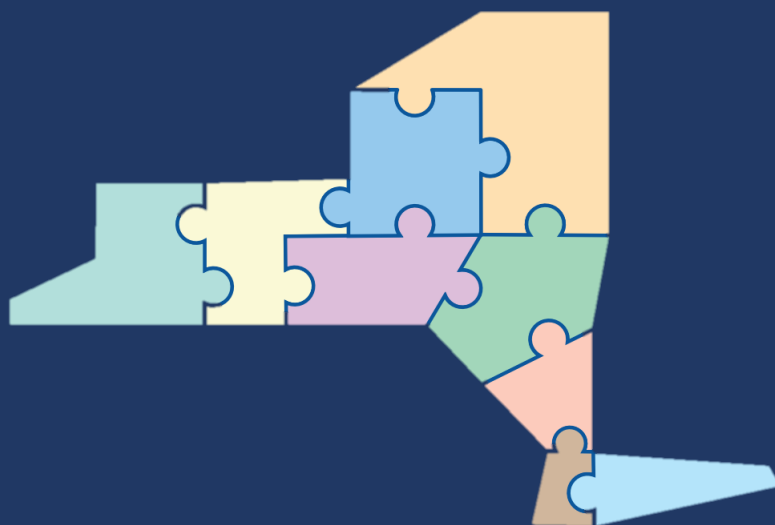




# Interim Report and Recommendations of the Statewide ADR Advisory Committee

February 2019



## **Chief Judge's ADR Advisory Committee's Summary Interim Recommendations**

1. **Significantly expand statewide infrastructures for developing and supporting court-sponsored ADR (and particularly court-sponsored mediation)**
  - a. Expand the effectiveness and reach of the statewide Office of the ADR Coordinator by directing the District Administrative Judges for each Judicial District to appoint a dedicated local ADR Coordinator, and by funding positions, if necessary, for dedicated court staff to administer local ADR programs. Authorize each District Administrative Judge to appoint additional local Coordinators as necessary in individual counties and courts.
  - b. Form a Statewide Judicial Leadership Team for ADR overseen by the Chief Administrative Judge to foster coordination of efforts, exchanges of information and experiences and expansion of court-sponsored ADR programs.
  - c. Ask the District Administrative Judge and the ADR Coordinator(s) for each Judicial District – in consultation with the Statewide Judicial Leadership Team and the Office of the ADR Coordinator – to develop and present a plan for implementing expanded court-sponsored mediation programs (including study of existing programs, broadening of successful ones, development of new programs and tracking of program performance) in that Judicial District.
  - d. Expand staffing of the Office of the ADR Coordinator to a degree that enables it to play needed coordinating, support, training, and communication roles, recognizing that as programs expand, there will be a greater need for increased training and education about court-sponsored mediation for judges, judicial administrators, court staff, advocates, parties, mediators, and the general public.
2. **Promulgate statewide uniform court rules**
  - a. Issue statewide Uniform OCA Rules that authorize, endorse and provide a framework for courts to introduce and expand court-sponsored mediation programs – particularly including mediation early in disputes accomplished through automatic presumptive referrals (subject to appropriate opt-out limitations) of identified types of disputes.
  - b. Generate templates of local rules that illustrate permitted options for particular mediation programs consistent with the framework presented by

the Uniform Rules, and compile and make readily available a library of already adopted local rules, protocols, guidelines and best practices for existing programs to serve as resources for local programs implementing new programs.

3. **Increase court connections with and expand funding for Community Dispute Resolution Centers (CDRCs), as a significant component of scaling up existing court-connected programs**

- a. Make use of this already existing court-sponsored, statewide, high quality network of mediation providers and educators, which has infrastructure in place and is well situated to scale up quickly and effectively, take on increased referrals and train new mediators.

4. **Take steps to support, encourage, and educate about court-sponsored mediation**

- a. Use the ADR Advisory Committee, the Office of the ADR Coordinator, the Statewide Judicial Leadership Team and the ADR Coordinators in individual judicial districts to educate and encourage participants in the dispute resolution process in the effective use of court-sponsored mediation.
- b. Promulgate rules that require attorneys to become familiar with mediation and other processes, to discuss with clients both mediation and other potential alternatives to conventional litigation and to discuss ADR options with opposing counsel in good faith.
- c. Improve existing websites, court notices and other communications about the availability of court-sponsored mediation or other alternatives to conventional litigation.
- d. Expand trainings and communications with court personnel about administering court-sponsored mediation programs and serving as mediators.
- e. Expand trainings and communications with, and recruitment of, private mediators, to promote establishment of quality court-sponsored panels of approved mediators who will provide at least some mediation services without charge.
- f. Amend CLE rules to provide pro bono credit for periods when attorneys serve on court-approved mediator panels or provide other court-sponsored ADR services without charge.

- g. Engage with and reach out to the legal community and law students concerning early mediation and other forms of ADR.

5. **Develop mechanisms for effective monitoring and evaluation of individual programs**

- a. Establish mechanisms to identify and understand particular successes or shortcomings in existing programs and to identify best candidates for replication or expansion.
- b. Engage the Statewide Divisions of Technology/Court Research to work with the ADR Coordinator's Office to develop data collection and analysis tools that track, by Judicial District and by individual program, referrals to mediation, opt-outs and matters actually mediated, settlements in the mediation (or sooner thereafter than if there had been no mediation), other mediation-related outcomes (such as opportunities for accelerated adjudication or other ADR processes), and litigant satisfaction with the experience.
- c. Develop mechanisms for evaluating, monitoring and ensuring the quality of mediation services being performed by court personnel and members of court-approved panels.

