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February 11, 2022

The Honorable Lawrence K. Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Eileen D. Millett, Esq.
Counsel, New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Dear Judge Marks and Ms. Millett:

You have requested comments regarding a new Part 60 dealing with alternate dispute resolution of matters, and for what it is worth, I thought I would set forth a few comments that may be of aid to you.

First, I wish to provide some background regarding my familiarity with the matter. As you know, I was the former Surrogate of Nassau County for 20 years, serving from 1980 to 2000. Prior to that, I was a Law Assistant, Deputy Chief Clerk and Chief Clerk of the Surrogate's Court. I was Chairman of the Executive Committee of the New York State Surrogate's Association; Chair of the Advisory Committee to the Legislature on EPTL and SCPA; Special Professor at numerous law schools teaching on various areas of Trusts and Estates; editor of Benders and Warren's Heaton treatises dealing with Surrogate's practice; and author of articles for the New York Law Journal as well as other periodicals.

Through the years of my practice, I was able to formulate some practices within the Surrogate's Courts practice and procedures dealing with attempts to resolve disputes that would come before the Court. I was instrumental in having law assistants appointed as referees for the purposes of attempting to either settle matters, or at least to narrow issues for trial. This has proven to be highly beneficial in the Surrogate's Court. I have participated as a Surrogate while I was working at other positions within the Court in actively attempting to resolve our heavy caseload by sitting down with the attorneys and parties, resolving issues and training others who were working with us to accomplish like results. Since I retired from the bench, I have been active in a law firm and Surrogates have been referring matters to me for mediation, and I would like to share with you my experience and recommend what I believe may be of help in handling the heavy caseload as it relates to Surrogates' practice.

Initially, either the Surrogates or their staff attempt to handle their own caseload without referring matters out. Either because of appointments by Surrogates or having been approached by attorneys who are looking for a person with experience to see if a matter could be mediated, I have in the last several years handled many mediations, fortunately with good results. With the present condition that we are under because of the pandemic, estate matters have required more utilization of outside help in order to control the calendars and, as a result, several Surrogates have been appointing either retired Surrogates, or other individuals who have experience, to see if matters could be resolved through mediation. Very often, settlements are reached and matters can be closed out. Sometimes, there are issues that still remain, and the question is whether the matter should be referred back to the Surrogate or could there be another approach to handling the matter. In many instances where parts of matters are settled but there remain some outstanding issues, the parties stipulate that a Referee be appointed. Very often they select the Mediator as the Referee, especially if the Mediator is either a former Surrogate, a Judge or someone who has experience in hearing matters. The parties can stipulate to have the Mediator act as Referee to hear and report, or to hear and determine. Needless to say, all of this is subject to the Surrogates' approval and the Surrogates are kept abreast of the progress of the assignments they make when they refer matters out for mediation or reference. Under the Surrogate's Court Procedure Act, there are precise procedures that Surrogates follow dealing with referring matters either within the Court staff or without.

I note in the proposal that you mention mediation and evaluators, and I believe that program would be very beneficial and would work well within Surrogates' practices.

Some of the Surrogates in making their assignments provide that the first 90 minutes are free and, believe it or not, I have found in many instances that 90 minutes is enough time to resolve certain issues, but certainly not complicated matters. Once the 90 minutes has been used, there is an agreement that the mediation will be continued which includes an agreement regarding compensation.

There are some things that have to be considered in dealing with mediation, especially if non-judicial employees are to handle a matter and compensation is involved. In certain instances, the attorneys would be willing to act pro bono, especially in small matters. The things that have to be considered are that the mediator or evaluator has to become familiar with the issues. They can either have the Court give them the information from the file or they can go to the Court and review the file. Needless to say, this takes time. Then, once the attorney is familiar with the issues, he/she will be in a better position when meeting with the clients and the their attorneys. In some instances, the attorneys do not want to run up expenses in connection with mediation and ask that the mediator or evaluator just meet with the parties and attorneys to get briefed as to what the issues are at that time and what the dispute is about. In other instances, we have the attorneys submit a 5-page brief setting forth the issues, how they think the matter can be resolved, and provide information as to whether there were negotiations among the parties themselves beforehand. Once again, it takes time for the attorney to arrange for submission of these briefs, review same, and the issue of compensation must be established. As indicated heretofore, there are also instances where the attorneys ask that we go straight to the mediation where the mediator or evaluator is working from scratch and hears the issues for the first time at the meeting. Needless to say, if the mediator or evaluator has to obtain the file and review it, or gets briefs, this does take some time and the question is whether the parties think it best for the mediator or evaluator to be able to get some background before starting the mediation, or are they willing to start from scratch once the mediation begins. All of the above must be considered and discussed with the parties and the attorneys initially so that all parties are aware of what the possible expense may be in connection with the mediation.

There is also the question of utilization of facilities. In my office I have the necessary technology to have Zoom meetings with all parties and attorneys, and break them down into rooms through Zoom. There is also the option to meet personally, and my office has plenty of space to accommodate all parties and separate them into different rooms. This ability must be considered in doing mediations and evaluations as an option. There is also a question as to whether the Court has facilities to accommodate such a program. All of these matters must be

considered and I think it wise that, while you are looking at the overall strategy in implementing a program, these issues be considered.

It should also be noted, some Surrogates or Judges feel uncomfortable in participating in negotiations because they are going to try the case. My experience is that most Surrogates are able to put aside what took place in settlement conferences and try the matter impartially, if the matter must go to trial. Other Judges will assign personnel to do the settlement negotiations and not partake in the negotiations themselves. Again, that must be considered.

If I can be of any assistance to you as it relates to the proposal dealing with alternate dispute resolutions, I would be happy to either comment on anything specific, or meet with anyone you assign to discuss matters, or if you prefer, we can discuss matters directly. I wish to be of as much assistance as I can.

With best regards,

C. RAYMOND RADIGAN

CRR:bak

963150

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March 11, 2022

Eileen D. Millett, Counsel
NYS Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: The NCBA Endorses the Adoption of the new Part 60 and Part 160 Rules.

Dear Ms. Millet,

On behalf of the Nassau County Bar Association, and upon unanimous consent from its board of directors, I am proud to endorse the adoption of the proposed Part 60 of the Rules of the Chief Judge, along with a new Part 160 of the Rules of the Chief Administrative Judge, to establish general statewide rules for presumptive alternative dispute resolution.

Please let me know if the NCBA can be of any further assistance.

Very truly yours,

Gregory S. Lisi
President
Nassau County Bar Association

Cc: Elizabeth Post
Executive Director
Nassau County Bar Association

**From:** ciprianoandbrown@nycap.rr.com
**Sent:** Monday, February 28, 2022 8:23 PM
**To:** rulecomments
**Subject:** Proposed new Rule 160 ADR

**Categories:** ADR rules

Hello,
I have been an attorney for 40 years. I would oppose this program on the ground that I do not believe the right to a jury trial should be taken away from any citizen who wants one. If the ADR system was available as a voluntary election by litigants, I would find that acceptable, so long as opposing parties both agreed to use ADR.
Mandating ADR for citizens who are involved in civil litigation would be a substantial overreach by the judiciary and would be wholly inappropriate.
Thank you-
Arlene P. Brown

# NEW YORK STATE BAR ASSOCIATION
# COMMERCIAL AND FEDERAL LITIGATION SECTION
# COMMENT ON THE NEW PART PROFFERED
# BY THE STATEWIDE ALTERNATIVE DISPUTE RESOLUTION
# ADVISORY COMMITTEE TO ESTABLISH GENERAL
# STATEWIDE RULES FOR PRESUMPTIVE ADR [1]

## SUMMARY

The Administrative Board of the Courts has requested comments on a proposal to adopt a new Part proffered by the Statewide Alternative Dispute Resolution ("ADR") Advisory Committee to establish general statewide rules for presumptive ADR. The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") recommends that the proposed new rule, as further explained below, be adopted.

## COMMENT

## I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who actively litigate in state and federal courts in New York and adjacent states, and in national and international forums. Thus, in offering the following comments, the Section is drawing on a broad range of experience.

## II. THE PROPOSED NEW RULE

The Proposed Part 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. The Proposed Part provides 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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[1] Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association's House of Delegates or Executive Committee.

## III. IMPORTANCE OF THE PROPOSED NEW RULE

The Section believes that specifically creating a new part to establish general statewide rules for presumptive ADR is critical to the process of making alternative dispute resolution processes a required part of prosecuting and defending a case.

While the use of alternate dispute resolution processes can be best utilized at different stages of a litigation depending on the case and can be effective early in the matter, as well as later on, and where counsel and client may have divergent views as to the likelihood of success of alternative dispute resolution, unless and until it is made part of the DNA of the litigation process, such resolution options will not be used by counsel and client to the fullest extent possible.

The proposed enabling rule provides judges with the flexibility to order the use of alternative dispute resolution tailored to the specific case and which he or she views as most likely to be successful. The Section applauds this enabling rule and will assist the Office of Court Administration by providing experienced litigators who would be willing to be trained as mediators to effectuate this program.

## IV. POSITION OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION

The Section supports the adoption of a new Part establishing general statewide rules for referral of civil disputes in trial courts to alternative dispute resolution. The Section notes that currently many of the judicial districts that have Commercial Divisions already have alternative dispute resolution programs in place and understands that this new court part authorizing or enabling rule would apply state-wide and the procedures that govern such existing Commercial Division programs might need to be modified to incorporate these new rules.

New York State Bar Association March 23, 2022
Commercial and Federal Litigation Section
Daniel K. Wiig, Section Chair

Approved by the Commercial & Federal Litigation Section Executive Committee, March 22, 2022

Mark Berman, Esq. *, Co-Chair, Commercial Division Committee
Ralph Carter, Co-Chair, Commercial Division Committee

*Denotes Principal Authors of Comment

NY State Council on Divorce Mediation

March 21, 2022

Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York, 10004

**Re: Comment to 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**

Dear Ms. Millett:

I write this letter in my capacity as President of the Board of Directors of the New York State Council on Divorce Mediation (NYSCDM) and on behalf of our Board and of our members. NYSCDM is a non-profit organization dedicated to promoting the highest professional standards of family and divorce mediation and has done so for more than 35 years. We have more than 245 members located throughout New York State and work actively to increase awareness of mediation, as the process that serves the needs of the people in New York State by helping families restructure their and their children's lives in the most holistic way.

All of our mediator members are experienced family and divorce mediators, and each member is required to abide by the highest professional and ethical standards imposed by NYSCDM. While our members come from various professional fields (i.e., lawyers, mental health professionals, financial professionals and others), they all possess a high level of skill in their primary fields and are united by their belief in the benefits of mediation.

I write to express NYSCDM's wholehearted support for the 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 Administration Judge to establish general statewide rules for the referral of civil disputes in the trial courts to alternative dispute resolution.

During the past decade, many of the NYSCDM's members have been, and continue to be, panel mediators on various court-annexed panels, from the pilot programs to PADR and others. Over the years, the rules of different programs varied greatly within New York State, so we are delighted that the new Part 160 strives to establish general statewide rules for ADR referrals. This will greatly help the public, the mediators and the court personnel.

All our mediators are well trained and well versed in all aspects of family and divorce issues, including parenting plans, support and maintenance determinations, equitable distribution, post-judgment modifications and issues relating to custody and relocation requests.

Most of our mediators are able to offer services throughout the State, regardless of their physical geographic location, through the use of video and online mediation platforms.

They can help parties not only to achieve global settlements, but also to narrow the issues in a case, so that the parties' and court's resources can be utilized more effectively. Our mediators also may be helpful during different stages of the court process: prior to the Preliminary Conference, during the discovery stage, and, even when the case is on the trial calendar.

The experienced divorce and family mediators of NYSCDM welcome the adoption of the New Part 60 and stand ready to assist the courts in the resolution of family and matrimonial disputes. Please let us know how we can help.

Respectfully,

Joelle A. Perez, Esq.
President
Board of Directors
New York State Council on Divorce Mediation
1732 1st Ave #21294
New York NY 10128
516-227-2595

MEDIATION MATTERS

10 N. Russell Road, Albany, NY 12206 v. 518.446.0356 f. 518.446.0379
480 Broadway, LL-32 Saratoga Springs, NY 12866 v. 518.584.6361 f. 518.583.9659
1473 Erie Boulevard, Suite 302, Schenectady, NY 12305 v. 518.847.0117 f. 518-847-0117



Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004

VIA EMAIL

Dear Ms. Millett,

I am writing in support of the new Part 60 of the Rules of the Chief Judge and the new Part 160 of the Rules of the Chief Administrative Judge, that establish General rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution.

As the Director of a Community Dispute Resolution Center, I know firsthand the benefit of this type of enabling legislation. This rule will help more Judges in our jurisdiction to create protocols to allow for more matters to be referred to Dispute Resolution processes. We have found the overwhelming majority of participants in these processes to have a highly favorable opinion of these alternatives to litigation. Presumptive Dispute Resolution would only increase the number of community members having access to these services which extends those benefits to a higher percentage of the population.

What is particularly useful in the Rules is the balance struck in establishing the authority with some uniformity of application, while still allowing for tailored protocols in local courts to allow exceptions if the interests of justice are not served or the court wishes to establish an opt out for a particular type of case. That balance is difficult to establish for a statewide rule and we feel these do that quite well.

In our local area, we have partnerships with our local small claims and family courts. Those courts with established presumptive procedures are able to send a higher number of referrals to our program thereby reducing the burden on the court. Further, with programs such as our mediation clinic with Albany Law School receiving those referred cases, it is also helping us to expand the roster of mediators ready to provide the direct services.

We are at the ready to partner with our local courts, Judicial District offices, and private mediators to implement the rule once it is established.

Thank you for seeking comments on this important rule.

Sincerely,

Sarah Rudgers-Tysz
Executive Director

From: New York Peace Institute (Community Dispute Resolution Center for New York and Kings Counties)

To: Eileen D. Millett, Esq.,
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
(sent via Email)

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 he 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: March 29, 2022

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We write this letter in support of the proposed Part 60 Rules of the Chief Judge and Part 160 Rules of the Chief Administrative Judge which give the Chief Judge authority to establish rules for the referral of disputes to ADR, and which will, if adopted, require that all civil disputes be referred to ADR, specifically mediation unless compelling reasons demand otherwise, at the earliest practicable time after commencement of a court case.

At New York Peace Institute (NYPI) prior to the pandemic, we consistently mediated 1,000 cases per year in small claims and civil court, with approximately 55%-60% of those cases resulting in agreements. This meant that there were 550 cases which no longer required judicial or court intervention—freeing judges and court staff to work on cases with more legal complexity or that otherwise required their attention. Research has also shown that mediated agreements are half as likely to require court intervention in the manner of post-stipulation judgements, inquests, or Orders to Show Cause than are court orders or dispositions. Beyond that, over 90% of respondents in our post-mediation surveys said they would recommend mediation to another person in a dispute. Not only is mediation an effective means of helping people reach agreement, but they also feel secure in the agreements they come to in mediation, and acknowledge mediation as a positive process worthy of endorsing. This proposal allows all litigants to have easy access to the benefits of mediation and ADR.

During the pandemic, we and CDRCs in New York City worked closely with the courts to establish the Small Claims Presumptive Mediation Program by helping to develop protocols and by providing other institutional support for the program and the courts. This was not new for NYPI, nor was it new for other CDRCs, who have been doing this work for four decades. That program is a notable example of our collaborative approach because it reflects our philosophy of working with the courts and providing services to our community: we see a need and strive to address the need in an accessible and responsive way. The proposed rules will allow us to continue to do that work which we are uniquely positioned to do.

In addition, referring cases to ADR helps mediators and the CDRCs. Individuals looking to become mediators have traditionally faced several challenges such as obtaining access to mentors, building experience by mediating real cases, and finding ways to secure paying work in the field of mediation. These rules assist mediators in getting access to cases and removing many of those barriers, while also ensuring that confidentiality (the proposed rule on confidentiality seems to track the Uniform Mediation

Act, which has been considered by the New York State legislature several times) and mediator quality are upheld. The rules additionally help local CDRCs by increasing access for cases to support their work as well as for training and developing mediators, work that CDRCs have done for forty years in New York State. We also have strong relationships with local law school mediation clinics and believe that this ruling will continue to strengthen those relationships, allowing us all to work more closely together.

Finally, NYPI stands ready to provide training and other types of support the court may need to ramp up if these rules are passed in substance as proposed. We have presented at the Summer Judicial Seminars and have trained many judges and court staff on mediation. We are also willing to provide support to roster mediators as presumptive ADR expands, which will ensure that consistent quality services are provided to litigants in the New York State court system.

In short, we support the passing of the proposed rules as written and encourage the Administrative Board to pass them.

Thank you for your kind consideration of this submission.

Sincerely

Michele Kirschbaum
Director of Programs
New York Peace Institute
mkirschbaum@nypeace.org

Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

*VIA ELECTRONIC TRANSMISSION:* rulecomments@nycourts.gov

March 29, 2022

Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
c/o Eileen D. Millett, Esq.

**RE: Proposed Rule Requiring Mandatory Referral to ADR**

Dear Sir or Madam

Please be advised that I object to the proposed new rules for referral of civil disputes to ADR.

As the Court may be aware, the proposed new rules do not indicate any attempt to evaluate the cost to litigants of these new rules. As such, they should not be adopted.

As of today, I am involved in two matters which were sent to mediation. In the first matter pending downstate, the mediator is receiving $850/hour. In the second matter pending upstate, the mediator is receiving $525/hour. Both of these amounts are prohibitive for many civil litigants and therefore, making mediation mandatory will reduce access to justice.

In that regard, there are many plaintiffs that do not have substantial cases and cannot afford the cost of mediation. They must rely on bringing their case to Court.

In the same vein, there are many corporations and small businesses that are faced with frivolous lawsuits and requiring them to spend money on mediation is also inappropriate.

Currently, sophisticated lawyers are able to determine whether mediation would be useful and they should be permitted to proceed in that regard.

As the Court calendars will make clear in many counties, there is no overwhelming utilization of the Court system and there is no need to force cases out of the civil justice system.

Therefore, these rules should not be adopted.

Very truly yours,

Roemer Wallens Gold & Mineaux LLP

Matthew J. Kelly
~~MJK/csh~~

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# MEMORANDUM

**TO:** Eileen D. Millett, Esq.
Counsel
Office of Court Administration

**FROM:** Onondaga County Bar Association (OCBA) ADR Task Force

**SUBJECT:** 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:** March 23, 2022

Thank you for the opportunity to comment on the proposed Part 60 of the Rules of the Chief Judge and Part 160 of the Rules of the Chief Administrative Judge ("Proposed Rules"). The OCBA ADR Task Force was established in May of 2021 to support the use of ADR as an effective, efficient and economic method of dispute resolution with a responsibility, in particular, to review and provide recommendations in support of the Fifth Judicial District's ADR plan. We commend the work of the Statewide Alternative Dispute Resolution Advisory Committee in developing proposed statewide rules for presumptive ADR. We are appreciative of the recognition in Section 160.5 of the Proposed Rules that local bar associations may play an important role in supporting the development of local ADR rules by the District Administrative Judges.

The OCBA ADR Task Force further supports the primary thrust of the Proposed Rules to authorize courts to require mediation and other forms of ADR, while deferring to individual Judicial Districts to establish local rules as set forth in Section 160.2(b)(2). This includes local rules governing the selection of neutrals, the mediation referral processes, mediator compensation, complaint procedures and the options available for parties unable to pay the costs

of ADR. We believe that the deferral to individual Judicial Districts to establish local rules will best meet the needs of the courts and litigants, and serve the interests of justice.

The OCBA ADR Task Force would make the following additional comments for consideration. We believe that the overriding purpose of the Proposed Rules to direct cases to mediation and other forms of ADR could be strengthened with a revision to Section 160.2(a)(1) to state that "a court shall issue an order referring each civil dispute pending before it to an appropriate ADR process at the earliest practicable time." We believe that a specific order would serve to underscore the presumption that ADR is mandatory unless a case meets very limited exceptions to the rule. In this respect, our suggestion would parallel the court-ordered mandatory settlement conference required under Rule 30 of the Uniform Rules of Practice for the Commercial Division. To this same end, the OCBA ADR Task Force believes that the exception to ADR set forth in Section 160.2(a)(1)(iii) when a party to the dispute "objects to and opts out from such referral" may be so broad as to swallow the rule. While we recognize that the contours of this exception may be addressed in local rules, we believe that this exception should be further defined with limiting language in these statewide rules. We would suggest Section 160.2(a)(1)(iii) be revised to state that "a party to the dispute objects to and ~~opts~~ is permitted by the court to opt 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.…"

The OCBA ADR Task Force would make the further comment that the expectation set forth in Section 160.3(d) that roster mediators will be subject to standards of conduct to be adopted by the Statewide ADR Advisory Committee should be extended to mediators chosen by the parties who are not on court rosters. We express no opinion at this time as to whether these standards should be extended to mediation-trained court staff, but consideration might be given by the Statewide ADR Advisory Committee when developing standards to extend some or all of these standards of conduct (e.g., conflicts of interest) to these neutrals as well.

Lastly, the OCBA Task Force would comment that the Proposed Rules could underscore the importance of local courts collecting data on ADR utilization and effectiveness with the inclusion of a specific rule directed to reporting responsibilities. As one organization put it: "Data allows organizations to measure the effectiveness of a given strategy: When strategies are put into place to overcome a challenge, collecting data will allow you to determine how well your solution is performing, and whether or not your approach needs to be tweaked or changed over the long-term." Council on Quality and Leadership, www.c-q-l.org/resources/guides/12-reasons-why-data-is-important/. We would suggest an additional Section 160.2(a)(6) to state as follows:

> (6) The ADR program administrative personnel assigned to each judicial district shall collect data from each local court in such manner, format and frequency as may be directed by the Chief Administrator of the Courts or a designee of the Chief Administrator, with such data to include but not be limited to: (i) the ADR process to which cases are referred, (ii) the stage of litigation at which cases are referred to an ADR process, (iii) the number and duration of ADR sessions in which the parties participated, (iv) whether ADR was successful in resolving the case in whole or in part, and (v) for cases not referred to ADR, the particular exception to ADR applied by the court to excuse or remove a case from ADR as set forth in Sections 160.2(a)(1) or 160.2(a)(5).

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**DISPUTE RESOLUTION SECTION**

*2021-2022 Officers*

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March 31, 2022

Via Regular Mail and Email (rulecomment@nycourts.gov)

Eileen D. Millet, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York 10004

**Re: Dispute Resolution Section of the New York State Bar Association 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**

Dear Ms. Millett:

I write on behalf of the approximately 2,000 member Dispute Resolution Section of the New York State Bar Association (the "DR Section") to provide an enthusiastic endorsement of the proposed New Part 60 of the Rules of the Chief Judge and the New Part 160 of the Rules of the Chief Administrative Judge (the "Proposed Rules").

In May 2019, Chief Judge Janet DiFiore announced the rollout of the Presumptive ADR Program, requiring local courts to develop processes for referring cases to mediation and other forms of ADR early in the life of each contested matter. The DR Section actively partnered with the courts and ADR coordinators to serve on court panels, train the needed mediators, and publicize and promote the process which set the groundwork for a statewide culture change. In addition, during the pandemic, the mediation community (including a significant number of DR Section members) provided cost-effective and flexible videoconferencing solutions for ADR that have assisted the courts in resolving cases during the emergency slow-down posed by the pandemic and permitted state-wide access to ADR that will outlive the global health crisis.

Promulgation of the Proposed Rules is the next vital step to secure the continued progress and a unified acceptance of Presumptive ADR. We applaud the work of the Statewide ADR Advisory Committee for crafting

the Proposed Rules. Of particular importance, the Proposed Rules clearly authorize the courts to send cases to an appropriate ADR process at the earliest practicable time, and mandate that the courts do so. This will go a long way to allay the hesitancy of some courts to order cases to mediation or other ADR processes. The Proposed Rules also explicitly leave certain areas open for local courts to address, namely: (i) the selection/referral process; (ii) the important subject of compensation; (iii) the manner in which opt-outs are implemented; (iv) handling of complaints about the process; and (v) addressing situations where the parties are unable to pay costs incurred. The DR Section supports the promulgation of the Proposed Rules and will participate in local efforts to implement them and any supplemental rules.

While the DR Section wholeheartedly endorses the Proposed Rules, the following suggestions are made with an eye on maintaining the general tenor of the rules while strengthening and clarifying the provisions on confidentiality and immunity.

The Proposed Rules provide for strict confidentiality of all communications, memoranda, and work product made in preparation for, during, or in connection with an ADR process. *See* §160.3. There are certain exceptions listed in the Proposed Rules (including a waiver provision) that permit disclosure of a neutral's memoranda, work products, case files, and communications. We note that, in most existing court-annexed ADR rules, such strict confidentiality is not waivable without the express consent of the neutral involved.[1] We recommend that § 160.3(2) "Waiver" be omitted from the Proposed Rules and that any *necessary* rule on waiving confidentiality be mentioned in § 160.2(b)(2) as an area left for local courts to address. We also suggest a slight revision to § 160.4 "Immunity for neutral third parties," to parallel the language of the rules of most local and federal courts, where immunity is clear and the neutral is protected.[2] Should there be any question as to the Court's ability to provide for such immunity in the

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[1] "The ADR process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the neutral in connection with the proceeding - as well as any communications made by the neutral, parties or their counsel, for, during, or in connection with the ADR process-shall be kept in confidence by the neutral, the parties and any individual present during the ADR process, and shall not be summarized, described, reported or submitted to the Court by the neutral or any individual present during the ADR process. No party to the ADR process shall, during the action referred to the ADR process or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR process, or seek to compel the testimony of any other party concerning the substance of the ADR process."

Nassau County Commercial Division Rules of the Alternative Dispute Resolution Program 2020, Rule 4 (a), https://www.nycourts.gov/LegacyPDFS/courts/10jd/nassau/pdf/Commercial-Divison-ADR-Rules.pdf; Queens County Commercial Division, Rules of the Commercial ADR Program 2017, Rule 5, https://www.nycourts.gov/LegacyPDFS/courts/11jd/supreme/civilterm/adr/rules_comm_adr_2017.pdf; Commercial Division New York County, Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8 https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Rules of the Alternative Dispute Resolution Program for the Ninth Judicial District, Rule IX https://www.nycourts.gov/LegacyPDFS/courts/9jd/ADR/rules/DISTRICT-WIDE-RULES.pdf.

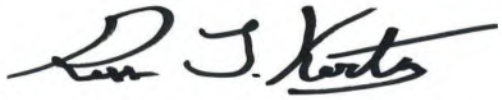
[2] "Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving."

New York County Commercial Division Rules and Procedures of the Alternative Disputes Resolution Program, Rule 9, https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Nassau County Commercial Division Rules of the Alternative Dispute Resolution Program 2020, Rule 6, https://www.nycourts.gov/LegacyPDFS/courts/10jd/nassau/pdf/Commercial-Divison-ADR-Rules.pdf; Kings County

Proposed Rules, we recommend that such immunity be provided "to the maximum extent permissible by law." As we are recommending the omission of § 160.3(2) while seeking to clarify the immunity afforded to neutrals, we further suggest that the last sentence of § 160.3(2)[3] be preserved and expanded in § 160.4 so that it is clear that mediators and neutral evaluators are protected from: (i) being hauled into court; and (2) responding to party subpoenas. Such protections would be consistent with rules established by various local courts.[4]

We acknowledge and appreciate the great effort and skilled expertise that went into the Statewide ADR Advisory Committee drafting process. The DR Section eagerly looks forward to the promulgation of the Proposed Rules as the Presumptive ADR culture change continues to improve the dispute resolution experience for parties, advocates, and neutrals throughout the State of New York.

Respectfully Submitted,



Ross J. Kartez, Esq.
*Chair*
*Dispute Resolution Section*
*New York State Bar Association*

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Presumptive Mediation Program Rules, Rule VII (c) https://www.nycourts.gov/LegacyPDFS/courts/2jd/kings/civil/Kings%20County%20Supreme%20Court%20Presumptive%20Mediation%20Rules.pdf; Rules of the Alternative Dispute Resolution Program for the Ninth Judicial District, Rule X (b) https://www.nycourts.gov/LegacyPDFS/courts/9jd/ADR/rules/DISTRICT-WIDE-RULES.pdf.

[3] "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."

[4] "…No party to the ADR process shall, during the action referred to the ADR process or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR process, or seek to compel the testimony of any other party concerning the substance of the ADR process… No party to an action referred to the Program shall subpoena or otherwise seek to compel the neutral or any individual present during the ADR process to testify in any legal proceeding concerning the content of the ADR process. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or reasonable sums lost by the neutral in representing himself or herself in connection therewith..."

Nassau County Commercial Division Rules of the Alternative Dispute Resolution Program 2020, Rule 4 (a) and (b), https://www.nycourts.gov/LegacyPDFS/courts/10jd/nassau/pdf/Commercial-Divison-ADR-Rules.pdf; (see also) Queens County Commercial Division, Rules of the Commercial ADR Program 2017, Rule 5, https://www.nycourts.gov/LegacyPDFS/courts/11jd/supreme/civilterm/adr/rules_comm_adr_2017.pdf; Commercial Division New York County, Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8 https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Rules of the Alternative Dispute Resolution Program for the Ninth Judicial District, Rule IX https://www.nycourts.gov/LegacyPDFS/courts/9jd/ADR/rules/DISTRICT-WIDE-RULES.pdf.

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April 4, 2022

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Re: 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

Dear Counsel Millett:

As Corporation Counsel of the City of New York I submit this letter in response to the request for Public Comment on the 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 new Part 160 of the Rules of the Chief Administrative Judge (Exhibit B). The proposal recommends establishing statewide rules that would refer, to the greatest extent practicable, "civil disputes in the trial court" to mediation, other forms of ADR, or neutral evaluation.

As stated in § 60.1 of the Proposed Rule of the Chief Judge, utilizing mediation and ADR can result in civil disputes being resolved more efficiently and effectively than adversarial proceedings. Given the success of the alternative procedures, I support building a system to create greater use of mediation and ADR in the state courts. As currently drafted, however, the proposed rules too broadly define the types of matters that can be referred for mediation, and the breadth of the proposal leaves open many questions that need to be addressed to fully understand how the system would impact the matters in which my office represents the City of New York.

