taken collectively such disputes are of enormous social or economic consequence.

To assist in the resolution of disputes in a complex society, there is a compelling need for the creation of dispute resolution centers as alternatives to structured judicial settings. Community dispute resolution centers can meet the needs of their community by providing forums in which persons can participate in the resolution of disputes in an informal atmosphere without restraint and without intimidation. The utilization of local resources, including volunteers and available building space, such as space in public facilities, can provide for accessible, cost-effective resolutions of minor disputes. While there presently exists centers where dispute resolution is available, the lack of financial resources limits their operation. Community dispute resolution centers can serve the interest of the citizenry and promote quick and voluntary resolution of certain criminal matters.

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## C. Article 75 of the Civil Practice Law and Rules (Arbitration)

### Section

- 7501 Effect of arbitration agreement.
- 7502 Applications to the court; venue; statutes of limitation; provisional remedies.
- 7503 Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.
- 7504 Court appointment of arbitrator.
- 7505 Powers of arbitrator.
- 7506 Hearing.
- 7507 Award; form; time; delivery.
- 7508 Award by confession.
- 7509 Modification of award by arbitrator.
- 7510 Confirmation of award.
- 7511 Vacating or modifying award.
- 7512 Death or incompetency of a party.
- 7513 Fees and expenses.
- 7514 Judgment on an award.

### **§ 7501 Effect of arbitration agreement.**

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

### **§ 7502 Applications to the court; venue; statutes of limitation; provisional remedies.**

- (a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county, or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

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- (b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators, who may, in their sole discretion, apply or not apply the bar. Except as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award.
- (c) Provisional remedies. The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a).

**§ 7503 Application to Compel or Stay Arbitration; Stay of Action; Notice of Intention to Arbitrate.**

- (a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrated is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.
- (b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

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- (c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.

**§ 7504 Court Appointment of Arbitrator.**

If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.

**§7505 Powers of Arbitrator.**

An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas. An arbitrator has the power to administer oaths.

**§ 7506 Hearing.**

- (a) Oath of arbitrator. Before hearing any testimony, an arbitrator shall be sworn to hear and decide the controversy faithfully and fairly by an officer authorized to administer an oath.
- (b) Time and place. The arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing. The arbitrator may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrator to proceed promptly with the hearing and determination of the controversy.
- (c) Evidence. The parties are entitled to be heard, to present evidence and to cross-examine witnesses. Notwithstanding the failure of a party duly notified to appear,

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the arbitrator may hear and determine the controversy upon the evidence produced.

- (d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney.
- (e) Determination by majority. The hearing shall be conducted by all the arbitrators, but a majority may determine any question and render an award.
- (f) Waiver. Except as provided in subdivision (d), a requirement of this section may be waived by written consent of the parties and it is waived if the parties continue with the arbitration without objection.

**§ 7507 Award; Form; Time; Delivery.**

Except as provided in section 7508, the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him. The arbitrator shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.

**§ 7508 Award by Confession.**

- (a) When available. An award by confession may be made for money due or to become due at any time before an award is otherwise made. The award shall be based upon a statement verified by each party, containing an authorization to make the award, the sum of the award or the method of ascertaining it, and the facts constituting the liability.
- (b) Time of award. The award may be made at any time within three months after the statement is verified.
- (c) Person or agency making award. The award may be made by an arbitrator or by the agency or person named by the parties to designate the arbitrator.

**§ 7509 Modification of Award by Arbitrator.**

On written application of a party to the arbitrators within twenty days after delivery of the award to the applicant, the arbitrators may modify the award upon the grounds stated in subdivision (c) of section 7511. Written notice of the application shall be given to other parties to the arbitration. Written objection to modification must be served on the arbitrators and other parties to the arbitration

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within ten days of receipt of the notice. The arbitrators shall dispose of any application made under this section in writing, signed and acknowledged by them, within thirty days after either written objection to modification has been served on them or the time for serving said objection has expired, whichever is earlier. The parties may in writing extend the time for such disposition either before or after its expiration.

**§ 7510 Confirmation of Award.**

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.

**§ 7511 Vacating or Modifying Award.**

- (a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.
- (b) Grounds for vacating.
  1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
    - (i) corruption, fraud or misconduct in procuring the award; or
    - (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
    - (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
    - (iv) failure to follow the procedure of this article, unless the party applying to vacate continued with the arbitration with notice of the defect and without objection.
  2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:
    - (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or
    - (ii) a valid agreement to arbitrate was not made; or
    - (iii) the agreement to arbitrate had not been complied with; or
    - (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

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- (c) Grounds for modifying. The court shall modify the award if:
1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
  2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
  3. the award is imperfect in a matter of form, not affecting the merits of the controversy.
- (d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.
- (e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

**§ 7512 Death or Incompetency of a Party.**

Where a party dies after making a written agreement to submit a controversy to arbitration, the proceeding may be begun or continued upon the application of, or upon notice to, his executor or administrator or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Where a committee of the property or of the person of a party to such an agreement is appointed, the proceedings may be continued upon the application of, or notice to, the committee. Upon the death or incompetence of a party, the court may extend the time within which an application to confirm, vacate or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict.

**§ 7513 Fees and expenses.**

Unless otherwise provided in the agreement to arbitrate, the arbitrator's expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires.

**§ 7514 Judgment on an award.**

- (a) Entry. A judgment shall be entered upon the confirmation of an award.

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- (b) Judgment-roll. The judgment-roll consists of the original or a copy of the agreement and each written extension of time within which to make an award; the statement required by section 7508 where the award was by confession; the award; each paper submitted to the court and each order of the court upon an application under sections 7510 and 7511; and a copy of the judgment.

#### D. Penal Law

##### **§ 70.02 Sentence of imprisonment for a violent felony offense.**

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, a class D violent felony offense, or a class E violent felony offense, defined as follows:
  - (a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnaping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, rape in the first degree as defined in section 130.35, sodomy in the first degree as defined in section 130.50, aggravated sexual abuse as defined in section 130.70, kidnaping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, criminal possession of a dangerous weapon in the first degree as defined in section 265.04, criminal possession of a firearm in the first degree as defined in section 265.09, [and] aggravated assault upon a peace officer as defined in section 120.11, and intimidating a victim or witness in the first degree as defined in section 215.17.
  - (b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a); assault in the first degree as defined in section 120.10, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03 and criminal use of a firearm in the second degree as defined in section 265.08.
  - (c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); assault in the second degree as defined in section 120.05, sexual abuse in the first degree as defined in section 130.65, criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02, [and] criminal sale of a firearm in the first degree as defined in section 265.12, and intimidating a victim or witness in the second degree as defined in section 215.16.
  - (d) Class E violent felony offenses: an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivisions

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four and five of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law.