# **Interim Report and Recommendations of Chief Judge's ADR Advisory Committee**

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February 12, 2019

## **I. Introduction and Summary of Interim Recommendations**

### **A. ADR and the Chief Judge's Excellence Initiative**

The ADR Advisory Committee submits this interim report to offer initial recommendations in support of expanding and facilitating New York courts' use of court-sponsored alternative methods of dispute resolution, and particularly court-sponsored presumptive mediation. The Committee believes this proposed expansion will foster faster and less expensive resolutions of disputes, offer parties valuable alternative approaches to resolving their disputes, and advance the administration of justice.

Chief Judge Janet DiFiore formed the ADR Advisory Committee in early 2018 as an important component of her Excellence Initiative, encouraging it to work with the Office of the ADR Coordinator in boldly developing alternatives to conventional litigation that will promote greater efficiency and improve the dispute resolution process. The Committee strongly supports Chief Judge DiFiore's vision. That vision implicates not only thoughtful continued experimentation but also focused efforts to move ADR programs from the experimentation phase to a scaled-up statewide implementation phase.

Court-sponsored ADR should be a significant component of the judiciary's approach to resolving disputes. The cost of litigating to a final judgment often represents such a high percentage of the amount in controversy that the parties find litigating to a final judicial decision is unaffordable. In addition, settlements reached only after parties have litigated for extended periods beg the question whether effective earlier discussions could have yielded a less expensive resolution. Alternatives to conventional litigation undeniably help parties resolve their disputes more quickly and less expensively.

New York and other courts have long administered or sponsored efforts to promote more streamlined achievement of final decisions or negotiated settlements, including: (1) a wide variety of court conferencing processes led by judges or court personnel; (2) referrals of disputes to dedicated court staff neutrals; (3) organization of “settlement days” in which courts try to resolve large numbers of disputes involving the same defendant in a focused negotiation effort; (4) mediations; (5) arbitrations; (6) neutral evaluations; (7) summary mini-trials; and (8) accelerated fast-track litigations. The ADR Advisory Committee is considering all of these ADR mechanisms. This interim report, though, focuses on recommendations regarding court-sponsored mediation – the use of a neutral facilitator to foster negotiation, usually involving the parties as well as their counsel, with a view to settling the dispute, significantly narrowing the issues to be adjudicated, or at least helping the parties to understand each other’s positions and interests and to consider ways of narrowing or resolving their dispute apart from conventional litigation.

**B. Court-Sponsored Mediation**

New York’s judicial leaders have long supported mediation as a valuable dispute resolution mechanism. Following 1981 initiatives led by Chief Judge Cooke, Community Dispute Resolution Centers throughout the state have been mediating thousands of court-referred disputes to resolution annually for almost 40 years and provide a ready and established venue and infrastructure for mediating additional disputes. A Task Force on ADR established by Chief Judge Kaye strongly endorsed increased court-sponsored mediation in 1996, which led to the formation of the Statewide

Office of the ADR Coordinator and the introduction of numerous new ADR programs. Chief Judge Lippman also broadly supported experimentation with multiple forms of court-sponsored mediation and other alternatives to conventional litigation. Notwithstanding these laudable efforts, mediation remains underutilized. Chief Judge DiFiore has expressed strong support for significant expansion of ADR to embrace a much larger percentage of cases, in particular through expansion of early and presumptive mediation models.

Experience in New York and elsewhere indicates that well-managed court-sponsored mediation programs achieve high settlement rates, and can particularly advance efficient dispute resolution when the mediation takes place very shortly after the litigation has commenced. High quality mediation can dramatically reduce the time and cost of dispute resolution to both the parties and the judicial system compared to conventional litigation. Mediation also enhances parties' sense of personal agency and self-determination in pursuing a resolution, improves parties' communications with each other and understanding of each other's positions, permits consideration of important personal dynamics apart from the dispute's legal merits, provides opportunities for understanding alternative outcomes, encourages effective approaches to litigating efficiently or achieving workable and mutually acceptable resolutions, and fosters parties' sense that they have achieved procedural justice.

Courts tend to achieve these results most broadly and effectively when they implement programs for automatic presumptive referral to mediation, preferably as early as possible in a dispute, of all or nearly all cases of particular types. Although referrals to



mediation often involve overcoming cultural and institutional resistance, the high settlement rates and participant satisfaction achieved from court referrals to early, presumptive mediation in this way suggest significant and growing public desire and appreciation for this streamlined dispute resolution.

The ADR Advisory Committee has been supporting and monitoring development of court-sponsored mediation programs in a variety of contexts, including disputes in family and matrimonial courts, surrogates courts, commercial and civil courts, and specialty courts that adjudicate matters involving essentials of life. This Interim Report presents a brief summary of Committee views and proposals developed to date, identifying some areas of near-consensus regarding court-sponsored mediation and some proposed courses of action going forward. Further recommendations will be incorporated into a final report at a later date.

These preliminary proposals advocate significantly increased use of high quality court-sponsored mediation programs in the New York State judicial system. These proposals are intended to help foster courts' development of mediation programs that give courts and parties opportunities to gain experience with this form of ADR, and that carry the potential to be scaled more broadly when they demonstrate capacity to promote substantial early settlement rates and high levels of participant satisfaction.