*Primary Question*

A primary question that is raised by the proposal is whom will bear the costs of mediation, ADR or neutral evaluation. Is the intent of the proposal that the costs should be borne by the litigants? Would the litigants be responsible to compensate the mediators,

arbitrators and neutral evaluators? Without understanding what the costs to the citizens of the City will be, it is not feasible to assess the practicality and potential success of the proposed rules. Although not discussed in the proposal, if the intent is to create an infrastructure of volunteer mediators, arbitrators and neutral evaluators, similar to the system that exists in the SDNY for the cases in that Court which are subject to referral for mediation, the goal of this proposal is more likely to be successful and in the best interests of the City. However, resolution of that fundamental question is important to any analysis of the proposed rules, and I would welcome a discussion about how to successfully apply that system to City matters.

*Time to Gather Relevant Information*

In the short time since I have been serving as Corporation Counsel, I have learned about attempts by Law Department lawyers and our client to work collaboratively with stakeholders to resolve case backlogs. I have learned about aspects of our practice, and the volume of matters we bring and defend on behalf of the City, that could be impacted by the proposed rules. For example, one practice area in our office has approximately 26,000 pending personal injury and property damage cases in the state courts. Another practice area is defending over 100 cases that seek damages in amounts of 800 to 900 million dollars, and assessing the City's potential liability in those cases is dependent on complex, time-consuming engineering analyses.

There are many other areas of practice handled by my office which arguably meet the broad definition of "civil disputes in the trial court" that raise complications, and may not be suitable for referral to ADR and mediation. Importantly, in all of our cases where monetary damages are sought, we are statutorily required to consult with and achieve the approval of our client, the independently elected Comptroller of the City of New York, in order to be able to enter into a settlement of a case. Accordingly, I would request more time to gather information that may be helpful to OCA in considering the proposal, and in potentially creating a more targeted approach to defining those cases which would benefit from referrals.

As mentioned above, last year my team of lawyers, in collaboration with our client the Comptroller, proposed a process to Judge Silver to address a category of cases that could be targeted for settlement. More information about those efforts could be helpful to the Advisory Committee and OCA as the proposed rules are considered.

I look forward to the opportunity to engage in more dialogue on the proposed rules.

Thank you for your consideration.

Very truly yours,

Sylvia Hinds-Radix

Honorable Sylvia O. Hinds-Radix
Corporation Counsel


**COUNCIL ON JUDICIAL ADMINISTRATION**

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April 4, 2022

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**Re: Proposed Rules for Presumptive Alternative Dispute Resolution**

Dear Ms. Millett:

Thank you for the opportunity to offer these public comments, responding to your and Chief Administrative Judge Marks's memorandum dated February 3, 2022. OCA's proposal is 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."

First and foremost, the Council on Judicial Administration ("CJA") of the New York City Bar Association ("City Bar") is pleased to support the promulgation of proposed Part 60 of the Rules of the Chief Judge and Part 160 of the Rules of the Chief Administrative Judge (the "Proposed ADR Rules"). We are delighted the New York Courts are taking this wise step.

The New York City Bar Association ("City Bar") is a voluntary organization with approximately 24,000 members. CJA's membership is comprised of judges, litigators, neutrals, chairs of court-related City Bar committees, and other members whose work is impacted by, or

impacts, the state and federal courts in New York State.[1] CJA consulted with many of its constituent committees and other interested City Bar members to better understand the needs and interests of members, and many of their contributions are contained in this public comment. CJA is grateful for their invaluable input.

The City Bar has long supported the use of ADR as an efficient, less costly and less burdensome way for litigants to resolve disputes. We view ADR, and particularly mediation, as strong methods both to complement and achieve the goals of the court system. ADR is a proven way to foster and implement — for litigants, lawyers, judges and other stakeholders — efficient, party-centric approaches to resolving disputes in creative and enduring ways, often using techniques and gaining results far beyond the power of a judge to order.

Since early in her tenure, Chief Judge DiFiore has centered "Excellence" as the theme of her efforts and of her term. In mid-2019, Judge DiFiore and Judge Marks announced the Presumptive ADR program ("PADR"). Half a year later, the COVID lockdowns temporarily stymied the rollout of PADR, but also had an unexpected but positive effect. Mediators and other ADR neutrals were able to pivot swiftly and move their processes to be almost entirely online. The benefits of that pivot were readily clear, especially as the courts were confronted with expanded dockets and delays and barriers to handling all the cases in the traditional way. In the experience of many of our members, those benefits were often acknowledged by the parties, their counsel and other stakeholders.

As you know, the chair of the Chief Judge's Statewide Advisory Committee on Alternative Dispute Resolution, John Kiernan, was several years ago the President of the City Bar. A theme of his presidency was to promote the efficient resolution of disputes in the face of ever-spiraling litigation time, cost and discontent; a theme which has been continued by Mr. Kiernan's successors. Among the approaches championed by the City Bar was to encourage the use of ADR in the courts.[2] The Proposed ADR Rules benefit not only the bar, but more importantly, the clients, other stakeholders and the courts.

One important feature of the Proposed ADR Rules is the clarity with which Section 160.2(a)(1) creates the new, unambiguous expectation in New York trial courts: that all civil disputes "*shall"* promptly be referred to an appropriate ADR process, with appropriate exceptions and conditions (emphasis added). ADR refers to "any one of a variety of processes designed to help parties resolve civil disputes alongside or apart from litigation. These processes include, but

[1] The City Bar committees represented on CJA include the ADR Committee, the Arbitration Committee, the Civil Court Committee, the Federal Courts Committee, the Housing Court Committee, the Litigation Committee, and the State Courts of Superior Jurisdiction Committee.

[2] *See* New York City Bar Association Report, *Recommendations for the Efficient Resolution of Disputes*, June 2018, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/recommendations-for-the-efficient-resolution-of-disputes-1; CPR Institute, *Progress Report: New York Courts' 'Presumptive ADR' Settles In*, Jan. 2020 (summarizing City Bar panel discussion among Administrative Judges), https://blog.cpradr.org/2020/01/27/progress-report-new-york-courts-presumptive-adr-settles-in/.

are not limited to, mediation, neutral evaluation, and other dispute resolution processes offered by community dispute resolution centers."

We also agree with the Proposed ADR Rules' approach of separating the issues that should have statewide application, such as confidentiality and quality standards, on the one hand, from the issues that are better left, with flexibility, to local needs, customs and resources, such as issues specific to different types of courts and litigants and cases. The variety of local rules, protocols and procedures that have developed across the state since the 2019 announcement of PADR are a mix of independent local thinking, planning and needs, plus a healthy sharing of experience among attorneys, neutrals, judges and administrators in OCA, the Judicial Districts, and individual courts. The wisdom of distinguishing statewide uniformity of overarching subjects that *should* be uniform (for example, confidentiality or quality standards) from the kinds of issues that are best addressed with local experience and experiments (for example, issues specific to different types of courts and litigants and cases) has been effective and well-received.

We also note that, importantly, the proposed rules provide for exceptions to the mandate (Section 160.2 (a) (1) (i) – (iv)) and, in addition, provide the courts with the flexibility to select ADR processes believed to be suitable for the cases at hand.[3] Further, the proposed rules enable local courts to manage and even withdraw cases referred to ADR (Section 160.2 (a) (5)). They enable future protocols to address important issues, such as the selection and compensation of mediators, how to address complaints regarding the ADR process and neutrals, and options where one or more parties may not be able to afford the costs of ADR (Section 160.2 (b) (2)). Taken as a whole, CJA believes that these terms provide the courts, and the parties, with sufficient flexibility to address issues that may pertain to a particular case.

CJA views the Proposed ADR Rules as an important step forward, and we urge their adoption. While supportive of the goals of the proposed ADR Rules, CJA received some comments and suggestions from the City Bar committees and individuals who were gracious enough to share the benefit of their thinking. We offer them for consideration now, as appropriate, and for consideration by local Administrative Judges as they implement the operational rules that are called for under OCA's currently Proposed ADR Rules.

[3] These exceptions and conditions include that the referral is prohibited under local rule of court or administrative order of the Chief Administrator of the Courts (or designee); that the court determines such a referral will not serve the interests of justice; that 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 designee); and that the court determines insufficient ADR resources are currently available. In addition, the proposal requires that the court consider other relevant factors when deciding which process is most suitable for a particular case, including, whether a party or parties to the dispute are unrepresented and whether there are allegations of violence or harm, or risk of harm to any person.

**Exceptions to Presumptive Referral in Certain Courts and the "Interests of Justice" Exception**

The application of PADR to certain kinds of proceedings and actions has been a continued focus of the City Bar. We think it is very important that the "interests of justice" exception to Section 160.2(a) allows the court to carve out most Housing Court proceedings and certain Civil Court proceedings from ADR, unless and until the necessary resources and counsel are available to support it. The experience of those who practice in the Housing Court since the implementation of the PADR initiative in the Fall of 2019 was that the interests of justice were not served by ADR in most Housing Court proceedings due to the expedited and complex nature of Housing Court actions, the lack of physical facilities, one side frequently lacking counsel, and shortages of interpreters and other resources.

We are particularly concerned that the power imbalance that often exists in the Housing Court and in many Civil Court actions needs to be addressed, both systemically and in a delicate way in any individual ADR process.[4] The need for this is obvious in, for example, consumer debt cases and residential non-payment proceedings, where plaintiffs and petitioners are routinely represented by counsel and the defendants or respondents frequently are not.[5] On October 8, 2019, the City Bar, while acknowledging the benefits of ADR, expressed these concerns to then-New York City Civil Court Administrative Judge Anthony Cannataro.[6] Justice Cannataro was aware of and responsive to these concerns, and we urge that the current New York City Civil Court Administrative Judge Carolyn Walker-Diallo continue to respect these concerns when the New York City Civil Court promulgates and monitors local court implementation.

**Confidentiality of ADR and Waiver of Confidentiality**

One provision that has been the subject of discussion among both litigators and neutrals is Section 160.3 (b) (2), which sets forth circumstances in which confidentiality can be waived. Many City Bar members have expressed concerns regarding this provision. We view confidentiality as a key component to a successful ADR process, as it fosters an environment that allows participants to engage in open communication. Section 160.3 (2) provides that fewer than all participants may waive the strict confidentiality on which each person relied while they were participating in the process (including the mediator). This waiver could undercut the way mediation sessions work in actual practice. Many parties and lawyers have commented that it was

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[4] Moreover, cases in which domestic violence has been alleged or identified or which present a risk of violence or harm to any party require particular sensitivity and training in order to properly assess power imbalances. This is an important topic for several City Bar committees and was raised by the Administrative Judges at the City Bar's January 2020 panel discussion, *see* n. 2, *supra,* and may be the subject of future communications with court officials as Presumptive ADR continues to roll out.

[5] The City Bar Housing Court Committee commented that although low-income tenants in New York City are covered by the groundbreaking Right to Counsel Law, the full expansion of the right to counsel is in its infancy.

[6] New York City Bar Association, *Presumptive ADR in NYC: Housing and Civil Courts,* Oct. 2019, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/presumptive-adr-in-nyc-housing-and-civil-courts.

the assurance of confidentiality that allowed the participants to speak frankly, candidly and collegially with each other.

We respectfully suggest that the waiver provision in Section 160.3(2) be omitted from the proposed rules.

**ADR Neutral Immunity**

In addition, neutrals have expressed concern that neither Section 160.3 (b) (2), nor any other provision, provides clear immunity for mediators and other neutrals. We acknowledge that Section 160.4 seeks to provide immunity protection for neutrals, although the provision has been read by some as being non-specific and unclear. Notably, immunity for neutrals is not a new concept and has been adopted in many ADR programs, which often rely on volunteer or unpaid neutrals who are and should be provided with protections that often apply to judges and other court personnel. The success of the state's presumptive ADR programs will depend, in large part, on attracting talented, committed and diverse neutrals.

We respectfully suggest that the Proposed ADR Rules incorporate more specific immunity protections as have been adopted by certain courts to date.[7] If there are concerns regarding the authority of OCA to provide such immunity protection, we recommend that such immunity be provided "to the maximum extent permissible by law."

Along the same lines as confidentiality and bolstering immunity to neutrals, we also recommend that additional language be added to protect neutrals from being compelled to appear in court or to respond to subpoenas for their work product or to testify. Again, these protections are not new and have been adopted in many NYC courts' PADR programs.[8]

**Early Presumptive Referral, Exchange of Documents and Information, and Preliminary Conferences**

As noted above regarding the presumption and direction that matters "shall" be referred as early as practicable, the Proposed ADR Rules envision ADR as an early and integral part of the litigation process. Concerns have been raised that the language, "at the earliest practicable time" can be interpreted to require mandatory ADR at the immediate inception of the case prior to the exchange of necessary evidence and other information, or to prevent ADR to take place other than at the immediate inception of the case or, stated differently, the "earliest possible time."

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[7] *See, e.g.*, New York County Commercial Division Rules and Procedures of the Alternative Dispute Resolution Program, Rule 9, https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Kings County Presumptive Mediation Program Rules, Rule VII(c), https://www.nycourts.gov/LegacyPDFS/courts/2jd/kings/civil/Kings%20County%20Supreme%20Court%20Presumptive%20Mediation%20Rules.pdf.

[8] *See, e.g.*, Commercial Division New York County, Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8, https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Queens County Commercial Division, Rules of the Commercial ADR Program 2017, Rule 5, https://www.nycourts.gov/LegacyPDFS/courts/11jd/supreme/civilterm/adr/rules_comm_adr_2017.pdf.

CJA believes that the term, "at the earliest practicable time" (Section 160.2 (a) (1)) is sufficiently flexible to allow the parties to address limited "discovery" or, better stated, an exchange of evidence and other information necessary for a meaningful ADR process in which the parties and counsel are confident that they know enough to resolve a dispute.[9] This can be accomplished by agreement of the parties at the time the matter is referred to ADR, with limited involvement by the judge's clerk or referee at the time of referral[10], within the ADR process itself with the able assistance of the neutral or, if necessary and warranted, at a more fulsome Preliminary Conference with the court if a party properly opts out of ADR under the proposed ADR Rules or as a precedent to ADR. Indeed, nothing in the Proposed ADR Rules would deny counsel access to the court – either to facilitate ADR or to pursue litigation should ADR not be suitable based on a particular case.

Given the foregoing points, and to address the concerns that have been raised about the "at the earliest practicable time" language and clarify any potential confusion, we respectfully suggest that OCA consider adding the following provisions:

> Notwithstanding anything to the contrary set forth herein, the term "at the earliest practicable time": (1) contemplates the exchange of evidence and other information that will assist in making the mediation as efficient and productive as possible prior to the first ADR session, including as may be provided by local court rule; (2) does not prevent a court from directing parties who have not participated in ADR pursuant to the exceptions in this Rule at the outset of the action, or who have had an unsuccessful early ADR process, to proceed to or restart any ADR process during the pendency of the action; and (3) does not prevent the scheduling or conducting of a Preliminary Conference although such scheduling and conference should not delay ADR from taking place should the court determine that the case and timing are appropriate for ADR.

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[9] This information exchange could be part of or parallel to discovery, of course. But as often already happens in mediation, the parties may ask for less than, and more than, they would be entitled to under discovery. It is in aid of coming to an agreement, not a search for smoking-gun evidence. This would allow the parties to request and obtain before the first session starts evidence and information such as key documents in a commercial dispute; medical records in a personal injury or malpractice action; or, if a party will argue an inability to pay regardless of merits, some financial information – which would be information beyond the scope of normal discovery prior to judgment.

[10] One example of how local rules and practice can expedite information exchanges in support of ADR is in Supreme Court, New York County. A Supplemental Administrative Order ("AOC") issued on September 27, 2017, modified a pilot program, such that certain commercial cases that are not eligible for assignment to the Commercial Division, could nonetheless be mediated under the Commercial Division's ADR program. *See* https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/AO-Pilot92717.pdf. The AOC provides for early conferences before a court or staff attorney – not necessarily the assigned judge -- to provide for production by each party of information "tailored to the mediation … that will assist in making the mediation as efficient and productive as possible." Notably, cases subject to mandatory mediation in the pilot program may be exempted from such mediation "upon a satisfactory showing that an applying party would be subjected to unreasonable hardship or burden by participation in the mediation."

In this way, the intent of the ADR Rules – that ADR take place early on in cases – would be realized, while providing the parties with the information they need to engage in meaningful ADR. It would also not delay the case from proceeding in the event ADR does not fully resolve the case. It would provide a mechanism for the court to address and attempt to resolve issues that may be viewed as an impediment to early ADR, or to recognize one of the exceptions that would render a particular case unsuitable for early ADR.[11]

**Additional Minor Suggested Revisions**

We also respectfully suggest the following minor revisions to Section 160.2, which we believe are consistent with the intent of the subsections:

In Section 160.2 (a) (1) (i), after the word "under," insert the word "statute," so that the subsection will provide, "(i) such referral is prohibited under **statute**, local rule of court….."(emphasis added).

In Section 160.2 (b) (2) (v), after the word "where," insert the words "one or more of" so that the subsection will provide, "(v) the options available where **one or more of** the parties are unable to pay... ." (emphasis added)

Also, while there is a Section 160.3 (d), there is no 160.3 (c).

These suggestions can be considered and addressed now or at a later date, when the rules inevitably are subject to analysis after the courts and others gain experience with them. Moreover, some of these suggestions could be considered by local Administrative Judges and courts as they develop their own rules as required by the statewide rules.

The City Bar is very appreciative of the effort and expertise of those who drafted the Proposed ADR Rules, is eager to see them enacted, and offers its assistance to the courts, now and in the future, in their implementation for the further enhancement of ADR in New York State Courts.

Respectfully submitted,

Michael P. Regan
Chair, Council on Judicial Administration

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[11] It bears repeating that while CJA endorses early ADR, not all cases will be suitable for ADR prior to some exchange of evidence and other information and/or limited discovery.

Association for Conflict Resolution
Greater New York Chapter

Via Email (rulecomments@nycourts.gov)

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***Re: Association for Conflict Resolution Greater New York 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***

Dear Ms. Millett:

On behalf of the **Association for Conflict Resolution Greater New York, Inc**. ("ACR-GNY" herein), we are pleased to offer our enthusiastic endorsement of the proposed New Part 60 of the Rules of the Chief Judge and the New Part 160 of the Rules of the Chief Administrative Judge (the "Proposed Rules" herein).

ACR-GNY is a 501(c)3 nonprofit organization dedicated to promoting and strengthening alternative dispute and conflict resolution, fostering the use of dialogue, and contributing to the professional development of the ADR field. Our **275** members represent diverse sectors including commercial arbitration, government agencies, academia, education, the judiciary, restorative justice, law practice and law enforcement, mental health, and the clergy.

ACR-GNY recognizes and broadly supports ADR as a collaborative, constructive, and non-adversarial pathway to resolving legal matters, and we advocate for its continuing and enhanced use by the courts.

We advise that, as the rules are implemented, key issues are also addressed:

> **Availability of interpreters.** In small claims court, interpreters were no longer available for pre-mediation communication and there is a disproportionate reliance on the interpreters already working in the courthouse and inconsistent access to capable interpreters overall. This creates unequal and disparate access to justice for often already



**Association for Conflict Resolution, Greater New York**
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marginalized communities. We request that equal and consistent access to interpreters be available for every stage of the mediation process.

**Supervision and support for mediators.** Completion of Part 146-approved training provides entrants to the field with significant subject matter knowledge. Many court mediation programs offer further apprenticeship, supervision and periodic evaluations, but this is not universal. We encourage all court mediation programs to adopt these quality assurance measures to ensure a consistent and quality pool of mediators.

**Diversification of mediators**. The pool of mediators must represent the publics whom they serve. The cost of participation in Part 146-approved mediator training programs can be a deterrent or even prohibitive to individuals outside of the legal profession. Expanded opportunities for training, mentorship, and professional development, along with scholarships to support greater inclusion for minority and marginalized communities.

With these considerations, ACR-GNY supports the acceptance of the new rules. We anticipate that these rules will lead to expanded participation in mediation, and ask that funding be allocated such that it provides inclusive and equitable access to mediation.

As a professional association of conflict resolution professionals, we offer to serve in a voluntary advisory capacity for the implementation or revision of the Proposed Rules.

Sincerely,

**Genesis Fisher**
President of the Board of Directors
Association for Conflict Resolution, Greater NY

**Nick Pozek**
Secretary to the Board of Director

**ACR-GNY Board of Directors**

Emily Skinner, President-Elect
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Rebecca Liebowitz
Rekha Rangachari
Susan Salazar
Melody Wang
Tony Yost



**Association for Conflict Resolution, Greater New York**
P.O. Box 20587, Brooklyn, NY 11202 | www.acrgny.org

**From:** Dawn K Wallant <dwallant@commongroundinc.org>
**Sent:** Thursday, March 31, 2022 10:22 AM
**To:** rulecomments
**Subject:** Request for Public Comment on Proposal to Adopt a New Part 60 and a New Part 160 to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution

**Categories:** ADR rules

The Administrative Board of the Courts:

I am the Executive Director of Common Ground Dispute Resolution Inc., a non-profit organization serving Greene and Columbia Counties, NY, and a member of the NYS Unified Court System, Office of ADR Dispute Resolution Community Dispute Resolution Programs.

I am writing with commentary with respect to the above. I wholeheartedly support the Proposal, as this would create more access to and public use of dispute resolution processes, which, unfortunately, are greatly underutilized.

This is the most significant proposed change since the conception of enabling legislation the NYS CDRCs, Article 21A of Judiciary Laws of 1987.

Thank you.

Sincerely,

Dawn K Wallant, Executive Director
Common Ground Dispute Resolution Inc.

**From:** Bobbie Dillon <bdillon@rochester.rr.com>
**Sent:** Monday, April 4, 2022 10:21 AM
**To:** rulecomments
**Subject:** RE: ADR Rules

**Categories:** ADR rules

April 4, 2022

Dear Ms. Millett,

As the past president of the New York State Council on Divorce Mediation and someone who has advocated for the use of family mediation for years, I am pleased that the New York State Courts are moving away from adversarial processes toward more peaceful means of resolution.

I, however, would like to express a concern that it does not appear you are screening for intimate partner violence **before referral** for mediation, nor is there a strong indication that you are requiring **adequate training in intimate partner violence** for screeners or mediators, or potential advocates.

In addition, it is unclear what resources and advocacy are being offered to the general population regarding intimate partner violence and education regarding the law prior to mediation.

Without these plans in place, referrals for mediation can put women and their children in further danger and lead to unfair settlements. In addition, such risk can extend to the mediator and others involved in the process.

Intimate partner violence depends upon fear, intimidation, and control. Under such conditions the ability to negotiate a fair settlement are severely restricted.

As many as one-third of cases in a recent mediation research study involved domestic violence behaviors (Raines & Indovina, 2020). As the authors of this study highlight, "many screening tools do not fully detect coercive-controlling behaviors without actual violence, even though many of these have a stronger negative impact on settlement in mediation" (p. 201).

I applaud the Courts move toward more peaceful means of resolution. However, in order to successfully and safely mediate family matters, the Courts need to work with members of the Domestic Violence Community and researchers to put in place a safe and valid screening and education system.

Sincerely,

Bobbie L. Dillon, MS
Communication & Conflict Management Specialist
585-748-8682
www.BobbieDillon.com
70 Windward Way
Canandaigua, NY. 14424

Citation: Raines SS, Indovina V. How does domestic violence influence the likelihood of settlement in mediation? New data answers old questions. Conflict Resolution Quarterly. 2020;37:195–205. https://doi.org/10.1002/crq.21274

**From:** Elizabeth Donlon <est8medi8@gmail.com>
**Sent:** Friday, April 1, 2022 3:20 PM
**To:** rulecomments
**Subject:** Public Comment on Proposal to Adopt New Part Rule 60 of the Rules of the Chief Judge and New Part 160 of the Rules of the Chief Administrative Judge

**Categories:** ADR rules

Kudos to the Statewide Alternative Dispute Resolution (ADR) Advisory Committee for their excellent work. Referral to ADR relieves the courts of a stifling amount of civil cases that can otherwise be resolved without judicial intervention. More importantly, ADR affords access to justice to parties who might never have the opportunity to be heard or to craft their own resolution of their own dispute.

I believe that the proposed Rules are a tremendous step toward having the various courts "buy in" to the mediation process. My concern is that participation of counsel in the mediation process, court-referred or not, would be less effective or wholly ineffective unless attorneys were also well-versed in mediation and their roles in that process. Accordingly, I would like to make the following proposal:

Although I recognize that the proposed Rules do not address funding per se, as a mediator familiar with the excellent services provided by the local Community Dispute Resolution Centers, I would like to urge the OCA to provide the CDRCs with additional funding. Perhaps such funding increase could be derived in part by raising the cost of an RJI. The amount in excess of what is currently charged for a request for judicial intervention could be waived by an attorney certification, which contains the following:

(1) that counsel has read and understands the Rules with regard to alternative dispute resolution;

(2) that the client has been advised as to the mediation process, the role of the mediator, and the role of counsel as mediation advocate; and

(3) that counsel and client are willing to or have participated in [specify] an alternate dispute resolution process on [indicate date(s)]:

Thank you for your consideration of my comments.

Elizabeth P. Donlon
Attorney & Mediator
Floral Park, NY
est8medi8@gmail.com

**From:** Nancy Erickson <nancysericksonn@gmail.com>
**Sent:** Monday, April 4, 2022 4:48 PM
**To:** rulecomments
**Cc:** Nancy Erickson
**Subject:** Proposal for Alternative Dispute Resolution in All Civil Courts In NYS

**Categories:** ADR rules

Dear Ms. Millett,

Every ten years or so, there is a proposal like this. I think the most recent one was 2013, but before that, similar proposals were made at least twice that I recall. I graduated from law school in 1973, so I have seen many. All the previous proposals failed, and I hope that this one will too.

This proposal would create a presumption that all civil disputes (which would include Family Court and Matrimonial disputes apparently) should be referred to ADR, unless one of the four listed exceptions applies.

And this proposal would require that they be referred to mediation (as opposed to any other form of ADR) "unless there are compelling reasons to select another ADR process." One of the "compelling reasons" is "allegations of violence or harm, or risk of harm to any person..." That could include DV of course, but the problem with that is that DV survivors may not make "allegations" of DV in their cases, for many reasons, as we know.

I was under the impression that there already was a rule against mediation in any DV situation, at least in NYC. However, although I have asked many colleagues who represent DV survivors, no such rule has been quoted to me, so perhaps that was just a practice among some of the matrimonial judges rather than a rule. I do remember that Judge Sunshine would not allow mediation in cases involving DV.

If the proposed rule were put into effect, how would a court determine whether there is an issue of DV, since some survivors do not reveal it? I know for a certainty that many cases involving DV would not be recognized as such and would be sent to mandatory mediation.

Even if it was possible to rule out most DV cases, the important issue of training of mediators needs to be addressed. They would have to be trained in DV -- especially coercive control -- in order to be able to perceive when one party was exerting power and control over the other. And they would have to know how to handle it. That is a very tall order.

Finally, "neutral evaluation" is a concept I remember from years ago, but I thought that it had been dropped because not enough attorneys volunteered for the program. I think there are substantial dangers in sending anyone, much less DV survivors, to "neutral evaluation." There is too much opportunity for bias to come in, because no one is really neutral. I would suggest that this proposal drop neutral evaluation and just deal with mediation. There could also be confusion because the term evaluation is also used to refer to custody evaluations.

In short, this proposal needs much more work. Exempting Family Court and Matrimonial cases from the ADR mandate would be a good start.

Sincerely,
Nancy S. Erickson

--
Nancy S. Erickson
Brooklyn, NY
718 398 2601

If you need a response within 24 hours, please call instead of emailing.

**From:** Victoria Esposito <VEsposito@Lasnny.org>
**Sent:** Monday, April 4, 2022 5:58 PM
**To:** rulecomments
**Subject:** Comments from the Legal Aid Society of Northeastern New York re: proposed mediation rules

**Categories:** ADR rules

Enclosed please find comments from the Legal Aid Society of Northeastern New York.

A rural practitioner is concerned that this might not apply to town and village courts and seeks clarification, as those are the places where we see most of our eviction proceedings. This same practitioner is concerned about the possibility that non-attorneys might be able to award a judgment in excess of the court jurisdiction, and would like to know whether the intent is to completely waive mediators' liability. That is a concern.

We would like to see more about the qualifications and standards for mediators, as the quality of mediation is a consistent problem in our rural courts. We would hope that this applies to town and village courts.

One of our urban practitioners believes that this is an excellent idea but is concerned that it is too easy for parties to opt out. This follows the practitioner's observations that evictions are particularly difficult as they are emotionally charged. We have also, by contrast, heard concerns that power differentials between the parties (such as whether both parties are represented and whether there is the threat of violence) is only one factor in allowing parties to opt out of mediation, and we would hope that this is prioritized in the final rule.

We hope that you find these comments helpful; I am available should you have questions or concerns.

Respectfully submitted,
Victoria M. Esposito

**Victoria Esposito**
*(she/her/hers pronouns)*
*Advocacy Director*

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*95 Central Ave.*
*Albany, NY 12206*

Legal Aid Society
NORTHEASTERN NEW YORK

**From:** Chenoa Maye <chenoa@mayemediation.com>
**Sent:** Monday, April 4, 2022 9:54 PM
**To:** rulecomments
**Subject:** Part 60 and Part 160 Comments

**Categories:** ADR rules

Hello,

I am writing to offer brief comments in support of the proposed rules requiring referral to ADR.

I am a neutral (mediator) of color, and made this pivot from litigation in the hopes of sustainably, restoring the self-determination of would-be litigants - particularly those of color. While the ADR process is not without its biases, I believe it presents a thoughtful and empowering alternative to engagement with a historically fraught forum for marginalized communities.

As a litigator-turned-mediator, I have been humbled by parties' eagerness to engage with this alternative and have learned a great deal from their feedback post-engagement. As president of the Rochester Black Bar Association (RBBA), I have already begun the work of stimulating membership interest in this area of practice. The RBBA aims to promote diversity in all areas of legal service, and equity in access to meaningful civil remedies. I believe these proposed Rules to be a major step in furthering said access and would welcome the opportunity to support this initiative.