2. Authorized sentence.
  - (a) The sentence imposed upon a person who stands convicted of a class B or class C violent felony offense must be an indeterminate sentence of imprisonment. Except as provided in subdivision five of section 60.05, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.
  - (b) Except as provided in subdivision five of this section, the sentence imposed upon a person who stands convicted of a class D violent felony offense, other than the offenses of criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02 and criminal sale of a firearm in the first degree as defined in section 265.12, must be in accordance with the applicable provisions of this chapter relating to sentencing for class D felonies.
  - (c) Except as provided in subdivision six of section 60.05, the sentence imposed upon a person who stands convicted of the class D violent felony offenses of criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02, or criminal sale of a firearm in the first degree as defined in section 265.12 or the class E violent felonies of attempted criminal possession of a weapon in the third degree as defined in subdivisions four and five of section 265.02 must be a sentence of an indeterminate period of imprisonment, or, in the alternative, a definite sentence of imprisonment for a period of no less than one year, except that:
    - (i) the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that such sentence would be unduly harsh; and
    - (ii) the court may apply the provisions of paragraphs (b) and (c) of subdivision five of this section when imposing a sentence upon a person who has previously been convicted of a class A misdemeanor defined in this chapter in the five years immediately preceding the commission of the offense.
3. Maximum term of sentence. The maximum term of an indeterminate sentence for a violent felony offense must be fixed by the court as follows:
  - (a) For a class B felony, the term must be at least six years and must not exceed twenty-five years; and

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- (b) For a class C felony, the term must be at least four and one-half years and must not exceed fifteen years.
- 4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a violent felony offense must be fixed by the court at one-third of the maximum term imposed and must be specified in the sentence; provided, however, that the court may impose a minimum term which is between one-third the maximum and one-half the maximum term imposed when the sentence is for a conviction of a class B armed felony offense.
- 5. (a) Except as provided in paragraph (b) of this section, where a plea of guilty to a class D violent felony offense is entered pursuant to section 200.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose an indeterminate sentence of imprisonment pursuant to section 70.00.
- (b) In any case in which the provisions of paragraph (a) hereof or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than an indeterminate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that one or more of the following factors exist: (I) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony.
- (c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that an indeterminate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

**§ 70.04 Sentence of imprisonment for second violent felony offender**

- 1. Definition of second violent felony offender.
- (a) A second violent felony offender is a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to a predicate violent felony conviction as defined in paragraph (b) of this subdivision.

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- (b) For the purposes of determining whether a prior conviction is a predicate violent felony conviction the following criteria shall apply.
- (i) The conviction must have been in this state of a class A felony (other than one defined in article two hundred twenty) or of a violent felony offense as defined in subdivision one of section 70.02, or of an offense defined by the penal law in effect prior to September first, nineteen hundred sixty-seven, which includes all of the essential elements of any such felony, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;
  - (ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;
  - (iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;
  - (iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;
  - (v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;
  - (vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate violent felony conviction.
2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second violent felony offender the court must impose an indeterminate sentence of imprisonment. Except where sentence is imposed in accordance with the provisions of section 70.10, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.
  3. Maximum term of sentence. The maximum term of an indeterminate sentence for a second violent felony offender must be fixed by the court as follows:
    - (a) For a class B felony, the term must be at least twelve years and must not exceed twenty-five years;

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- (b) For a class C felony, the term must be at least eight years and must not exceed fifteen years; and
  - (c) For a class D felony, the term must be at least five years and must not exceed seven years.
  - (d) For a class E felony, the term must be at least four years.
4. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence for a second violent felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.

**§ 70.06 Sentence of imprisonment for second felony offender.**

- 1. Definition of second felony offender.
  - (a) A second felony offender is a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony defined in this chapter, other than a class A-1 felony, after having previously been subject to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.
  - (b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:
    - (i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence of a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irregardless of whether such sentence was imposed;
    - (ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;
    - (iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;
    - (iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;
    - (v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;

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- (vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate felony conviction.
2. Authorized sentence. Except as provided in subdivision five of this section, when the court has found, pursuant to the provision of the criminal procedure law, that a person is a second felony offender the court must impose an indeterminate sentence of imprisonment. The maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.
  3. Maximum term of sentence. Except as provided in subdivision five of this section, the maximum term of an indeterminate sentence for a second felony offender must be fixed by the court as follows:
    - (a) For a class A-II felony, the term must be life imprisonment;
    - (b) For a class B felony, the term must be at least nine years and must not exceed twenty-five years;
    - (c) For a class C felony, the term must be at least six years and must not exceed fifteen years;
    - (d) For a class D felony, the term must be at least four years and must not exceed seven years; and
    - (e) For a class E felony, the term must be at least three years and must not exceed four years.
  4. Minimum period of imprisonment.
    - (a) the minimum period of imprisonment for second felony offender convicted of a class A-II felony must be fixed by the court at no less than six years and not to exceed twelve and one-half years and must be specified in the sentence.
    - (b) Except as provided in paragraph (a), the minimum period of imprisonment under an indeterminate sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence.
  5. Lifetime probation. Notwithstanding any other provision of law the court may sentence a person convicted of a class A-II felony or a class B felony defined in article two hundred twenty of this chapter to lifetime probation in accordance with the provisions of section 65.00.

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**§ 70.08 Sentence of imprisonment for persistent violent felony offender; criteria.**

1. Definition of persistent violent felony offender.
  - (a) A persistent violent felony offender is a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04.
  - (b) For the purpose of determining whether a person has two or more predicate violent felony convictions, the criteria set forth in paragraph (b) of subdivision one of section 70.04 shall apply.
2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent violent felony offender the court must impose an indeterminate sentence of imprisonment, the maximum term of which shall be life imprisonment. The minimum period of imprisonment under such sentence must be in accordance with subdivision three of this section.
3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate life sentence for a persistent violent felony offender must be fixed by the court as follows:
  - (a) For a class B felony, the minimum period must be at least ten years and must not exceed twenty-five years;
  - (b) For a class C felony, the minimum period must be at least eight years and must not exceed twenty-five years;
  - (c) For a class D felony, the minimum period must be at least six years and must not exceed twenty-five years.

**§ 70.10 Sentence of imprisonment for persistent felony offender.**

1. Definition of persistent felony offender.
  - (a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.
  - (b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:
    - (i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and
    - (ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

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(iii) that the defendant was not pardoned on the ground of innocence.

- (c) For the purposes of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.
2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04 or 70.06 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

**§ 220.00      Controlled substances; definitions.**

1. "Sell" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.
2. "Unlawfully" means in violation of article thirty-three of the public health law.
3. "Ounce" means an avoirdupois ounce as applied to solids or semi-solids and a fluid ounce as applied to liquids.
4. "Pound" means an avoirdupois pound.
5. "Controlled substance" means any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marijuana, but including concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of such law.
6. "Marihuana" means "marihuana" or "concentrated cannabis" as those terms are defined in section thirty-three hundred two of the public health law.
7. "Narcotic drug" means any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone.
8. "Narcotic preparation" means any controlled substance listed in schedule III(d) or III(e).
9. "Hallucinogen" means any controlled substance listed in schedule I(d)(5), (18), (19), (20), (21) and (22).
10. "Hallucinogenic substance" means any controlled substance listed in schedule I(d) other than concentrated cannabis, lysergic acid diethylamide, or an hallucinogen.
11. "Stimulant" means any controlled substance listed in schedule I(f) or II(d).

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12. "Dangerous depressant" means any controlled substance listed in schedule I(a)(2), (3), II(a), III(c)(3) or IV(c)(2), (31), (32), (40).
13. "Depressant" means any controlled substance listed in schedule IV(c) except (c)(2), (31), (32), (40).
14. "School grounds" means in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or within one thousand feet of the real property boundary line comprising any such school.
15. "Prescription for a controlled substance" means a direction or authorization, by means of an official New York state prescription form, a written prescription form or an oral prescription, which will permit a person to lawfully obtain a controlled substance from any person authorized to dispense controlled substances.

**§ 220.03 Criminal possession of a controlled substance in the seventh degree.**

A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance.

Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor.

**§ 220.05 Criminal possession of a controlled substance in the sixth degree.**

A person is guilty of criminal possession of a controlled substance in the sixth degree when he knowingly and unlawfully possesses one hundred or more but less than five hundred milligrams of undiluted phencyclidine.