### **C. Summary of Proposals**

We recommend the following steps by the Office of Court Administration and the court system generally:

1. Significantly expand statewide infrastructures for developing and supporting court-sponsored ADR, including by (a) directing District Administrative Judges in each Judicial District to designate a dedicated ADR Coordinator, or, in some districts, multiple local ADR Coordinators, to work with the Office of the Statewide ADR Coordinator (which may in certain circumstances involve establishing and funding new positions), (b) forming a Statewide Judicial Leadership Team for ADR, (c) asking the local Judicial District ADR Coordinators – in consultation with their counterparts in other Judicial Districts, the Judicial Leadership Team and the Office of the ADR Coordinator – to develop and present a plan for implementing expanded high-quality mediation programs in their Judicial Districts, and (d) increasing court connections to and financial support for CDRCs.
2. Promulgate statewide Uniform Court Rules that expressly endorse and provide a framework for courts to introduce court-sponsored mediation – particularly early in disputes, through automatic presumptive referrals of identified types of disputes that generally seem like promising candidates – and generate templates of local rules that illustrate permitted options for particular mediation programs consistent with the statewide framework.
3. Take steps to educate, support, and encourage participants in the dispute resolution process – judges, court administrators and staff, advocates, parties, and neutrals – in the constructive use of mediation, and provide for

sufficient staffing in the Office of the ADR Coordinator to facilitate significant communications and education about mediation.

4. Develop mechanisms (using the OCA's Divisions of Technology and Court Research) for effective monitoring and evaluation of individual programs, to identify and understand particular successes or shortcomings, and to identify best candidates for replication or expansion.

## **II. The Current State of Court-Sponsored Mediation in New York**

Early court-sponsored mediation has become a routine and widely appreciated feature of judicial approaches to dispute resolution in the federal and state court systems. It is being successfully used to resolve many kinds of disputes, including high volume, low value cases; high value cases; cases in which the parties have continuing relationships; and complex cases in which the parties expect to have no future dealings. New York courts have been experimenting with court-sponsored mediation for decades, and the scope and scale of the progress has recently been expanding significantly. The rate of roll-out of new programs has increased so substantially in New York as to provide a basis for envisioning future large-scale early mediation in a significant percentage of disputes. Despite this promising expansion of programs, though, mediation continues to be underused.

Currently, most mediation referral relies on parties to mediate voluntarily or individual judges to exercise their discretion to refer parties to mediation in individual cases. By explicitly changing the default to a more automatic or presumptive form of referral to mediation, and by designating and supporting dedicated court staff to be

responsible for the development and implementation of local mediation programs in consultation with the Statewide ADR Office, courts and court administrators could refer significantly more cases to mediation, increasing efficiency and procedural justice in line with the Excellence Initiative.

New York's largest-scale mediation program by far is its statewide network of CDRCs, which are operating and conducting mediations that result in the resolution of disputes in all 62 New York counties. CDRCs handled 31,000 disputes in 2017 (about half referred to them by courts), and achieved a 74% settlement rate in an average of 25 days from first contact to case closure, using 1,100 staff and volunteer mediators, on a budget of \$5.9 million from the State and an approximately equal amount from other sources (an extremely low all-in cost of about \$188 in state funds per case handled, and about \$286 in state funds per case serviced by an ADR process).

Another notable large-scale ADR program operates in the New York City Small Claims Court, where parties, upon attending court, are asked to choose between same-day binding arbitration before volunteer arbitrators, same-day mediation by volunteer mediators or adjudication by a judge at some future date. Parties frequently choose one of the first two options, resulting in about 12,000 arbitrations to a final decision and thousands of successful mediations out of a total of 28,000 resolutions in 2017.

Other smaller but impressive programs are in effect throughout the State. For example:

- About 1,100 disputes are arbitrated or mediated each year in the Attorney-Client Fee Dispute Resolution Program.

- In the 8<sup>th</sup> Judicial District, the Martin P. Violante ADR Program has referred a broad range of disputes to early mediation by trained court staff, while also developing a panel of court-approved volunteer mediators who are available to permit expansion of the mediation program going forward.
- Nassau County mediated over 750 commercial, civil and matrimonial disputes through in-house and volunteer private mediators in 2017.
- Appellate Division courts for three of the four Judicial Departments mediate hundreds of cases annually at the appellate level using staff mediators and volunteers.
- Administrative judges in New York City have organized collections of mass settlement days with insurance carriers, achieving high settlement rates. They also conduct extensive in-court settlement conferences and refer parties to trained, experienced, and trusted court staff neutrals, who achieve impressive success rates.
- New York City Family Court's custody and visitation mediation program increased the number of cases mediated by 25%, and has focused on early on-site referrals to mediation. In the 7<sup>th</sup> JD, a Family Court mediation initiative has also significantly reduced court appearances for parties with parenting disputes, by referring them at the earliest opportunity to free community mediation services. These mediations typically yield 92% participant satisfaction rates and 74% resolution rates. The Family Court in the 6<sup>th</sup> JD implemented this model recently with great enthusiasm and efficiency.
- The Mediation Non-Jury (Med-NJ) Program in New York County Supreme court, which makes use of an experienced court attorney and law school externs, has been expanded to mediate both pre-note and post-note cases, ending 2018 with a 70% success rate.