Thank you for your consideration,
Chenoa Maye

GARY P. SHAFFER, ESQ.
480 7TH STREET
BROOKLYN, NY 11215
347-314-2163
Gary@Shaffermediation.com

April 4, 2022

Via email to rulecomments@nycourts.gov

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York, 10004

Re: New Proposed ADR Rules

Dear Ms. Millet,

I am a long-time attorney and current co-chair of the Mediation Committee of the NYSBA Dispute Resolution Section. I write now to express my support for adoption of the proposed new rules relating to the referral of civil cases to ADR and to express concerns about two aspects of Proposed Rule 160 that I believe will require ongoing attention.

I would first like to note the excellent work done by those involved in preparing the proposed rules, which artfully address the need to expand the use of ADR in resolving civil cases. This was a difficult task that was handled with a great deal of thought and practical wisdom.

My main concerns with Proposed Rule 160 of the Rules of the Chief Administrative Judge are the references in Section 160.2(a)(1) to 1) the timing of referrals ("as soon as practicable") and 2) the opting out of referrals. It is critical that the anticipated local court ADR rules are not constructed so as to effectively undermine the presumptive nature of a court annexed ADR program.

**As Soon As Practicable**

Section 160.2(a)(1)(i) of the proposed rule states that "a court shall refer each civil dispute pending before it to an appropriate ADR process at the earliest practicable time…" followed by various exceptions. In the many discussions held about presumptive court mediation in the past few years, more than one judge has stated that discovery would need to be completed before a case was ready for mediation. In almost all my mediations, my first substantive question to counsel is what if any discovery is needed before we can hold an

effective mediation session. To the extent there is, we figure out what is needed, how long it will reasonably take, and when to schedule the mediation. Rarely does this cause any difficulties, and that is true regardless of subject matter or the items needed by any party. Whether it is an exchange of medicals, tax records, contracts, leases, evidence of lost earnings, employment records, etc., I rarely find that a case needs to proceed through the "normal" discovery process before a useful mediation session can be held. Indeed, quite the opposite is true. Needed discovery can typically be accomplished quickly and successfully as part of the mediation process.

Based on the foregoing, I believe it imperative that local presumptive mediation rules ensure that cases go out to mediation (or other ADR process) very early in the litigation process. Indeed, for many cases, the filing of an answer should be sufficient to trigger a referral to mediation. Many successful court annexed mediation programs require such an approach. For example, Section 2.1.A of both the Western and Northern District of New York ADR rules state that, with certain specified exceptions, all civil cases are referred automatically to mediation and that notice of the program requirements "will be provided to all parties immediately upon the filing of a complaint and answer or a notice of removal." Scheduling occurs "at the conference held pursuant to Rule 16 of the Local Rules of Civil Procedure."[1] These programs, and others like them in both state and federal courts, have been enormously successful in saving parties the time, expense, and often anguish, of protracted litigation.

**Opting Out**

Section 160.2(a)(1)(iii) of the proposed rule states that civil cases shall be referred to ADR unless "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…." The proposed rule understandably does not attempt to detail when opting out may be appropriate. However, local rules must be tailored so that opting out is not a matter of mere convenience or a party's belief that there is little likelihood of a settlement. Rather, a party seeking to opt out should be required to demonstrate by motion why referral to mediation is inappropriate for other reasons. Absent that, the presumptive nature of ADR could be critically undermined.

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The proposed rules go a long way toward establishing a foundation for robust court annexed ADR in the New York State Courts. State and Federal courts throughout the nation have been enormously successful in establishing such programs. The onset of the Covid pandemic further highlighted the need for these programs, and adoption of the proposed rules will further help bring about the cultural change required to make them successful in New York.

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[1] https://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%201-01-2022%20-%20with%20Signatures.pdf; https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO47_2.pdf.

Indeed, the last year in particular has already demonstrated increased acceptance and appreciation of the benefits that early mediation can bring to the litigation process. I look forward to the proposed rules being adopted and working with the courts to make their implementation a complete success.

Sincerely,

s/
Gary Shaffer

April 1st, 2022

Ms. Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

*Re: 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.*

Dear Ms. Millett,

We write on behalf of the Westchester County Bar Association's Alternative Dispute Resolution Committee to support the adoption of statewide rules for the referral of civil disputes in New York's trial courts to alternative dispute resolution ("ADR").

The Westchester County Bar Association ("WCBA"), is dedicated to promoting access to justice, jurisprudence and the integrity of the legal profession. The WCBA is both a professional and a civic institution that serves all of Westchester, largely through its partnership with its many Sections and Committees. The WCBA's ADR Committee promotes knowledge, improvement, and awareness of the many practices of dispute resolution among its members, the WCBA and the Westchester community.

The WCBA ADR Committee fully supports the adoption of the proposed Part 60 and Part 160 Rules ("Part 160 Rules"). The Part 160 Rules will assist Judges and Districts to build on the extensive work already done to implement and grow ADR throughout the State. Among other key elements, the Rules strengthen the Court's ability to refer civil matters to ADR; highlight important exceptions to the referral process; and clarify protocols regarding mediator standards, immunity, compensation, and the place of confidentiality in mediation as well as when parties may opt out of it. Of particular note to the Committee is reference to referral "at the earliest practicable time." It is our experience that early referral to ADR affords litigants an opportunity to take agency in how their dispute is resolved before they expend tremendous resources towards having a judge or jury resolve it for them. The Part 160 Rules will help promote just, fair and timely resolutions.

The WCBA ADR Committee fully supports the proposed Part 160 Rules and looks forward to working with OCA in their adoption and implementation.

Thank you.

Sincerely,

Russell M. Yankwitt, Esq.
Adam J. Halper, Esq.

Empire Justice Center
Telesca Center for Justice
One West Main Street, Suite 200 ◆ Rochester, NY 14614
Phone 585.454.4060 ◆ Fax 585.454.2518
www.empirejustice.org

April 4, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Submitted via e-mail at: rulecomments@nycourts.gov

**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**

Dear Ms. Millett,

I am writing on behalf of Empire Justice Center to provide comments regarding establishment of proposed statewide rules for the referral of civil disputes in the trial courts to Alternative Dispute Resolution (ADR).

Empire Justice Center is a New York-based multi-issue, multi-strategy public interest law firm founded in 1973 that is focused on changing the systems within which poor and low-income families live, including those marginalized by their intersectional identities. Our tools include direct client representation and impact litigation, policy advocacy, training and technical assistance. We have offices in Rochester, Albany, Long Island, and Westchester County. We work in many substantive areas of the law that find our clients in state courts, including, but not limited to, domestic violence and other crime victimization, housing, civil rights, health, LGBTQ rights, public assistance benefits, and foreclosure to name a few.

We respectfully submit these comments in the spirit of access to justice for the communities we serve.

1. **§60.1 (Preamble):** We sincerely appreciate the usefulness and the promise of mediation and other forms of alternative dispute resolution. It is good for the courts, of course, because it can lighten already over-burdened dockets and reduce the demand on attorneys. We also agree that, for many parties and proceedings, access to ADR can be a wonderful tool for avoiding acrimonious and expensive litigation, narrowing issues actually in dispute, or facilitating settlement. However, coming at this proposed rule from the basic premise that mediation is more effective and efficient downplays the concern the income inequality, educational inequality, racism, sexism, disability status, limited English proficiency, homo-and transphobia, and many other intersectionalities conspire to create power and privilege dynamics that we know all too well undercut access to justice.[1] Does ADR alleviate the justice gap or widen it, especially in the vast majority of civil cases beyond Family Court where litigants do not enjoy the right to counsel? Is this proposal evidence-based and, if so, what do the studies tell us about the impacts of ADR outcomes on marginalized communities, communities of color, and people of no or limited means—particularly where one party to ADR benefits from power and privilege, and the other has unequal bargaining power. If this tool is going to be expanded well beyond its current reach, what do we know about its impact on our most vulnerable communities? *We recommend that a working group or series of public hearings be established to discuss and study this essential question before mandatory statewide presumptive ADR in all civil settings is established.*

2. **Diversity, Equity, and Inclusion:** The state courts' commitment to expose and respond to concerns around diversity, equity, and inclusion (DEI) are well documented.[2] In particular, the many recommendations outlined in the October 2020

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[1] *See generally* Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures*, 88 Fordham L. Rev. 2407 (2020). This recent article discusses some of the challenges of using ADR for diverse communities. Notably, the May 2020 issue of Fordham Law Journal contains over a dozen papers thought-provokingly analyzing the use of ADR and access to justice. These papers were delivered at a 2019bsymposium entitled, *Achieving Access to Justice Through ADR: Fact or Fiction?*. This symposium was hosted by the *Fordham Law Review* and cosponsored by the National Center for Access to Justice and Fordham Law School's Conflict Resolution and ADR Program. All papers can be found at: https://fordhamlawreview.org/symposiumcategory/achieving-access-to-justice-through-adr-fact-or-fiction/

[2] *See for example*: Franklin H. Williams Judicial Commission: https://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml; Report from the Special Advisor on Equal Justice in the New York State Courts (October 2020)(hereinafter "Jeh Johnson Report"):https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf; Permanent Commission on Access to Justice: http://ww2.nycourts.gov/accesstojusticecommission/index.shtml; Richard C. Failla LGBTQ Commission https://ww2.nycourts.gov/ip/LGBTQ/index.shtml; Advisory Committee on Access for People with Disabilities: https://www.nycourts.gov/ip/advisory-committee-ADA/; Office of Language Access and its most recent report: https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/language-access-report2017.pdf;

Jeh Johnson Report that the court is actively implementing are all intended to address and help mitigate systemic bias around race and other identities. Therefore, as virtually all civil cases would have the potential to be shunted to ADR now, it is critical that these efforts around DEI are not diluted or lost in the scaling up.

We understand that the rosters around the state are already limited at this time for the cases where mediation is in active use. Has demographic diversity in the current roster been examined? Prior to expanding their reach now to all civil cases, are there efforts underway not only to expand the roster but with a goal of making rosters and mediators across the state more diverse and reflective of the communities that will be served? Building on the concerns raised above in #1, when engaging in ADR, are the mediators extensively trained to recognize and mitigate the bias that indeed all of us carry around issues such as race, gender/gender identity & expression, ableism, and more? Beyond meeting the general mediator training thresholds outlined in Part 146 to qualify, will there be annual training requirements around DEI? *We recommend that either proposed Part 160 or current Part 146 be amended to explicitly require both baseline and annual training in DEI. We also recommend that the proposed rules require that local administrators make efforts, not only to grow, but to diversify the roster of mediators and neutrals and that they report annually on the success of these efforts to recruit and retain around diversity. What other recommendations in the Jeh Johnson Report can help inform the recognition and elimination of systemic bias in ADR?*

Additionally, when entertaining cases, courts and court staff are bound by state and federal laws and policies, court rules, and ethical codes. These requirements address critical issues such as accommodations for people with disabilities, language access, anti-discrimination protections and other safeguards that ensure due process, promote trust and accountability, and help level the field. Failing, for example, to provide for free interpreters, use correct pronouns, or make accommodations, can harm litigants and undermine the success of ADR. Private third-party mediators may not have the same obligations to these clients as a court does. When a case is referred by the court to ADR, those vital protections for litigants should follow—especially around the provision of language access and disability-related accommodations. Providing ADR professionals with broad immunity from liability (*§*160.3) and only a complaint process (§160.2(b)(2)(iv)) to address accountability around bias or discrimination, may not provide sufficient incentive for ADR professionals to meet the diverse needs of litigants. *We recommend that. beyond the standard code of conduct generally referenced in §160.3(d), language be specifically added to the rules that requires ADR professionals to provide for the diverse needs of litigants and the court's role in insuring that these professionals have the resources they need to adequately meet these diversity concerns. For example, this should include translated materials, as well as information around rights to interpreters and for accommodation requests.*

3. **Domestic Violence:** We know, and are grateful, that OCA recognizes and takes very seriously the concerns around using ADR when domestic violence is present. Empire Justice Center was pleased to participate in the DV Committee Working Group that OCA's Statewide Office for ADR convened throughout last year. This DV Working Group

developed screening protocols, curricula, trainings, and resource guides collaboratively with the input of domestic violence attorneys, court personnel, mediators, and others. Significant time and resources have been dedicated to this issue and continue to be expended as the roll out of these tools continues. Therefore, we were surprised that the proposed rules make no specific reference to or mention of domestic violence. We appreciate that the proposal contains language around "allegations of violence or harm, or risk of harm to any person" in §160.2(a)(3)(iv), we believe the language could be more explicit. While the rules cannot address every scenario where ADR may not be appropriate where a history or risk of violence or harm is involved, given the near universal agreement that cases involving domestic violence are exceptions (at this time), the rules should be explicit on this point. *We recommend that the rules explicitly state that domestic violence is an exception and reference the products and policies developed by the DV Working Group. We also ask that the products developed by the working group be made publicly available as soon as possible.*

Further, the DV Working Group developed extensive training resources around identifying and addressing domestic violence and to a lesser extent child abuse and neglect. *We recommend the rules addressing qualifications and training requirements for all mediators should be amended to explicitly include trauma-informed training on family violence, including domestic violence and child abuse and neglect.*

4. **Child Abuse and Neglect:** Section 160.3 addresses the broad confidentiality protections of the ADR process, as well as exceptions. We specifically have concerns around §160.3(b)(5) which provides that if a mediator has "reasonable cause to suspect that a child is an 'abused child' or a 'neglected child' as defined by….the Family Court Act…the appropriate authorities may be notified." While the proposal falls just short of making ADR professionals "mandated reporters" as defined by Social Services Law §413[3], its explicit inclusion in the rules makes clear that reporting to "authorities" such as the Statewide Central Register or law enforcement is almost imperative. While we recognize the vital importance of protecting children from harm or abuse, this well-meaning provision has the potential to problematically inflict the weight of a child welfare system plagued by systemic racism[4] and significant bias on families. This is especially concerning where in most civil proceedings, except certain family or matrimonial law matters, people do not enjoy the right to counsel. Although ADR introduction processes should advise litigants about the confidentiality exceptions prior

[3] Since 1983 when the Attorney General Formal Opinion was published, Social Services Law §413 has been amended over two dozen times adding more and more professions to the list of mandatory reporters. Notably, during that time Community Dispute Resolution Center staff or other mediators and ADR professionals have not been legislatively included in the list of mandatory reporters.

[4] See press release from 4/2/22 from NYSBA's House of Delegates:https://nysba.org/new-york-state-bar-association-finds-child-welfare-system-replete-with-systemic-racism-pushes-for-reforms/?fbclid=IwAR1UgMVaf9KvVet-CfrGYk-LeUeA7MjuO0gooiCfvtm and the recently approved April 2022 report from the Committee on Children and Families in the Law entitled, *Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare*: https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-report-and-all-comments.pdf

to referral or screening, some litigants may not understand, anticipate, or appreciate the significant and long-term consequences of sharing information that a mediator may consider child abuse or neglect.

Further, other than *1983 N.Y. Op. Atty. Gen. 44 (N.Y.A.G.),* an Attorney General Opinion from nearly four decades ago, we have found no other legal authority that actually addresses confidentiality and the issue of child abuse reporting in ADR settings. Also alarmingly, these rules are silent on mandatory training and education around child abuse and neglect identification and reporting. *We recommend that the issue of disclosure around child abuse and neglect be subject to further legal examination, public input, and study. Additionally, if ultimately deemed appropriate for the rules, we recommend an explicit training requirement for mediators.*

5. **Reliance Upon Local Rules:** Given the significant differences in judicial districts statewide, we agree that courts around the state should have some ability to customize local ADR practice to fit their needs as addressed in §160.2(a)(1)(i), (iii). However, we fear that with such decentralization there could be significant inconsistency in practice and process across the state. Not only will this be confusing for attorneys that practice in multiple counties, but it will also be confusing for litigants. It may also be difficult to find necessary information about ADR processes if people must look in multiple places, such as both statewide rules and local rules. Many unrepresented litigants simply will not be legally sophisticated enough to know to look in multiple places to educate themselves about their rights. This will place unrepresented parties at a particular disadvantage. *We recommend that, to the extent possible, statewide rules be enacted and local courts be given templates and other tools to streamline and standardize the ADR process as possible.*

*6.* **Significant Burden Placed on Unrepresented Litigants Who May Want to Opt-Out:** Section 160.2(a)(1)(iii) requires an unrepresented party to be their own advocate by "object[ing] to and opt[ing] 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." With ADR being presumptive, we have concerns that some litigants may be intimidated or coerced into participating in ADR because they believe failing to participate may annoy, upset, or disappoint the court. They may perceive it as mandatory regardless of information shared about ADR processes. Further, the proposed rule §160.2(a)(1) ambiguously states that "*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…with access to written or electronic materials explaining how ADR is used to resolve a dispute, and the associated costs, if any." [emphasis added]

*We agree that it is imperative to timely educate litigants about these processes but recommend that clear statewide standards and goals should be given to local courts on when and how information should be shared, including directives on around language*

*access and accommodations. These should explain the right to refuse in clear and easily understandable language and provide reassurance to parties that they will not be penalized for failure to participate. We recommend that these be drafted by the Statewide ADR Office to ensure that all parties are provided consistent and accurate explanatory information.*

Thank you for the opportunity to share our comments.

Sincerely,

Amy Schwartz-Wallace, Esq.
Senior Attorney and Unit Director

VIA PDF/Email

Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Dear Ms. Millett;

As the President of the Family Divorce Mediation Council of Greater New York, ("FDMC") I am writing to express FDMC's support for the proposed new Part 60 of the Rules of the Chief Judge and Part 160 of the Rules of the Chief Administrative Judge to establish general statewide rules for presumptive ADR. FDMC applauds the effort to bring uniformity and standardization to the ADR processes within the Unified Court System while recognizing the efforts to provide the flexibility needed for different courts and locations. This recognition of the need for some flexibility will also encourage the development of new ideas, processes and protocols in the ever changing and evolving arena of alternative dispute resolution.

FDMC is an interdisciplinary professional organization dedicated to promoting the highest professional standards of family and divorce mediation and has been doing so for more than 35 years. With over 150 members, FDMC works to actively promote family wellness through increased awareness of mediation as a preferred process for divorce.

FDMC has a specific focus and expertise in issues surrounding families and divorce. We have insights that more general organizations might not have.. We write to highlight some of those concerns with the goal of providing some clarification to the proposed rules:

1. Confidentiality and waiver §160.3 and in particular §160.3(b)2). One of the hallmarks of ADR, in general, and, mediation in particular, is the need for the confidentiality within the process. This is not to be secretive but rather to encourage transparency, the free flow of ideas and the creation of options for resolution without concern for attribution, imprimatur of an authority figure, or should the matter not settle, be used in litigation. All parties sign on to this confidentiality protocol including the mediator, neutral evaluator or other neutral profession, who is neutral and impartial (the Neutral"). Any waiver of the

confidentiality of the process needs to be within the control of the parties as well as the Neutral. Confidentiality must extend to the Neutrals' notes and files and specify protection from being called to testify in any proceeding, including, but not limited to discovery. The proposed rules provide that the parties may waive the confidentiality of discussions with the Neutral without the Neutral's consent (possibility hindering the free flow of ideas within the process). We appreciate that the process is client driven and is colloquially referred to as "their" process. However, they are not the only ones involved in the process. The Neutral is the one charged with facilitating the conversation to help the parties reach a resolution The Neutral is integral to the process of the parties reaching a resolution. .As such we suggest that any waiver of confidentiality must include the Neutral's written approval.

2. Connected with the issue of confidentiality, the Neutrals should be provided with immunity and the clause must be strong. The wording of §160.4 may be a bit too vague especially as noted herein regarding certain interpersonal issues and concerns.

3. Relating to areas specifically related to Family Law issues (inclusive of matters currently addressed in Family Court as well as the Matrimonial Parts of the Supreme Court) we suggest that the rules may need some clarification around the issues of Intimate Partner Violence, ("IPV") as well as child abuse and neglect.

    a. Regarding IPV and Sections 160.2(a)(1) and (a)(3), clarification may be necessary to define the role of mediators in any screening process especially in light of the current OCA sponsored IPV screening training All stakeholders should be aware of their roles in any such screenings including i) if screenings are done prior to or after a referral is made to a PADR program, ii) what such screenings would entail and iii) who will be performing such screenings. This should be done through a protocol that assures the safety of everyone involved.

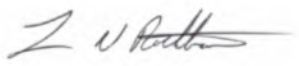
    b. In regard to the reference to reporting potential "Threats of imminent, serious harm" §160.3(b)(4) it should be clear that immunity would extend to the Neutral who reports such concerns.

    c. In terms of Child Abuse and Neglect notification (§160.3(b)(5), it should be clear that Neutrals are not being raised to the level of "mandated reporters" but they should be authorized, as contemplated, to report possible actions to an appropriate authority while maintaining the cloak of confidentiality which is so important to the overall process. Further, it should be clear that immunity would extend to the Neutral who reports such concerns.

We understand OCA fully recognizes and embraces the fact that ADR, and in particular mediation, is essential for the courts to provide more options to litigants to resolve their case and to address current backlogs including helping couples seeking to divorce or separate and create some balance to their lives. These proposed rules, as drafted, are just one large step in that recognition which FDMC strongly supports.

FDMC looks forward to working together with the court system to provide an ever more effective, standardized and protective use of Neutrals to provide speedy resolution of disputes brought by the public.

Respectfully,



President FDMC of Greater NY

NYSCADV
NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE

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April 4, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Submitted via e-mail at: rulecomments@nycourts.gov

**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**

Dear Ms. Millett,

The New York State Coalition Against Domestic Violence (NYSCADV) and the 21 undersigned domestic violence and legal services providers are writing to you today to provide comments regarding establishment of proposed statewide rules for the referral of civil disputes in the trial courts to Alternative Dispute Resolution (ADR).

**At the outset, we formally request that the Administrative Board of the Courts extend the public comment period on these proposed rules changes.** NYSCADV staff have contacted several civil legal attorneys, DV survivors and other stakeholders about these proposed rules and the public comment period. Very few individuals report being aware that they have been published for public comment. On a matter of such importance to the functionality of all civil trial courts in the State, the Administrative Board must ensure that all stakeholders have been informed of these proposed rules changes and have sufficient time and opportunity to provide input.

Which leads to our second request. We are unaware of any public discourse the Administrative Board of the Courts has held on these proposed rules changes. **We respectfully request that the Administrative Board of the Courts hold a public hearing, open to all who are interested in providing testimony, to obtain oral comments on these proposed rules changes.** Many stakeholders, particularly those who speak English as a second language or require accommodations for a disability, may be unable to convey their thoughts in writing and might prefer to provide comments orally instead.

For several years, DV advocates and civil court practitioners have been aware of the courts' increasing reliance on mediation to resolve court proceedings. Individual jurisdictions have developed their own practices and procedures for incorporating mediation into their processes. The overall goal, we suspect, is to accelerate resolution of certain proceedings and reduce bloated dockets. We appreciate the Administrative Board's goals in this regard and agree that it is beneficial to have a statewide approach to the use of ADR to ensure consistency throughout the State.

That being said, we are not aware that the Administrative Board of the Courts has collaborated with stakeholders beyond the confines of the Unified Court System in the development of these proposed rules changes, and that is a significant concern. The Administrative Board must seek the input of Family Court and matrimonial attorneys, attorneys working with DV survivors, attorneys working with low-income, LGBTQ+, BIPOC, disabled or immigrant clients, DV survivors or DV advocates before finalizing these proposed changes.

We are also gravely concerned about incorporating the proposed ADR practices into current court procedure without significant financial resources to support the work. It is our understanding that when cases involving low-

income individuals are currently referred to mediation, the parties are entitled to three, free, one-hour sessions with a mediator, after which the parties are required to pay for additional sessions or the cases are referred back to trial court. Three hours seems wholly insufficient to resolve most cases involving custody, visitation and child support issues. If this limit on the number of free sessions for low-income individuals continues, this presumption of referral to ADR would likely do little to resolve more child custody, visitation and child support cases. Instead, it would create significant delays for parties that first turn to ADR for resolution, only to find themselves back in trial court when their case is not concluded in three hours of mediation.

We urge the Administrative Board to consider the following comments and revise the proposed rules changes accordingly:

1. The preamble of §60.1 of Part 60 states, "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." This premise is the foundation and support for these proposed rules changes. Unfortunately, there is not universal agreement that this premise is true – particularly for proceedings involving DV victims and parents who may be trying to protect their children from abuse. For many years, scholars, judges, attorneys and advocates have debated whether such cases should be mediated, and if so, what conditions should be placed on such practices.

   The primary concern is that, in cases involving DV, the parties do not have equal bargaining power. This significantly disadvantages the DV victim in the negotiating process and impairs their ability to obtain the full protections available under the law.[1] The Advocates for Human Rights' Stop Violence Against Women project, which is focused on advocacy and change in the promotion of women's human rights around the world, states that "mediation is inappropriate in domestic violence situations. Mediation presumes that the parties have equal bargaining power and an equal voice in decision-making, focuses on future behavior, and many mediators do not allow the victim to address past issues of violence. This can further the victim's sense of personal responsibility for the abuse, and it undermines the accountability of the abuser… Due to the unequal bargaining power between a victim of domestic violence and her abuser, abusers are afforded with further opportunities to exercise power over the victim."[2]

   In her Yale Law Journal article titled "The Mediation Alternative: Process Dangers for Women," Trina Grillo writes, "[M]andatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and therefore, does not fulfill its promises. In particular, quite apart from whether an acceptable result is reached, mandatory mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes rigid orthodoxy as to how they should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties' speaking with their authentic voices."[3]

   Further, ADR's goal is for each party to make certain concessions and "meet-in-the-middle." On the contrary, the mission of New York's civil courts, particularly Family Court, is to address a wide range of issues involving children and families. Often, these families are in a state of crisis with one or more family members experiencing trauma or at risk of harm. As such, Family Courts are often required to make challenging decisions in order to enhance the family's overall safety and well-being, especially when DV or child abuse may be an issue. In such a situation, a "meet-in-the-middle" approach is not warranted. For

[1] Former Judge Marjory D. Fields, "Diversion of DV Cases Endangers Victims," *Domestic Violence Report,* Vol. 15, No.3 (February/March 2010): 33.
[2] "Mediation," Stop Violence Against Women, A project of The Advocates for Human Rights, last updated May 2019, https://www.stopvaw.org/mediation
[3] Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. (1991): 1549-1550.

example, joint legal custody and equal physical custody are virtually never safe options when DV and/or child abuse may be present.

2. Regardless of whether advocates and attorneys working with DV survivors believe ADR can be an effective practice for cases involving domestic violence, all agree that any ADR practice must maximize safety for all participants.

   The proposed rules changes would permit the court to consider "allegations of violence or harm, or risk of harm to any person" when deciding whether to refer the case to mediation or to an alternative form of ADR (see §160.2(a)(3)(iv)). This is unfortunately insufficient to maximize the safety of participants. Instead, if such allegations or risk has been identified, the parties should have the option of foregoing any ADR process, including but not limited to mediation, and return to the trial court.

   Several states have adopted specific rules and guidance for the use of ADR in cases involving domestic violence. For example, nearly 30 years ago, Georgia courts created The Georgia Commission on Dispute Resolution to study the issue of domestic violence and its impact on the mediation process and issue guidance for its use. In 2016-2018, Georgia reinstituted a working group to re-evaluate and update these guidelines,[4] based on the great deal of research and practice that has occurred since then. New York's Administrative Board of the Courts should evaluate this model, as well as other models developed by other states and practitioners, before finalizing any rules adopting ADR for cases involving domestic violence.

   Best practice for ensuring safety of the participants during an ADR practice is to require all cases to be properly screened for a history of violence and abuse before being referred to ADR. Georgia's screening tool is intended to assess the parties' suitability for participation in mediation, gathering information from parties to determine the presence of DV risk factors, the verification of the existence of current or past orders of protection involving the parties and or children, and the optional examination of available records to determine if DV is an issue in the case. If domestic violence is alleged or determined to be present in the case, and the parties still want to pursue ADR, the case would be conducted by a mediator who has obtained specialized training in domestic violence (beyond the foundational training recommended for all court personnel described below).[5] Information gathered during the screening process should be kept confidential.

   Gabrielle Davis, Loretta Frederick and Nancy Ver Steegh write in the American Bar Journal, "screening is less about sorting people into specific processes based on the presence or absence of [intimate partner violence] than it is about allowing parties to make their own, informed, deliberate choices about participation, with support from the mediator and, under ideal circumstances, guidance from an attorney or IPV advocate."[6]

   We are aware that a working group of civil legal attorneys and the Center for Court Innovation was organized last year to develop a DV screening tool to be used when cases were referred to mediation. We find it odd that these proposed rules changes do not require the use of this screening tool, nor any screening process at all for that matter. NYSCADV urges the Administrative Board to collaborate with

[4] Rules for Mediation in Cases Involving Issues of Domestic Violence, as amended by the Georgia Commission on Dispute Resolution, May 5, 2021.
[5] Georgia Rules for Mediation in Cases Involving Issues of Domestic Violence.
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individuals with knowledge and experience in the areas of DV and family violence to finalize this DV screening tool. We also urge the Administrative Board to incorporate a DV screening process for all cases referred to ADR in its proposed rules changes.

To ensure such screening is performed in a trauma-informed, survivor-centered manner, all mediators, mediation-trained court staff, neutral evaluators, roster mediators, roster neutral evaluators and staff of community dispute resolution centers must be properly trained, at a minimum, to understand the dynamics of domestic violence, the potential power imbalances between the parties to provide the victim a meaningful opportunity to participate and the ability to use their voice to advocate for a desired outcome, the safety needs of victims during the process of ADR, and cultural competence including within the LGBTQ+ community. Mediators and associated staff must also be trained to understand the safety needs of victims and children in terms of any agreement obtained as a result of the ADR.

