



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUNSEL

MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on Proposal to Adopt a New Part 60 of the Rules of the Chief Judge and a New Part 160 of the Rules of the Chief Administrative Judge, to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution

Date: February 3, 2022

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Statewide Alternative Dispute Resolution (ADR) Advisory Committee, to adopt a new Part 60 of the Rules of the Chief Judge (Exhibit A), along with a new Part 160 of the Rules of the Chief Administrative Judge (Exhibit B), to establish general statewide rules for presumptive ADR. The new rules, with allowance for appropriate exceptions, will refer parties in civil disputes in the trial courts to mediation and other forms of ADR.

Proposed Part 60 broadly authorizes the Chief Administrative Judge, with the advice and consent of the Administrative Board of the Courts, to establish rules for the referral of disputes to ADR. Proposed Part 160 implements Part 60 by providing a set of basic rules to govern referrals to ADR, including rules relating to the determination of whether a dispute should or should not be referred (Ex. B, p. 2), the choice of neutral third parties to conduct the ADR process (Ex. B, pp. 3-4), and the confidentiality of the ADR process (Ex. B, pp. 4-5).

The proposed rules require that all civil disputes be referred to ADR at the earliest practicable time after commencement unless (i) referral is prohibited by local court rule or order of the Chief Administrative Judge, (ii) the court determines that referral will not serve the interests of justice, (iii) a party to the dispute objects and opts out in accordance with local court rule or order of the Chief Administrative Judge, or (iv) the court determines that insufficient ADR resources are currently available. The proposed rules subject mediators in court-referred ADR to certain standards of conduct now being reviewed. When those standards are approved, their location will be specified in proposed section 160.3(d) of the rules.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than April 4, 2022.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

1/13/2022

RULES OF THE CHIEF JUDGE OF THE STATE OF NEW YORK

PART 60. ALTERNATIVE DISPUTE RESOLUTION IN THE TRIAL COURTS

§60.1. Preamble. Experience has demonstrated that civil disputes are often resolved more effectively and more efficiently through mediation or other forms of alternative dispute resolution (ADR) than through traditional adversarial proceedings in court. Accordingly, this Part is established to authorize and encourage referral of disputes to ADR to the greatest extent practicable in the trial courts of the unified court system.

§60.2. Rules for the referral of civil disputes. The Chief Administrator of the Courts, with the advice and consent of the Administrative Board of the Courts, shall adopt rules for the referral of civil disputes in the trial courts of the unified court system to ADR. Such rules shall regulate the manner in which referrals shall be made and prescribe circumstances in which disputes shall not be referred; regulate the qualifications and manner of engagement of mediators or other neutral third parties as required by the ADR processes to which such referrals are made; and provide for the confidentiality of those processes.

EXHIBIT B

1/13/2022

**RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS
PROPOSED NEW PART 160**

PART 160. ALTERNATIVE DISPUTE RESOLUTION IN THE TRIAL COURTS

§160.1. Definitions. As used in this Part, the following terms shall have the indicated meanings:

(a) “Alternative dispute resolution” or “ADR” shall refer to any one of a variety of processes designed to help parties resolve civil disputes alongside or apart from litigation. These processes include, but are not limited to, mediation, neutral evaluation, and other dispute resolution processes offered by community dispute resolution centers.

(b) “Civil dispute” shall refer to any civil action or proceeding commenced in a court of the Unified Court System (“UCS”).

(c) “Community dispute resolution center” shall refer to a not-for-profit organization that is a center within the meaning of subdivision one of section 849-a of the Judiciary Law and that receives funding from the UCS pursuant to Article 21-A of such Law.

(d) “Court ADR program administrative personnel” shall refer to a local ADR coordinator or other nonjudicial court staff who administers an ADR program.”

(e) “Mediation” shall refer to an ADR process in which a neutral third party (referred to as a mediator) helps parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

(f) “Mediation-trained court staff” shall refer to employees of the UCS who have completed the training required of a mediator pursuant to subdivision (b) of section 146.4 of the Rules of the Chief Administrator of the Courts (22 NYCRR §146.4(b)), or its equivalent as

approved by the administrative judge of the judicial district in which they serve in consultation with the statewide ADR office of the UCS, and who provide mediation services in disputes referred to an ADR process in accordance with this Part.