Other programs are in the early but promising stages of development:

- After unimpressive results in a 2014-15 experiment with mandatory early mediation of every fifth matter, randomly selected, in the New York County Commercial Division (where the jurisdictional minimum amount in controversy is \$500,000), a more recent and ongoing New York County experiment with early automatic mediation of the same types of commercial cases involving amounts in controversy below the Commercial Division's \$500,000 threshold reported a 2017 settlement rate of about 60% – results that appear to justify continuing this program and

replicating it in Commercial Division courts that have significantly lower jurisdictional thresholds. This early referral to mediation model may benefit litigants and courts in other case types and for lower dollar cases types throughout the State.

- In Surrogates Court, where disputes often feature human dynamics not tied to the legal issues, a Manhattan program that offers mediation through CDRC staff and volunteers and through a bar-led group of private mediators has had success, and Westchester recently started a new early mediation program using an all-volunteer combination of experienced mediators and experienced trust and estates lawyers.
- Courts in Brooklyn and Suffolk have begun implementation of programs for early presumptive mediation of matrimonial disputes, and a pilot will begin in Rochester later this year.

The proliferation of new programs suggests a significant growth dynamic. But most of the new and even the fairly established programs remain small in relative terms. Automatic presumptive referral to mediation (with appropriate opt-out arrangements) of substantial categories of disputes, and establishment of pools of available trained court personnel or private panels of trained mediators, will ultimately be essential to achieving large-scale high-quality mediation presence in the state's judicial system.

Outside of New York, numerous states are similarly expanding their ADR programs. These expansions appear to be based on consistent experience of high settlement rates, including particularly for mediations early in disputes, that save significant party and court resources and apparently satisfy important public appetites for faster and less expensive resolutions (and for dispute resolution processes having different dynamics from conventional litigation). Some court systems require referral of all disputes of certain enumerated types to up-front mediations. Some provide for mediations by court staff, while others develop panels or rosters of approved mediators

for parties to select or courts to assign in individual cases. Some provide for the first few hours of mediation without charge, and require virtually all parties to participate in these expense-free sessions (while permitting the parties to choose whether to keep mediating and compensate the mediator once the uncharged component is finished). These other court systems provide a wide variety of options for New York courts to consider and to determine what works best in each venue.

Nearly all jurisdictions administering court-sponsored mediation programs report general enthusiasm for the benefits of mediation processes, while recognizing that mediation does not always result in rapid settlements and acknowledging the challenges of achieving sufficient scale to affect court dockets and dispute resolution processes generally (although Florida and New Jersey, and parts of Texas, appear to have achieved that degree of scale).

### **III. Recommendations**

#### **A. Expansion of the Statewide Infrastructure for Developing and Implementing the Roll-Out of Increased Court-Sponsored Mediation**

The Office of the Statewide ADR Coordinator is extraordinarily engaged in efforts to develop, expand and improve court-sponsored mediation and other forms of ADR around New York. Many programs are in advanced stages of development or in operation. As local courts look to develop ADR programs, the statewide office needs well-informed and engaged local coordinators to help implement and optimize the quality of specific programs. Further, local courts need at least one point-person in their

courthouses charged with developing new and expanded programs and coordinating with and learning from a statewide network of ADR facilitators.

The ADR Advisory Committee recommends a significant expansion in statewide organizational infrastructure for the development of increased court-sponsored mediation. That expansion should start with the designation of a local ADR Coordinator by District Administrative Judges (DAJs) in each of the Judicial Districts. The DAJs and ADR Coordinator should be charged with inventorying and understanding ADR programs already in place, developing a plan for the roll-out and administration of new and expanded court-sponsored mediation programs within their Judicial District, working with local courts to facilitate implementation of that plan, and overseeing and participating in convenings of judges and administrators to share experiences and learn from each other's efforts. The DAJs should also be authorized and encouraged to appoint local court coordinators to oversee programs in individual counties (or smaller judicial units), and in individual courts.

To the extent ADR Coordinators are appointed for multiple courts in particular substantive disciplines – family, matrimonial, surrogates, commercial, small claims, civil or others – the Statewide Office should coordinate those specialized groups for interaction and sharing of best practices and ideas for rollouts and expansions of mediation programs in the particular contexts of their dockets, the nature of their disputes, and their individual administrative challenges.

The Chief Administrative Judge should also form a Statewide Judicial Leadership Team for ADR to provide organization in development, expansion and evaluation of



court-sponsored mediation, in coordination with the DAJs and ADR Coordinators in each Judicial District and the Statewide Office of the ADR Coordinator. A Judicial Leadership Team could be particularly effective at fostering communication, emphasizing judicial support for expansion of ADR, setting priorities, identifying programs that seem like particularly appropriate candidates for expansion or replication, considering the budgetary implications of various forms of efforts to increase the scale of court-sponsored mediation, and coordinating the roll-out of expanded mediation programs around the State. If this group is formed, it should meet periodically with the Chief Administrative Judge to discuss new programs and evaluate progress.

Staffing at the Statewide Office of the ADR Coordinator – which is already highly stretched in engagement with courts around the state that are seeking to learn about, develop or enhance mediation programs – should be expanded as needed to permit coordination and oversight of local efforts and handling of the contemplated expansion. That expansion also should be sufficient to permit an allocation of substantial resources to effective communication and education about mediation, recognizing that judges, advocates and the public generally have limited experience with mediation and will need further information and encouragement for mediation programs to flourish. In addition, resources should be allocated as needed to ensure full language access for program participants.