3. Court-sponsored ADR that encourages parties to voluntarily submit to the process have the appearance of being mandatory, even when either party may opt out of the process. DV victims may believe the court prefers them to participate in ADR. This could prompt them to agree to participate, despite their fear of their abusive partners, because they do not want to anger the judge.[7]

   When parties are currently referred to mediation, they are not consistently made aware of their right to refuse to participate in mediation. This is particularly a concern for pro se litigants. The proposed rules changes should clarify how parties will be informed of their right to opt-out of any ADR process.

4. The proposed rules changes vaguely describe information that will be provided, "to the extent possible," to parties "explaining how ADR is used to resolve a dispute, and the associated costs of ADR, if any" (see §160.2(a)(2)). Instead, the proposed rules changes should be modified to ensure all parties are <u>fully informed</u> about the ADR process before being asked to participate in it.

   To ensure this occurs, as well as to protect at-risk parties, Georgia's model requires all parties to be given the opportunity to exercise their choice about whether to proceed with ADR prior to assignment of the case. The information provided at this stage includes, but is not limited to: the role of the neutral evaluator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome; the mediator will not allow abusive behavior and, while having skills in balancing power, will not in any way serve as an advocate for the at-risk party; details about confidentiality and any limitations on the extent of confidentiality; an explanation that the ADR process can be terminated by either party or the mediator/neutral evaluator at any time; and an explanation that a mediated agreement, once signed, can have a significant effect on the rights of the parties and the status of the case.[8]

5. The proposed rules changes include two circumstances that could cause removal of a case from ADR (see §160.2(a)(5)). This section should be expanded to explicitly state that cases found to involve domestic, sexual or family violence may be referred back to trial court.

6. §160.2(b)(2) describes the protocols courts may establish for mediators and neutral evaluators. We recommend these protocols also require mediators and neutral evaluators to disclose any conflicts of interest they have with the court, court personnel and/or the parties.

7. We are deeply concerned that the information to be shared with the court regarding "session information" will prejudice the court against any party that chooses to no longer participate in the ADR

[7] Fields, "Diversion of DV Cases Endangers Victims": 33
[8] GA rules of mediation

process once it has been initiated (see §160.3(b)(1)). This section should clarify that a mediator or neutral evaluator may not disclose to the court which party has requested additional sessions, which party opted out of referral to an ADR process, and/or which party decided to terminate an ADR process once initiated.

8. The proposed rules changes do not explicitly state that parties participating in an ADR process would be entitled to translation and interpretation services during an ADR process, at no cost to themselves. This is critical to ensure New York's ADR process is equitable.

Thank you for the opportunity to provide these comments. We would be happy to meet with the Administrative Board of the Courts, as these proposed rules changes are modified, to discuss these issues in greater detail.

Sincerely,

New York State Coalition Against Domestic Violence

A New Hope Center, Inc.

Arab-American Family Support Center

Catholic Charities of Delaware, Otsego, and Schoharie

Center for Battered Women's Legal Services

Connecting Communities in Action

Domestic Violence Program of Herkimer County

Domestic Violence Program of Warren and Washington Counties

Family Services Center for Victim Safety and Support

Fearless! Hudson Valley Inc.

Grace Smith House Inc.

Hope's Door

LI Against Domestic Violence

Opportunities for Otsego, Inc., Violence Intervention Program

Rise-NY

Safe Harbors of the Finger Lakes

Sanctuary for Families

Survivor Advocacy Center of the Finger Lakes

The Retreat

Vera House, Inc.

Willow Domestic Violence Center

YWCA NorthEastern NY

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April 4, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Submitted via e-mail at: rulecomments@nycourts.gov

**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**

Dear Ms. Millett,

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Which leads to our second request. We are unaware of any public discourse the Administrative Board of the Courts has held on these proposed rules changes. **We respectfully request that the Administrative Board of the Courts hold a public hearing, open to all who are interested in providing testimony, to obtain oral comments on these proposed rules changes.** Many stakeholders, particularly those who speak English as a second language or require accommodations for a disability, may be unable to convey their thoughts in writing and might prefer to provide comments orally instead.

For several years, DV advocates and civil court practitioners have been aware of the courts' increasing reliance on mediation to resolve court proceedings. Individual jurisdictions have developed their own practices and procedures for incorporating mediation into their processes. The overall goal, we suspect, is to accelerate resolution of certain proceedings and reduce bloated dockets. We appreciate the Administrative Board's goals in this regard and agree that it is beneficial to have a statewide approach to the use of ADR to ensure consistency throughout the State.

That being said, we are not aware that the Administrative Board of the Courts has collaborated with stakeholders beyond the confines of the Unified Court System in the development of these proposed rules changes, and that is a significant concern. The Administrative Board must seek the input of Family Court and matrimonial attorneys, attorneys working with DV survivors, attorneys working with low-income, LGBTQ+, BIPOC, disabled or immigrant clients, DV survivors or DV advocates before finalizing these proposed changes.

We are also gravely concerned about incorporating the proposed ADR practices into current court procedure without significant financial resources to support the work. It is our understanding that when cases involving low-

income individuals are currently referred to mediation, the parties are entitled to three, free, one-hour sessions with a mediator, after which the parties are required to pay for additional sessions or the cases are referred back to trial court. Three hours seems wholly insufficient to resolve most cases involving custody, visitation and child support issues. If this limit on the number of free sessions for low-income individuals continues, this presumption of referral to ADR would likely do little to resolve more child custody, visitation and child support cases. Instead, it would create significant delays for parties that first turn to ADR for resolution, only to find themselves back in trial court when their case is not concluded in three hours of mediation.

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   The primary concern is that, in cases involving DV, the parties do not have equal bargaining power. This significantly disadvantages the DV victim in the negotiating process and impairs their ability to obtain the full protections available under the law.[1] The Advocates for Human Rights' Stop Violence Against Women project, which is focused on advocacy and change in the promotion of women's human rights around the world, states that "mediation is inappropriate in domestic violence situations. Mediation presumes that the parties have equal bargaining power and an equal voice in decision-making, focuses on future behavior, and many mediators do not allow the victim to address past issues of violence. This can further the victim's sense of personal responsibility for the abuse, and it undermines the accountability of the abuser… Due to the unequal bargaining power between a victim of domestic violence and her abuser, abusers are afforded with further opportunities to exercise power over the victim."[2]

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[5] Georgia Rules for Mediation in Cases Involving Issues of Domestic Violence.
[6] Gabrielle Davis, Loretta Frederick, Nancy Van Steegh, "Intimate Partner Violence and Mediation," American Bar Association, April 1, 2019, available at https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/spring-2019-family-matters/11-davis-et-al-safer/

individuals with knowledge and experience in the areas of DV and family violence to finalize this DV screening tool. We also urge the Administrative Board to incorporate a DV screening process for all cases referred to ADR in its proposed rules changes.

To ensure such screening is performed in a trauma-informed, survivor-centered manner, all mediators, mediation-trained court staff, neutral evaluators, roster mediators, roster neutral evaluators and staff of community dispute resolution centers must be properly trained, at a minimum, to understand the dynamics of domestic violence, the potential power imbalances between the parties to provide the victim a meaningful opportunity to participate and the ability to use their voice to advocate for a desired outcome, the safety needs of victims during the process of ADR, and cultural competence including within the LGBTQ+ community. Mediators and associated staff must also be trained to understand the safety needs of victims and children in terms of any agreement obtained as a result of the ADR.

3. Court-sponsored ADR that encourages parties to voluntarily submit to the process have the appearance of being mandatory, even when either party may opt out of the process. DV victims may believe the court prefers them to participate in ADR. This could prompt them to agree to participate, despite their fear of their abusive partners, because they do not want to anger the judge.[7]

   When parties are currently referred to mediation, they are not consistently made aware of their right to refuse to participate in mediation. This is particularly a concern for pro se litigants. The proposed rules changes should clarify how parties will be informed of their right to opt-out of any ADR process.

4. The proposed rules changes vaguely describe information that will be provided, "to the extent possible," to parties "explaining how ADR is used to resolve a dispute, and the associated costs of ADR, if any" (see §160.2(a)(2)). Instead, the proposed rules changes should be modified to ensure all parties are <u>fully informed</u> about the ADR process before being asked to participate in it.

   To ensure this occurs, as well as to protect at-risk parties, Georgia's model requires all parties to be given the opportunity to exercise their choice about whether to proceed with ADR prior to assignment of the case. The information provided at this stage includes, but is not limited to: the role of the neutral evaluator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome; the mediator will not allow abusive behavior and, while having skills in balancing power, will not in any way serve as an advocate for the at-risk party; details about confidentiality and any limitations on the extent of confidentiality; an explanation that the ADR process can be terminated by either party or the mediator/neutral evaluator at any time; and an explanation that a mediated agreement, once signed, can have a significant effect on the rights of the parties and the status of the case.[8]

5. The proposed rules changes include two circumstances that could cause removal of a case from ADR (see §160.2(a)(5)). This section should be expanded to explicitly state that cases found to involve domestic, sexual or family violence may be referred back to trial court.

6. §160.2(b)(2) describes the protocols courts may establish for mediators and neutral evaluators. We recommend these protocols also require mediators and neutral evaluators to disclose any conflicts of interest they have with the court, court personnel and/or the parties.

7. We are deeply concerned that the information to be shared with the court regarding "session information" will prejudice the court against any party that chooses to no longer participate in the ADR

[7] Fields, "Diversion of DV Cases Endangers Victims": 33
[8] GA rules of mediation

process once it has been initiated (see §160.3(b)(1)). This section should clarify that a mediator or neutral evaluator may not disclose to the court which party has requested additional sessions, which party opted out of referral to an ADR process, and/or which party decided to terminate an ADR process once initiated.

8. The proposed rules changes do not explicitly state that parties participating in an ADR process would be entitled to translation and interpretation services during an ADR process, at no cost to themselves. This is critical to ensure New York's ADR process is equitable.

Thank you for the opportunity to provide these comments. We would be happy to meet with the Administrative Board of the Courts, as these proposed rules changes are modified, to discuss these issues in greater detail.

Sincerely,

New York State Coalition Against Domestic Violence

A New Hope Center, Inc.

Arab-American Family Support Center

Catholic Charities of Delaware, Otsego, and Schoharie

Center for Battered Women's Legal Services

Connecting Communities in Action

Domestic Violence Program of Herkimer County

Domestic Violence Program of Warren and Washington Counties

Family Services Center for Victim Safety and Support

Fearless! Hudson Valley Inc.

Grace Smith House Inc.

Hope's Door

LI Against Domestic Violence

Opportunities for Otsego, Inc., Violence Intervention Program

Rise-NY

Safe Harbors of the Finger Lakes

Safe Horizon

Sanctuary for Families

Survivor Advocacy Center of the Finger Lakes

The Retreat

Vera House, Inc.

Willow Domestic Violence Center

YWCA NorthEastern NY

**From:** Joan Gerhardt <jgerhardt@nyscadv.org>
**Sent:** Monday, April 4, 2022 5:01 PM
**To:** rulecomments
**Subject:** Re-Submitted: NYSCADV Comments re: Parts 60 and 160
**Attachments:** FINAL2_NYSCADVComments_OCSProposedRegsMediation_040422.pdf

**Categories:** ADR rules

We had one additional DV service provider sign on to the comments. Please accept this re-submission with 22 DV and legal service providers. Thank you!

Joan

---

**From:** Joan Gerhardt
**Sent:** Monday, April 4, 2022 4:57 PM
**To:** rulecomments@nycourts.gov
**Subject:** NYSCADV Comments re: Parts 60 and 160

Good afternoon,

Enclosed please find the comments of the New York State Coalition Against Domestic Violence and 21 domestic violence and legal service providers regarding a 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.

Please contact me if you are unable to access the file.

Thank you!
Joan

**JOAN GERHARDT**
**DIRECTOR OF PUBLIC POLICY & ADVOCACY**

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**LAWRENCE K. MARKS**
Chief Administrative Judge

**JEFFREY S. SUNSHINE**
Statewide Coordinating Judge for
Matrimonial Cases

# MEMORANDUM

**TO:** Eileen D. Millett, Esq., Counsel, Office of Court Administrations

**FROM:** Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases

**DATE**: April 1, 2022

**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

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Thank you for the opportunity to provide comment on the Proposal by the Statewide Alternative Dispute Resolution ("ADR") Advisory Committee described in your Memorandum dated February 3, 2022 which was sent out for public comment. The Matrimonial Practice Advisory and Rules Committee supports the Proposal.

Please let me know if I may be of further assistance.

cc: Susan Kaufman

THE LEGAL AID SOCIETY
CIVIL

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John K. Carroll
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*Attorney-in-Chief*
*Chief Executive Officer*

Adriene L. Holder
*Attorney-in-Charge*
*Civil Practice*

April 4, 2022

*By email to rulecomments@nycourts.gov*
NYS Unified Court System
Office of Court Administration
25 Beaver Street, Suite 8
New York, New York 10004

**Re: Proposal to Adopt a New Part 60 and 160 to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution**

Dear Office of Court Administration:

The Legal Aid Society is grateful for the opportunity to provide comments on the Proposed Rules by the Office of Court Administration which would refer parties in civil dispute in the trial courts to mediation and other forms of Alternative Dispute Resolution (ADR). We believe that facilitated negotiations, especially mediation, plays a role in expanding access to justice in several areas of law, including Family Court and Small Claims Court. We believe certain categories of cases are not appropriate for presumptive ADR, such as eviction proceedings and consumer debt collection matters.[1]

ADR can be a vehicle to promote access to justice, and when implemented and administered where appropriate, it can empower, expand self-determination, and provide efficient and just outcomes for litigants. In many areas, the benefits of ADR include more choice in the ways to resolve disputes, potential for earlier and faster resolution, less costly means to resolve disputes, and greater satisfaction with the dispute resolution process. We believe that ADR can be efficient and cost-saving in many areas, while also addressing concerns about the quality of the final resolution and how it was reached. The hallmarks of any successful ADR program would allow for litigants to easily access the ADR process, would address power imbalances such as when one party is unrepresented, and provide for fair and just outcomes for all parties.

The Legal Aid Society has been a member of Chief Judge DiFiore's Statewide ADR Advisory Committee (Committee) since its founding.[2] We are the oldest and largest legal services provider for low-income families and individuals in the United States. Annually, the Society handles over 146,000 legal matters for low-income New Yorkers with civil, criminal, and juvenile rights issues. Our Civil Practice operates across a network of neighborhood- and courthouse-based offices and 21 citywide units and programs that provide comprehensive legal assistance to

[1] See, Letter to Hon. Anthony Cannataro, New York City Bar Association 10/8/2019. Available at https://s3.amazonaws.com/documents.nycbar.org/files/2019577-PresumptiveADR_FINAL_10.8.19.pdf
[2] Including the High-Volume Court's Subcommittee.

clients. We have one of the largest civil caseloads in the nation, annually working on 52,500 individual direct cases and legal matters benefiting more than 135,000 low-income adults and children. With decades of impact litigation, and legislative and policy advocacy work, we fight and advance efforts to improve the law.

We commend the proposed ADR Rules flexibility in permitting local courts to develop their own rules and procedures in implementing presumptive ADR. While uniformity of general principles of ADR is necessary, such as confidentiality, we believe local courts and stakeholders are best able to determine the specific needs and protocols to suit their ADR program.

Though the goals of ADR are in part to reduce extended discovery and motion practice, and resolve disputes early, it is important that parties can exchange documents to make a fully informed decision in considering whether to settle. Section 160.2(a)(1) requires that the court "shall refer each civil dispute pending before it to an appropriate ADR process at the earliest practicable time…." Pre-session exchanges are invaluable in ensuring an informed and just outcome for any ADR process, when such documents are necessary for the ADR session. These exchanges often facilitate resolution and aid participants to express their viewpoints. We recommend that the early referral to ADR should still allow for exchange of documents so salient facts are known and considered in the ADR appraisal of the case.

**Consumer Debt Cases and Unequal Bargaining Power**

As a form of ADR, mediation plays an important non-adjudicatory role where conflicts typically arise between parties involved in long-term relationships that outlives the conflict itself. Yet, consumer debt cases are more suitable for settlement conferences where the focus is on the party's claims as set out in their pleadings and is resolution is focused on assessment of the outcome in court or viability of post-judgment collections.

We oppose the implementation of ADR, beyond existing settlement conferences, where there exists a deep power imbalance between the parties.[3] The most common example of such power imbalance exists when only one party to a dispute is unrepresented, such as in consumer debt lawsuits. Over a hundred thousand consumer debt collection lawsuits are filed each year in New York City civil court each year. In these cases, 97% of defendants are unrepresented and 100% of the plaintiff business entities are represented. Plaintiff's counsel generally has deep familiarity with court processes and access to key information and documents. The opposite is true for the pro se defendants, who often lack basic knowledge of their rights, legal procedures and applicable defenses. Lawyers who repeatedly appear mediation sessions are likely to dominate the process and mediators are constrained by their neutrality to equal the power imbalance.

As a result of these dynamics, unrepresented litigants who participate in mediation are often vulnerable to pressure to settle and to accept unfair results. Presumptive mediation would have

[3] It is Legal Aid Society's understanding as a member of the ADR Committee, that settlement conferences fall within the broad definition of "ADR" contemplated by the ADR Committee.

the unintended effect of impinging upon a pro se litigant's self-determination, which includes the right to an informed and voluntary decision to mediate. Where parties are unrepresented, presumptive mediation influences their choice to mediate and leaves them at greater risk of coercion throughout the process. Though mediation is about informed decision-making, the focus in mediation often turns to explaining the procedural mechanics of the process and not the substantive decision that they are making which inhibits access to justice for the unrepresented.[4]

Lack of proficiency regarding procedural and substantive laws puts pro se parties at a disadvantage because the law is an important tool in the settlement process.[5] Pro se litigants are particularly at risk given that they are likely to mediate with little or no knowledge of the law or applicable defenses. The mediator's duty to promote informed decision-making is insufficient where they cannot provide legal advice, which results in the unrepresented making decisions that are not in their best interest. Even when provided with key documents, low literacy and lack of English proficiency further hinder the unrepresented person's understanding of the court process. Most defendants will not be capable of reviewing, analyzing, and evaluating documentary evidence shared by a creditor.

Without representation, many defendants would enter into repayment plans and settlements that are entirely inappropriate, unaffordable, and result in default. The consequences of defaulting on settlement agreements are severe with automatic judgments entered for the full amounts originally sought with interest and fees. Existing case law makes it virtually impossible for defaulting defendants to vacate a default judgment in consumer debt cases. Moreover, ADR generally does not require findings of fact or conclusions of law, which makes it impossible to determine if critical information or legal principles have been recognized. With confidentiality appropriately being a key element of most forms of ADR, there is no reliable corrective mechanism for pro se litigants.

**Housing Disputes**

For most housing cases in New York City there already exists a form of presumptive ADR, in the form of Resolution Parts and other routine settlement conferences. Tenants in New York have significant procedural and substantive rights in housing laws and regulations, such as the Housing Stability and Tenant Protection Act of 2019. For pro se tenants, mediation could likely result in the waiver of basic legal rights and advantages, such as the applicability of the rules of evidence, to their detriment. Though the promise of autonomy and free will are important, it is critical that vulnerable parties not unwittingly forfeit their formal legal protections without knowing they did so. Most cases in Housing Court are not disputes between roommates or neighbors, but disputes between parties with deeply unequal levels of access to resources and

[4] Mediators often avoid conversations with pro se litigants that may constitute the unauthorized practice prohibitions.

[5] Especially where the represented party maximizes long-term gain by developing advance intelligence, planning for future engagement, developing trust and legitimacy with court personnel.

legal sophistication. Tenants sued in Housing Court are mostly poor while landlords generally have more resources and experience with navigating the court system.

For represented parties the summary nature of Housing Court proceedings makes them generally incompatible with ADR due to additional delays that result. Moreover, the lack of interpreters, physical spaces, neutrals, and other necessary resources to conduct mediation in any significant number would make most housing court cases inappropriate for presumptive mediation. While listing some exceptions, the Proposed Rules in Section 160.2(a)(1) declares that "a court shall refer each civil dispute before it to an appropriate ADR process…." The courts do not have the resources and infrastructure to refer even a portion of the hundreds of thousands of cases filed in Housing Court and consumer debt collection lawsuits each year. Therefore, it is necessary for the Proposed Rules to exempt these high-volume cases and courts from presumptive ADR.[6]

We commend the Office of Court Administration for the bold mandate in the Proposed Rules and generally endorse presumptive ADR in many categories of cases. To ensure that the Proposed Rules secure access to justice for pro se and vulnerable litigants, we make the following recommendation in implementing presumptive ADR.

1. Consumer debt collection and cases where only one party is unrepresented, and housing disputes generally, be exempted from presumptive ADR as not being "in the interest of justice" and because "insufficient ADR resources" are available under Section 160.2(a)(1)(ii) and (iv).

2. Roommate holdovers and owner-occupied small buildings are two categories of housing court cases where mediation might be helpful, and we recommend that any effort to pilot mediation in housing court be limited to those categories.

3. Settlement conferences, referenced in Section 160.6, should be explicitly held to be included within the broad definition of ADR in Section 160.1(a), though not subject to confidentiality. Confirming that court settlement conferences fall within the definition of ADR would allow courts to ensure due process where mediation is not appropriate and consider "whether party or parties to the dispute are represented" under Section 160.2(a)(3)(iii).

4. The requirement of Section 160.2(a)(1) for referral of civil disputes to an appropriate ADR process "at the earliest practicable time" allow for pre-session exchange of documents to ensure salient facts are known and considered in any ADR process.

[6] Certain housing disputes may be appropriate for mediation, such as double licensee "roommate" holdover cases due to their unique nature.

5. Any ADR process deemed to be appropriate for specific categories or individual cases, must be free of cost to low-income individuals, and adequate safeguards must exist to ensure that the quality of ADR services for these litigants secure quality access to justice.

Thank you for the opportunity to submit our comments on this important initiative by the Office of Court Administration. We are available to discuss our comment and recommendations if you have any questions or require additional information.

Sincerely,

Tashi Lhewa
Supervising Attorney – Consumer Law Project
The Legal Aid Society
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CENTER FOR DISPUTE SETTLEMENT
peace it together

March 28, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004

Dear Ms. Millett:

I am writing on behalf of the Center for Dispute Settlement (CDS) to express our support for the Statewide ADR Advisory Committee's proposal to establish statewide rules for presumptive ADR in civil disputes.

Established in 1973 as the first conflict resolution center in the state, CDS is part of New York State's network of Community Dispute Resolution Centers (CDRC), funded by the Unified Court System. Our organization serves the eight-county 7th judicial district, located in the Greater Rochester and Finger Lakes region.

The proposed court rule marks a historic development in the history of the court's provision of ADR services to New Yorkers. Finally, the courts and ADR service providers will have a clear set of statewide rules guiding how we can partner together effectively to support New Yorkers who can benefit from services to support the peaceful, informal, and effective resolution of conflicts in civil matters.

CDS has a long history of involvement in New York State's presumptive mediation initiative. We are involved with several established mediation programs in collaboration with our local Family Court partners. This year we began a new pilot mediation diversion program with Monroe County Supreme Court for uncontested matrimonial cases - the first of its kind in the state. We have seen the benefits that mediation services have afforded our clients, including savings of time and money, reduction of time spent in court, reduction in stress associated with lengthy court proceedings, and a sense of empowerment to make decisions that work for everyone involved.

We look forward to working with our court partners across the 7th judicial district to ensure that parties in civil disputes across our region have access to the affordable, safe, confidential, and transformative ADR services that our center can provide.

Sincerely,

Shira May, Ph.D.
President/CEO

Reynolds Arcade Building, 16 E. Main Street, Suite 800, Rochester, NY 14614-1813
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ALSO ADMITTED IN FL AND PA

March 31, 2022

Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
c/o Eileen D. Millett, Esq.

Re: Comments Relating to Mandatory Mediation

Your Honors:

I forward this letter as a comment with regard to the mandatory mediation issue.

Again, it appears to be in part patterned after the Federal Rules. I have had experience with mandatory mediation in Federal Court, and must comment that it is most often unsuccessful.

Mediation will only work if both attorneys, and their clients are interested in mediating the case. Often the mediation is required prior to a time when the case has been fully developed. Additionally, it is very frequent, for example, that the insurance company that is in control of the offer is unwilling to make any kind of reasonable offer at the mediation stage. As a result, the likelihood of success is minimal.

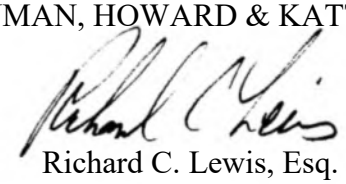
Like the new Court Rules, this mediation creates additional steps for practitioners. The cost associated with mediation often include attorney's travel, and presence at a mediation as well as preparation for the client so they can intelligently take part in the mediation. All of this creates a significant expense to the client, and of course significant additional time for the attorney. In addition, the cost of mediators can be extremely expensive, and if you participate in a five-hour mediation, the bill can run into the thousands of dollars which is another impediment to access to the Courts by persons with smaller claims.

I believe that this requirement will result in a further burden upon middle class litigants leaving them without recourse to pursue their claims because of the growing expense of litigation.

I believe that the ultimate result of these Rules will be a huge diminishment in smaller litigants having access to the Court and will reserve the use of litigation to only major cases.

Respectfully submitted,

HINMAN, HOWARD & KATTELL, LLP

By 
Richard C. Lewis, Esq.

RCL/jd

New York County Lawyers Association

April 4, 2022

**VIA FIRST-CLASS MAIL AND E-MAIL** (rulecomment@nycourts.gov)

Eileen D. Millet, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

**Re: New York County Lawyers Association Alternative Dispute Resolution Committee 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**

Dear Ms. Millett:

We write on behalf of the New York County Lawyers Association's ("NYCLA") Alternative Dispute Resolution ("ADR") Committee (the "Committee") to inform the Office of Court Administration ("OCA") that the Committee joins with the many dispute resolution sections or committees of bar associations throughout the Empire State, including but not limited to those of the New York State Bar Association ("NYSBA"), the New York City Bar (a/k/a Association of the Bar of the City of New York), and the Nassau County Bar Association in enthusiastically endorsing the proposed statewide New Part 60 of the Rules of the Chief Judge and the New Part 160 of the Rules of the Chief Administrative Judge (the "Proposed Rules").[1]

In May 2019, Chief Judge Janet DiFiore announced the rollout of the Presumptive ADR Program, requiring local courts to develop processes for referring cases to mediation and other forms of ADR early in the life of each contested matter. Since then, NYCLA's ADR Committee has actively partnered with OCA to provide a broad array of continuing legal education ADR training programs such as a virtual Part 146 Advanced Divorce Mediation Training program (run in the summers of 2020-21) and a February 2022 statewide virtual Part 137 Attorney-Client Fee Dispute Arbitration training program that have featured OCA personnel and

[1] This statement of support was approved for dissemination by the NYCLA President as a Committee statement. This statement has not been approved by the NYCLA Board of Directors and does not necessarily represent the views of the Board.

members of the judiciary as guest speakers. These individuals as well as the Committee's leaders and members have—both independently and in conjunction with other bar associations—publicized and promoted Presumptive ADR relentlessly, thereby setting a solid foundation for a statewide culture change.

Promulgation of the Proposed Rules is the next vital step to secure the continued progress and a unified acceptance of Presumptive ADR, and the Committee applauds the work of the members of the Statewide ADR Advisory Committee for crafting the Proposed Rules and for dedicating valuable time to attend a March 23rd Committee meeting (*see generally* https://youtu.be/xRQJSNwz6xE) in which they explained their history and operation. Of particular importance, the Proposed Rules clearly authorize New York courts to send cases to an appropriate ADR process at the earliest practicable time and mandate that they do so. This presumptive scheme will serve to allay the hesitancy of some judges to order cases to mediation or other ADR processes.

The Proposed Rules are flexible and dynamic, prudently leaving certain areas open for our local courts to address, including but not limited to: (i) the selection/referral process; (ii) the manner in which opt-outs are implemented; (iii) handling of complaints about the process; (iv) addressing situations where parties are unable to pay costs incurred; and (v) most importantly, neutral compensation.

Indeed, the issue of neutral compensation—which some Committee members have studied and discussed extensively over at least the past two years (*see generally* https://tinyurl.com/State-Neutral-Comp-Statutes)—is a complicated one best left for decision by local courts (and perhaps individual judges within local courts if authorized by District Administrative Judges) on a case-by-case basis, insofar as case type and complexity, regional judicial needs, availability of public funding/charitable donations, socioeconomic considerations, and many other variables present a plethora of challenges to instituting one or more statewide uniform compensation rules at this time.[2]

[2] To be sure, New York is not yet one of over forty-five states that have at least one in-state court-annexed ADR civil dispute resolution program providing for some minimum neutral compensation (a/k/a "floor compensation") due upon commencement of an ADR session (*see Analysis of State Neutral Comp. Rules & Stats*. Worksheet at https://tinyurl.com/State-Neutral-Comp-Statutes) such that speedy neutral compensation reform in the Empire State is at least worthy of serious discussion and has garnered popular support both within and beyond the Committee. (*See generally* https://www.change.org/NY-ADR-Compensation). However, attempting to effectuate such reform prior to official adoption of the Proposed Rules would be akin to putting the proverbial cart before the horse or trying to build the second floor of a building without having completed the first. Our state courts first have to be cloaked with the legal authority to address the issue of neutral compensation—which is currently provided for by the Proposed Rules—much as the federal courts are cloaked with similar authority. (*See* 28 U.S.C. § 658(a)). Once this occurs, the time will then be ripe to establish

New York County Lawyers Association

In conclusion, the Committee wholeheartedly endorses the Proposed Rules, supports their promulgation, and acknowledges and appreciates the enormous effort and skilled expertise that went into the Statewide ADR Advisory Committee drafting process. The Committee also thanks OCA for its significant assistance in developing the Proposed Rules and looks forward to their adoption soon, resulting in enhancement of the dispute resolution experience for parties, advocates, and neutrals throughout the State of New York.

Respectfully submitted,

Elan E. Weinreb, Esq.
*Co-Chair, NYCLA ADR Committee*

Christopher Fladgate, Esq.
*Co-Chair, NYCLA ADR Committee*

Nelson E. Timken, Esq.
*Vice-Chair, NYCLA ADR Committee*

equitable, fair, and reasonable compensation schemes for neutrals working in state court-annexed ADR programs that provide at least a modicum of financial support to these honorable facilitators of justice.