Criminal possession of a controlled substance in the sixth degree is a class E felony.

**§ 220.06 Criminal possession of a controlled substance in the fifth degree.**

A person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses:

1. a controlled substance with intent to sell it; or
2. one or more preparations, compounds, mixtures or substances or an aggregate weight of one-half ounce or more containing a narcotic preparation; or
3. fifty milligrams or more of phencyclidine; or
4. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-quarter ounce or more containing concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of the public health law.

Criminal possession of a controlled substance in the fifth degree is a class D felony.

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**§ 220.09 Criminal possession of a controlled substance in the fourth degree.**

A person is guilty of criminal possession of a controlled substance in the fourth degree when he knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-eighth ounce or more containing a narcotic drug; or
2. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing methamphetamine, its salts, isomers or salts of isomers; or
3. one or more preparations, compounds, mixtures or substances of an aggregate weight of two ounces or more containing a narcotic preparation; or
4. one gram or more of a stimulant; or
5. one milligram or more of lysergic acid diethylamide; or
6. twenty-five milligrams or more of a hallucinogen; or
7. one gram or more of a hallucinogenic substance; or
8. ten ounces or more of a dangerous depressant; or
9. two pounds or more of a depressant; or
10. one or more preparations, compounds, mixtures or substances of an aggregate weight of one ounce or more containing concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of the public health law; or
11. two hundred fifty milligrams or more of phencyclidine; or
12. three hundred and sixty milligrams or more of methadone; or
13. fifty milligrams or more of phencyclidine with intent to sell it and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense.

Criminal possession of a controlled substance in the fourth degree is a class C felony.

**§ 220.16 Criminal possession of a controlled substance in the third degree.**

A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses:

1. a narcotic drug with intent to sell it; or
2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide, with intent to sell it and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or

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3. one gram or more of a stimulant with intent to sell it; or
4. one milligram or more of lysergic acid diethylamide with intent to sell it; or
5. twenty-five milligrams or more of hallucinogen with intent to sell it; or
6. one gram or more of a hallucinogen substance with intent to sell it; or
7. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-eighth ounce or more containing methamphetamine, its salts, isomers or salts of isomers with intent to sell it; or
8. five grams or more of a stimulant; or
9. five milligrams or more of lysergic acid diethylamide; or
10. one hundred twenty-five milligrams of a hallucinogen; or
11. five grams or more of a hallucinogenic substance; or
12. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing a narcotic drug, or
13. one thousand two hundred fifty milligrams or more of phencyclidine.

Criminal possession of a controlled substance in the third degree is a class B felony.

**§ 220.18 Criminal possession of a controlled substance in the second degree.**

A person is guilty of criminal possession of a controlled substance in the second degree when he knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances of an aggregate weight of two ounces or more containing a narcotic drug; or
2. one or more preparations, compounds, mixtures or substances of an aggregate weight of two ounces or more containing methamphetamine, its salts, isomers or salts of isomers; or
3. ten grams or more of a stimulant; or
4. twenty-five milligrams or more of lysergic acid diethylamide; or
5. six hundred twenty-five milligrams of a hallucinogen; or
6. twenty-five grams or more of a hallucinogenic substance; or
7. two thousand eight hundred eighty milligrams or more of methadone.

Criminal possession of a controlled substance in the second degree is a class A-II felony.

**§ 220.21 Criminal possession of a controlled substance in the first degree.**

A person is guilty of criminal possession of a controlled substance in the first degree when he knowingly and unlawfully possesses:

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1. one or more preparations, compounds, mixtures or substances of an aggregate weight of four ounces or more containing a narcotic drug; or
2. five thousand seven hundred and sixty milligrams or more of methadone.

Criminal possession of a controlled substance in the first degree is a class A-I felony.

**§ 220.25 Criminal possession of a controlled substance; presumption.**

1. The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when he received possession thereof, or (c) when the controlled substance is concealed upon the person of one of the occupants.
2. The presence of a narcotic drug, narcotic preparation, marijuana or phencyclidine in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found; except that such presumption does not apply to any such persons if (a) one of them, having obtained such controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when he received possession thereof, or (b) one of them has such controlled substance concealed upon his person.

**§ 220.31 Criminal sale of a controlled substance in the fifth degree.**

A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance.

Criminal sale of a controlled substance in the fifth degree is a class D felony.

**§ 220.34 Criminal sale of a controlled substance in the fourth degree.**

A person is guilty of criminal sale of a controlled substance in the fourth degree when he knowingly and unlawfully sells:

1. a narcotic preparation; or
2. ten ounces or more of a dangerous depressant or two pounds or more of a depressant; or

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3. concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of the public health law; or
4. fifty milligrams or more of phencyclidine; or
5. methadone; or
6. any amount of phencyclidine and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense; or
7. a controlled substance in violation of section 220.31 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds.

Criminal sale of a controlled substance in the fourth degree is a class C felony.

**§ 220.39 Criminal sale of a controlled substance in the third degree.**

A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells:

1. a narcotic drug; or
2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or
3. one gram or more of a stimulant; or
4. one milligram or more of lysergic acid diethylamide; or
5. twenty-five milligrams or more of a hallucinogen; or
6. one gram or more of a hallucinogenic substance; or
7. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-eighth ounce or more containing methamphetamine, its salts, isomers or salts of isomers; or
8. two hundred fifty milligrams or more of phencyclidine; or
9. a narcotic preparation to a person less than twenty-one years old.

Criminal sale of a controlled substance in the third degree is a class B felony.

**§ 220.41 Criminal sale of a controlled substance in the second degree.**

A person is guilty of criminal sale of a controlled substance in the second degree when he knowingly and unlawfully sells:

1. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing a narcotic drug; or
2. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing methamphetamine, its salts, isomers or salts of isomers; or

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3. five grams or more of a stimulant; or
4. five milligrams or more of lysergic acid diethylamide; or
5. one hundred twenty-five milligrams of a hallucinogen; or
6. five grams or more of a hallucinogenic substance; or
7. three hundred and sixty milligrams or more of methadone.

Criminal sale of a controlled substance in the second degree is a class A-II felony.

**§ 220.43 Criminal sale of a controlled substance in the first degree.**

A person is guilty of criminal sale of a controlled substance in the first degree when he knowingly and unlawfully sells:

1. one or more preparations, compounds, mixtures or substances of an aggregate weight of two or more ounces containing a narcotic drug; or
2. two thousand eight hundred and eighty milligrams or more of methadone.

Criminal sale of a controlled substance in the first degree is a class A-I felony.

**§ 220.44 Criminal sale of a controlled substance in or near school grounds.**

A person is guilty of criminal sale of a controlled substance in or near school grounds when he knowingly and unlawfully sells:

1. a controlled substance in violation of any one of subdivisions one through six of section 220.34 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds; or
2. a controlled substance in violation of any one of subdivisions one through eight of section 220.39 of this chapter to a person less than nineteen years of age, when such sale takes place upon school grounds.

Criminal sale of a controlled substance in or near school grounds is a class B felony.

**§ 220.45 Criminally possessing a hypodermic instrument.**

A person is guilty of criminally possessing a hypodermic instrument when he knowingly and unlawfully possesses or sells a hypodermic syringe or hypodermic needle.

Criminally possessing a hypodermic instrument is a class A misdemeanor.

**§ 220.46 Criminal injection of a narcotic drug.**

A person is guilty of criminal injection of a narcotic drug when he knowingly and unlawfully possesses a narcotic drug and he intentionally injects by means of a hypodermic syringe or hypodermic needle all or any portion of that drug into the body of another person with the latter's consent.