These recommendations are presented with recognition that they contemplate some reallocation of already tightly stretched judiciary resources toward the proposed expansion. Effective roll-out of broadly expanded mediation programs should ultimately

result in reduction of administrative burdens on courts, though, to a degree that the extra expenditures for developing these programs should ultimately pay for themselves. These resource allocations will also fulfill an important public need. Once such resources and infrastructure are in place, the Committee will work with the Statewide Office of the ADR Coordinator and the judiciary to study and coordinate an effective roll-out of new and expanded programs.

**B. Statewide Uniform Court Rules and Local Templates**

The ADR Advisory Committee recommends that the Office of Court Administration promulgate statewide Uniform Court Rules offering a formal endorsement of court-sponsored mediation and a framework to which individual local programs can refer. While individual districts and particular courts have adopted rules, protocols and best practices for local programs, the Committee believes that promulgation of Uniform Rules would advance important goals of confirming courts' authority to develop and operate mediation programs, and of providing a general roadmap to individual courts of how to initiate and manage court-sponsored mediation programs in their jurisdictions. New York's only current statewide rules regarding court-sponsored mediation are the provisions in Part 146 of the Rules of the Chief Administrative Judge identifying required training and experience for court-approved mediators, and Rules 3 and 10 of the Commercial Division (Section 202.70, Rules of the Commercial Division of the Supreme Court), authorizing judges to refer parties to an uncompensated mediator and requiring that counsel certify that they have discussed the availability of ADR options with their client.

The ADR Advisory Committee also believes that local courts would benefit from the availability of templates identifying options for potential approaches to court-sponsored mediations in their particular jurisdictions. These options, designed to fall within the framework of the statewide rules, would enable individual courts to experiment with different approaches to managing a court-sponsored mediation program. This identification of different options would reflect the current consensus that particularly at this developmental stage of thinking about effective mediation practices in New York, a “one size fits all” set of rules might not sufficiently permit courts to adapt and customize their programs to take account of relevant distinctive characteristics of their dockets, administrative staffs and legal communities. Existing sets of rules for programs already in place should be combined with these templates to generate a library of rules that courts can review in considering how to organize their own programs.

Promulgation of statewide rules and templates for local application of those rules would also help communicate to courts throughout the State the conviction that conventional litigation (and the use of extensive court resources to resolve litigations) should generally be viewed and treated as a backstop for circumstances where disputing parties have first exhausted efforts to resolve their disputes through negotiation or mediation. This shift in sensibilities could significantly enhance the process of resolving disputes and the administration of justice generally in New York State.

The Committee is aiming to present a set of proposed statewide Uniform Rules to the Office of Court Administration in the first quarter of 2019, following review by the Committee and by the statewide Office of the ADR Coordinator.

1. Uniform Rules

The Uniform Rules that the ADR Advisory Committee will propose for the OCA's consideration will address the following points, among others:

- i. Courts are empowered to order parties to any dispute to participate in a mediation of that dispute (as distinct from case conferencing or other activities that can also sometimes lead parties to settlement). Recognizing the ultimately voluntary nature of any effort to reach a settlement, courts may permit parties to avoid or halt mediation processes under prescribed circumstances. Courts may also identify categories of disputes that will not be subject to mediation except as requested by all parties or under other special circumstances. Courts are authorized to direct parties to comply with local court rules regarding mediation, to ensure that mediation sessions are attended by the parties (or, in the case of an institutional party, someone with authority to settle for that party) as well as by their counsel, and to follow such procedures with regard to pre-mediation statements and exchanges of documents or information as the court or the local rules may direct, recognizing that such procedures may not be necessary in all programs. Those local rules may provide that failures to abide by mediation obligations (including failures to attend, to prepare or to bring

representatives with settlement authority) may be treated as a violation of a court order.

- ii. While courts can direct that any individual case be referred to mediation, courts can also direct, and are encouraged to experiment with directing, that all cases of certain categories be presumptively referred automatically to mediation. The categories of cases to be uniformly referred to mediation can include all cases featuring prescribed kinds of claims, arising under prescribed laws, or involving prescribed amounts in controversy. These categories can be selected based on courts' priority preferences, empirical records indicating that particular types of disputes are especially well-suited for mediation, or intuitions or experimental desires to gain knowledge about how well mediation works in previously untested types of disputes.
- iii. Similarly, while courts are empowered to direct disputes to mediation at any time, courts are particularly encouraged to refer parties to mediation as early as practicable in disputes. Although many parties and advocates have assumed that mediation is most promising when disputes have ripened through motions and discovery, experimental programs have repeatedly yielded high settlement rates for disputes submitted to mediation early, and the goal of reducing avoidable litigation costs is often best served by

early mediation. Litigations tend to take on their own momentum, leading to delays in serious engagement over settlement. Early mediation can sometimes forestall that delay at significant savings to the parties and to judicial resources.

- iv. The mediators for court-sponsored mediation programs can be (1) specially trained court personnel, (2) private mediators approved by the court for membership in a panel, or (3) professional mediators who are affiliated with CDRCs or other court-approved dispute resolution organizations. In addition, parties are always free to choose private mediators not members of a court-approved panel. Courts can experiment with using mediators of any or all of these types.
  - a. If the mediators are court personnel, they must undergo training as mediators consistent with the requirements of Part 146, specifically communicate to the parties that they are acting as mediators, and observe the customary mediator requirements of strictly maintaining the confidentiality of all communications made during the mediation, playing no role in any decision regarding the dispute and having no communication with the judge charged with adjudicating the dispute regarding the mediation (apart from reporting whether the dispute settled

or, depending on local rules, whether any party failed to abide by the court's mediation order).