New York State Dispute Resolution Association, Inc.
300 Great Oaks Blvd, Suite 300-027 | Albany, NY 12203

Eileen D. Millett, Esq.,
Counsel, Office of Court Administration,
25 Beaver Street, 11th Fl.,
New York, New York, 10004

April 4, 2022

Re: Proposed Rule to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution

Dear Ms. Millet,

On behalf of the Community Dispute Resolution Centers of New York State, I am writing in support of the proposed rule to establish general statewide rules for the referral of civil disputes to mediation and other forms of ADR. The Community Dispute Resolution Centers (CDRCs) Program of the Office of Court Administration, Office of ADR are critical partners in the Presumptive ADR initiative in referring appropriate civil matters to ADR to resolve matters early and effectively. The centers cover every county in New York State and have provided critical de-escalation and dispute resolution services in courts and communities for more than 40 years.

*Court Referrals*
During fiscal year 2020 – 2021, the CDRC network received 7,982 court referral cases across all thirteen judicial districts and served 19,343 individuals. The CDRCs have effectively mediated referrals from judicial districts in supporting parties resolve their own disputes and drafting resilient agreements. CDRCs build and maintain relationships within their communities and work closely with local court personnel and ADR Coordinators in accepting referrals for cases originating in City, Town, and Village Courts, Family Court, and Supreme and Surrogates Courts. The centers are uniquely positioned to be part of the solution with an existing statewide infrastructure.

*Access to Justice*
CDRCs work closely with parties to de-escalate conflict affording them to enter into effective dialogue to develop their own solutions without the intervention of a judge. CDRCs also develop partnerships with civil legal service providers in assisting to help parties resolve interpersonal conflicts which therefore increases the effectiveness of legal representation by providing clarity around the nature of a dispute. The CDRCs serve as a court and community resource providing individuals with the tools to navigate and resolve their own disputes outside of the court system, resulting in an increasingly effective and more just judicial system.

Sincerely,

Elizabeth Vanasdale
Executive Director

Phone (518) 687-2240 Fax (518) 687-2245
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**Loretta Miraglia, Esq.**
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April 4, 2022

via email
Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
rulecomments@nycourts.gov

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

Dear Ms. Millett:

I submit my comments to the above proposed rules as an individual mediator/attorney. I am a member of a number of bar associations including mediation focused associations and committees (NYSBA DRS Mediation Committee; Westchester County Bar Association ADR Committee; Westchester Women's Bar Association; ACR-GNY; NYSCDM and FDMCGNY) but am writing on behalf of myself as an individual. I have been a mediator for 15 years, am a Panel mediator for Civil, Commercial, Matrimonial and Surrogates court panels in Westchester, the Bronx, Manhattan and Richmond counties; a NYC Family Court Mediator; a mediator with CLUSTER's Westchester/Rockland Mediation Center; and have been newly-accredited under NYSCDM's Advanced Accredited Mediator program.

Generally, my comments are focused on ensuring that mediator compensation is a priority; mediators and mediator associations will be consulted in developing local rules for implementation of these rules; and unsigned draft agreements and term sheets may be provided to the court with the parties approval.

Regarding Part 60 Alternative Dispute Resolution in the Trial Courts:

- § 60.2 second sentence should be amended to add "provide for the proper compensation of mediators for their time". See proposed insertion below (underlined):

> §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; provide for the proper compensation of mediators for their time; and provide for the confidentiality of those processes.

Regarding the Rules of the Chief Administrator of the Courts Proposed New Part 160. Alternative Dispute Resolution in the Trial Courts:

- § 160.1(e) Definition of "Mediation" should include "communicate" as follows: "'Mediation' shall refer to an ADR process in which a neutral third party (referred to as a mediator) helps parties communicate, identify issues, clarify perceptions and explore options for a mutually acceptable outcome."

- § 160.2(a)(4) and § 160.2(b)(2) Specify that all rules relating to specific compensation limits for mediators, including uncompensated time (which I feel should be done away with entirely) and all caps on compensation, shall not apply to roster mediators who are chosen by the parties nor to mediators not on the roster.

- § 160.2(b)(2) Uncompensated time shall be contemplated only for those who cannot afford to pay. In the last sentence, case type should not be a basis for requiring uncompensated mediator time.

- § 160.3(b)(1) – allow mediator to report if a party or parties refused to participate in the court-referred process. Allow a mediator to disclose that a party has refused to provide the agreed-upon compensation for mediator's time for purposes of collecting such fee.

- § 160.3(b)(2) Where the parties waive confidentiality, affirmatively state that mediators shall be compensated at their current rate for their time in relation to such waiver.

- § 160.3(b)(3) Allow submission to the court of an unsigned or partially signed agreement or term sheet on consent of the parties. From a practical perspective,

the parties may want to submit an unsigned document, for example, if obtaining electronic signatures is a burden; if the parties want the court to review a partial agreement with the parties at the next court date; or for court personnel to print out or make photocopies of an agreement for the parties to sign (if and when mediations take place in the courtroom in the future).

- § 160.4 Rather than pointing out that neutrals shall have immunity from liability "as may be provided by law", this section should affirmatively state that immunity.

- § 160.5 Add consultation with "mediators and mediator associations" for developing local rules for implementation of this Part.

Thank you for considering my remarks.

Sincerely,

Loretta Miraglia, Esq.

Where Solutions Begin

DRC
DISPUTE RESOLUTION CENTER

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street 11th Fl.
New York, New York 10004

Dear Ms. Millett,

Please accept this letter as a formal and strong endorsement from the Dispute Resolution Center of Orange, Putnam, Sullivan and Ulster Counties, to adopt both a new Part 60 of the rules of the Chief Judge(ExhibitA), along with a new Part 160 of the Chief Administrative Judge (ExhibitB).

Sincerely,

Donna Ramlow
Executive Director

# Public Comments of

# Halina Radchenko, President, New York State Trial Lawyers Association to the New York State Unified Court System Office of Court Administration Regarding the 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 Trial Courts to Alternative Dispute Resolution

## April 1, 2022

The New York State Trial Lawyers Association presents these comments to the Unified Court System Office of Court Administration regarding the proposed General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution. Alternative Dispute Resolution (ADR) can be a valuable mechanism for resolving disputes, with the appropriate neutral authority, at the appropriate time, when it is entered into with the consent of all parties and without binding effect.

ADR must be carefully defined to prevent persistent bias against certain parties or classes of litigants. Proposed Rule 160.1(a) has an unacceptably broad definition of Alternative Dispute Resolution. The language, as written, would permit the use of arbitrators. Arbitration consistently disadvantages claimants and plaintiffs and often denies a fair hearing to individuals in favor of corporations. While Proposed Rule 160.2(3) creates a presumption that disputes will be referred for mediation and Proposed Rule 160.2(4) limits referrals to mediators and evaluators, the broad definition in Proposed Rule 160.1(a) leaves open the possibility that binding arbitration will be imposed. Therefore, Proposed Rule 160.1(a) should be amended to omit the language that is struck though and add the underlined language:

- Proposed Rule 160.1(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 <u>non-binding</u> processes include~~, but are not limited to,~~ mediation, neutral evaluation, and other dispute resolution processes offered by community dispute resolution centers <u>and exclude binding arbitration</u>.

Proposed Rule 160.2(a)(1) mandates that matters must be referred for Alternative Dispute Resolution at "the earliest possible time." While all parties are served by the swift resolution of cases, it would be inappropriate to refer cases prior to the filing of the note of issue and Statement of Readiness. Discovery must be completed before the parties can present their arguments in a full and fair manner to a mediator. Premature ADR would waste the time and resources of the courts and the litigants. Therefore, Proposed Rule 160.2(a)(1) should be amended to omit the language that is struck though and add the underlined language:

- Proposed Rule §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~~ after the filing of the note of issue and Statement of Readiness 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.

Proposed Rule 160.2(a)(1)(iii) permits a party to opt out of a referral to ADR subject to "local rule of court or administrative order of the chief administrator of the courts or the chief administrator's designee." Any party must be able to opt out of ADR without limitation. ADR relies upon the good faith efforts of all parties to resolve a dispute. Without the consent and meaningful participation of all parties, ADR will simply be used as a delaying tactic for more moneyed parties to avoid resolution. Forcing parties to participate in ADR will undermine the purpose of ADR, create confusion for litigants and potentially create inconsistencies for matters brought in different parts of the state. Proposed Rule 160.2(a)(1) should be further amended and Proposed Rules 160.2(a)(5) and 160.5 should be amended to exclude the language struck through and add the underlined language:

- Proposed Rule 160.2(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~~ after the filing of the note of issue and Statement of Readiness 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
- Proposed Rule 160.2(a)(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~~.
- Proposed Rule §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. Such rules shall not limit a party tp the dispute from objecting to and opting out of ADR.

It is paramount that ADR be non-binding on litigants. ADR is a consensual process to try to achieve settlement. Parties cannot have the frank and necessary discussion to resolve disputes if they fear an adverse determination will be imposed. 22 NYCRR 146.2(c) defines neutral evaluation as non-binding. That clarity should be duplicated in the Proposed New Part 160. Specifically, the proposed Rules 160.1(a), 160.1(e) and 160.2(a)(1) should be amended or further amended to exclude the language struck through and add the underlined language:

- Proposed Rule 160.1(a) "Alternative dispute resolution" or "ADR" shall refer to any one of a variety of non-binding 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 non-binding dispute resolution processes offered by community dispute resolution centers and exclude binding arbitration..
- Proposed Rule 160.1 (e) "Mediation" shall refer to ~~a~~an non-binding 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.
- Proposed Rule 160.2(a)(1) As provided in this Part, a court shall refer each civil dispute pending before it to an appropriate non-binding ADR process ~~at the earliest practicable time~~ after the filing of the note of issue and Statement of Readiness 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.

The New York State Trial Lawyers Association looks forward to working with the Unified Court System Office of Court Administration to ensure that the proposed General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution provide an option for those parties who opt in to resolve disputes.

The Legal Project



April 4, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York, 10004

rulecomments@nycourts.gov

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

Dear Ms. Millett:

Please accept these comments on behalf of The Legal Project, a not-for-profit organization located in Albany, NY, that has provided civil legal services to the working poor since 1995. Our many programs include civil legal assistance for crime victims, humanitarian and family-based immigration assistance, holistic civil legal services for human trafficking victims, foreclosure prevention, wills, bankruptcy, veteran's legal clinics, small business legal assistance, and community legal clinics on general civil legal issues. The Legal Project aims to make the law more accessible for those in need, to increase the legal community's involvement in pro bono work, and to serve as a resource on legal issues.

We were originally founded with a focus on providing civil legal services to domestic violence victims. A large part of our work, both through our staff attorneys and our volunteers, focuses on domestic violence victims seeking assistance through family and supreme courts against their abusive partners or former partners. We are recognized as one of the leading providers in the area on civil legal services for domestic violence victims, and we pride ourselves on providing professional and compassionate legal services to domestic violence victims. Many of our other programs, such as our immigration program, originally grew out of the needs that we saw among the clients of our domestic violence program.

The Legal Project emphasizes trauma informed lawyering through all of our programs. We are committed to recognizing and acknowledging how our clients' trauma has impacted their day to day lives and how we as lawyers can help guide them through their legal issues in a way that is healing to them, rather than causing them more trauma, as much as possible.

Our opinion on New York's request for comments on referral of civil legal disputes to ADR is informed by our experience and expertise as a legal services agency that prioritizes civil legal services for victims of domestic violence. While the idea of ADR for civil legal issues sounds promising, there are many reasons why it could be unproductive or even dangerous to require ADR for all cases.

It is important to acknowledge the trauma suffered by victims of domestic violence and how this trauma impacts them in their lives. Trauma has been shown to have a tangible, biologic effect on brain function, memory, and health. Reminders of trauma can cause physical and psychological symptoms in a person making it difficult for them to manage and function around those reminders. The civil court system itself can be inherently traumatizing for individuals. Most people seeking the intervention of the civil courts, not only victims of domestic violence, are there because something terrible has happened to them. They may feel confused and like they no longer have control over their own lives. They are involved in a system that uses jargon they may not understand, where lawyers and judges are asking them to make decisions quickly or making those decisions on their behalf. If they cannot afford representation they may feel even more lost. Given this it might seem that ADR offers a gentler solution that is more accessible and easier to understand. However, this may not always be the case, especially where domestic violence is involved.

One big concern is that in order for ADR to work, both parties to the dispute must be able to freely express themselves during negotiations without fear of retaliation. This is not possible if there is a history of domestic violence between the parties. If we start with the premise that domestic violence is a pattern of coercive control by one intimate partner against another with the goal of gaining the "upper hand" in the relationship, it is clear that expecting a just and fair outcome from a negotiation between parties where one has a history of abuse against the other is extremely problematic if not impossible.

Unlike many civil disputes, the types of disputes that would involve domestic violence survivors forced to negotiate with their abusers, by their very nature, require the parties to remain in contact with one another long after the court case has concluded. The nature of family life, even after divorce, and especially where parties share children, means that they will still be in contact with one another for years to come. Where one party is being abused or has been abused by the other, they will be acutely aware of this dynamic and of the fact that they will have to continue having contact with their former partner long after the courts have closed their file. It is important to understand that this dynamic may very likely have a chilling effect on the abused party's ability to speak up for themselves, whether it is to speak up during negotiation or even to speak up that they are not comfortable with the case going to ADR in the first place. ADR as a more fair and equitable solution to disputes only works if the parties both feel free to speak up and ask for what they want without fear of retaliation or abuse.

The rules as proposed do state that parties may object to the case going to ADR or that it might not be appropriate where there are allegations of violence or risk of harm. But there is no real guidance as to how this will be addressed or what is meant by this language.

Who is expected to screen for allegations of violence or risk of harm? With most divorces now being filed on no fault grounds, the pleadings themselves will not contain such allegations for a typical matrimonial proceeding. Are parties expected to self report allegations or risk of harm? In what context? Will they be asked at an appearance in open court in front of their abuser? Many victims might have very real fear of the repercussions of disclosing such information to a judge directly, especially if their abuser is listening or will be told of the disclosure at a later time.

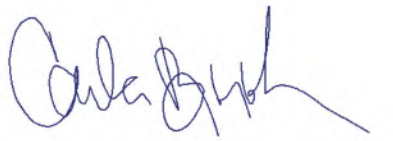
Will police involvement, prior orders of protection between the parties, or other types of formal written allegations of violence or harm be required? Many victims of domestic violence, for myriad reasons,

never call the police or report their abuse to authorities. For many victims of domestic violence, a matrimonial proceeding against their abuser may be the first and only time they have contact with the court system in their lives. For these people there will not be a documented history of abuse or harm, but the risks to them are still valid.

For allegations of violence or risk of harm to factor into whether a case gets sent to ADR in any effective, victim centered way, there needs to be clear guidance on how the Court obtains that information and what the procedure is after it is obtained. It is our understanding that at some point prior to the COVID pandemic there was a screening tool or guidance being developed specifically regarding how to screen out domestic violence cases for ADR and what to do about them. However, this guidance is not apparent in the proposed rule. It is imperative that if ADR is to become mandatory in civil cases that there be a screening tool for domestic violence that is developed with input from victim side domestic violence service providers and that is applied universally, confidentially, and accurately. There should at no point be the perception or idea that a case being screened out of ADR due to allegations or risk of harm is a failure or that it is somehow the fault of the reporting party.

Thank you again for providing us the opportunity to comment on this important matter. For any additional information, please do not hesitate to contact me at the above listed address.

Sincerely,



The Legal Project
Carla Brogoch, Esq.
Legal Director
cbrogoch@legalproject.org

cc: Michele Pollock Rich, Executive Director, The Legal Project

**From:** Elan Weinreb <eweinreb@weinreblaw.com>
**Sent:** Thursday, February 17, 2022 8:07 PM
**To:** Ross Kartez
**Cc:** rulecomments; Yvonne Marin; GARY SHAFFER; DANIEL F. KOLB, Esq.; jskiernan@debevoise.com; Christopher Fladgate; Nelson Timken; Dorothy Kaldi; Federica Romanelli; Suzanne Levy, Esq.; Jess Bunshaft (jess@synergistmediation.com); Marilyn K. Genoa, Esq.; M.A.Markowitz@outlook.com
**Subject:** Re: Personal Comments - Suggestions for Public Comment on the Proposed ADR Rules

**Categories:** ADR rules

Dear Ross:

Good evening, and thank you and many of the people cced on this e-mail for your incredible work in formulating and developing the statewide proposed ADR rules. This is a tremendous undertaking, and all too often, such work is underappreciated or otherwise does not garner an appropriate level of recognition. As such, regardless of any differences that I have with you, OCA personnel, and other NYSBA, NCBA, or NYCLA members on the rules and the topic of neutral compensation, I and every other DR professional owe you, OCA, your taskforce, and any other individual committed to the historic attempt to enact the proposed rules a tremendous debt of gratitude. "Thank you" does not ultimately suffice, but at least until the proposed rules are officially enacted, it will have to do for the time being.

I do not recall whether you are a signatory to the change.org petition that I've been running concerning fair compensation for neutrals working in court-annexed programs in New York (https://www.change.org/NY-ADR-Compensation). If you are, what will appear below will be redundant to what I sent out Monday afternoon (02/14/2022) to the petition supporters, but regardless of whether you received it, the following constitutes my **PERSONAL COMMENTS** (i.e., these are not made on behalf of or by or should otherwise be associated with NYCLA's ADR Committee). A separate set of comments from that committee will likely be sent to Ms. Millett by the April 4th deadline.

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Dear Supporters:

I hope that this message finds you all well, and for those celebrating Valentine's Day, I wish you a happy holiday. (Being Jewish, I do not personally celebrate this day, but the themes of love and friendship associated with the day are concepts to which I certainly can and do relate).

Earlier this morning, the New York State Bar Association Dispute Resolution Section's Mediation Committee held an important and one might even say historic meeting on the proposed statewide ADR rules. I spoke briefly on the petition and alerted the participants to the existence of the Table of State Neutral Compensation Rules and Statutes (https://tinyurl.com/State-Neutral-Comp-Statutes) as a valuable source of information in formulating future policies

pertaining to neutral compensation. I also shared what amounted to the following comments on the proposed rules (which are taken from an e-mail that I wrote prior to the meeting to one of the meeting's organizers, although portions below are close to being near-verbatim to what I actually stated):

"I think the proposed statewide rules are a welcome development. As they are currently written, I'm certainly not opposed to them, insofar as they amount to enabling rules with respect to neutral compensation on some level.

The main issue I have with them from a compensation perspective is that they still can provide for "free time" systems, which effectively amount to ADR slavery and zero compensation. There can be no opportunity for such systems to exist, and the current ones must be eliminated.

As such, I believe there should eventually be a pronouncement in the Rules of the Chief Judge establishing that except in cases where parties prove to the Court financial inability to pay (which also means that they cannot pay their attorneys anything), neutrals must be compensated by default such that they are guaranteed by law to receive a certain minimum per case. This is currently the Eastern District of New York model ($600 minimum pro rata for mediation) and a relatively good one in my view, although it would also be nice if preparation time were compensated by default as well to some degree, as currently provided for by the Northern District of New York (up to $300 pro rata for two hours' worth of preparation time).

Once these compensation 'floors' are set, individual courts can then act as they see fit, but without them, we're likely going to have a situation develop where neutrals will refuse to work in courts where compensation is not guaranteed in favor of courts where some minimum compensation is set."

After the meeting officially concluded, I was approached virtually by one of the attendees who remarked that the various references that I have to "slavery" or "ADR slavery" in the petition as well as in the Table were inflammatory to her in light of the African-American experience with the institution in the United States.

There was not enough time then for an adequate response to her, but I would like to post one here now.

Black's Law Dictionary (2d ed.) defines slavery as the "civil relation in which one man has absolute power over the life, fortune, and liberty of another." (See https://thelawdictionary.org/slavery/).

Without in any way minimizing or otherwise denigrating the horrible experience of African-Americans (both in North America and South America), Jews (from ancient Egypt through and including the Holocaust), Native Americans (again, both in North America and South America), devshirme recruits (see https://en.wikipedia.org/wiki/Devshirme), and other victims of "classical" or "historical" slavery which featured hideous and revolting torture, homicide, theft of real and personal property, and other crimes against G-d and humanity such that there can be no complete equivalence or identity between "classical" or "historical" slavery involving these victims and the inequitable, unfair, and unjust treatment involved in the use of "free time" ADR systems, I respectfully submit that such systems implicate the elements of "slavery" as defined above.

To be clear, "free time" systems--those in which all preparation time and a certain period of ADR session time (usually ranging between 90 minutes and 180 minutes)--currently mandate that neutrals expend hours of their lives in preparation for ADR sessions and then further expend a period of ADR session time in order to have ***even a chance*** at being compensated for their expertise and hard work. The time they expend--compelled by government (i.e., the current rules in place throughout New York)--constitutes lost life. Their deprivation of compensation--compelled by government--until "free time" periods elapse constitutes lost fortune. Their being powerless to conduct ADR sessions without fear of at least one of the participants potentially weaponizing the "free time" period against their adversaries or, worse, against the neutral by taunting him/her with such jabs as "keep in mind that no matter what you do here, you will not get paid and will have wasted your time because we are walking out as soon as the free time is up" constitutes an egregious loss of liberty and peace of mind (i.e., psychological damage).

This is not to say that true pro bono ADR programs (i.e., small claims court, Part 137 attorney-client fee disputes, conflicts or disputes handled by Community Dispute Resolution Centers, etc.) or ADR in cases where the litigants truly cannot afford access to justice in the first place have no place in society. They most certainly do.

However, court-annexed programs involving cases where both sides are represented by paid counsel should not be grouped with such programs. More

importantly, they should not be governed by a pseudo-compensation scheme that effectively meets all of the elements of the word which I initially used to describe it: slavery. As such, as now clarified by my comments above, I will continue to use this word in the petition to describe "free time" systems for what they are and why they must be eliminated with all deliberate speed.

All the best,
Elan

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Because not everyone who has been cced on this e-mail was in attendance at the Monday meeting, in the interest of respecting the privacy of the attendee who approached me after the meeting, I have bcced her accordingly on this e-mail.

Finally, Ross, FYI, on February 8, 2022, I had some additional preliminary comments to those above supporting the adoption of the proposed statewide rules that you might find helpful.

As far as neutral compensation is concerned, the proposed statewide rules provide for local courts within New York State to establish neutral compensation policies, which is in line with the objectives of this petition and loosely tracks federal legislation concerning neutral compensation. (See 28 U.S.C. 658 at https://www.law.cornell.edu/uscode/text/28/658).

This is certainly a step in the right direction toward seeing NY neutrals fairly compensated for their hard work.

However, there is nothing in the proposed statewide rules that prohibit such local courts from adopting unfair and unjust "free time" policies that require neutrals to provide a set period of time--usually 90 minutes but sometimes as much as 180 minutes--of uncompensated ADR services.

. . .

New York is only one of three states in the Union (with the other two being New Jersey and California (to a limited extent)) that have abusive and unjust "free time" policies instituted state-wide. . . . [S]uch effective slavery policies severely diminish the value of ADR to both neutrals and stakeholders. In addition, these policies limit the opportunities of diverse neutrals seeking to gain experience. See https://drive.google.com/file/d/1Tbu0Jvr7v_tTOyEngsdeJN0QTmNeWG4s/view?usp=sharing.

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As renowned mediator Jeff Kichaven writes in the 2015 Resolver article that is the target of the previous hyperlink, “In reality, the fundamental moral obligation runs the other way. The essential moral tenets of our society require all of us to compensate other people fairly for valuable services provided, if we can afford it. Is this kind of language overly high-minded? No. Just take a look at Article 23, Section 3, of the Universal Declaration of Human Rights, adopted on Dec. 10, 1948, by no less an authority than the United Nations: ‘**Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity**....’ There’s no carve-out for mediators.” (Emphasis added).

If fair compensation is inextricably linked to human dignity, unfair compensation is inextricably linked to its antithesis, human oppression. We’re at a historical crossroads now where the proposed statewide rules can firmly ensure only one or the other when first enacted: human dignity or human oppression, peace of mind or torment of heart, life or death to presumptive ADR in the Empire State.

May G-d grant us all the foresight, insight, and wisdom to make the correct choice at this time of first and only opportunities.

All the best,
Elan

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**From:** Elan Weinreb <eweinreb@weinreblaw.com>
**Sent:** Monday, February 14, 2022 07:14
**To:** Gary P. Shaffer <gary@shaffermediation.com>
**Cc:** Christopher Fladgate <cf@gs2law.com>; Nelson Timken <nelson.timken@verizon.net>; Dorothy Kaldi <dorothykaldiesq@gmail.com>; Federica Romanelli <FRomanelli@nycla.org>
**Subject:** Re: Proposed ADR Rules

Dear Gary:

Good morning. Generally, we're on the same page here, and I think the proposed rules are a welcome development.

As they are currently written, I'm certainly not opposed to them, insofar as they amount to enabling rules with respect to compensation on some level, as you point out.

The main issue I have with them from a compensation perspective is exactly what you set forth below, namely that they still can provide for "free time" systems, which effectively amount to ADR slavery and zero compensation. There can be no opportunity for such systems to exist, and the current ones, including Nassau's, must be eliminated.

As such, I believe there should eventually be a pronouncement in the Rules of the Chief Judge establishing that except in cases where parties prove to the Court financial inability to pay (which also means that they cannot pay their attorneys anything), neutrals must be compensated by default such that they are guaranteed by law to receive a certain minimum per case. This is currently the EDNY model ($600 minimum for mediation) and a relatively good one in my view, although it would also be nice if prep time were compensated by default as well to some degree, as currently provided for by the NDNY (up to $300 for two hours).

Once these "floors" are set, individual courts can then act as they see fit, but without them, we're going to have a situation develop where neutrals will refuse to work in those courts where compensation is not guaranteed in favor of those courts where some minimum compensation is set.

In any case, I should, please G-d, be able to make a good portion of the meeting later this morning.

See you then, and perhaps we and maybe some of my colleagues as well (cced) can chat more after the meeting has concluded.

All the best,
Elan

_____

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**From:** gary@shaffermediation.com
**Sent:** February 13, 2022 22:55
**To:** eweinreb@weinreblaw.com
**Subject:** Proposed ADR Rules

Hi Elan. Don't know if you're planning on coming to the NYSBA Mediation Committee meeting, but I thought I'd touch base about the proposed ADR rules for which comments are being sought. My opinion is that it's important to support these rules. They do not resolve all the issues, such as compensation, but the rules are essentially authorizing legislation that make clear cases "shall" be sent to ADR, authorize judges to send cases to mediation, and make clear compensation is appropriate. I believe your concern is that individual judicial districts could decide to enact rules that don't allow for compensation. While theoretically that could happen, it is not what's going on. As different districts and courts bring out ADR rules, they are addressing it in ways that in fact work for most mediators. The new Nassau County rules, for

example, effective just this past November, allow for fees up to $450/hour with some free time, but also allow the parties and the mediator to agree on a different compensation arrangement.

I believe we need to be careful not to let the perfect be the enemy of the good and these rules really set a firm foundation to quickly build on.

Let me know your thoughts and I'm happy to discuss if you'd like.

Regards, Gary

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POLNER ABRAHAMS
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February 7, 2022

rulecomments@nycourts.gov

Eileen D. Millett, Esq., Counsel

Office of Court Administration

25 Beaver Street, 11th Floor

New York, NY 10004

Dear Ms. Millett,

This letter is for public comment on the recently released Proposal to Adopt new Part 60 and new Part 160 in connection with the use of and referral to alternate dispute resolution for disputes in civil courts.

I am an elder law, estate, trust, guardianship, and special needs attorney admitted in 1982. For most of my practice, I engaged in litigation including contested litigation in subject areas. I witnessed firsthand the destructive and damaging effect of litigation on families and relationships, and the Court's time and effort to protect an incapacitated or disabled person while balancing the highly charged emotions of families at war, or the detritus remaining in contested Surrogate matters after the family member's death.

Since 2013, but more particularly since the presumptive ADR initiative spearheaded by Chief Judge Janet DiFiore was launched, I have mediated cases within my subject areas as part of Suffolk County Surrogate's Court roster; for CDRC CMS (Center for Mediation Services) in Queens County; and for the Nassau County Bar Association's Mental Hygiene Law Article 81 Guardianship Mediation Pilot Program. I have served as a coach during OCA sponsored statewide mediation trainings for Part 146 mediators for Surrogate's Court. In 2021, I collaborated on the article, "The Mediation Advocate: Changes in Attorney Paradigms in Guardianship, Elder Law and Estate Contests," NYSBA Elder and Special Needs Law Journal (2021, Vol. 31, No. 1).

I am in complete support of the proposed new Part 160 and new Part 60. The proposed rules will be a welcome path for litigators who view – or can be educated to view – mediation (one component of ADR) as a valuable and billable part of their of law practice and less costly – emotionally, financially and in terms of expenditure of time – for the client.

I believe the rules, as proposed, also offer litigants and their clients the flexibility needed in alternative dispute resolution including but not limited to choices for referral options for dispute resolution which

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can be tailored to the needs of a particular case type and value/dollar of the case; opt out provisions; a clear statement of confidentiality which supports mediation and its process; and a very good explanation of harm/ imminent harm as a guide for mediators and litigants.

In conclusion, I support the adoption of new Part 60 of the Rules of the Chief Judge and new Part 160 of the Rules of Chief Administrative Judge as proposed.

Sincerely,

Beth Polner Abrahams

**From:** Suzy Hickson
**Sent:** Wednesday, February 9, 2022 11:33 AM
**To:** rulecomments
**Subject:** ex B p 3

**Categories:** ADR rules

Good morning,

Just 2 questions:

1.

At page 3 of Ex B (a) (2) the rule refers to “such” dispute

whereas (3) refers to “a” dispute and (4) refers to “the” dispute

Perhaps the (a) (2) should not be such but rather “a”

2.