(g) “Neutral evaluation” shall refer to a non-binding process in which a neutral third party (referred to as a neutral evaluator) with expertise in the subject matter relating to the civil dispute referred to such process provides an assessment of likely court outcomes of that dispute or an issue to help the parties to such dispute reach a settlement.

(h) “Roster mediator” shall refer to a mediator who has been appointed to a roster of mediators compiled pursuant to section 146.3 of the Rules of the Chief Administrator of the Courts (22 NYCRR §146.3).

(i) “Roster neutral evaluator” shall refer to a neutral evaluator who has been appointed to a roster of neutral evaluators compiled pursuant to section 146.3 of the Rules of the Chief Administrator of the Courts (22 NYCRR §146.3).

§160.2. Court referral of civil disputes to ADR.

(a)(1) As provided in this Part, a court shall refer each civil dispute pending before it to an appropriate ADR process at the earliest practicable time unless: (i) such referral is prohibited under local rule of court or administrative order of the Chief Administrator of the Courts or a designee of the Chief Administrator, (ii) the court determines that such a referral will not serve the interests of justice, (iii) a party to the dispute objects to and opts out from such referral in accordance with local rule of court or administrative order of the chief administrator of the courts or the chief administrator’s designee, or (iv) the court determines, in consultation with the local Administrative Judge, that insufficient ADR resources, including but not limited to, mediators and neutral evaluators, are currently available.

(2) At the earliest practicable time, a court shall inform the parties to such dispute regarding the available ADR processes. To the extent possible, the court shall provide the parties, and their counsel if they are represented, with access to written or electronic materials explaining how ADR is used to resolve a dispute, and the associated costs of ADR, if any.

(3) Where a court refers a dispute to an ADR process under this Part, the court shall refer such dispute to mediation unless there are compelling reasons to select another ADR process. In determining whether such compelling reasons exist, the court shall consider all relevant factors, including but not limited to: (i) any preference for a particular ADR process expressed by the parties to the dispute, (ii) the specific issues raised by the dispute, (iii) whether a party or parties to the dispute are unrepresented; (iv) allegations of violence or harm, or risk of harm to any person, provided local rule, practice, or protocol does not prohibit referral of the dispute to any ADR process; and (v) the availability of ADR processes other than mediation.

(4) Referrals in accordance with this section may be to a neutral third party chosen by the parties to the dispute or, as appropriate, to a roster mediator, to a roster neutral evaluator, to mediation-trained court staff, or to a community dispute resolution center. Where the parties agree upon the choice of a neutral third party, they shall provide notice thereof to the court's ADR administrative personnel, as prescribed by the court.

(5) Notwithstanding the foregoing, a court may at any time remove a dispute from an ADR process to which it already has been referred where: (i) the court determines that such referral does not serve the interests of justice; or (ii) a party to the dispute objects to and opts out from such referral in accordance with local rule of court or administrative order of the Chief Administrator of the Courts or a designee of the Chief Administrator.

(b) Referral to a neutral third party.

(1) Where a referral in accordance with this section is to a mediator or neutral evaluator, other than one chosen by the parties to the dispute, such mediator or neutral evaluator must qualify under Part 146 of the Rule of the Chief Administrator of the Courts (22 NYCRR Part 146) or, in the case of a mediator, be eligible to serve as a mediator pursuant to rules of the Chief Administrator applicable to community dispute resolution centers, and meet such additional criteria as the court may prescribe.

(2) Courts may establish protocols for (i) the selection of neutral third parties, (ii) the referral of disputes to them, (iii) their compensation, (iv) the manner in which complaints of the parties about their conduct may be addressed, consistent with such statewide complaint process as shall have been approved by the Chief Administrator and such disciplinary process as may be applicable to nonjudicial employees of the UCS, and (v) the options available where the parties are unable to pay the costs of ADR. Nothing in this paragraph shall prohibit the Chief Administrator from prescribing, by administrative order, rules of general applicability regulating the compensation of neutral third parties in appropriate case types.

§160.3. ADR process conducted by a mediator or neutral evaluator to be confidential.

(a) Except as otherwise provided herein or as otherwise required by law, all communications, memoranda, and work products made in preparation for, during, or in connection with an ADR process conducted by a mediator or neutral evaluator to which a dispute is referred pursuant to this Part shall be confidential and not subject to disclosure in any judicial or administrative proceeding.