- b. If courts wish to refer disputes to a mediator who is a member of a court-approved panel, the courts may establish their own rules for selection of members of the panel, provided that all approved members must satisfy the requirements of Part 146. Courts may approve rosters of mediators who are volunteers or mediators who are compensated. If the mediators are compensated, they should nevertheless agree to provide some hours of preparation and mediation without charge, and/or should agree to handle some portion of their assigned mediations without charge, as prescribed by court rule. Amendment of current CLE rules to provide for pro bono credit to attorneys who serve on court-appointed mediator panels for periods when they provide mediation services without charge would provide appropriate extra incentives and rewards for this unpaid service.
- c. Courts can also refer parties to mediation through the CDRC offices in their county or through other court-approved mediation organizations, subject to court rules or to CDRC rules and practices.

- v. Parties can choose to mediate their disputes with a mutually agreed-upon private mediator at any time. Courts may also see value in providing parties they refer to mediation with an opportunity to respond to the referral by agreeing to use a private mediator of their mutual choosing, or by selecting their preferred mediator from a court-approved panel.
- vi. Mediations should take place under guidelines for mediator conduct akin to the Model Standards of Conduct for Mediators approved by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution, the Standards for Conduct by Mediators promulgated by the New York County Commercial Division, or the Standards of Conduct for New York State Community Dispute Resolution Center Mediators. Mediators should also be governed by ethical rules established on a statewide basis and subject to an appropriate grievance procedure for parties wishing to present complaints about instances of assertedly improper mediator conduct.
- vii. Assignment of a dispute to court-sponsored mediation should result in temporary suspension of courts' Standards and Goals time count – for example, for the shorter of 60 days or the time until the mediation is suspended or completed. This should prevent the undesirable result of courts avoiding potentially constructive



mediations for the purpose of maximizing adherence to Standards and Goals timetables. Courts may also stay discovery or other litigation processes for some period to permit mediation, and may condition continuation of any such stay on receiving reports on whether the mediation appears to be making progress.

- viii. Entry into mediation should not operate as a deterrent to consideration of other forms of streamlined dispute resolution, including court conferences, neutral evaluation, arbitration, requests that the court conduct a summary jury trial of discrete pivotal issues, or requests for fast-tracked litigation. These and other forms of ADR can all readily be subjects for discussion in mediation.
- ix. Courts can determine by local rule, or may leave to mediators, such matters for management of mediations as the nature and scale of pre-mediation written statements, if any, to be provided to mediators in advance by the parties, and the timing deadlines for selection of mediators and commencement of mediation sessions.
- x. The mediation process should be governed by principles of confidentiality, with the aim of ensuring that the mediation is kept entirely separate from the adjudicative process and that parties not suffer prejudice for engaging in candid communications during the mediation. Exceptions may apply to this principle of complete

confidentiality for the purpose of permitting disclosures mandated by law (such as allegations or evidence of child abuse as defined in the Family Court Act, § 1012(e) and (f) and Social Services Law § 412, that may be subject to mandatory disclosure under Social Services Law § 413). Exceptions may also apply for the purposes of judicial administration (such as reports about refusals to abide by courts' mediation orders, if the applicable rules call for such reports, or for the limited purpose of compiling information about how mediation processes are working for presentation to administrative personnel). Confidentiality obligations may also be governed by provisions of the enabling statute for CDRCs, Judiciary Law § 849. A statewide rule defining the confidentiality parameters for court-sponsored mediation is desirable for the purpose of guiding individual courts in adhering to the principles of confidentiality while accommodating the exceptions.

- xi. Court-appointed mediators should be protected by immunity and indemnification rules for actions in their capacity as mediators to the full extent permitted by law.
- xii. Mediation programs should provide for interpreters as needed to ensure that language differences do not preclude a party from participating effectively in the mediation, and should provide for satisfaction of plain language targets in all public communications.

### **C. Local Templates and Libraries of Existing Local Rules**

Mediation programs already in place in various New York courts apply a wide range of rules, protocols and practices that are broadly consistent with the framework that the proposed Uniform Rules are intended to provide, but with significant local variations customized to reflect such factors as the preferences of the judges overseeing the programs, the availability of court personnel able and willing to act as mediators or to help administer programs, the availability of knowledgeable and experienced private mediators to join court-approved panels, local court dynamics affecting voluntarism, budgets, and connections already forged between the court and local CDRC offices.

Judges who have expressed enthusiasm about the concept of mediation programs in their courts consistently ask how to go about establishing such programs. A template of possible local rules, identifying a range of permissible variations falling within the broad scope of the proposed Uniform Court Rules, should be helpful to courts in deciding how to structure their individual programs. A readily accessible library of the rules under which current mediation programs are being operated should also provide significant assistance to courts trying to introduce their own programs. Experience with different forms of local rules may lead over time to consensus views about which approaches work best, which ones have sufficiently general application to warrant their inclusion in Uniform Rules, and which ones best promote scalability to more universally applicable mediation programs.

Beyond access to templates and libraries of local rules, courts structuring and administering new mediation programs could benefit from access to existing or potential

protocols, guidelines for program development, compilations of best practices and related support materials. These could include protocols on exchanges in advance of mediation sessions of basic documents or information independently of conventional discovery (which exist, for example, for certain kinds of disputes subject to automatic presumptive mediation in the federal court for the Southern District of New York). Some of these protocols have already been collected within the statewide Office of the ADR Coordinator. They should be made broadly available as exemplars to courts that would benefit from piggy-backing on others' organizational thinking.