At page 3 of Ex B (a) (4) second sentence

“Where the parties agree upon the choice of a neutral third party, they”

Does they refer to the parties and the neutral third party? Perhaps the pronoun should be replace with “the parties”

Sincerely,

Suzy Hickson
Law Clerk to Hon Walter Rivera, Court of Claims

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OF ERIE COUNTY



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March 30, 2022

Via Regular Mail and Email (rulecomment@nycourts.gov)

Eileen D. Millet, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl.
New York, New York 10004

**Re: Dispute Resolution Section of the New York State Bar Association 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**

Dear Ms. Millet,

The Bar Association of Erie County endorses the proposed Alternative Dispute Resolution (ADR) Rules.

We have seen the growth of ADR in the law, over the last few decades. With the proposed Rules, we applaud this next necessary step in the progress of ADR.

"Presumptive" ADR will improve the litigation process by allowing parties non-adversarial ways of exploring resolutions without jeopardizing their litigation positions. As everyone will now be exposed to the process, they can more easily integrate ADR planning. It may even reduce litigation as parties may more actively pursue an alternative resolution BEFORE filing, since formed litigation will require them to do it anyway.

The proposed Rules will allow everyone the advantages of the mediation or other ADR processes and enhance effective conflict resolution and litigation.

Without detracting from our unconditional support for the proposed Rules, we would suggest consideration of the following issues in the final version:

1. Allow for broader confidentiality provisions, particularly relative to allowing the mediator to have a voice in what is waivable.
2. Expand the indemnity provisions for ADR providers to be equivalent to quasi-judicial officers.

3. Clarify the usage of certain terms such as "participant", "mediator", and "counsel", etc. There are portions of the proposed Rules that refer to the terms but without consistency or clarity. Consistency in use of terms or defining them more clearly for use would be most helpful.

Thank you for your consideration and for your leadership in making this an integral part of the court system.

Sincerely,

HUGH M. RUSS, III
President

cc: Jill K. Bond, Vice President
Anne M. Noble, Executive Director

RMF
RUSKIN MOSCOU FALTISCHEK P.C.
*Counselors at Law*

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February 22, 2022

The Honorable Lawrence K. Marks
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Eileen D. Millett, Esq.
Counsel, New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Dear Judge Marks and Ms. Millett:

This letter is to supplement the remarks that I set forth in my correspondence of February 11, 2022 regarding mediation, as it pertains to supervising disclosure.

Surrogates sometimes appoint Referees to supervise disclosure, as provided for under Section 3104 of the CPLR. The Court can either appoint one of its court attorneys or outside counsel to supervise disclosure. In the case of outside counsel, the Court can either fix compensation, or the parties can agree to compensation. Some of the Surrogates, when they assign a matter for mediation and anticipate that the matter may not be resolved quickly, as set forth in my prior letter, the Surrogate may also assign the Mediator or another to hear and report or hear and determine, as the case may be. The Surrogate also can appoint a Referee to supervise disclosure.

Another scenario is that the Court may appoint a Mediator and then the Mediator will establish, after discussions with the parties and attorneys that further discovery is needed. When that is determined, very often from my experience, the Mediator reports back to the Court that further discovery is necessary before the mediation can progress. Again, from my experience, the Surrogate may appoint the Mediator to supervise discovery, and once that is completed the mediation can be resumed. This is with the attorneys' and parties' consent and Surrogate approval. The Court can always appoint someone else, if the Court deems it appropriate.

Whatever the attorneys and parties agree to, needless to say, it has to be approved by the Surrogate.

In sum, in addition to what I set forth in my prior correspondence, I wanted to cover the issue of supervision of discovery in the event further discovery is necessary before mediation can continue. Supervision of discovery can be set forth in the initial order, or a matter can be referred by the Surrogate to a former judge or attorney.

With best regards,

C. RAYMOND RADIGAN

CRR:bak

963770

NYSCADV
NEW YORK STATE COALITION
AGAINST DOMESTIC VIOLENCE

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May 19, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Submitted via e-mail at: rulecomments@nycourts.gov

**RE: Supplemental Comments 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**

Dear Ms. Millett,

The New York State Coalition Against Domestic Violence (NYSCADV) is writing to you today to provide additional comments regarding establishment of proposed statewide rules for the referral of civil disputes in the trial courts to Alternative Dispute Resolution (ADR). Please note that these comments are not intended to replace the comments NYSCADV previously submitted on April 4, 2022, but to supplement them with additional information and feedback.

This information and feedback was collected during numerous one-on-one conversations with domestic violence advocates and attorneys representing domestic violence survivors in civil court matters, during a "Listening Session" with domestic violence advocates from across the state who reviewed the proposed rules changes and offered their thoughts and concerns, and during a meeting that OCA, Judge Sunshine, and Judge Sherman held with domestic violence advocates and attorneys on May 16, 2022.

We urge the Administrative Board to consider the following comments and revise the proposed rules changes accordingly:

1. NYSCADV's earlier comments noted a concern for the preamble contained in §60.1 stating "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." We recommend modifying this language to state "Some civil disputes can be resolved more effectively and more efficiently through mediation or other forms of alternative dispute resolution (ADR) than through traditional adversarial proceedings in court."

2. NYSCADV understands that the proposed rules changes are intended to represent an umbrella, constitutional-like authority for all civil trial courts in the state to refer civil matters to ADR as a presumptive default. Following the passage of this umbrella authority, District Administrative Judges, in consult with local bar associations and others, will then develop local rules for the implementation of these rules in their local communities. Based on these intentions, OCA representatives have informed DV advocates that the proposed rules changes were crafted to be broad and general in nature, and were intended to address a wide array of proceedings, as well as diversity amongst those participating in such proceedings.

At the same time, OCA representatives have informed domestic violence advocates and attorneys that they understand that cases involving domestic violence, child abuse and/or neglect, or cases involving power and control dynamics and coercive tactics, should not be presumptively referred to ADR/mediation. OCA representatives describe a process where proceedings involving ongoing domestic violence, family violence or child abuse, as identified by the presence of orders of protection or inclusion on a statewide registry, will be screened out from referral before parties are asked if they would like to participate in an ADR process. For all other civil cases that are not deemed ineligible from referral, and where the parties voluntarily agree to participate, a comprehensive screening process will be undertaken using a mediation tool initially developed by the Battered Women's Justice Project (BWJP) and modified by OCA and New York State domestic violence attorneys for use here. This will ensure parties involved in power and control dynamics or abuse are not referred to ADR/mediation, regardless of whether either party has an existing Order of Protection or other documentation of the abuse.

OCA representatives have noted that District Administrative Judges will identify the specific protocols to be implemented in their communities for both stages of screening to ensure parties experiencing power and control dynamics and/or abuse will not be referred to ADR/mediation.

While NYSCADV understands the desire to keep these proposed rules changes broad enough that they apply to all civil proceedings in New York's trial courts, we believe the proposed rules changes should be more definitive regarding how all trial courts statewide should be handling cases involving power and control dynamics and/or abuse. The simplest way to do that would be to add a new subdivision (v) to the exception process described in §160.2(a)(1), stating: "allegations of violence or harm, or risk of harm to any person, are present, or if the parties do not have equal bargaining power due to the presence of power and control dynamics and/or the use of coercive tactics."

This new language will also ensure that cases in Family Court where an Order of Protection is sought at the initiation of a proceeding would not be eligible for referral to ADR.

3. Many advocates and NYSCADV have noted a concern that individuals will not understand their right to opt out of this presumptive, yet voluntary ADR process. NYSCADV has suggested that, instead of "opting out of" ADR, parties should be asked if they would like to "opt in," which would send a stronger message to individuals that participation in an ADR process is voluntary. We suggest making the following change in §160.2(a)(2): "At the earliest practicable time, a court shall inform the parties to such dispute regarding the available ADR processes, and that participation in such processes is voluntary. ~~To the extent possible,~~ [T]he 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, the associated costs of ADR, if any, and the fact that their participation, or lack of participation, in ADR shall not prejudice the court against them in any way."

4. To ensure all statewide trial courts appropriately screen all parties who have agreed to engage in an ADR process for eligibility to ADR/mediation, as envisioned by OCA representatives, NYSCADV recommends adding a new subdivision between §160.2(a)(2) and §160.2(a)(3) that states: "Where the parties have voluntarily agreed to participate in an ADR process under this Part, and such referral is made, the court shall conduct a screening process, using a standardized mediation screening tool developed by the Office of Court Administration's Statewide ADR Office, to determine whether a case is appropriate for ADR. Where ADR is determined to be inappropriate, the proceeding shall return to the court and an ADR process shall not be utilized."

5. §160.3(b)(2) gives parties the opportunity to waive confidentiality by "specifying 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." NYSCADV agrees that providing a confidentiality waiver to parties is an important aspect of these rules. However, such waivers must comply with federal provisions requiring confidentiality of personally identifying information for domestic violence survivors unless an "informed, written, time-limited consent" is provided. The proposed rules changes should be modified accordingly.

6. OCA representatives have explained that §160.3(b)(4) gives mediators and neutral third parties the authority to speak with their supervisor about next steps should one of the parties participating in an ADR process threaten to harm someone. However, the proposed rules changes go far beyond giving mediators the authority to speak to their supervisor. Instead, the proposed rules changes give mediators the authority to notify "appropriate authorities." This would have the effect of making mediators and neutral third parties de facto mandatory reporters, a responsibility that they currently do not have under statute. While a mediator may think contacting the appropriate authorities may enhance a party's safety, it might actually enhance risk to a potential victim under certain circumstances. As such, NYSCADV recommends this subdivision be modified to permit mediators and neutral third parties to notify "their supervisor or the court" rather than "appropriate authorities." Mediators should also be required to notify potential victims that they will be contacting a supervisor or the court based on information gleaned during the ADR process. This notification to the victim should occur prior to any outreach to a supervisor or the court.

7. Neutral third parties should not be granted quasi-immunity, as provided in §160.4. In a December 2021 report, the Governor's Blue Ribbon Commission on Forensic Custody Evaluations recommended removing "a cocoon of quasi-judicial immunity" from forensic child custody evaluators because it "effectively prohibits civil action against evaluators" and "impedes evaluator accountability." NYSCADV agrees and believes the same applies to other court personnel such as mediators and neutral third parties. We recommend removing §160.4 from the proposed rules changes.

8. Domestic violence advocates and attorneys have raised concerns about the practices of some mediators when contacting parties about ADR. Electronic messages have indicated that the mediator "has been assigned by the court," that the mediator "need[s] to ask you questions," or asks for a contact phone number without asking permission to be calling or whether it is safe to be contacting the party by phone. Most important, communications have not clearly informed parties that engagement in an ADR/mediation process is voluntary and have not provided clarity on the costs of ADR. As such, NYSCADV recommends that the Office of Court Administration's Statewide ADR Office develop clear and consistent materials, including fact sheets, sample phone scripts and template electronic communications, for mediators and other neutral third parties to send to parties.

9. At the initiation of an ADR process, in advance of the screening process, NYSCADV recommends mediators and neutral third parties be required to review any petitions and responsive pleadings associated with the case. These materials can identify issues pertaining to domestic violence, abuse, power and control dynamics or coercive tactics that could make the case ineligible at the outset for referral to ADR/mediation.

10. NYSCADV was pleased to learn of the recent Administrative Order (AO/119a/22) requiring all roster mediators who mediate in family or matrimonial matters for the court to obtain an additional four hours of training on how to screen potential mediation cases for intimate partner violence, and complete two hours of continuing education in intimate partner violence every two years after that. However, we

question why mediators who are already on a family or matrimonial roster have until December 31, 2023, to complete such training. We strongly urge the timeframe to obtain such training for those currently on the rosters to be moved earlier to December 31, 2022.

Further, we encourage such training to be required for all judges serving in New York's family and matrimonial courts, all attorneys representing clients in such courts, all Attorneys for Children representing children in such courts, and appropriate court personnel.

Thank you for the opportunity to provide these comments. We would be happy to meet with OCA's Statewide ADR Office as these proposed rules changes are finalized to discuss these issues in greater detail.

Sincerely,

Connie Neal

Connie Neal
Executive Director

No Evictions, Defend Your Rights!

Right to Counsel NYC COALITION

May 23, 2022

Eileen D. Millett, Esq.
Counsel
NYS Office of Court Administration
25 Beaver Street 11th floor
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rulecomments@nycourts.gov

Re: Objection to Proposed Rules for Presumptive Alternative Dispute Resolution

Dear Ms. Millett:

We write to express our strong objection to the implementation of Alternative Dispute Resolution (ADR) in Housing Courts across New York State. The Right to Counsel (RTC) NYC Coalition is a coalition of tenant organizing groups, legal service organizations, educators, and housing advocacy organizations which advocates for a fair and just implementation of the city's RTC law.

The proposed rules require that all civil disputes be referred to ADR at the earliest practicable time after commencement with few exceptions, e.g., times the court determines that the referral to ADR will not serve the interests of justice. The proposed rules subject mediators in court-referred ADR to certain standards of conduct which are now under review. When those standards of conduct are approved, their location will be specified in proposed section 160.3(d) of the rules.

The Right to Counsel NYC Coalition joins other voices across the City in opposing the plan to include ADR in Housing Courts and across New York State. If the court's goal is to "advance the delivery and quality of civil justice", ADR would move Housing Courts in the opposite direction by disallowing tenants the ability to have their cases decided on the merits by a judge, and by forbidding tenants the opportunity to exercise their Right To Counsel, as mandated by City law. We believe ADR is the wrong approach and reverses the progress made through the passage and implementation of the New York City Right to Counsel law which has already - and repeatedly - delivered meaningful access to justice to tens of thousands of tenants since its inception in late 2017.


We object to the use of ADR in Housing Court for a number of reasons:

- **Housing Courts must ensure that tenants' rights are protected, enforced and upheld.** When cases are sent to ADR, they are resolved without tenants' rights, defenses, and claims being protected. This is one of the key reasons we fought for the Right to Counsel; to deny tenants the opportunity to be heard in a court of law is not justice.

- **Landlords and tenants are not evenly matched in Housing Court.** Most landlords have attorneys, and most tenants do not. Pro se tenants are at a severe disadvantage as they are unfamiliar with the terminology and procedures of the court as well as the substantive law. On the other hand, the vast majority of landlords use lawyers or firms with high volume practices in Housing Court that are well-versed in the court process and applicable laws. Mediation, or ADR, is a poor choice for the court when there is a clear and immediate imbalance of power between landlords and tenants. Mediation will undermine NYC's effort, through the Right to Counsel, to address these power imbalances tenants face when fighting against eviction in Housing Court.

- **Mediators are not trained housing lawyers and lack the knowledge necessary to fully understand the issues in any given case.** Tenants appearing before mediators, particularly those new to the complex area of housing law (and often evolving), are likely to come out of the mediation with really disadvantageous settlements. These bad settlements, or one-sided settlements, could easily be prevented through a tenant exercising their Right to Counsel and having their case heard before a judge in Housing Court. Troubling still, it is not clear how these settlements would be vacated if improvidently entered into given that ADR cases are not heard "on the record."

- **It is highly unlikely that represented tenants will use ADR.** ADR would therefore create two systems of justice. One where tenants have an RTC lawyer to ensure they understand the law and use it to defend their homes, and the second where the court pushes them to resolve a case absent the law and without a judge or lawyer. In the context of Right to Counsel, ADR is a dangerous departure from allowing tenants to exercise this basic right and instead signifies the court's lack of respect and indifference to a tenant's Right to Counsel in Housing Court.

- **Sessions with mediators and arbitrators will be conducted off the record.** Tenants without counsel in Housing Court negotiate settlements in the hallways with landlord lawyers. Since the ADR sessions would not be recorded, there will be no way for the judge to ensure that the unrepresented tenants' defenses were explored, and no way to prevent the tenant from unknowingly revealing information that prejudices their case.


The system would see no improvement or distinction between an unrepresented tenant negotiating in the hallway and an unrepresented tenant attending ADR.

- **Precious resources should not go to a new mediation program while the current Right to Counsel implementation is hampered by lack of personnel, space and other resources.** There is no extra space in the Housing Courts – there is not enough space now in some of the courts for the proper implementation of Right to Counsel. It would be a shame for the court to provide precious space for mediators when tenants do not have adequate confidential space to meet with their RTC attorneys.

- **The Housing Stability and Tenant Protection Act of 2019 significantly increased protections for tenants facing eviction.** The HSTPA increased notice periods, got rid of punitive laws that penalized tenants for adjournments in holdover cases, and increased a tenant's ability to prevent eviction with longer marshal's notices. These changes were all made with an eye towards the traditional court setting. ADR mediation undermines these enhanced protections, and deficiencies that would otherwise be fatal to an owner's case are sure to be overlooked

- **Given all of the ways the courts could use their resources, ADR is a poor choice.** It's highly unlikely that represented tenants would use ADR. As Right to Counsel expands, fewer and fewer tenants would use it.

For the various reasons outlined above, we strongly ask that OCA mandate all Housing Court cases be excluded from any existing or proposed rules that permit eviction cases to be referred to ADR. The referral of these cases will not serve the interests of justice and prevent tenants from exercising their right to counsel. At a time when the courts and state struggle to provide adequate resources for Right to Counsel, carving out resources for ADR severely undermines the equal access to justice the court claims to support.

Sincerely,

The Right to Counsel NYC Coalition

Pablo Estupiñan, Interim Coalition Coordinator
email: pablo@righttocounselnyc.org
cell: 917-753-6996

Association of Legal Aid Attorneys
UAW 2325 (AFL-CIO)

May 20, 2022

Eileen D. Millett, Esq.
Counsel
NYS Office of Court Administration
25 Beaver Street 11th floor
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rulecomments@nycourts.gov

Re: Objection to Proposed Rules for Presumptive Alternative Dispute Resolution

Dear Ms. Millett:

On behalf of the Association of Legal Aid Attorneys (ALAA), UAW Local 2325, which represents over 2,700 public interest attorneys and advocates in the New York City metropolitan area, I am writing to express ALAA's strong objection to the implementation of Alternative Dispute Resolution (ADR) in Housing Courts and consumer debt matters across New York State. Many of ALAA's members are nonprofit legal services attorneys who represent low-income debtors and tenants, and we have seen first-hand the imbalance of power between our clients and the landlords and debt collectors who seek to take advantage of them.

The proposed rules require that all civil disputes be referred to ADR at the earliest practicable time after commencement with few exceptions, e.g., times the court determines that the referral to ADR will not serve the interests of justice. We are writing to urge you to exclude Housing Court and consumer debt matters from the ADR process because, across-the-board, the use of ADR in those matters will not serve the interests of justice.

**ADR Must Not Be Implemented in Housing Court**

ALAA joins the Right to Counsel NYC Coalition and other voices across the City in opposing the plan to include ADR in Housing Courts and across New York State. If the court's goal is to "advance the delivery and quality of civil justice," ADR would move Housing Courts in the opposite direction by disallowing tenants the ability to have their cases decided on the merits by a judge, and by forbidding tenants the opportunity to exercise their Right To Counsel, as mandated by City law. We believe ADR is the wrong approach and reverses the progress made through the passage and implementation of the New York City Right to Counsel law which has

already—and repeatedly—delivered meaningful access to justice to tens of thousands of tenants since its inception in late 2017.

We object to the use of ADR in Housing Court for reasons which include:

- **Housing Courts must ensure that tenants' rights are protected, enforced and upheld.** When cases are sent to ADR, they are resolved without tenants' rights, defenses, and claims being protected. This is one of the key reasons we fought for the Right to Counsel; there is no justice if tenants are denied the opportunity to be heard in a court of law with legal representation.
- **Landlords and tenants are not evenly matched in Housing Court.** When a housing court case is commenced, most landlords have attorneys, and most tenants do not. Pro se tenants are at a severe disadvantage as they are unfamiliar with the terminology and procedures of the court as well as the substantive law. On the other hand, the vast majority of landlords use lawyers or firms with high volume practices in Housing Court that are well-versed in the court process and applicable laws. Mediation, or ADR, is a poor choice for the court when there is a clear and immediate imbalance of power between landlords and tenants. Mediation will undermine NYC's effort, through the Right to Counsel, to address these power imbalances tenants face when fighting against eviction in Housing Court.
- **Mediators are not trained housing lawyers and lack the knowledge necessary to fully understand the issues in any given case.** Tenants appearing before mediators, particularly those new to the complex area of housing law (and often evolving), are likely to come out of the mediation with disadvantageous settlements. These bad settlements, or one-sided settlements, could easily be prevented through a tenant exercising their Right to Counsel and having their case heard before a judge in Housing Court. Troubling still, it is not clear how these settlements would be vacated if improvidently entered, given that ADR cases are not heard "on the record."
- **It is highly unlikely that represented tenants will use ADR.** ADR would therefore create two systems of justice. One where tenants have an RTC lawyer to ensure they understand the law and use it to defend their homes, and the second where tenants are pushed to resolve a case absent the law and without a judge or lawyer. In the context of Right to Counsel, ADR is a dangerous departure from allowing tenants to exercise this basic right and instead signifies the court's lack of respect and indifference to a tenant's Right to Counsel in Housing Court.
- **Sessions with mediators and arbitrators will be conducted off the record.** Tenants without counsel in Housing Court negotiate settlements in the hallways with landlord lawyers. Since the ADR sessions would not be recorded, there will be no way for the judge to ensure that the unrepresented tenants' defenses were explored, and no way to prevent the tenant from unknowingly revealing information that prejudices their case. The system would see no improvement or distinction between an unrepresented tenant negotiating in the hallway and an unrepresented tenant attending ADR.
- **Precious resources should not go to a new mediation program while the current Right to Counsel implementation is hampered by lack of personnel, space and other resources.** There is no extra space in the Housing Courts – there is not enough space now in some of the courts for the proper implementation of Right to Counsel. It

would be a shame for the court to provide precious space for mediators when tenants do not have adequate confidential space to meet with their RTC attorneys.

- **The Housing Stability and Tenant Protection Act of 2019 significantly increased protections for tenants facing eviction.** The HSTPA increased notice periods, got rid of punitive laws that penalized tenants for adjournments in holdover cases, and increased a tenant's ability to prevent eviction with longer marshal's notices. These changes were all made with an eye towards the traditional court setting. ADR mediation undermines these enhanced protections, and deficiencies that would otherwise be fatal to an owner's case are sure to be overlooked
- **Given all of the ways the courts could use their resources, ADR is a poor choice.** It's highly unlikely that represented tenants would use ADR. As Right to Counsel expands, fewer and fewer tenants would use it.

**ADR Must Not be Implemented in Consumer Debt Cases**

ALAA also joins the consumer advocate community and other voices in opposing the plan to include ADR in any cases involving consumer debt. ADR is inappropriate for use in consumer debt cases due to the substantial imbalance of power between debt collection attorneys and unrepresented consumers, the technical nature of defenses to debt collection which unrepresented consumers are unlikely to be aware of, and the well-documented patterns of fraud in the debt collection industry. The use of ADR in consumer debt cases would exacerbate the pressure to settle even unmeritorious debt claims, putting low- and moderate-income New Yorkers in harm's way, without access to legal advice or representation.

We object to the use of ADR in consumer debt cases for reasons which include:

- **Debt collection attorneys exert tremendous pressure on unrepresented litigants and frequently engage in deceptive and fraudulent tactics.** Consumer debt litigation is characterized by profound information asymmetry and abuse, and unrepresented litigants are often pressured to enter settlements that they cannot afford even when they have substantial defenses to the underlying cases, including that the claims of debt are false or unverified, that collection of the debt is time-barred, or that the litigants have exempt income, including senior citizens and people with disabilities. Most litigants, especially those who have limited English proficiency or other vulnerabilities, do not understand the legal documents they receive and are not aware that they may have substantial defenses to the alleged debt. Thus, an ADR process for consumer debt cases would "not serve the interests of justice" because countless litigants would be pressured to settle debt cases without regard for defenses that could reduce or even eliminate the alleged debt.
- **The use of ADR will prevent unrepresented litigants from accessing legal advice and representation which could inform them of their defenses.** In recent years, the courts and the consumer advocate community have made great strides in fighting debt collection abuses, in large part by expanding access to legal representation and court-sponsored programs which provide advice and limited-scope representation to low-income litigants. Many of ALAA's members work for legal services organizations which represent low-income litigants in debt collection cases, and our organizations assist defendants in asserting defenses they did not know they had, often getting cases dismissed entirely. In the courthouse, programs such as the Civil Legal Advice and Resource Office (CLARO) and Volunteer Lawyers for the Day Program ensure that even unrepresented litigants

have access to information and assistance to defend their cases. The use of ADR in consumer debt cases would reverse the progress that has been made by pressuring litigants into settling their cases before they have access to legal advice or representation.

- **Settling debt collection cases is economically unviable for many litigants.** Many New Yorkers, including the litigants that many of ALAA's members represent, have income so low that entering a debt collection settlement of even a modest amount (such as $10 or $15 per month for years) is unrealistic and likely to cause great hardship. Litigants entering these agreements are likely to default, resulting in money judgments for the entirety of the debt amount, plus fees and 9% statutory interest. They are thereby at risk of wage garnishment and resulting hardships like inability to pay for household necessities and rent, and even eviction. For that reason, economically distressed New Yorkers must have access to legal advice before entering a settlement that could cripple them for years and may be based on an alleged debt that wouldn't even stand up in court.
- **ADR is a poor use of court resources and a misguided effort to cut costs at the expense of justice.** To the extent that ADR is proposed as a cost-cutting measure, it is a misguided effort to cut costs for debt collectors at the expense of justice for unrepresented and often very vulnerable, New Yorkers. New York State's court reforms to combat abuses in debt collection abuses have resulted in a significant decrease in consumer debt filings because debt collectors have found that it is more difficult to get away with deceptive practices like bringing cases for unverified debt and engaging in sewer service. The use of ADR in consumer debt cases might thus have the unintended consequence of causing an uptick in cases based on unmeritorious claims. Court oversight in consumer debt cases is an invaluable check on debt collection abuses which must not be eliminated via ADR.

For the various reasons outlined above, we strongly ask that OCA mandate that all Housing Court and consumer debt cases be excluded from any existing or proposed rules that permit cases to be referred to ADR. The referral of these cases to ADR will not serve the interests of justice and will prevent low-income tenants and debtor-defendants from obtaining legal representation and advice, at great cost. At a time when the courts and state struggle to provide adequate resources for Access to Justice initiatives, carving out resources for ADR severely undermines the equal access to justice that the court claims to support.

Sincerely,

Lisa Ohta
President, Association of Legal Aid Attorneys (ALAA), UAW Local 2325

MANHATTAN
Legal
Services NYC
DEMAND JUSTICE

May 23, 2022

By email to rulecomments@nycourts.gov
NYS Unified Court System Office of Court Administration
25 Beaver Street, Suite 8 New York, New York 10004

Re: Proposal to Adopt a New Part 60 and 160 to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution

Dear Office of Court Administration:

Legal Services NYC appreciates the opportunity to comment on your proposal to adopt a new Part 60 and 160 for Alternative Dispute Resolution (hereinafter "ADR") in civil disputes. As a certified mediator and consumer attorney, although I value ADR programs, I do not believe that the current proposal will benefit self-represented litigants appearing in consumer actions in Civil Court or meet the court's goals of providing justice in an time efficient manner.

Legal Services NYC (LSNYC) is the largest civil legal services provider in the country and has offices in the Bronx, Brooklyn, Queens, Staten Island and Manhattan. For over fifty years, LSNYC has provided critical legal help to low-income residents of New York City. Our organization works to reduce poverty by challenging systemic injustice and helping clients meet basic needs for housing, access to high-quality education, health care, family stability, and income and economic security.

In my role as a senior LSNYC staff attorney and consumer law specialist in our Economic Justice Unit, I frequently appear in Civil Court representing consumers who are being sued on credit card debt, medical debt, car loans, student loan debt, and rent arrears (where the landlord is seeking a money judgment instead of eviction.)

As a certified mediator in three states and a former project director of a mediation program in Michigan, I am also aware of the challenges it presents in a litigation context.

In my experience, court related ADR works best when the parties have a mutual interest in maintaining their relationship, both sides will benefit from resolving their dispute without litigation, and the mediator has the ability to minimize or eliminate any power imbalance. Unfortunately, I believe these factors are almost universally absent in Civil Court consumer cases.

**Manhattan Legal Services** | 1 West 125th Street, 2nd Floor, New York, NY 10027
Phone: 646-442-3100 | Fax: 212-348-4093 | www.LegalServicesNYC.org
**Peggy Earisman**, Project Director

### A. The parties in consumer cases have no interest in maintaining relationships and potential savings in litigation costs is often not a sufficient incentive to resolve a case through ADR

Almost without exception, creditor plaintiffs in consumer cases[1] are corporate entitles which have terminated any relationship they had with the consumer prior to commencing the court action and both sides are uninterested in having any business dealings with each other in the future. In some cases, cases where a debt buyer has purchased the debt, or the debt is the result of identity theft, there is no prior relationship and no interest in creating one.

Unfortunately, avoiding litigation is, in itself, insufficient incentive for parties to actively and meaningfully engage in ADR. Large corporate plaintiffs see attorney's fees as the cost of doing business and many view settlement as harmful to their interests. Many fear that settling a case for less than the original amount of the debt will weaken their bargaining power in future settlement negotiations. For example, landlords often insist on going to trial over repair issues because they believe negotiating a rent abatement will lead to more tenants asking for one, even though the cost of the litigation exceeds the amount of the rent abatement requested. Original creditors suing for credit card debt have expressed the same belief to me.

On the defendant side, most of those who do not dispute the debt have already tried to settle the case before they are sued, but were unable to reach an agreement because they could not afford to pay even a reduced amount. Presumptive mediation, even in cases where the debt is not disputed, is of limited utility when the pro se litigant simply lacks the means to make any payment on the debt. People with the means to enter into a payment arrangement so are generally able to settle the debt before litigation or on the first court date without needing ADR.

### B. Where the legal issues are complex and the debt is disputed, there is no incentive to settle at an early stage in the litigation

ADR can be very helpful in situations in ending litigation quickly where compromise is possible and in both parties' interests. In many consumer cases, however, there is a dispute over whether the debt is actually owed. In debt buyer cases, consumers are being sued by an entity they have never heard of, which may not have standing to collect on the debt, or the debt may be outside the statute of limitations. A growing number of debt collection cases involve identity theft or the actions of a third party, such as insurers in medical debt cases where settlement may be partially dependent on a third party (the insurer).