Criminal injection of a narcotic drug is a class E felony.

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**§ 220.50      Criminally using drug paraphernalia in the second degree.**

A person is guilty of criminally using drug paraphernalia in the second degree when he knowingly possesses or sells:

1. Diluents, dilutants or adulterants, including but not limited to, any of the following: quinine hydrochloride, mannitol, mannite, lactos or dextrose, adapted for the dilution of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use, the same for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant; or
2. Gelatin capsules, glassine envelopes or any other material suitable for the packaging of individual quantities of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use, the same for the purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant.

Criminally using drug paraphernalia in the second degree is a class A misdemeanor.

**§ 220.55      Criminally using drug paraphernalia in the first degree.**

A person is guilty of criminally using drug paraphernalia in the first degree when he commits the crime of criminally using drug paraphernalia in the second degree and he has previously been convicted of criminally using drug paraphernalia in the second degree.

Criminally using drug paraphernalia in the first degree is a class D felony.

**§ 220.60      Criminal possession of precursors of controlled substances.**

A person is guilty of criminal possession of precursors of controlled substances when, with intent to manufacture a controlled substance unlawfully, he possesses at the same time:

- (a) carbamide (urea) and propanedioc and malonic acid or its derivatives; or
- (b) ergot or an ergot derivative and diethylamine or dimethylformamide or diethylamide; or
- (c) phenylacetone (1-phenyl-2 propanone) and hydroxylamine or ammonia or formamide or benzaldehyde or nitroethane or methylamine;
- (d) pentazocine and methyl iodide; or
- (e) phenylacetone nitrile and dichlorodiethyl methylamine or dichlorodiethyl benzylamine; or
- (f) diethylphenylacetone nitrile and dimethylaminoisopropyl chloride; or
- (g) piperidine and cyclohexanone and bromobenzene and lithium or magnesium; or

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(h) 2, 5-dimethoxy benzaldehyde and reducing agent.

Criminal possession of precursors of controlled substances is a class E felony.

**§ 220.65 Criminal sale of a prescription for a controlled substance.**

A person is guilty of criminal sale of a prescription for a controlled substance when, being a practitioner, as that term is defined in section thirty-three hundred two of the public health law, he knowingly and unlawfully sells a prescription for a controlled substance. For the purposes of this section, a person sells a prescription for a controlled substance unlawfully when he does so other than in good faith in the course of his professional practice. Criminal sale of a prescription is a class C felony.

**II. REGULATIONS**

**A. Rules of the Chief Administrator (22 New York Code of Rules and Regulations Part 116)**

**§ 116.1 Definitions**

- (a) Center means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
- (b) Mediator means an impartial person who assists in the resolution of a dispute.
- (c) Grant recipient means any organization that administers a community dispute resolution center receiving funds pursuant to this Part.
- (d) Chief Administrator means the Chief Administrator of the Courts or his designee.

**§ 116.2 Application**

- (a) The provisions of this Part shall apply to the funding of community centers organized to expeditiously resolve minor disputes, especially those matters that would otherwise be handled by the criminal justice system.
- (b) Funds available for disbursement pursuant to this Part shall include those funds appropriated by the State Legislature for said purposes, and shall also include funds received by the State from any public or private agency or person, including the Federal government, to be used for the purposes of this Part.

**§ 116.3 Eligibility**

To be eligible for funding pursuant to this Part, a center must meet the following conditions:

- (a) It must be administered by a nonprofit organization organized for the resolution of disputes or for religious, charitable or educational purposes.
- (b) It must provide neutral mediators who have received at least 25 hours of training in conflict resolution techniques.

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- (c) It must provide dispute resolution services without cost to indigents and at nominal or no cost to other participants.
- (d) It shall, whenever reasonably possible, make use of public facilities at free or nominal cost.
- (e) It must provide, during or at the conclusion of the dispute resolution process, a written agreement or decision, subscribed to by the parties, setting forth the settlement of the issues and future responsibilities of each party, and must make such agreement or decision available to a court which has adjourned a pending action pursuant to section 170.55 of the Criminal Procedure Law.
- (f) It may not make monetary awards except upon consent of the parties, and such awards may not exceed \$1,500, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the Criminal Procedure Law, a monetary award not in excess of \$5,000 may be made.
- (g) It may not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging:
  - (1) a class A felony; or
  - (2) a violent felony offense as defined in section 70.02 of the Penal Law; or
  - (3) any drug offense as defined in article 220 of the Penal Law; or
  - (4) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the Penal Law, or a felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of the Penal Law.
- (h) It must provide to parties, in advance of the dispute resolution process, a written statement relating:
  - (1) their rights and obligations;
  - (2) the nature of the dispute;
  - (3) their right to call and examine witnesses;
  - (4) that a written settlement or a written decision with the reasons therefor will be rendered; and
  - (5) that the dispute resolution process will be final and binding upon the parties.
- (i) It must permit all parties to appear with representatives, including counsel, and to present all relevant evidence relating to the dispute, including calling and examining witnesses.

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- (j) It must keep confidential all memoranda, work products or case files of a mediator, and must not disclose any communications relating to the subject matter of the resolution made during the resolution process by any participant, mediator or any person present at the dispute resolution.

#### **§ 116.4 Application Procedures**

Applications for funding pursuant to this Part shall be submitted to the Chief Administrator, and shall include the following information:

- (a) a description of the organization administering the center, including a description of any sponsoring organizations;
- (b) an itemized description of the annual cost of operating the proposed center, including the compensation of employees;
- (c) a description of the geographic area of service, the service population and the number of participants capable of being served on an annual basis;
- (d) a description of the facilities available in which the proposed center is to be operated;
- (e) a detailed description of the proposed program for dispute resolution, including the types of disputes to be handled and the cost, if any, to the participants;
- (f) a statement of the present availability of resources to fund the center;
- (g) a description of the applicant's administrative capacity to operate the center, including the educational, training and employment background of every member of the staff of the center;
- (h) a list of civic groups, social services agencies and criminal justice agencies available to accept and make referrals, written statements from these groups and agencies indicating an intent to accept and make referrals, and a description of how the program will be publicized to make potential referring agencies, the courts and the public aware of its availability;
- (i) a description of the past history of the operation of the center, including specific information for the past two years concerning the program, area of service, staff, source of funding, expenditures, referring agencies, number and types of disputes handled, and number and types of disputes resolved;
- (j) a list of all other available dispute resolution services and facilities within the proposed geographical area;
- (k) documentation that the center meets the eligibility requirements set forth in section 114.3 of this Subchapter; and
- (l) such other information as may be required by the Chief Administrator.

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### **§ 116.5 Approval**

- (a) The Chief Administrator shall select centers for funding pursuant to this Part and shall determine the amount of funds to be disbursed for each center within available appropriations.
- (b) No funds provided by the State shall be disbursed for any center in an amount greater than 50 per centum of the estimated annual cost of operating the program as determined by the Chief Administrator.
- (c) In determining the centers for which funds may be disbursed, the Chief Administrator shall consider:
  - (1) the need for the program in that geographical area;
  - (2) the structure and scope of the proposed program;
  - (3) the cost of operation;
  - (4) the availability of sources of funding;
  - (5) the adequacy and cost of facilities;
  - (6) the ability of the applicant to administer the program;
  - (7) the qualifications of the personnel staffing the center;
  - (8) the effectiveness of the program; and
  - (9) any other consideration which may affect the provision of dispute resolution services pursuant to this Part.
- (d) A center may be rejected if the Chief Administrator determines that it will be unable to comply with any of the conditions set forth in section 114.3 of this Subchapter.
- (e) Nothing herein shall require the Chief Administrator to approve funding for any applicant.