#### **D. Supporting and Expanding CDRCs**

CDRCs' infrastructure – including mediation facilities, trained and certified mediators (many of whom currently are not fully utilized), and established relationships with local communities and organizations and court personnel who refer matters to them – is already in place throughout New York, with capacity in many individual offices to handle more mediations than they are currently handling.

The budget for CDRCs was cut substantially in the painful budgetary belt-tightening period associated with the financial crisis. CDRCs are likely to be central contributors to any effort to achieve substantial expansion of court-sponsored mediation and other forms of ADR in New York. Their extraordinary record of proven efficiency in achieving early settlements and reducing burdens on courts, their existing infrastructure, and their established reputation for effective and informed responsiveness to their communities present compelling reasons for increasing funding and other support for

them and treating them as an important component of efforts to foster ADR throughout New York.

CDRCs' current structure and model would not readily absorb all new court referrals to mediation. For example, several CDRC offices are directed primarily to mediations that do not contemplate a need for the mediator to be a lawyer, but some disputes may require legal resolutions or otherwise call for mediation by lawyers with the training obligations spelled out in Part 146. But CDRCs can and should play an important role in the expansion of court-sponsored mediation throughout the state (as Part 146 also contemplates) and can serve as a model for how to expand many court-sponsored mediation programs in the future.

**E. Support for Education and Encouragement of Participants About Mediation**

Although many courts and participants in disputes have expressed enthusiasm for expanded experimentation with mediation, many judges, advocates and parties remain generally inexperienced with alternatives to conventional litigation and wary of these unfamiliar mechanisms for dispute resolution. Other states that have developed broad programs for court-sponsored mediation have reported that experience with early mediation consistently leads to increased enthusiasm for it among participants. But until mediation has become significantly more familiar and more widely embraced, education and encouragement will likely be important components of the development and expansion of court-sponsored mediation.

1. *Attorney communications with clients and adversaries.* The OCA should promulgate rules that require attorneys to educate clients about ADR options to conventional litigation, including early mediation. These rules could be akin to Rule 10 of the Commercial Division Rules, which requires counsel to certify at the initial conference and each subsequent conference that counsel has discussed with the client whether the client may be interested in mediation. The rules could also include development of a plain language statement about ADR alternatives that counsel would be required to provide to each client in a potential or actual dispute, either in the engagement letter or in a separate communication. The rules could further require opposing counsel to discuss ADR options in good faith with each other before the first conference in any dispute. Such rules would be expected to increase the frequency of parties' and their counsels' active engagement in thinking about how to resolve their disputes more efficiently and less expensively and about whether an early negotiated resolution is potentially achievable through mediation or otherwise.
2. *Judicial communications to the parties.* Courts should improve existing communications to counsel and parties about the availability of court-sponsored mediation or other alternatives to conventional litigation. These improvements could include active management of central and local court websites to explain, in plain language, types of available ADR, the potential benefits of mediation and other forms of ADR, available

mechanisms for pursuing mediation (including free and low-cost options, and including information about language access), the credentials and hourly cost of members of panels of available private neutrals, and how the mediation or other ADR process can be expected to work. Information about mediation options should also be available in the courthouse, for both unrepresented and represented litigants – including in petition rooms, Help Centers, help lines, clerks’ offices, and on posters and brochures wherever information is made available to parties.

3. *Trainings and communications with court personnel.* Court clerks and other internal personnel regularly engage in a variety of efforts to help parties settle their disputes. Those efforts prominently include case conferences encouraging identification of common ground or efforts to achieve settlements. Some courts have designated court attorneys or other personnel to focus exclusively on mediation and other efforts to achieve settlements, and other courts have expressed interest in having personnel obtain training in mediation. Particularly because mediation carries characteristics of confidentiality, neutrality, engagement of clients as well as counsel, and other points of potentially significant differentiation from other forms of settlement efforts, court personnel who act as mediators should receive training in mediation techniques that is distinct from their prior work on settlement or case conferencing, as well as training in describing the mediation process to participants so that everyone

understands how it will work. Administrators also have shown a desire for training on how to establish and administer mediation programs in their courts. These forms of training have begun to take place. Increased training in these areas will be necessary in any courts that feature mediation by court personnel as part of their court-sponsored mediation programs.

4. *Trainings and communications with private mediators.* The success of mediation programs that draw on court-approved panels of private mediators who can be chosen by the parties or appointed by the court depends substantially on the quality and engagement of the mediators. Significant training programs for mediators already exist, but an effective panel-based program will require energetic and constructive communication with local and specialty legal communities about how to obtain admission onto the panel and why becoming a panel mediator (which should carry some component of voluntarism but also should provide some measure of increased professional stature for panel members) is a good step to take. Development and nurturing of effective and well-deployed panels of court-approved mediators will also require (i) thoughtful processes for the selection of members of the panel, (ii) communications with panelists that keep them engaged and enthusiastic about participating, (iii) communications with potential users about the mediators' qualifications and billing rates, (iv) engagement of



judges in understanding that the mediators to whom they are referring their matters can be trusted to make constructive contributions to dispute resolution, (v) establishment and monitoring of court appointments of mediators to ensure effective protocols for distribution of these appointments among volunteers, (vi) attention to pursuing diversity and inclusiveness in selection of the mediator panel and assignment of mediators, and (vii) communication to the Statewide ADR Coordinator's Office about results, in ways that can be used to improve processes and evaluate what works particularly well or less well.