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[1] For the purpose of this letter I use consumer cases to refer to credit card debt, medical debt, student loan debt, car financing debt, and rent arrears cases filed in Civil Court.

Presumptive ADR, at least at an early stage, would be premature under these circumstances and could lead to the parties entering into agreements which do not resolve the underlying issue or which may seem reasonable at the time, but after discovery may prove to be unjust.

Presumptive ADR may be more useful to the parties post-discovery after the issues of the case have have been narrowed, but will do little to reduce the court's workload, since the majority of the time the court spends on these types of cases is related to discovery and discovery compliance, since very few involve motion practice or go to trial.

### C. Mediators lack the tools they need to address power imbalances in these cases

Mediators often address power imbalances by pointing out the strengths and weaknesses of both sides' cases, but as discussed above, in preliminary stages of litigation, the parties themselves do not know always know the basic facts, let alone the strength of weakness of their case. This leaves the mediator with little to work with.

In addition, some power imbalances, such as when one party is a represented corporation or business entity and the other is a self-represented individual simply cannot be corrected. Too often, consumers who are unrepresented face barriers to attending court dates, such as a disability, the inability to get time off from their job, or child care or elder care issues. These pressures make them much more likely to accept an agreement, even if it is unfair or unworkable, simply to get out of court faster.

Plaintiffs, however, can wait the defendant out. Their attorneys bear most of the burden of court or mediation appearances. Even a requirement that someone with settlement authority attend the mediation has less impact on a large corporation with many employees than on an individual consumer.

The mediator simply cannot overcome this type of imbalance, because it involves systemic issues the mediator has no way of mitigating.

### D. Power imbalances relating to race, language access, and gender are prevalent in consumer cases

Based on my personal observations during court cases and while serving as a consumer law expert for CLARO—an access to justice program providing pro se assistance to defendants in debt collection cases—the majority of unrepresented litigants are people of color, and a significant percentage of them are limited English proficient.

These facts implicate power imbalances that result when one party is a member of a group that is marginalized based on class, race, gender, national origin/ethnicity and/or language and the other is not.

Having multiple mediators and a diverse panel of mediators is one way to address this power imbalance. Although there are ongoing efforts to increase mediator diversity, they are still a work in progress, and court based programs, which often lack the resources to assign more than one mediator per case, are not in a position to correct it themselves.

A defendant of color, faced with a white mediator and a plaintiff represented by a white attorney, for example, may not believe that the mediator can be neutral and this lack of trust will impact the mediation's effectiveness.

This type of power imbalance can be addressed in other ways, but it takes extra effort and above all time to establish trust, and court based ADR programs often have to limit the time spent on each case due to their limited resources.

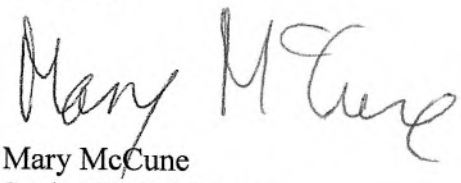
**Effect on the court docket**

ADR is a powerful tool that can, in the right cases, provide parties with an effective mechanism to resolve their cases quickly and fairly.

In a consumer case context however, the possible advantages of presumptive ADR are outweighed by the disadvantages. The imbalance of power between the parties is difficult or impossible to mitigate, and the complexity of legal issues make the cases unsuitable for mediation at an early stage in the litigation.

Mediations performed in a consumer matter are less likely to result in no agreements because the parties have no incentive to settle the action or because the defendant lacks the resources to settle it. Under these circumstances, ADR would not save the court or litigants time or resources, and in fact, would just prolong the litigation. There is also a real risk that because of power imbalances, unrepresented defendants will agree to settlement terms that they will not be able to keep, or agree to pay a debt they do not owe because they are ignorant of their defenses.

Sincerely,



Mary McCune
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Via Email to: rulecomments@nycourts.gov

May 23, 2022

Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver St., 11th Fl.
New York, NY 10004

**Re: Request for Public Comment on the Proposal to Adopt a New Part 60 of the Rules of the Chief Judge and 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**

Dear Eileen D. Millett:

Mobilization for Justice (MFJ) submits the following comments to the above-referenced request for comments. MFJ's mission is to achieve justice for all. MFJ prioritizes the needs of people who are low-income, disenfranchised, or have disabilities as they struggle to overcome the effects of social injustice and systemic racism. We provide the highest-quality free, direct civil legal assistance, conduct community education and build partnerships, engage in policy advocacy, and bring impact litigation. MFJ also promotes diversity, equity, and inclusion in our workplace, and understands the need to eliminate all racial disparities to achieve justice for all. We assist more than 13,000 New Yorkers each year, benefitting over 25,000. MFJ's Consumer Rights Project provides advice, counsel, and representation to New Yorkers on debt collection problems. We appear in the consumer parts in all five boroughs and volunteer for the court-based Civil Legal Advice and Resource Center (CLARO) clinics.

The proposal seems to establish general statewide rules for presumptive alternative dispute resolution (ADR) and "will refer parties in civil disputes in the trial courts to mediation and other forms of ADR." We have several concerns with requiring mandatory ADR in consumer debt cases. We believe referring these cases for ADR will not serve the interests of justice for the reasons laid out in the New York City Bar Association's October 8, 2019 letter to the Hon. Anthony Cannataro regarding the Presumptive ADR Initiative and the August 31, 2017 letter to the Hon. Lawrence K. Marks from organizations and law school clinical faculty regarding Online Dispute Resolution Pilot Project for Consumer Credit Cases (attached).

Debt collection cases, which are notoriously rife with problems and inaccuracies,[1] are particularly inappropriate for ADR, because the mediation process allows plaintiffs to avoid

[1] *See, e.g.*, Human Rights Watch, *Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor* (Jan. 20, 2016) (*available at*: https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-

having to prove their cases. In fact, consumers often have very good and complete defenses to debt collection actions, which they would waive by entering into ill-advised settlements.

Further, ADR, which has an end goal of obtaining a monetary settlement, is inappropriate for consumers sued in debt collection cases. Many consumers are from limited-English communities, are not able to read, lack education and do not understand complex legal documents. They also have income exempt from collection or are low-income or working poor; they should not be pressured, with the court's blessing, into binding settlements in which they pay creditors instead of paying for basic necessities, Further, because of decades of systemic racism, communities of color are disproportionately impacted by debt collection; mandatory ADR in consumer debt cases will only serve to exacerbate these harms.

Finally, debt collection cases are marked by an unequal balance of power, because plaintiff creditors are always represented by counsel, and appear in court--and would appear before the same mediators--regularly, compared to the vast majority of defendant consumers who are *pro se* and unfamiliar with (and quite often fearful of) the court system and court process. Placing such parties at the bargaining table and treating them as equals will result in an unfair advantage for creditor plaintiffs. In fact, the National Standards for Court-Connected Mediation Programs, has stated that mediation may be inappropriate "when a party or parties are not able to negotiate effectively themselves or with assistance of counsel"[2] or when "real inequality of knowledge or sophistication between the parties that cannot be balanced in the mediation."[3]

If consumer debt cases are included in the Court's ADR plan, despite the near-universal opposition by consumer advocates, it should be implemented on a trial basis only and thoroughly reviewed. Defendant consumers should under no circumstances be required to pay any fees for mediation. Mediators should engage in detailed, documented allocutions of settlements. And information about mediation outcomes should be collected and analyzed to ensure they are conducted fairly.

Thank you for the opportunity to submit comments.

Sincerely,
*Carolyn E. Coffey*
Director of Litigation for Economic Justice
212-417-3701
ccoffey@mfjlegal.org

Encl.

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corporations-and-poor); Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 24 (Jan. 2013) (*available at*: https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf); New Economy Project, The Debt Collection Racket in New York (June 2013) (*available at*: http://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf).

[2] Center for Dispute Settlement, the Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, Section 4.2(c) (*available at* https://s3.amazonaws.com/aboutrsi/59a73d992959b07fda0d6060/NationalStandardsADR.pdf.

[3] *Id.* Section 5.2 Commentary.

August 31, 2017

Hon. Lawrence K. Marks
Chief Administrative Judge
New York State Unified Court System
25 Beaver Street
New York, NY 10004

**Re: Online Dispute Resolution Pilot Project for Consumer Credit Cases**

Dear Judge Marks:

The undersigned organizations and law school clinical faculty write to convey our serious concerns regarding the Office of Court Administration's proposed Online Dispute Resolution ("ODR") pilot project for consumer credit actions. While we welcome technological innovations to increase access to justice, we strongly oppose the use of ODR in consumer credit cases. The substantial imbalance of power between debt collection attorneys and unrepresented consumers, as well as the well-documented patterns of attorney fraud and abuse frequently associated with these cases, lead us to believe that ODR in consumer credit cases would impede access to justice for New Yorkers. We appreciate the opportunity to share our detailed comments below, which are based on our organizations' collective decades of expertise and leadership in consumer debt litigation.

We welcome the opportunity meet with you and to further discuss our concerns, as well as cases for which court-sponsored ODR may be appropriate. Our organizations have a long track record of partnering with OCA on successful access-to-justice initiatives, and we welcome the opportunity to work with you to develop an ODR program that truly enhances access to justice for New Yorkers.

## I. Our Understanding of The Current Plan for The ODR Pilot Program

We have met several times with Office of Court Administration ("OCA") staff and appreciate having had the opportunity to learn more about the proposed ODR pilot and to share our concerns about the impact of the program on unrepresented individuals.[1] However, it is

[1] OCA reached out to several organizations involved in the operation of the CLARO Programs in early December 2016 to discuss the ODR Pilot Project, including Western New York Law Center ("WNYLC") on December 5, 2016, Fordham Law School's Feerick Center for Social Justice ("Feerick Center") on December 5, 2016, Brooklyn Bar Association Volunteer Lawyers Project ("Brooklyn VLP") on January 20, 2017, and Queens County Bar Association Volunteer Lawyers Project ("Queens VLP"). WNYLC staff discussed with OCA staff and two consultants the ODR Pilot Project on December 7, 2016 and on April 21, 2017, each time for approximately two hours and on both occasions expressed deep concerns about the ODR Pilot Project as described at the time on its impact on unrepresented consumers. OCA reached out to Brooklyn VLP on January 20, 2017 to set up a time to discuss the ODR Pilot Project and Brooklyn VLP responded on February 3, 2017; a series of emails ensued to set up a time with a final email exchange taking place on February 10, 2017, but no meeting was finally scheduled. OCA also reached out separately in January 2017 to clinical law school faculty, Gina Calabrese of St. John's University and Marcella Silverman of Fordham University, but initial efforts to find a mutually convenient time to confer were

concerning that our organizations were not consulted earlier in the process of developing this proposal and that while OCA assures us there is support for this proposal from within New York's consumer advocacy community, we are unaware of any such support. Based on our meetings, we understand that the program will work as follows:

Assuming a consumer actually receives service of the summons and complaint at the correct address,[2] the consumer would also receive a notice about the ODR program. Participation in the program would be voluntary and would extend the time for a consumer to answer the lawsuit. As we understand it, the ODR program would consist of three stages:

1. An *expert triage and education module* would provide legal information to people who receive a summons and complaint in a consumer credit action. It would educate and screen consumers about potential defenses and legal resources, including providers of free legal services on a full- or limited-scope (i.e., CLARO and VLFD) basis.

2. a. A *negotiation module*[3] in which the consumer defendant would communicate directly with the plaintiff's attorney in an online chat room.[4] No other person would be present. Debt collectors commonly overreach in such settings, where their statements are unchallenged by an opposing attorney or tempered by the presence of a judge or court attorney. This chat room, however, would be sponsored by the court. There would be a record of the conversation, though this is contrary to principles of confidentiality in alternative dispute resolution and in settlement negotiations.

   b. If negotiation fails, the consumer and collection attorney could engage in *mediation* with a trained mediator from Community Dispute Resolution Centers. These mediators may not be lawyers or know the legal rules governing consumer credit cases. A consumer could have a complete defense to a collection case that a non-attorney, or even an attorney untrained in the subject area, would not have the skills to identify or incorporate into the mediation.

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not successful. Professor Calabrese is the outgoing Chair and Prof. Silverman is an outgoing member of the NYC Bar Civil Court Committee. The Feerick Center did not connect with OCA until late April 2017 and helped coordinate with OCA to schedule two meetings between OCA staff and consumer practitioners, including CLARO and VLFD operators, on May 8 and July 17, 2017.

[2] Despite recent reforms, "sewer service" persists in consumer credit cases.

[3] The court would need to verify that the person participating as the consumer defendant in ODR is in fact the named defendant in the lawsuit being resolved and not a scammer (including peddlers of sham debt relief services) or identity thief impersonating the consumer online. Likewise, the court should verify the identity of the person conducting negotiations on behalf of the plaintiff in the ODR chat room. Debt collection law offices typically use non-attorneys to perform out-of-court negotiations. Non-attorney collectors have limited authority, nor are they subject to rules of professional conduct for attorneys, New York's Rule 4.3, governing communications with unrepresented persons.

[4] The Task Force to Expand Access to Civil Legal Services in New York: Report to the Chief Judge of the State of New York 31 (Nov. 2014), https://www.nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf (hereafter, "2014 Task Force Report").

3. *Online allocution of settlements*, through questions presented on a screen, which would ultimately be "so-ordered" by a judge. These binding settlements present grave harm to unrepresented consumers, who would enter into them without counsel and thus without informed consent. Improvidently-entered stipulations become judgments when the consumer defaults. These judgments earn interest at 9% and lead to years if not decades of forced collection, causing extreme financial hardship to low-income New Yorkers.

OCA also courteously shared with us two papers on the emergence of court-sponsored ODR in international and American courts.[5] Neither report discussed the use of ODR programs in contexts comparable to consumer debt litigation in New York (or the United States), nor has OCA identified any such comparable examples in our discussions. The examples described in the reports were almost entirely from outside the United States. None of the additional literature that we have been able to access contains enough information to determine whether any jurisdiction uses ODR in circumstances similar to consumer credit litigation in New York—where the plaintiff is more powerful, knowledgeable, and has an attorney, the defendant is an unrepresented individual with far less knowledge and resources, and the stronger party is known to engage in abusive tactics against the weaker party.[6] Rather, existing models, such as several successful programs in the Netherlands, Canada, and Ohio have focused on using ODR where neither party is represented by counsel.[7] The Joint Technology Committee (a committee of three separate U.S. state court associations) recognizes: "Not all cases are suitable for online dispute resolution."[8] While ODR is an emerging technology with promise, we think a pilot project is better suited to cases in which both parties are on more equal footing.

## II. ODR Is Not Appropriate for Consumer Credit Actions in New York

### A. Debt Collection Attorneys Exert Tremendous Pressure on Unrepresented Litigants and Frequently Engage in Deceptive and Fraudulent Tactics

Consumer debt litigation is characterized by profound information asymmetry and abuse: expert debt collection attorneys who are in court daily employ overreaching and often misleading litigation tactics against unrepresented consumers, most of whom are interacting with the court system for the first time.[9] Examples of such practices include making unverified or even false

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[5] Hill Trend Report IV, "ODR and the Courts: The Promise of 100% Access to Justice?" Online Dispute Resolution 2016, available at http://www.onlineresolution.com/hiil.pdf (hereafter, "Hill Trend Report") and JTC Resource Bulletin, *Online Dispute Resolution and the Courts* (Version 1.0; Adopted 30 November 2016) (Joint Technology Committee: Conference of State Court Administrators (COSCA), the National Association for Court Management (NACM), and the National Center for State Courts (NCSC), available at http://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/ODR%20QR%20final%20V1%20-%20Nov.ashx (hereinafter, "JTC Resource Bulletin").

[6] Ethan Katsh and Orna Rabinovich-Einy, Digital Justice at 158 - 163 (Oxford University Press 2017) (hereafter, "Digital Justice"); Hill Trend Report at 30.

[7] Digital Justice at 150; Hill Trend Report at 39 and 57; JTC Resource Bulletin at 4. These programs include, respectively, separating spouses both proceeding without counsel, neighbor disputes, and small claims.

[8] JTC Resource Bulletin at 9.

[9] Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2017 (Mar. 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Fair-Debt-Collection-Practices-Act-Annual-Report.pdf (hereafter, "CFPB Report"); New Economy Project, The Debt Collection Racket

statements about the existence of evidence; filing lawsuits to collect time-barred debt; exerting pressure tactics on defendants who have exempt income, including seniors and litigants with disabilities; and filing motions for summary judgment, but making the return date different from the next scheduled court date to increase the chances of default by the defendant. For a more detailed discussion of the power imbalances inherent in debt collection litigation, please see the attached *amicus* brief. *Arias v. Gutman Mintz, Baker & Sonnenfeldt, P.C. et al.*, 16-2165-CV (U.S. Court of Appeals, 2nd Cir.), Brief of *Amicus Curiae* CAMBA Legal Service, et al. (other legal services organizations) In Support of Plaintiff-Appellant.

Some consumers who are the most ill-equipped to use ODR will be drawn to the process in order to avoid going to court, where they know they will face an experienced attorney with more power and knowledge of the court process. A court-sponsored ODR pilot project will give litigants undue faith in the fairness and safety of the modality.

Most consumer defendants do not understand the legal documents they receive, which are riddled with technical language.[10] They do not know the basic precepts of legal procedure, including pleading requirements, service of process rules, the ramifications of burden of proof, and the admissibility of evidence. This problem is more acute in limited-English proficient communities.[11] As a result, unrepresented New Yorkers are simply not in a position to evaluate the strength of the claims against them and the appropriate settlement value of a debt collection lawsuit.

**Ramifications for ODR Pilot Project**

The Task Force to Expand Access to Civil Legal Services in New York concluded that ODR is inappropriate for "matters involving domestic violence *or similar situations where the imbalance in power is inextricably bound up in the legal problem*."[12] For similar reasons, ODR is equally inappropriate for consumer credit actions. Debt collection attorneys have a financial stake in case outcomes because they are paid on contingency;[13] some even have a direct financial interest in the debt buying companies they represent.[14] Moreover, collection attorneys will be repeat players in the ODR platform. Because ODR programs are designed to incorporate and adapt to data

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in New York (June 2013), http://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf.

[10] The Honorable Fern A. Fisher, *Insuring Civil Justice For All: Meeting the Challenges of Poverty, in Impact: Collected Essays on the Threat of Economic Inequality* 12 (2015), https://www.nycourts.gov/ip/nya2j/pdfs/Fisher_NYLS_Economic-Inequality-Publication-2015.pdf (noting that only 13% of the adult population in the United States reads at the level of literacy necessary to understand the complex concepts found in legal documents).

[11] *Id.*

[12] The Task Force to Expand Access to Civil Legal Services in New York: Report to the Chief Judge of the State of New York 36 (Nov. 2013), https://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceReport_2013.pdf (hereafter, "2013 Task Force Report") (emphasis added).

[13] Consumer Financial Protection Bureau, Third-Party Debt Collection Operations Study 35 (July 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/20160727_cfpb_Third_Party_Debt_Collection_Operations_Study.pdf.

[14] *See* Legal Aid Society, et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers 4 (May 2010).

acquired from repeat transactions,[15] there is a concern that the program could develop a bias in favor of debt collectors. Although dependent on program design, this could further disadvantage a consumer who has no experience with the legal system.

The National Standards for Court-Connect Mediation Programs, issued by the State Justice Institute, provide further guidance. They state that mediation may be inappropriate "when a party or parties are not able to negotiate effectively themselves or with assistance of counsel"[16] or when "real inequality of knowledge or sophistication between the parties that cannot be balanced in the mediation."[17]

The National Standards further caution that:

> When parties to mediation have neither legal representation nor access to legal information, they are often vulnerable to pressure to settle and to accept unfair results. When parties are unrepresented, courts should make special efforts to alert them to settlement alternatives. . . . Similarly, courts should be sensitive to practices that make the uninformed perceive that they must settle. . . .
>
> Th[e] concern [of uninformed pressured settlements] is especially important when the party is unsophisticated about legal processes and might easily be intimidated or manipulated.[18]

Low literacy and lack of English proficiency further hinder an unrepresented person's understanding of the court process. Most consumer defendants will not be capable of reviewing, analyzing, and evaluating documentary evidence uploaded by the creditor, even with the benefit of educational modules. Even OCA's own outside expert agrees that "something as seemingly innocuous as a difference in typing skills may have a dramatic effect on a technology-facilitated dispute resolution process … The inability to keep pace with a rapidly evolving text-based dialogue can prove catastrophic to a dispute resolution process."[19] In court, both court attorneys and interpreters, not to mention VLFD attorneys, ameliorate this inequity.

Given all of the concerns outlined above, the proposed court-sponsored ODR pilot project would not ensure that unrepresented New Yorkers are truly "making free and informed choices about whether or not to settle."[20] Even with consumer education modules and digital "allocutions" of

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[15] Digital Justice at e.g., 48, 52, and 165-67.
[16] State Justice Institute, *National Standards for Court-Connected Mediation Programs*, Section 4.2(c), http://courtadr.org/files/NationalStandardsADR.pdf.
[17] *Id.* Section 5.2 Commentary.
[18] *Id.* Section 1.4 Commentary.
[19] David A. Larson, "Brother, Can You Spare a Dime?" Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes, 11 Nev. L.J. 523, 545 (2011). Likewise, the Joint Technology Committee, noting evidence that ODR users are more likely to use smart-phones than computers observed: "Additionally, mobile-dependent populations are also likely to have more limited ability to communicate effectively in writing – a skill essential to utilizing an ODR system no matter where the individual accesses the internet." JTC Resource Bulletin at 10.
[20] *See* State Justice Institute, *supra* note 16, Section 11.1 Commentary.

settlements, unsophisticated consumers will be subject to unjust results and exploitation by debt collection attorneys who will manipulate the ODR platform to their own advantage.

### B. Defendants Are Often Extremely Low Income and Economically Distressed

Collectively, our organizations serve thousands of low- and moderate-income New Yorkers every year. Many of us helped to design, implement, and supervise the CLARO and Volunteer Lawyer for the Day (VLFD) Programs, which operate under the auspices of the New York State Access to Justice Program. Our clients come to us at all stages of the process from pre-litigation to post-judgment, and we believe they are typical of unrepresented defendants in consumer credit actions.

Though CLARO and VLFD have no income restrictions, the New Yorkers who use them typically have very low incomes and are in economic distress. For example, among Bronx CLARO visitors who reported their monthly income in 2016, one third earned less than $1,200 per month. Of those who reported their source of income, 27% reported receiving exempt income. Moreover, CLARO visitors are often severely debt-burdened, with 52 percent in the Bronx in 2016 owing at least $5,000 in consumer debt, an unsustainably high level given their incomes. The 2016 Bronx CLARO data aligns with a recent study published by the CFPB stating that people with incomes less than $40,000 (well above what many Bronx CLARO visitors reported) were more likely to report being sued than people with higher incomes, as were older people and people with poor credit histories.[21]

Many New Yorkers want to take responsibility for debts they believe they owe. **But entering into a settlement is only viable for people who have steady disposable income.** Such people are rare exceptions at CLARO and VLFD. For economically-distressed litigants, settlement agreements of even very low amounts (i.e., $10 to $15 per month for years) are rarely realistic, often create significant hardship, and can result in defaults and money judgments for the amount originally pled in complaints plus fees and 9% interest.

It is crucial that economically-distressed New Yorkers carefully consider whether to enter into settlement agreements and it is often in the best interest of low-income people to avoid them entirely. People with exempt income receive subsistence-level benefits, which cover the necessities of life, including rent, food, utilities, and medicine. Still, many feel they have a moral obligation to repay a debt despite their dire economic situation. To ensure that economically vulnerable New Yorkers preserve their limited financial resources to remain housed and fed and not fall further into a cycle of poverty, consulting with an attorney is paramount. Many New Yorkers who receive exempt income do not know that their income is protected from collection until they are advised by a practitioner. Understanding the protections of and policy rationales behind exemption laws is essential to informed decision-making. Settlement agreements are often unsustainable for low-wage workers as well. Like people with exempt income, they need every penny for housing, food and other essential expenses like medication, transportation, and child care. Such individuals frequently default on stipulations of settlement, leading to wage garnishment, sometimes for many years.

[21] *Id.*

Importantly, people who default on stipulations of settlement have far fewer rights than those who default for failure to have filed an answer. Members of the former group typically cannot alter the settlement terms, however unfair or disadvantageous. Members of the latter group have various avenues for opening up a default and usually end up interposing defenses on the merits.

**Ramifications for ODR Pilot Project**

The proposed ODR program will result in an unacceptable number of unrepresented, economically-distressed New Yorkers waiving valid defenses in order to enter into unaffordable, binding settlements.

### C. Consumers Often Have Strong Defenses, Which Should Be Raised and Considered Before Settling

As you are aware, in 2014 former New York State Chief Judge Jonathan Lippman promulgated new court rules to address a range of systemic problems related to entry of default judgments in consumer credit actions. The reforms prevented debt collectors from obtaining default judgments in clearly unprovable cases, resulting in a significant drop in filings. Even today, however, plaintiffs in consumer credit actions often lack the necessary admissible evidence to prove their cases and consumers often have strong defenses. Problems with sufficient documentation occur with both debt buyers[22] and original creditors.[23]

In our experience, New Yorkers often come to CLARO expecting to have to settle, but after consulting with an attorney and understanding their legal rights and defenses, they often decide to litigate their cases instead. With the assistance of an advocate, people typically decide to file answers and complete discovery before considering settlement and, in limited-scope contexts, are able to review the discovery produced with an attorney. Given industry-wide problems with recordkeeping and documentation, discovery usually reveals the weaknesses in the plaintiff's case, giving consumers tools to obtain dismissals or negotiate significantly better settlements. Discovery can also confirm that a debt is legitimately owed and the consumer is the correct defendant, which assuages legitimate concerns about settling with the wrong entity.

**Ramifications for the ODR Pilot Project**

The ODR pilot is based partly on the erroneous premise that there is no question as to whether a person legally owes the plaintiff money; thus, all that is required for resolution is to bring the parties together to strike a bargain. In fact, the prevalence of strong legal defenses is yet another factor that weighs against the use of ODR for unrepresented defendants in consumer credit actions, especially before someone files an Answer. Without the advice of counsel, New Yorkers will unknowingly give up potentially dispositive legal rights and defenses.

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[22] Human Rights Watch, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor* 38-44 (Jan. 20, 2016), *https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor*; Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry* 24, 34-49 (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[23] *See, e.g.,* CFPB Report, *supra* note 9, at 34-35.

### D. Unsophisticated New Yorkers Are Susceptible to Debt Relief Scams, Including Unscrupulous Attorney-Fronted Operations

Notwithstanding the economic and legal factors that make settlement ill-advised, economically-distressed New Yorkers are often desperate to resolve their debts. Unfortunately, these desires lead some people to seek the services of unscrupulous, attorney-fronted debt relief scams. Some CLARO visitors fall prey to online scams and others respond to deceptive radio and print advertisements, often targeted to immigrants and communities of color. By way of example, thousands of New Yorkers have hired the Rodier Law Office, an out of state entity, to represent them. Rodier monitors case filings and sends targeted mailers to defendants. Rodier does not typically personally appear in New York Courts but charges its clients hundreds of dollars to negotiate stipulations for the full amount of the debt or more – something individual defendants could accomplish without Rodier's "assistance."

**Ramifications for ODR Pilot Project.**

Even limiting the ODR pilot project to two-attorney cases presents serious risks for New Yorkers. By eliminating the need for court appearances, the ODR pilot program would create new opportunities for attorney-fronted debt settlement scams and other bad actors to take advantage of unsophisticated consumers. Internet tracking could make it very easy for such outfits to solicit New Yorkers.

## III. Faulty Rationales for Using ODR for Consumer Credit Actions

### A. The Cost Saving Rationale

The reports of the Task Force to Expand Access to Civil Legal Services in New York, of the Permanent Commission, and of the Working Group make clear that a major rationale for the ODR pilot project was to reduce caseloads and resolve matters "in a fraction of the time and at a fraction of the cost."[24]

These cost-saving rationales favor reduction of costs for debt collectors and for the courts but jeopardize the interests of unrepresented, often very vulnerable, New Yorkers. Court-sponsored programs should advance procedural and substantive fairness for both parties.[25]

Moreover, the ODR pilot project will not yield the savings originally anticipated by the Task Force. New York State's court reforms, among other factors, have already caused a significant decrease in consumer credit filings. Filings in New York City Civil Court dropped from over

[24] The Task Force to Expand Access to Civil Legal Services in New York: Report to the Chief Judge of the State of New York 36 (Nov. 2014) at 31, available at https://www.nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf (hereafter "2014 Task Force Report").

[25] *See generally* Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, University of Maryland Francis Carey School of Law Legal Studies Research Paper No. 2016-40, available at http://digitalcommons.law.umaryland.edu/fac_pubs/1576/

300,000 in 2008 to only 46,837 in 2016.[26] Although the courts still handle large numbers of consumer credit cases, these often involve motions to vacate old judgments, and ODR will not address those cases or reduce those numbers.

Moreover, diverting consumer credit cases to ODR will mean that the judiciary cannot serve as a check on illegal and improper debt collection practices. ODR may even have the unintended consequence of encouraging creditors to bring more meritless claims, knowing they will not be put to their proof or have to counter any defenses. Sections 4.2(a) and 4.2(b) of the National Standards for Court-Connected Mediation Programs provide that "considerations [that] may militate against the suitability of referring cases to mediation" include "when there is a need for public sanctioning of conduct" and "when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly."[27] Given the prevalence of objectionable and illegal industry-wide debt collection practices, the role of state court judges in debt collection cases can be especially important. A recent example of such judicial intervention involves action by the New York City Civil Court in cases brought by Northern Leasing Systems, Inc. Certain patterns emerged after Northern Leasing Systems, Inc. brought thousands of cases in New York City Civil Court over several years which led to a lawsuit by the New York State Attorney General alleging claims based on deceptive practices and abuse of judicial process.[28]

### B. Increasing Access to Justice Rationale

Another rationale for ODR is that it would "provide great flexibility" to litigants by increasing remote access to the courts and may result in lowering the default rate.[29] While some litigants may be so fearful of appearing in court that they simply default, in fact, many people default because they were never properly served with the summons and complaint.