### **§ 116.6 Payment**

Payment of funds pursuant to this Part shall be made pursuant to contract entered into between the Unified Court System and the grant recipient.

### **§ 116.7 Program Evaluation**

- (a) The Chief Administrator shall monitor and evaluate each program receiving funds pursuant to this Part.
- (b) Each grant recipient shall provide to the Chief Administrator on a periodic basis as determined by the Chief Administrator the following information concerning its program:
  - (1) amount of, and purpose for which, all monies were expended;

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- (2) number of referrals received by category of cases and the source of each referral;
  - (3) number of parties serviced;
  - (4) number of disputes resolved;
  - (5) nature of the resolution of each dispute, including the type of award and amount of money awarded, if any;
  - (6) number of cases in which the parties complied with the award, including the nature of the dispute and award in each such case;
  - (7) number of returnees to the resolution process, including the nature of the dispute and award in each such case;
  - (8) duration of each hearing;
  - (9) estimated cost of each hearing; and
  - (10) any other information as required by the Chief Administrator.
- (c) The Chief Administrator shall have the power to inspect at any time the operation of any center receiving funds pursuant to this Part to determine whether the center is complying with the provisions of this Part and the terms of its contract, including the examination and auditing of the fiscal affairs of the program.
- (d) The Chief Administrator may halt the disbursement of funds pursuant to this Part at any time he determines that the program is not adequately providing services pursuant to this Part or that any of the provisions of this Part are being violated.

#### **§ 116.8 Records Retention**

- (a) All financial records of the grant recipient and center pertaining to funding received pursuant to this Part, shall be retained for a minimum of four years after the expiration of the contract entered into with the Unified Court System pursuant to this Part.
- (b) A copy of the written agreement of decision subscribed to by the parties, setting forth the settlement of the issues and future responsibilities of each party, referred to in section 116.3(e) of this Part, shall be retained for a period of six years after execution.
- (c) A fact sheet or summary of each case from which the center may compile the information required for program evaluation pursuant to section 116.7 of this Part, shall be retained for a period of six years after termination of the case.
- (d) No other time requirements for records retention shall apply unless otherwise contracted by the parties.

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## B. Opinion of the Attorney General

(Opinion Number F 83-17)

Hon. Robert Sise  
Chief Administrative Judge  
Office of Court Administration  
Agency Building 4—20th Floor  
Albany, New York 12223

Dear Judge Sise:

Your deputy counsel has asked whether certain mediators in the Community Dispute Resolution Centers Program (hereinafter "Dispute Program") are required to report evidence of child abuse under provisions of the Social Services Law, or whether such evidence is confidential under provisions of the Judiciary Law governing mediations in the Dispute Program.

The Dispute Program was established as a vehicle for the voluntary settlement of certain criminal matters in an informal setting as an alternative to more costly and complex formal judicial proceedings (L 1981, ch 847, § 1). With the assistance of State aid, Dispute Resolution Centers provide neutral mediators to resolve conflicts without cost to indigents and at nominal or no cost to other participants (Judiciary Law, § 849-b[1] and [4]). Decisions rendered are final and binding upon the parties (*id.*, § 849-b[5][e]). The confidentiality of Dispute Program proceedings is provided for as follows:

"all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication." (*Id.*, § 849-b[6].)

Section 413 of the Social Services Law requires the reporting of child abuse.

"The following persons and officials are required to report or cause a report to be made in accordance with this title when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child: any physician, surgeon, medical examiner, coroner, dentist, osteopath, optometrist, chiropractor, podiatrist, resident, intern, psychologist, registered nurse, hospital personnel engaged in the admission, examination, care or treatment of persons, a Christian Science practitioner, school official, social

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services worker, day care worker or any other child care or foster care worker, mental health professional, peace officer, police officer or law enforcement official. \* \* \* " (§ 413.)

A child protective service established by each local Department of Social Services is responsible for investigating or arranging for the investigation of reports of child abuse and for the provision of protective services to prevent further abuse or maltreatment of children (Social Services Law, § 423[1] ). A person required to report suspected child abuse or maltreatment who wilfully fails to do so is guilty of a class A misdemeanor and is civilly liable for the damages proximately caused by such failure (*id.*, § 420).

Persons given the responsibility of reporting child abuse under section 413 of the Social Services Law occasionally serve as Dispute Program mediators, raising a possible conflict between section 413 and the confidentiality under section 849-b(6) of the Judiciary Law of Dispute Program proceedings. Under section 849-b(6), the memoranda, work products, or case files of a mediator are confidential as is "any communication *relating to the subject matter of the resolution* made during the resolution process" (emphasis supplied). Under this language evidence of child abuse would be confidential only if it is present in the designated work products of a mediator or if it is part of a communication relating to the subject matter of the dispute. (Currently, neither statute nor regulation excludes child abuse from Dispute Program mediations.) Therefore, if during the course of a Dispute Program proceeding, evidence of child abuse appears and is unrelated to the subject matter of the dispute and not included in the work papers of the mediator, it need not be regarded as confidential.

However, this analysis does not reach the question whether a mediator is required to report such evidence under the terms of the Social Services Law. The persons designated by section 413 of the Social Services Law are required to report child abuse only as to "a child coming before them in their professional or official capacity". We believe that this language contemplates children appearing before them in their capacities as physicians, surgeons, medical examiners, coroners, dentists, osteopaths, etc. (§ 413). It would not include children appearing before them in their capacity as Dispute Program mediators. State-funded Dispute Resolution Centers are required to provide "neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques" (Judiciary Law, § 849-b [4][b] ). Thus, persons do not qualify as mediators by virtue of their occupations, but rather by receiving the prescribed training. In acting as a mediator, one does not serve as a physician, surgeon, medical examiner, etc., but rather as a citizen volunteer. Accordingly, the reporting requirements of section 413 do not apply to those acting as mediators in the Dispute Program.

We note that the public policy underlying the instant sections of the Social Services Law is to encourage the reporting of suspected child abuse. Certain professionals and officials are required to report it but all citizens with reasonable cause to suspect that a child is a victim of abuse may report such maltreatment. The latter provision reflects the legislative

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intent that the plight of the uniquely situated victims of child abuse not remain hidden from and inaccessible to the protective services which society has authorized.

Dispute Program mediators should be spared the possibility of finding themselves torn between the demands of their program's confidentiality rules and their responsibility as citizens to cooperate in the detection of child abuse. We believe that the Office of Court Administration may establish by regulation that child abuse is not a proper subject for mediation and that evidence of child abuse is inadmissible for any purpose at a mediation and is, therefore, not confidential under section 849-b(6) of the Judiciary Law. Such a regulation would be an extension of both present screening procedures and current rules which provide that the Dispute Program is for the resolution of minor disputes (22 NYCRR 116.2[a] ). Also, such a regulation would eliminate any remaining doubt as to whether a mediator would be free to report evidence of suspected maltreatment, as encouraged by Social Services Law, § 414.

We conclude that the confidentiality provisions of the Community Dispute Resolution Program do not bar Program mediators from reporting evidence of child abuse which is not contained in the memoranda, work products or case files of a mediator and which is not the subject matter of the resolution process. Nor are Program mediators, when acting as such, required to report such evidence as are other officials or professionals specified in section 413 of the Social Services Law.