5. *Communication with law students and with the legal community.* Many law schools have introduced thinking about methods of dispute resolution other than conventional litigation into their curriculum. Nevertheless, most law students graduate without substantial grounding in mediation and other forms of ADR. The courts, the Office of the Statewide Coordinator and the ADR Advisory Committee should play constructive roles in supporting the expansion of legal education about different ways of resolving disputes. Similarly, many members of the legal community generally remain inexperienced in and unaware of the benefits of early mediation and other forms of ADR directed to faster and less expensive resolution of disputes. Those same groups should devote resources to speaking at public events, writing and otherwise supporting openness to new efforts in this area.

## F. Support for Monitoring and Evaluation of Programs

Information about the impressive settlement rates achieved through early automatic mediation programs has tended largely to be anecdotal, although the limited instances of compiling records of outcomes have tended strongly to reinforce the anecdotal impressions.<sup>1</sup> At this stage of thinking about significant expansion of court-sponsored mediation programs, given the limited quantity of reliable data about outcomes and the unfamiliar and unproved character of mediation in the public consciousness, it seems essential to devote some resources to collecting and organizing data about how (and how well) court-sponsored mediation programs work.

The Committee recommends that OCA’s Statewide Divisions of Technology and Court Research be asked to work with the ADR Coordinator’s Office to develop data collection and analysis tools that track, by Judicial District and by individual program, referrals to mediation, opt-outs and matters actually mediated, settlements in the

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<sup>1</sup> See, e.g., Rebecca Price, U.S. District Ct.: S.D.N.Y., Mediation Program Annual Report, January 1, 2016 – December 31, 2016 6-7, 9 (Dec. 5, 2017), [http://nysd.uscourts.gov/docs/mediation/Annual\\_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf](http://nysd.uscourts.gov/docs/mediation/Annual_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf) [<https://perma.cc/24KV-578U>]; Alternative Dispute Resolution Plan, U.S. District Ct.: W.D.N.Y. (May 11, 2018), [www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf](http://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf) [<https://perma.cc/T5VD-YEA4>]; Alternative Dispute Resolution Report, July 1, 2015-June30, 2016, U.S. District Ct.: E.D.N.Y., [https://img.nyed.uscourts.gov/files/local\\_rules/2015-2016mediationreport.pdf](https://img.nyed.uscourts.gov/files/local_rules/2015-2016mediationreport.pdf) [<https://perma.cc/N9Q3-7M7H>]; Dispute Resolution Procedures, U.S. District Ct.: E.D.N.Y., <https://img.nyed.uscourts.gov/files/forms/DisputeResolutionProcedures.pdf> [<https://perma.cc/QJ7X-5AJW>] (last visited Sept. 8, 2018); *Mandatory Mediation Program Statistics*, U.S. District Ct.: N.D.N.Y., [www.nynd.uscourts.gov/mandatory-mediation-program-statistics](http://www.nynd.uscourts.gov/mandatory-mediation-program-statistics) [<https://perma.cc/384C-6267>] (last visited Sept. 8, 2018); see also Hon. Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 Just. Sys. J. 343 (2005) (“[R]eporting that of cases sent to non-binding arbitration in 2004, 74% settled before arbitration hearings and almost exactly half of the remainder that were arbitrated were resolved without the need for further court proceedings.”); Gilbert J. Ginsburg, *The Case for a Mediation Program in the Federal Circuit*, 50 Am. U. L. Rev. 1379, 1383 (2001) (as of 2001, the Senior Staff Counsel for the Second Circuit estimated that 45-50% of the cases referred to the Second Circuit’s CAMP mediation program—the first of its kind among federal courts of appeal—settled each year).

mediation (or sooner thereafter than if there had been no mediation), other mediation-related outcomes (such as opportunities for accelerated adjudication or other ADR processes), and participants' satisfaction with the experience. The Divisions of Technology and Court Research should also be consulted about ways technology can be used to facilitate effective early referrals to mediation, about whether it is feasible and desirable to integrate mediation processes into the Uniform Case Management System and other court databases, and about website and other communications relating to court-sponsored mediation programs.

#### **IV. Conclusion**

Some court systems are plainly aiming at the goal of treating mediation as a default up-front process to be presumptively pursued at the outset of nearly all disputes (apart from ones considered poor candidates for mediation for highly specific reasons). Those courts, the parties who appear before them, and advocates who practice in them widely regard early mediation as generally constructive and frequently capable of accomplishing an earlier and less expensive resolution that satisfies a significant public appetite – one often not fully appreciated by the parties before they are directed to mediation - while freeing up resources for adjudication of disputes that parties resolve to litigate to a decision.

The current environment presents an important opportunity to focus on scaling up mediation processes to a point that establishes mediation as the first step in nearly all disputes. Such scaling up would of course likely require a substantial expansion of resources and expenditure of money. But significant expansion along the lines proposed

in these interim recommendations, which should help indicate how much and in what ways court-sponsored mediation should be expanded further, should be achievable through relatively modest additional expenditures coupled with redirection of existing priorities and energies and calls upon high quality lawyers to become members of court-approved panels (and to provide at least some of their mediation services without charge). As the value of mediation becomes more widely recognized and mediation programs demonstrate their capacity to reduce burdens on court dockets, serious consideration of significantly increased funding for broadly applied automatic presumptive mediation programs will be increasingly warranted.

The ADR Advisory Committee

February 12, 2019

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