(b) Notwithstanding any other provision of this section, a mediator's or neutral evaluator's memoranda, work products, case files, and communications made in preparation for, during, or in connection with an ADR process such mediator or neutral evaluator is conducting

in a dispute that has been referred pursuant to this Part may be subject to disclosure under any of the following circumstances:

(1) Session information. A mediator or neutral evaluator may report to court ADR program administrative personnel details as to an ADR process such mediator or neutral evaluator is conducting pursuant to this Part including: (i) the duration of a session conducted as part of such process, (ii) whether the parties thereto requested and held additional sessions and session dates, (iii) whether the dispute subject to the ADR process was resolved in whole or in part, (iv) whether the dispute remains unresolved, and (v) whether one or more parties opted out of referral to an ADR process where authorized to do so (without disclosing the name(s) of that party or parties), whether the mediator or neutral evaluator had a conflict of interest, whether the dispute is not appropriate for the process, and without comment on any substantive aspect of the dispute.

(2) Waiver. Parties to an ADR process to which a dispute has been referred pursuant to this Part and their counsel may agree to waive confidentiality as to certain information or communication(s). Any such waiver shall be in writing and signed by each party to the dispute and their attorneys (if applicable), or the parties may agree to such waiver on the record of the court in which the dispute is pending. Each waiver shall specify the information or communication(s) that may be disclosed, the person or entity to whom the disclosure may be made, and the purpose of the disclosure. Nothing herein shall be construed to require a mediator or neutral evaluator who conducts an ADR process to which a dispute has been referred pursuant to this Part to appear in any court.

(3) Written agreement settling a dispute. A writing signed by all parties embodying a negotiated agreement settling a dispute that has been referred to an ADR process pursuant to this Part, in compliance with statutory requirements, if any, may be submitted to the court for review on consent of all parties.

(4) Threats of imminent, serious harm. Nothing in this section shall prohibit a mediator or neutral evaluator conducting an ADR process to which a dispute has been referred pursuant to this Part or a party to that dispute from notifying the appropriate authorities and or any potential victim where the mediator or neutral evaluator or the party to the dispute becomes aware that information or a communication disclosed in that process constitutes a credible threat of serious and imminent harm to the mediator or neutral evaluator, a party to the dispute, or any other person or entity.

(5) Child abuse or neglect. If information or a communication reveals reasonable cause to suspect that a child is an “abused child” or a “neglected child” as defined by subdivisions (e) and (f) of section 1012(e) of the Family Court Act, respectively, the appropriate authorities may be notified.

(6) Complaints or claims of wrongdoing or malpractice. Any participant in an ADR process to which a dispute has been referred pursuant to this Part pursuing or defending against a complaint or claim of wrongdoing or legal malpractice arising from such ADR process may seek party or court permission to reveal, or may be compelled to disclose, otherwise confidential information or communications, to the extent directed by court order or through party agreement, or, where appropriate, through the mediation complaint process approved by the UCS, or through any other

state disciplinary or law enforcement proceeding. Such disclosure shall be permitted only to the extent necessary to pursue or defend against such complaint or claim.

(7) To collect an authorized, unpaid fee for services in relation to an ADR process, a mediator or neutral evaluator may disclose the services such mediator or neutral evaluator has rendered.

(8) Research and education. Information or a communication may be disclosed for research or educational purposes provided that the names of the parties, other identifying information, and specific facts related to the issues in controversy shall remain confidential.

(d) Roster mediators shall be subject to the standards of conduct for mediators in court-referred ADR adopted by the statewide ADR advisory committee of the UCS found at _____.

§160.4. Immunity for neutral third parties. Neutral third parties conducting an ADR process to which a dispute has been referred pursuant to this Part shall have such immunity from liability as may be provided by law.

§160.5. Local ADR rules. Following consultation with local bar associations and, as appropriate, with others, including but not limited to the Chief Judge's Advisory Committee on ADR, the UCS Commercial Division Advisory Council, and the Office of Court Administration Office of ADR, and with the approval of the appropriate Deputy Chief Administrative Judge, each District Administrative Judge shall develop local rules for the implementation of this Part in the courts of the Judicial District over which such District Administrative Judge exercises jurisdiction.

§160.6. Settlement conferences. Nothing in this Part shall prohibit or otherwise limit use of settlement conferences by the courts to resolve civil disputes.

§160.7. Effect of rules. The rules set forth in this Part shall not supersede any existing rule or order of the Chief Judge of the State or of the Chief Administrative Judge, or any provision of statute, including but not limited to section 4547 of the CPLR and Article 21-A of the Judiciary Law.