Very truly yours,

Robert Abrams

Attorney General

1983 N.Y. Op. Atty. Gen. 44

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### III. CASES

#### A. People v. Snyder

Supreme Court, Erie County, New York.

The PEOPLE of the State of New York

v.

George SNYDER.

(Cite as: 129 Misc.2d 137, 492 N.Y.S.2d 890)

July 29, 1985.

#### DECISION AND ORDER

JOHN J. CONNELL, Acting Justice.

The above named defendant was indicted by the Erie County Grand Jury on charges of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree involving an alleged incident on August 16, 1983 in which William Fugate was shot to death by the defendant.

In the case at bar, the defense, both in the voir dire and opening statement to the jury, had raised the defense of justification claiming that the defendant shot and killed William Fugate in self defense. Mention was also made by defense counsel in his opening statement of the victim and defendant's participation with the Community Dispute Resolution Center prior to the fatal shooting. Because of these statements, the District Attorney subpoenaed any and all records pertaining to such mediation between the defendant and the victim and involving a third person, Deborah Nelson.

Attorneys for the Better Business Bureau Foundation which administers the Community Dispute Resolution Center

program in Erie County served an Order to Show Cause on the District Attorney's Office signed June 7, 1985 and made returnable on June 10, 1985 seeking that the said subpoena be quashed pursuant to CPLR 2304. On the return date arguments were heard from the attorney for the Better Business Bureau Foundation, the District Attorney's Office and defense counsel for George Snyder. Subsequent to the oral argument, and after review of the papers submitted in support of and in opposition to the motion, and upon review of the applicable statutory law, the motion to quash the subpoena was granted. There appears to be no reported case construing Section 849-b(6) of the Judiciary Law.

The Community Dispute Resolution Center's Program was established in 1981 by the New York State Legislature to enable the creation of community dispute centers to resolve neighborhood and interpersonal disputes. The goal of the Legislature in creating these centers was to provide a "quick, inexpensive and voluntary resolution of disagreements, while at the same time serving the overall public interests by permitting the criminal justice community to concentrate its resources on more serious criminal matters." (1981 McKinney's Session Laws, p. 2630.) It was the feeling of the Legislature that in order for such programs to be successful, the parties availing themselves of the services of these forums must feel that they can air their disputes "in an informal atmosphere without restraint and intimidation." (1981 McKinney's Session Laws, pp. 1728-1729.)

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In order to assure confidentiality to the parties involved, and thereby encourage their full, frank, and open participation, Section 849-b(6) of the Judiciary Law was enacted as follows:

"Except as otherwise expressly provided in this Article, all memoranda, work products, or case files of the mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication."

In spite of the first sentence in this statute, there appears no where else in the article an exception to the restrictive language of the statute.

I find that even if the defendant can be found to have waived the confidentiality of the records pertaining to the mediation sessions in which he was involved, the statute, as drafted, permits no such waiver. The items sought by the District Attorney are by definition, "confidential communications."

Confidential communications are, by their very nature, guided by rules of exclusion. Most commonly rules of exclusion are drafted to prevent evidence being presented to a jury that is of no probative value or of a kind that may unfairly prejudice one of the parties or misdirect the jury's attention from the primary issue at hand. The confidentiality of certain communications,

however, is meant to nurture very specific interpersonal or professional relationships that the Courts, society and the legislature deem desirable. (*Fisch on NY Evidence*, 2nd Edition, p. 335).

The Court of Appeals recently strictly construed Public Health Law Section 2306 which relates to information concerning sexually transmittable diseases. That section reads as follows: "All reports or information secured by a board of health or health officer under the provisions of this article shall be confidential except in so far as is necessary to carry out the purposes of this article." In the *Matter of Grattan v. People*, 65 N.Y.2d 243, 491 N.Y.S.2d 125, 480 N.E.2d 714, the Court held that the goal of the statute cannot be defeated simply by the consent of the source to release the information. "The requirement of confidentiality (Public Health Law Section 2306) is integral to a statutory scheme designed to encourage afflicted persons to seek and secure treatment, which in the case of communicable disease, served individual interests as well as those of society." (*Matter of Grattan*, supra, at p. 245, 491 N.Y.S.2d 125, 480 N.E.2d 714).

Section 849-b(6) is even more restrictive in its language by specifically referring to excluding disclosure from "any judicial or administrative proceeding."

Section 849-b(4)(a) places funding for the dispute centers in jeopardy unless "... it complies with the provisions of this article and the applicable rules and regulations of the chief administrator ..." The intent of the Legislature to provide forums for the resolutions of disputes as alternatives to structured judicial settings is, therefore, clearly defined in the statutory language

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itself as well as the funding provisions for the dispute centers.

To grant the District Attorney's request to review the records of the Community Dispute Resolution Center would subvert the legislature's clear intention to guarantee the confidentiality of all such records and communications.

Accordingly, the subpoena is hereby quashed.

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## B. Wright v. Brockett

Supreme Court, Bronx County, New York,

Part IA 6.

Russell WRIGHT and Helen Wright,  
Plaintiffs,

v.

Emma BROCKETT, "John Doe" and "Jane  
Doe", Defendants.

Cite as: 150 Misc.2d 1031,

571 N.Y.S.2d 660

May 9, 1991.

LEWIS R. FRIEDMAN, Justice.

This is an ejectment action. Plaintiffs move for an order seeking to have the defendant immediately vacate her apartment in plaintiffs' building. The motion seeks to enforce a written "agreement", denominated an "award", entered into by the parties as a result of non-judicial "mediation-arbitration" of a dispute which originated in the Criminal Court.

The facts of this case are typical of the more than 100,000 actions which have been diverted from the criminal process into alternative dispute resolution over the past 10 years. For nearly 20 years, defendant Brockett rented an illegal basement apartment in plaintiffs' two-family house. In December 1989, this court precluded the collection of rent or "use and occupancy" payments on the ground that, according to the certificate of occupancy obtained by plaintiffs long after they rented the apartment to defendant, the basement apartment was illegally occupied (*see*, Multiple Dwelling Law § 302[1][a], [b] ).

Relations between the parties have degenerated. Defendant, contending that plaintiffs had turned off the heat and committed other acts, filed a Criminal Court complaint alleging harassment, reckless endangerment and other crimes; plaintiffs cross-complained of harassment. In accord with the usual practice in the Criminal Court, the parties were referred to the local dispute resolution center, which in Manhattan and the Bronx, is the IMCR Dispute Resolution Center. At a session with a "mediator-arbitrator", the parties "resolved" their dispute. An agreement, labeled an "award", was signed by all parties and the mediator-arbitrator. One of the agreement's provisions was that "Ms. Brockett agrees to relinquish Mr. Wright's apartment on or before Tuesday, July 31, 1990 at the close of the day." Ms. Brockett, however, has refused to vacate. After plaintiffs unsuccessfully sought additional assistance from the mediator, they brought this proceeding.

Defendant argues that the IMCR Dispute Resolution Center was not a competent forum to resolve the dispute, that she only agreed because the situation at the apartment was so unpleasant, that she was unrepresented at the Center, that the mediator failed to explain her rights to her, and that there was no consideration for the agreement. The court has found no published cases analyzing enforcement problems presented by the alternative community dispute resolution procedures which have become central features in the disposition of many cases brought in the criminal courts.