While we support the use of technology to increase access to justice, courts should provide flexible options for accessing free legal services and the judicial system itself. In our opinion, we respectfully posit that enticing unrepresented litigants into an alternative realm where they will waive defenses without informed consent will not increase access to justice.

## IV. Promising Alternative Uses for ODR in New York Courts

One promising aspect of the ODR pilot program is the expert triage and consumer education module. In British Columbia, there is a well-developed online legal information and self-help

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[26] Data provided by the former Chief Administrative Judge for New York City Courts, Justice Fern A. Fisher, to the New York City Bar Civil Court Committee.
[27] *See* State Justice Institute, *supra* note 16, Sections 4.2(a) & 4.2(b).
[28] *See* Press Release, Attorney General Eric T. Schneiderman, *A.G. Schneiderman Sues Northern Leasing Systems, Inc. for Deceptive Business Practices And Abuse of Judicial Process: Attorney General Schneiderman Sues Northern Leasing Allegedly For Trapping Small Business Owners Through Deceptive Practices In Unconscionable Lease Agreements And Suing Them for Failure to Pay; The Lawsuit Seeks To Vacate Judgments Obtained by Northern Leasing, Provide Additional Relief For Consumers, And Dissolve the Company* (Apr. 13, 2016), https://ag.ny.gov/press-release/ag-schneiderman-sues-northern-leasing-systems-inc-deceptive-business-practices-and.
[29] Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York 31 (Nov. 2015).

program called MyLawBC used by Legal Aid.[30] It contains information about many legal topics and allows individuals to choose pathways that fit their particular legal issue (i.e., family law, and even mortgage foreclosure). The pathways ask questions relevant to leading the user to the appropriate legal forms as well as to legal advice from attorneys. It is not generally an ODR program, though there is a portal for separating spouses to resolve disputes. An online portal for consumer credit actions that emphasizes legal education and access to full and limited-scope legal representation could be very helpful for *pro se* New Yorkers and we strongly support the two pilot efforts the New York State Permanent Commission on Access to Justice helped launch, which are in development in New York State.

There are other types of cases where ODR could help reduce the burden on courts and preserve judicial resources while advancing access to justice for vulnerable New Yorkers. For example, no-fault insurance cases, where both parties are represented and which dominate lower court dockets, seem ideal for an ODR pilot program. If OCA prefers to focus the ODR pilot program on matters that involve unrepresented litigants, we strongly recommend employing ODR only in situations where both parties are unrepresented, such as disputes involving small claims and security deposits.

Thank you very much for the opportunity to share our feedback. If you have any questions, please contact Dora Galacatos, Executive Director of Fordham Law School's Feerick Center for Social Justice at 212-636-7747 and galacatos@law.fordham.edu.

Respectfully,

Dora Galacatos

**Also on behalf of:**

Brooklyn Volunteer Lawyers Project

CAMBA Legal Services, Inc.

District Council 37 Municipal Employees Legal Services

Legal Services of the Hudson Valley

Lincoln Square Legal Services, Inc.
at Fordham University School of Law

Mobilization for Justice, Inc.

National Center for Law and Economic Justice

New Economy Project

[30] http://www.mylawbc.com.

Consumer Protection Unit
at New York Legal Assistance Group (NYLAG)

Consumer Justice for the Elderly: Litigation Clinic
St. Vincent De Paul Legal Program, Inc.
of St. John's University School of Law

The Legal Aid Society

Legal Services NYC

Queens Volunteer Lawyers Project

Community Development Project
at the Urban Justice Center

Western New York Law Center

cc: Hon. Edwina G. Mendelson
Director
Access to Justice Programs
New York State Unified Court System

Helaine M. Barnett
Chair
New York State Permanent Commission on Access to Justice

Hon. Helene E. Weinstein
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Diana Colon
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NEW YORK CITY BAR

October 8, 2019

Hon. Anthony Cannataro
111 Centre Street, Room 838
New York, NY 10013

Dear Judge Cannataro:

We are writing regarding the rollout of the Presumptive ADR Initiative (the "Initiative") in the New York State courts. First, we would like to thank you for taking the time to discuss the Initiative with numerous lawyers, including many members of the New York City Bar Association (the "City Bar"), over the past several months. We hope you have found the meetings to be a productive way to hear from practitioners directly. We have expressed our appreciation to Lisa Courtney and Lisa Denig, as well.

As you know, the City Bar has long supported the use of ADR as an efficient, less costly and less burdensome way for litigants to resolve disputes. We have several active committees in the ADR space and we're pleased that they have been invited to express their views about the benefits and challenges of implementing the Initiative on such a large scale. They stand ready to assist the court system in effectuating a successful rollout, including with respect to information dissemination, mediator training and diversity goals.

Notwithstanding our general and longstanding support for ADR, we are writing today to express certain concerns regarding implementation of the Initiative in New York City's Civil Court and Housing Court. We trust you will take these concerns in the spirit with which they are intended, i.e., borne out of a desire to ensure the fair and effective administration of justice for all litigants, regardless of income level. We believe more time is needed before the Initiative can roll out in the Civil and Housing Courts, and would urge that practitioners have an opportunity to review and publicly comment on the plans as it applies to these particular courts.

## I. CIVIL COURT

We believe that Presumptive ADR would be inappropriate, and potentially harmful, in Civil Court cases where one side is a business entity represented by counsel and the other side is an unrepresented litigant. This type of situation creates an imbalance of power that is inextricably linked to the legal problem at hand. The purpose of ADR is to afford the opportunity for parties to work together towards thoughtful and mutually agreed-upon settlements that create fair and efficient results. This laudable goal is unrealistic when an extreme imbalance of power exists between the parties.

As you know, most of the cases in the Civil Court where one side is a represented business entity and the other side is an unrepresented individual are consumer credit actions.[1] In 2018, over 100,000 consumer credit actions were filed against alleged debtors in New York City Civil Court.[2] Of those alleged debtors, a mere 4% were represented by counsel. Unrepresented litigants are ill-equipped to represent themselves in ADR when faced with an experienced attorney with far greater knowledge about the process. Indeed, many consumer defendants do not understand the legal documents they receive, or understand basic precepts of legal procedure, such as to inquire as to whether the plaintiff has standing to bring its case, how to tell if a complaint is missing critical information, how to raise jurisdictional defenses, that the burden of proof is on the plaintiff, or what kind of evidence is admissible. This problem is even more acute among limited-English proficient defendants. Consequently, unrepresented New Yorkers cannot evaluate the strength of the claims against them or determine an appropriate settlement value of the lawsuit—both of which are crucial components of a successful ADR process. Unrepresented litigants would be vulnerable to pressure to waive their defenses and accept an unfair settlement.

ADR also would impose undue logistical pressures on unrepresented litigants by requiring additional appearance dates. Many unrepresented litigants do not have paid time off, are hourly workers, have disabilities that limit their ability to travel, or are unable to afford child care. Thus, attending court dates on more occasions than is necessary results in lost pay, additional physical burdens, dragging a child to court, or having to make unaffordable arrangements for childcare. All of these factors create pressures to settle even when not advisable just to avoid returning to court and taking further days off of work.

What is more, consumer debt litigation is characterized by profound information asymmetry and abuse: expert debt collection attorneys who are in court daily too frequently employ overreaching and sometimes misleading litigation tactics against unrepresented consumers.[3] For most debt collectors, the goal in filing a debt collection case is to either obtain a default judgment or intimidate the defendant into settling – not to actually litigate the claims. In fact, many creditors would not be able to meet their burden of proof were their cases to be adjudicated, which few are. But most of the people they sue do not know this, and do not test plaintiffs' cases.

For these reasons, when it comes to New York City Civil Court, we do not believe that ADR will result in thoughtful and mutually agreed-upon settlements where one side is an attorney armed with legal knowledge and intimately familiar with the court process and the court staff, while the other side is an unrepresented, economically-distressed New Yorker who is unfamiliar with the law and court procedure. We appreciate the role Civil Court judges often play in holding creditor and debt-buyer plaintiffs to legal standards, even when there is no defense counsel asking them to do so. It is our view that judicial involvement is critical and these cases warrant greater scrutiny from the bench, not less. Therefore, we recommend that the Initiative focus on those Civil

[1] Although we focus primarily on unrepresented defendants in consumer credit actions, a lack of counsel can create a power imbalance in any case being heard in Civil Court. This would include many of the cases on the Part 11 calendar where one side is a represented business entity and the other side is an unrepresented individual.

[2] The number of consumer debt cases filed in the Civil Court is likely higher because many consumer debts, such as rental arrear debts, are not defined by the Civil Court as consumer credit actions or designated as "C" cases.

[3] Human Rights Watch, *Rubber Stamp Justice US Courts, Debt Buying Corporations, and the Poor*, (Jan. 20, 2016) *available at* https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor. (All websites cited in this letter were last visited on October 8, 2019

Court cases where both parties are represented by counsel or where both are pro se individuals. These types of cases are appropriate for ADR because they do not present the issue of extreme power and knowledge imbalances between the parties.

## II. HOUSING COURT

Housing Court is already a form of alternative dispute resolution. Prior to going to an expedited trial, parties are assigned to Resolution Parts where each case is conferenced to foster speedy settlements. When attorneys represent the litigants, both sides discuss the case and often resolve the issues without the need for a trial. In fact, the vast majority of Housing Court cases are resolved quickly by stipulations of settlement, overseen by the necessary and critical eye of judges.[4] An additional resolution process imposed by the Initiative may lengthen the proceeding or increase the complexity of the action.

Although we have not yet seen the Initiative's rollout plan, it certainly appears that adding another form of ADR to Housing Court proceedings would be incompatible with Article 7 of the Real Property and Proceedings Law, which governs Housing Court cases. Housing Court cases are summary proceedings, which move much faster than traditional litigation. Time limits and case structure are statutory, and must be strictly enforced. There are no provisions in Article 7 for additional alternative dispute resolution, and none are expected to be enacted by the Legislature. Thus, to the extent the Initiative would add additional steps to the process, there is a strong argument to be made that such a change would conflict with the law. In addition, judges in existing mediation parts often cannot so-order or enforce mediated settlements and still comply with the law. Alternative forms of relief fashioned by mediators are often beyond the jurisdiction of the court to uphold.

As you know, Housing Court is in the midst of two sea changes: first, the historic rollout of the citywide Right to Counsel Law for low income tenants; second, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), which became law in June. Judges, court staff, and tenant and landlord attorneys are working hard to keep up with these changes.

New York City is the first jurisdiction to ensure legal representation for all low income tenants in eviction proceedings. This groundbreaking right will correct the imbalance of power, and restore dignity to the process. New York City is setting an example for the nation, and is the test case for whether the civil right to counsel will be a successful model for other states. As such, the media devotes significant resources to covering the Housing Courts. Universities and organizations are gathering facts and data points for studies, and attorneys are adapting their practices to new complex norms. At this time, the focus and resources of the Housing Court should be on the success of the Right to Counsel Law, and not on the addition of new resolution processes to the mix. In short, we are very concerned that the Initiative will interfere with the successful rollout of the Right to Counsel Law in Housing Court.

The 2019 HSTPA drastically amended the statute that governs Housing Court cases. Time limits, requirements and notice provisions have changed, and judicial discretion has been broadened. Court decisions and orders on the new law are necessary to guide practitioners and

[4] This letter does not encompass or relate to Housing Court cases where mediation is already taking place or perhaps where ADR techniques will be augmented once the Initiative is fully implemented, *i.e.*, roommate dispute cases or cases where neither party is represented by counsel.

establish new standards and practices in Housing Court. It is crucial that clear and understandable legal precedent be created with respect to the HSTPA. If cases are required to go to new forms of ADR, lawyers will be prevented from litigating the principles of the HSTPA, parties will be prevented from fully asserting their rights under the new law, and important judicial precedent will not be developed by judges. The inability to opt out of ADR curtails the functionality of the HSTPA, and infringes upon the rights of litigants.

Fortunately, there is a solution that can address these problems and still implement the Initiative in a way that makes sense and optimizes the chances for a successful outcome. Additional trained Court Attorneys (preferably one or more per courtroom) can implement ADR techniques during the mandated pre-trial conference. We believe that would keep the focus on successful implementation of the Right to Counsel Law, assist both sides and encourage resolutions that judges can enforce. No additional facilities or space would be needed, as Court Attorneys can function in the existing space and use judges' chambers. Making additional Court Attorneys the mediators also means that experienced court personnel, who understand the intricacies of changing housing laws, will preside over resolutions in a neutral and efficient manner. Implementing the Initiative with additional Court Attorneys also compliments the 2019 Housing Court Report Survey results, wherein nearly three quarters of Housing Court practitioners surveyed said more Court Attorneys are needed.[5]

***

We acknowledge the difficulty of implementing a statewide court plan such as the Initiative. We also acknowledge the difficulty of changing hearts and minds when it comes to how lawyers and their clients litigate cases, something we addressed in a 2018 report on the need to re-think how to efficiently resolve disputes. At the same time, not all proceedings and litigants are the same, and in the context of the Initiative's rollout, we urge you to consider our above concerns and suggestions regarding Civil and Housing Court. We further suggest that a more formal stakeholder meeting be convened so that the bench and bar members who practice in those courts can fully discuss the issues and devise alternative ways to reach the intended goals of the Initiative.

As always, thank you for considering our views. We look forward to hearing from you and stand ready to assist in coordinating an in-person meeting if that would be helpful.

Respectfully,

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[5] The Housing Court Committee recently conducted a survey of Housing Court practitioners, culminating in the April 2019 report: State of New York City's Housing Court, which I attach for your reference. Nearly three quarters of Housing Court practitioners surveyed said more Court Attorneys are needed. Implementing the Initiative with additional Court Attorneys will complement the existing system and comply with the governing statute, as well as assist with the growing judicial needs surrounding the Right to Counsel Law.

cc:

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May 23, 2022

Eileen D. Millett, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Submitted via e-mail at: rulecomments@nycourts.gov

**RE: Supplemental Comments 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**

Dear Ms. Millett,

Sanctuary for Families (Sanctuary) signed on to the submission of the New York State Coalition Against Domestic Violence (NYSCADV) to the Office of Court Administration on April 4th, and fully endorses NYSCADV's updated submission of May 19th. In addition, Sanctuary submits the following as an addendum regarding OCA's proposed regulations.

Mediation, and related forms of alternative dispute resolution (ADR) should not be ordered by the New York State Court System in cases of domestic violence, or where there is a history of one party exerting a pattern of power and control over the other party. The new proposed rules of the Chief Judge and Rules of the Chief Administrative Judge (Rules) should explicitly state that cases involving domestic violence should be excluded from mediation and/or other forms of ADR.

We understand that it is the intention of OCA that all cases referred to mediation or ADR will undergo a screening, the goal of which is to prevent cases involving domestic violence to be screened out. However, there is currently no reference to this critical screening process in the draft Rules. We further submit that the proposed Rules should explicitly specify that this screening will take place, and state the goals of such screening.

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Finally, any communications with or to litigants regarding mediation or related forms of ADR should state clearly that their participation in mediation and/or ADR is completely voluntary and that no information regarding a litigant's decisions whether to participate will be communicated to the court. No communications to litigants from mediators, their agents, or the Court should suggest that the Court or court system is requiring the litigant to participate in mediation or ADR, or in any way suggest that a litigant is required to communicate with a mediator, or that any failure to contact a mediator or their agent will have any bearing on the litigant's case.

Thank you for your attention to our comments.

Best Regards,

Jennifer Friedman

Jennifer C. Friedman, Esq.
Director, Bronx and Manhattan Family Law Project & Policy

FORDHAM UNIVERSITY
THE SCHOOL OF LAW

FEERICK CENTER FOR SOCIAL JUSTICE

May 23, 2022

*By email to* rulecomments@nycourts.gov

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Counsel
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New York State Unified Court System
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New York, New York

**Re: Proposal to Adopt A New Part 60 of the Rules of the Chief Judge and a New Part 150 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**

Dear Ms. Millett:

Fordham Law School's Feerick Center for Social Justice (Feerick Center or the Center) appreciates the opportunity to submit comments on the Proposed Rules issued by the Office of Court Administration (OCA), which would refer parties in civil disputes in the trial courts to mediation and other forms of Alternative Dispute Resolution (ADR). While we believe that ADR can help resolve disputes more efficiently than through court processes in many types of cases—particularly where both parties are represented and/or where no significant asymmetry of power between the parties exists—we urge that, at this time, OCA exempt application of the Proposed Rules in consumer debt collection cases where defendants are unrepresented.

Starting in 2008, the Feerick Center has operated Civil Legal Advice and Resource Office (CLARO) Programs in Manhattan (2008), Bronx (2009), and Richmond Counties (2010) under the auspices of the New York State Unified Court System's (NYSUCS) Office for Justice Initiatives and the Access to Justice Program. Over the years, in providing limited-scope legal services to unrepresented defendants with consumer debt collection issues in over 24,000 consultations, the Center has gained extensive expertise in access-to-justice issues as they relate to this practice area.

As discussed in further detail below, the Center strongly believes that, due to the inherent nature of consumer debt cases in New York City Civil Court in which defendants are unrepresented, at this time, utilization of ADR in this context would be not only inappropriate but also very likely would obstruct and *frustrate* the fair administration of these matters. Read in their totality, the Standards for Court-Connected Mediation Programs raise serious concerns against utilizing ADR where a substantial imbalance of power exists between or among parties, which is very much the case with unrepresented defendants with consumer debt collection actions.

**National Standards for Court-Connected Mediation Programs Recognize that Some Cases Should be Excluded and, In the Instance of Consumer Debt Collection Actions, Doing So Is a Matter of Racial Justice**

The National Standards for Court-Connected Mediation Programs, issued by the Center for Dispute Settlement and the Institute for Judicial Administration, caution that "[c]ourts should consider whether to exclude certain kinds of cases from mediation altogether, or to refer such cases to mediation only on a very selective, case-by-case basis."[1] The Commentary to the National Standards includes in this category cases in which "the parties are not able to negotiate effectively on their own behalf."[2] The Center believes that consumer debt collection cases involving unrepresented litigants fall under this latter category.

Data from the NYSUCS show that, in 2020, creditors filed over 139,000 consumer credit actions in New York City Civil Court. Notably, these data exclude other types of consumer debt collection cases, such as those seeking money judgments for alleged rental arrears and many medical debts, which are also very numerous. According to the most recent available OCA data on rates of representation, in 2018, defendants were unrepresented in over 96% of New York City Civil Court consumer credit actions. This Court's consumer parts are thus extremely high volume with dockets involving overwhelmingly unrepresented defendants. The long-term economic impact of the pandemic on low-income/low-wealth communities will likely only exacerbate these numbers.

Economic factors, such as an end in Pandemic Unemployment Assistance, inflation, endemic underemployment in communities of color, and resumption of collection of rent payments, are likely to contribute to heightened economic distress and to a larger number of New Yorkers defaulting on credit cards and other payment obligations.[3] The National Consumer Law Center has warned that families are likely to face a "wave of lawsuits" for payments including medical bills, back rent, utility bills, and credit card debt.

Black and Latinx households are and will continue to be disproportionately harmed. The financial safety nets of Black and Latinx households are at least 75% smaller on average than the safety nets of white households, which means that communities of color are more likely to be burdened by debt and are especially vulnerable when faced with financial emergencies. Given that 17% of front-line workers were Black and Black workers are 60% more likely to be uninsured than white workers, the COVID pandemic has been particularly dangerous for them. In the midst of the pandemic, the majority of Black (60%), Latinx (72%), and Indigenous (55%) households faced severe economic hardship compared to only 36% of white households.[4]

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[1] Center for Dispute Settlement & The Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, Section 4.2 Commentary, https://s3.amazonaws.com/aboutrsi/59a73d992959b07fda0d6060/NationalStandardsADR.pdf.
[2] *Id.*
[3] We note that pandemic assistance was not sufficient to guard against this economic distress. Talmon Joseph Smith, "Americans' Pandemic-Era 'Excess Savings' Are Dwindling for Many," New York Times, Dec. 7, 2021, available at https://www.nytimes.com/2021/12/07/business/pandemic-savings.html.
[4] Shriver Center on Law and Poverty, *Race Equity at the Core of Consumer Law* (July 2021), available at https://www.povertylaw.org/wp-content/uploads/2021/07/Consumer_Law_and_Race_report_v5-2.pdf.

Moreover, this country's deep racial wealth gap has made communities of color more susceptible to economic setbacks and to being targeted for predatory financial products.[5] Racial disparities are also embedded in credit reports, resulting in more costly credit for people of color.[6] Banks have long redlined communities of color in New York City, leaving a vacuum filled by predatory, fringe financial services.[7] Given this continuum of discriminatory financial practices, it is hardly surprising that Black and Latinx communities are also disproportionately impacted by debt collection abuses.[8]

The debt collection industry has a well-documented history of illegal practices.[9] Unfortunately, the role of state courts in facilitating debt collection abuses has been examined both nationally[10] and in New York City and New York State.[11] Some of the most salient features of consumer debt collection actions that make mediation and ADR inappropriate include the following:

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[5] *See* Shriver Center on Poverty Law's Legal Impact Network, Race Equity at the Core of Consumer Law, 10 (July 2021) ("Across the nation payday lenders, auto-title loan businesses, and other types of high-cost, high-risk loan servicers target Black, Latino/a/x, Indigenous, and other people of color, who have lacked access to traditional financial institutions, and ensnare them in a cycle of debt."), *available at*: https://www.povertylaw.org/wp-content/uploads/2021/07/Consumer_Law_and_Race_report_v5-2.pdf. Black and Latinx communities are also the ones most impacted by the COVID-19 crisis. *Id*. For example, more Black people borrowed against their retirement savings during the pandemic than white people. *Id*. ("14% of Black people under age 35 (compared to 4% of white people) and 22% of Black people over age 55 (compared to 10% of white people) borrow[ed] from or cash[ed] out their retirement savings.").

[6] *See* National Consumer Law Center, *Past Imperfect: How Credit Scores and Other Analytics "Bake in" and Perpetuate Past Discrimination* (May 2016), *available at*https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf.

[7] *Hearing on Modern-Day Redlining: the Burden on Underbanked and Excluded Communities in New York Before the Subcomm. on Consumer Protection and Financial Institutions of the H. Comm. on Financial Services*, 116th Cong. (2020) (statement of Jaime Weisberg, Senior Campaign Analyst, Association of Neighborhood and Housing Development, 5-7), *available at* https://www.congress.gov/116/meeting/house/110580/witnesses/HHRG-116-BA15-Wstate-WeisbergJ-20200306.pdf.

[8] *See* The Pew Charitable Trusts*, How Debt Collectors Are Transforming the Business of State Courts,* 17 (May 2020),*available at* https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-toconsumers.pdf.; New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality*(June 2013), available at https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf.

[9] *See, e.g.,* Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, (Jan. 1, 2013), https://www.ftc.gov/reports/structure-practices-debt-buying-industry; Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation* (July 1, 2010), https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-collection-litigation; Federal Trade Commission, *Collecting Consumer Debts, The Challenges of Change: A Federal Trade Commission Workshop Report* (Feb. 1, 2009).

[10] *See* Human Rights Watch, *Rubber Stamp Justice: U.S. Courts, Debt Buying Corporations, and the Poor* (Jan. 20, 2016), https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor.

[11] *See, e.g.,* The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* (May 2010), http://mobilizationforjustice.org/wp-content/uploads/reports/DEBT-DECEPTION.pdf; New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* (June 2013), https://www.neweconomynyc.org/wp-content/uploads/2014/08/DebtCollectionRacketUpdated.pdf; Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* (Oct. 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160600.

- **A gross asymmetry of power between plaintiffs and defendants.** Consumer debt creditors are represented by high-volume debt collection law firms who are repeat players and part of an industry marked by demonstrated, longstanding illegal activities.[12] Abusive, unfair, and deceptive practices by debt collection law firms are all-too-common with an end goal of extracting funds from defendants regardless of the strength or validity of the case. On the other side, defendants who are overwhelmingly unrepresented are unfamiliar with the court process and their substantive defenses, among other vulnerabilities.
- **Consumer debt collection cases are replete with procedural and substantive defects that can be outcome-determinative in favor of defendants.** As documented extensively in consumer protection agency and civil society reports cited throughout this comment, consumer debt collection lawsuits are plagued by defects that include—among others—widespread and systematic improper service of process, insufficient evidence to demonstrate chain of title for debt buyer cases, and time-barred debts. Based on court data, advocates estimate that between 2008 and 2019, creditors filed over **1.5 million** consumer credit actions in New York City Civil Court (excluding other common types of consumer debt collection cases such as "broken lease" cases) and obtained over **813,000** default judgments in cases that historically have been marred by the systemic problems documented in the literature.

  Unrepresented defendants, particularly economically-distressed consumers, without access to counsel, are often unaware of potential legal defenses available to them and unable to assess the strength and weaknesses of their case. Through its work with the CLARO Program, the Feerick Center has routinely observed the extreme pressure placed upon unrepresented defendants by both plaintiffs' counsel and court personnel to enter into settlement agreements—notwithstanding potentially outcome-determinative defenses that may exist. An ill-considered settlement agreement, especially if unnecessary, can lead to disastrous outcomes for individuals, exacerbating housing and food insecurity and leading to a downward spiral of hardship and negative outcomes for the litigant and their loved ones.

Due to the reasons highlighted above, at this time, consumer debt collection cases in which defendants are unrepresented warrant exemption from OCA's Proposed Rules for mandatory—or even permissive—referral to mediation and ADR. Unrepresented defendants are outmatched by sophisticated repeat players in plaintiffs' counsel—debt collection law firms whose industry has been documented to engage in widespread abusive, deceptive, and unfair practices. Mandatory or even consensual referral to mediation and ADR will take away one of the few safeguards against ill-considered and unfair settlement agreements, the possibility that judicial oversight will ensure a fair administration of the case.

[12] *See supra* note 9 & note 10.

**National Standards for Court-Connected Mediation Programs Spotlight Additional Concerns and Pitfalls for Cases Involving Unrepresented Parties and Inherently Problematic Matters**

The National Standards examine numerous additional concerns and pitfalls of court-sponsored mediation and ADR programs as they relate to unrepresented litigants.

First, while making the case that unrepresented litigants should have equal access to mediation, the National Standards also note that "[w]hen parties to mediation have neither legal representation nor access to legal information, they are often vulnerable to settle and to accept unfair results."[13] The National Standards elaborate that barring any unrepresented party from mediation, "provides the most complete assurance to courts that the customary courtroom protections afforded vulnerable litigants will not be lost during mediation."[14]

Rule 100.3(b)(12) of the New York State Rules of Judicial Conduct states that "[i]t is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard." By contrast, mediators' ethical duty of impartiality does not incorporate differences in the relative sophistication of the parties or fairness with respect to the substantive issues at hand.[15] The context of consumer debt collection cases described above makes clear the significant risks of ill-informed and ill-considered settlement agreements by unrepresented defendants and the need for additional protections through judicial oversight to ensure fairer adjudication of such matters.

Second, the National Standards advise that "[c]ourts should take steps to ensure that pro se litigants make informed choices about mediation."[16] Given the very high volume of cases in New York City Civil Court and the resource constraints in simply processing the cases (and even more so given the interruptions of the pandemic), OCA cannot devote sufficient resources to ensure that unrepresented defendants have adequate access to effective information to make informed decisions about mediation and also that presiding judges would be able to make considered referrals for mediation based on individualized assessments of cases.[17]

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[13] Center for Dispute Settlement & The Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, *supra* note 1, at Section 1.4 (Commentary); *see also id.* ("judges and administrators, working in an overburdened court system, may tend to make decisions regarding the referral of cases to mediation for entire classes or types of cases rather than on an individual basis").

[14] *Id.*

[15] American Bar Association & Association for Conflict Resolution, *Model Standards of Conduct for Mediators* Standard II and Standard II.B (Sept. 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf ("A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of impartiality.); *see also* Center for Dispute Settlement & The Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, *supra* note 1, at Section 8.1.a (discussing impartiality of mediators).

[16] Center for Dispute Settlement & The Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs*, *supra* note 1, at Section 1.4.

[17] *Id.*

**Conclusion**

In conclusion, for the reasons outlined above and given the context of consumer debt collection cases in New York City Civil Court, at this time, the Feerick Center unequivocally recommends that OCA excludes application of the Proposed Rules to consumer debt collection actions involving unrepresented defendants. Should conditions change materially in the future, such a policy could be proposed again for reconsideration.

Thank you again for the opportunity to submit comments in relation to the Proposed Rules. Staff from the Feerick Center are available to discuss our comment and recommendations if you have any questions or require additional information.

Sincerely,

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**From:** David Galalis
**Sent:** Friday, May 27, 2022 12:45 PM
**To:** rulecomments
**Cc:** Carmelo Laquidara; Christy Bass
**Subject:** Comment on Proposed ADR Rules

To whom it may concern:

In order to make clear that the proposed rules on presumptive ADR for civil disputes do not apply to or affect the scope or conduct of statutory CPLR 3408 Mandatory Residential Foreclosure Settlement Conferences, I propose the following additions to the proposed rules (additions to proposed rule text in italicized bold font):

"The rules set forth in this Part shall not supersede any existing rule or order of the Chief Judge of the State or the Chief Administrative Judge, or any provision of statute, including but not limited to section 4547 of the CPLR, ***section 3408 of the CPLR,*** and Article 21-A of the Judiciary Law"

and

"a civil dispute should be referred to ADR unless 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. ***The rules set forth in this Part do not apply to residential mortgage foreclosure actions that are covered by CPLR 3408 and 22 NYCRR 202.12-a.***"

I believe these additions are necessary to avoid confusion not only among court staff, but also among the foreclosure bar, as to whether or not residential mortgage foreclosures fall under the purview of "presumptive ADR." I respectfully believe that residential mortgage foreclosures should not fall under the purview of "presumptive ADR," as there is already a well-defined, well-understood, and well-established statutory framework for the settlement of these matters under the rubric of CPLR 3408.

Thank you for your consideration.

Sincerely yours,

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