### **Alternative Dispute Resolution**

Annually, thousands of interpersonal disputes are brought to criminal courts for resolution. It has long been acknowledged

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by experts in the field that the criminal courts are ill-suited to the resolution of non-violent disputes between neighbors. Alternative dispute resolution ("ADR") is a process by which appropriate cases, which cannot be handled successfully by the courts,<sup>1</sup> are referred to a non-judicial forum for resolution by trained mediators. Theoretically, non-judgmental, out-of-court proceedings will give the parties time to be heard and an opportunity to "air" their grievances and to "work out" their underlying problems, without, as the courts must, focusing on proof and punishment. Practice shows that, in the main, the theory works.

New York's earliest formal ADR program started in 1972 in Rochester, where the American Arbitration Association sponsored an effort to resolve a limited class of cases referred from the courts. The success in Rochester, one of the first programs in the United States, was copied throughout this state and nationally. Although IMCR was organized in 1969, it began taking cases from the Summons Part of the Criminal Court in New York County in 1975. "The programs have proved to be immensely successful" (Letter of Mayor Koch to Governor Carey, July 6, 1981, Bill Jacket, L.1981, ch. 847). By 1981, there were 17 privately funded programs functioning in 15 counties throughout the state. The Legislature formally acknowledged the crucial importance of diversion of cases

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<sup>1</sup> The program was originally limited to "minor" cases. However, since 1986 certain felonies may be referred to ADR with the consent of the District Attorney, the victim and the defendant (Judiciary Law § 849- b(4)(f); L.1986, ch. 837). Approximately 200 felony cases per year are referred to the ADR program (OCA Community Dispute Resolution Centers Program, Annual Report, Mar. 31, 1990, at p. 36).

from the court system and the advantages of ADR. It noted that "[t]he involved procedures and the attendant constraints [of the court system] are not always conducive to affording the present assurance to the public and persons involved against the recurrence of such [socially undesirable] conduct" (L.1981, ch. 847, § 1).<sup>2</sup>

The Legislature decided to fund community based dispute resolution centers on a state-wide experimental basis by enacting Judiciary Law Article 21-A, which also contains the detailed statutory scheme permitting diversion from the criminal courts (L.1981, ch. 847). "New York State Courts are currently overburdened with cases involving minor neighborhood and interpersonal disputes" (Approval Memo., 1981 McKinney's Session Laws p. 2630). Once adequate funding was provided, ADR programs multiplied rapidly. By 1984, when ADR was made a permanent part of the criminal process (L.1984, ch. 156), there were programs in 37 counties (*see*, Sise, ABA Special Committee on Dispute Resolution, Problem Solving through Mediation [1984], 16-17). According to the most recent report by the Office of Court Administration there are now ADR programs in all 62 counties. In both 1988/89 and 1989/90 there were approximately 40,000 referrals to ADR from courts, prosecutors and police. Almost 20,000 cases were resolved by agreement or

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<sup>2</sup> The program was supported both as an aid toward resolving interpersonal disputes and because it would alleviate congestion in the courts so as to allow more time for the "more important" cases. Indeed, many supporters of ADR saw the conservation of limited court resources as the main rationale for the program (*see, e.g.*, Letter of Police Benevolent Association; Letter of Member of the Assembly Kremer, the sponsor; Letters of Nassau and Onondaga County District Attorneys, Bill Jacket, L.1981, ch. 847).

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arbitration each year (OCA, Community Dispute Resolution Centers Program, Annual Report, March 31, 1990, 36 ["Annual Report"]). ADR has become a most important part of the system; more than 450,000 persons have been involved in the more than 150,000 non-judicial resolutions since the system began (OCA, State of the Judiciary [1990], 79).

ADR programs are an efficient, cost-effective means of disposing of conflicts. The average time from intake to disposition ranges from 14 days, when there is only one hearing, to 32 days, when there are multiple hearings (Annual Report, at 38). Clearly ADR cases are disposed of much faster than in the criminal courts. For 1989/90 the cost to the state for ADR was much less than for the criminal courts: only \$58.51 was spent for each case screened as appropriate for ADR and \$122.17 for each arbitration or mediation actually held (Annual Report, at 49). A recent estimate is that each case disposed of through ADR saves the court system "as much as \$2500" (OCA, State of the Judiciary [1990], 80).<sup>3</sup>

Although cases are disposed of rapidly, substantial time is devoted to each hearing. The average time consumed by each arbitrated or mediated case is 83 minutes (Annual Report, at 38). Dispositions in the

criminal courts, unfortunately, devote much less time to the parties.

Once a case is referred to an ADR center various techniques are used to resolve it. ADR programs throughout the state use mediators, arbitrators, or both; they are all community based volunteers, who have received at least 25 hours of classroom training in conflict resolution techniques given by state certified trainers followed by an on the job apprenticeship as well as in-service training. (Annual Report, at 12; *see* Judiciary Law § 849-b[5]). The mediator-arbitrators serve in mediations, where the parties are encouraged to reach mutually acceptable agreements, as well as arbitrations, where they render binding decisions. Some ADR programs also use a "med-arb" modality where the parties agree that a mediated agreement may be entered as an arbitration award, or if there is a failure to agree, the matter is referred to the arbitrator for a decision (Underhill & Powers, Confidentiality in Community Dispute Programs: Recent Developments in ABA Standing Committee on Dispute Resolution, Expanding Horizons: Theory & Research in Dispute Resolution [1989], 92-93). During efforts at conciliation, mediation or arbitration, the parties may be represented by counsel. Those who support ADR argue that counsel is often not necessary. Also, in an effort to obtain a frank and open discussion of the issues, all statements and documents involving the case are confidential and may not be used in any proceeding for any purpose (Judiciary Law § 849-b[6]; *People v. Snyder*, 129 Misc.2d 137, 492 N.Y.S.2d 890; *United States v. Gullo*, 672 F.Supp. 99; Underhill & Powers, *supra*, 95-107).

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<sup>3</sup> Accurate computations of the cost per disposition within the court system are unavailable. The Fund for Modern Courts performed a study in 1977/78 of the costs in Bronx County Criminal Courts. That study found the weighted average cost of cases disposed of at arraignment was \$390, while later dispositions cost \$969 (Association of the Bar of the City of New York, The Cost of Justice: An Analysis of Case Processing Costs in the Bronx Criminal Justice System [1979], p. 111-116). Of course, these figures must be adjusted for inflation as well as changing court and police procedures.

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### **Enforcement of ADR Determinations**

If a dispute is submitted to ADR and there is a written agreement consenting to arbitration, the resulting award will be enforceable. That is, the successful party may proceed under CPLR Article 75 to obtain a judgment on the award. The award will be enforced regardless of the nature of the dispute. As Justice Sklar held in *Rothchild v. Diamond*, 132 Misc.2d 701, 504 N.Y.S.2d 965, the ADR program created by Judiciary Law Article 21 was intended to, and did, carve out an exception to the general rule that violations of the criminal law are not arbitrable. Awards may enjoin future criminal activity or other conduct or may order restitution in amounts up to the limits of the small claims courts and, in certain instances, up to \$5,000 (Judiciary Law § 849-b[4][e]). The form of the award does not preclude enforcement (*Rothchild v. Diamond, supra*, 132 Misc.2d at 703-704, 504 N.Y.S.2d 965). Without doubt, had the "award" in this case been rendered as a result of an arbitration properly consented to in writing, the court would enforce it. IMCR is a proper forum to resolve the dispute and the form of relief is suitable to be reduced to judgment.

The record before the court does not contain any proof of a consent to arbitrate. The court has also reviewed all papers filed at IMCR; they do not contain a signed consent. The "award", on the usual IMCR form, states, immediately above the parties' signatures: "THE PARTIES TO THIS AGREEMENT HEREBY AUTHORIZE THE MEDIATOR-ARBITRATOR(S) WHOSE SIGNATURES APPEAR BELOW TO INCORPORATE ALL OF THE ABOVE PROVISIONS INTO THEIR ARBITRATION AWARD FOR THE ABOVE NOTED CASE, IN

ACCORDANCE WITH THEIR SUBMISSION TO MEDIATION-ARBITRATION." That statement is obviously, by itself, not a consent to arbitrate. Rather, it refers to some other "submission" document; certainly it does not advise unrepresented parties that their agreement to mediate their dispute would be treated as though it were a legally enforceable arbitration award. It is axiomatic that arbitration, absent specific statutory authority, can only result from the agreement of the parties (*cf.* CPLR 7501, 7511[b][2][ii]).

The papers before the court do not specify what procedure plaintiffs are invoking; presumably plaintiffs seek to confirm the "award" pursuant to CPLR 7510. However, confirmation may be denied and the award may be vacated pursuant to CPLR 7511(b)(2)(ii) on the ground that "a valid agreement to arbitrate was not made." That ground may only be relied on if the objecting party did not participate in the arbitration (*see, Matter of Harris [East India Trading Co.]*, 16 Misc.2d 87, 89, 144 N.Y.S.2d 894), since participation of a party is deemed to be a waiver of any objection to the arbitration (*Matter of White Rose Tea [Meyer]*, 58 A.D.2d 544, 396 N.Y.S.2d 7). Thus vacatur here on that ground is unavailable. However, the record in this case shows that the "arbitration" hearing did not comply with the CPLR. The arbitrator apparently did not hear any evidence as required by CPLR 7506 [b]. Although the CPLR appears to permit the parties to consent to an award without the taking of testimony, any waiver of a hearing must be in writing (CPLR 7506[f]). (The statute also permits waiver "if the parties continue with the arbitration without objection", but

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obviously that alternative does not apply in cases, such as the one at bar, where there was, in fact, no arbitration.) Thus, if the document before the court is to be treated as an arbitration "award", the motion to confirm it is denied and the "award" is vacated on the ground that there was a "failure to follow the procedure" of CPLR Article 75 (CPLR 7511[b][1][iv] ).<sup>4</sup>

That does not end the inquiry. The "award" is, at the very least, a mediation agreement between the parties. It would, therefore, be subject to enforcement as a contract. The papers before the court may be treated as though they were a motion for summary judgment in the action, since there has been joinder of issue. The law clearly favors

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<sup>4</sup> The court has received a copy of the "submission" form IMCR currently uses as its consent to arbitrate. The form does not unequivocally state that the parties consent to arbitrate and that they are aware that the arbitrator's decision is final and binding. An ADR award may lead to judgments well in excess of \$2,000 or to injunctions ultimately enforceable by contempt. Yet, the small claims courts throughout the state, which heavily rely on arbitration, require a consent to arbitration which specifically acknowledges that the award is final, binding and non-appealable (*see*, 22 NYCRR §§ 208.41[n][2], 210.41[m][2], 212.41 [m] [2] ). The "final and binding" language is also required by Judiciary Law § 849-b[5][e]. Further, the IMCR form, which no doubt anticipates that there will be consented to "awards" without a hearing, does not contain the waiver of the statutory procedure required by CPLR 7506[f]. Thus, even if the "submission" form had been signed here, the result would be the same.

stipulations between parties, which resolve their disputes without court adjudication. Stipulations of settlement are enforceable as contracts and are not lightly set aside (*Bond v. Bond*, 260 App.Div. 781, 782, 24 N.Y.S.2d 169). Defendant contends that there was no consideration for her agreement; however, the resolution of the criminal cross-complaints is sufficient to support the award. Agreements between parties to compromise criminal cases are usually void and unenforceable. It is a class A misdemeanor to agree to accept or to confer any benefit "upon an agreement or understanding that [a person] will refrain from initiating a prosecution for a crime" (Penal Law § 215.45). That section, derived from Penal Law of 1909 § 570 and Penal Code of 1881 § 125 essentially restates a common law rule prevalent before independence. In the earliest civil cases the courts analyzed the English rule and found that any agreement to prevent prosecution was void (*The Steuben County Bank v. Mathewson*, 5 Hill 249, 251-253; *Conderman v. Trenchard*, 58 Barb. 165, 169). "The rule is everywhere recognized that agreements to forbear prosecution ... are contrary to public policy, and void ..." (*Buffalo Press Club v. Greene*, 5 Misc. 501, 508, 26 N.Y.S. 525 *affd.* 86 Hun. 20, 21, 33 N.Y.S. 286; *Porter v. Havens*, 37 Barb. 343, 348). Since the payment of "hush money" is illegal, a contract to make that type of payment is void (*Fellows v. Van Hying*, 23 How.Prac. 230, 232). The court finds that the Legislature, in adopting Judiciary Law Article 21- A, specifically intended for the parties to resolve their disputes through ADR and to abandon pending or threatened criminal prosecution. The newly declared public policy supersedes that found in the common law cases. Therefore, ADR agreements which involve

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monetary settlements in exchange for discontinuation of proposed or pending criminal charges are not void.

This case is really a landlord-tenant dispute. Stipulations settling landlord-tenant disputes are so favored that parties may waive nearly all statutory and constitutional rights (*cf.*, *Matter of Matinzi v. Joy*, 60 N.Y.2d 835, 470 N.Y.S.2d 131, 458 N.E.2d 372). However, in this Department stipulations made in Housing Court to surrender possession of a tenant's home are subject to special scrutiny (*Solack Estates v. Goodman*, 102 Misc.2d 504, 425 N.Y.S.2d 906, *affd.* 78 A.D.2d 512, 432 N.Y.S.2d 3; *Weehawken St. Assocs. v. Estate of Nudorg*, N.Y.L.J. March 26, 1991, p. 21, col. 3 [App.Term., 1st Dept.]). The Housing Court uses lay mediators to resolve many cases; yet, all proposed stipulations are presented in open court for a Housing Judge to review with the parties. It is contrary to sound public policy for the court to give an out-of-court agreement, between an unrepresented tenant and a landlord made after discussions with a lay mediator, greater effect than would be accorded to a similar stipulation entered into in open court before a judge of the Housing Court. This agreement must be viewed on the same terms as a Housing Court stipulation. On the facts presented here, the court cannot conclude that the agreement represents a provident decision by the tenant, free of coercion to warrant a judgment of ejectment. That is, it is not subject to enforcement on summary judgment without further inquiry.

### **Conclusion**

This court supports the important goals of ADR in the resolution of interpersonal disputes that are not well handled within the court system. However, the case at bar typifies many of the problems recently identified by the Office of Court Administration Task Force on Processing Civilian Complaints by the New York City Criminal Court. The Task Force correctly recommended that procedures utilized by the various ADR centers throughout New York City, and presumably throughout the state, should be uniform (Findings & Recommendations [1990], at 56-7). The Task Force proposed increased use of a med-arb format in which arbitration is used as the final step to produce an enforceable decision. That proposal needs careful study before full implementation to insure that there is a legally sufficient written "plain language" consent by the parties both to the arbitration of the dispute and the specific procedures to be employed. Special care must be taken to see that mediator-arbitrators are properly trained to understand the special bodies of law applicable to agreements in special areas, such as landlord-tenant and matrimonial law. Reform of the procedural process at many ADR centers is required. As the instant case shows, ADR which is not procedurally well-grounded may only prolong litigation or void an appropriate agreement.

The motion is denied in all respects.