New York State Bar Association
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August 27, 2019

The Honorable Janet DiFiore
Court of Appeals of the State of New York
20 Eagle Street
Albany, NY 12207

The Honorable Lawrence K. Marks
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Presumptive ADR Initiative of the New York State Courts

Dear Chief Judge DiFiore and Chief Administrative Judge Marks:

On behalf of the Executive Committee of the Dispute Resolution Section ("Section") of the New York State Bar Association ("NYSBA"), I write to offer the Section's considered suggestions and recommendations regarding the New York State Unified Court Systems' Presumptive ADR Initiative, which was announced on May 14, 2019.

The Section was founded over 10 years ago and has members in every Judicial District. Among other activities, the Section serves to promote the responsible development and practice of dispute resolution in the State; further the education of the bench and bar so as to enhance the proficiency of practitioners and neutrals and increase the knowledge and availability of party-selected solutions; and provide service to the courts and the general public about various dispute resolution processes. Our areas of focus and expertise include procedures applicable to alternative dispute resolution ("ADR"), competence of arbitrators and mediators, and legal issues relating to arbitration, mediation, and other forms of ADR.

Introduction

The February 2019 Interim Report and Recommendations of the Chief Judge's Advisory Committee on ADR ("Advisory Committee") and the statements set forth in the May 14, 2019 press release set out a bold vision for change in the New York Courts. We embrace that vision and will do all we can to help implement it, promptly and effectively. Toward that end, we provide suggestions below that may aid in creating a robust, efficient, and successful presumptive mediation program in the New York State courts. We look forward to working with the Advisory Committee, the Office of Court Administration ("OCA"), and other local, county, and specialty bar associations, as part of an ongoing conversation as the program unfolds.

While "Presumptive ADR" will include options other than mediation, this letter is limited to providing comments on the implementation of presumptive mediation in the New York State courts.

General

In our view, there is no subject matter area in which civil cases do not settle, and no particular subject matter areas have ever been shown to be inappropriate for mediation. Therefore, none should be excluded from the presumptive program. Screening mechanisms should be in place to protect parties where there are issues of domestic violence,[1] and limited opt-out provisions can be created to address other unique circumstances.

We also believe there is no need to re-invent the wheel. Rules for presumptive court-annexed mediation programs already exist, in and outside of New York, that can serve as models and can, with relative ease, be modified to fit particular courts in New York State. Further, many courts collect data, and the best approaches from diverse court programs can be drawn upon to create robust data collection of broad scope.

We further suggest that the program should be re-visited regularly to allow for feedback and modification. Regular review and feedback from attorneys, parties, panel mediators, the judiciary, and administrators will only make the program more successful.

What is Needed for Program Success

1. Competent, Well-Trained Mediators

Competent, well-trained mediators are essential to a successful mediation program. To participate in a court-annexed program, mediators should have a minimum of 40 hours training, which would include significant role play opportunities.

To begin, we suggest that all mediation training programs where role-playing is a core part of the curriculum and CLE credits are provided should be accepted, at a minimum, to qualify someone for the court mediation panels, not just those that have specifically been approved under Part 146. Successful completion of a law school mediation clinic program should be accepted as covering the initial minimum 40 hours of training. We recommend that mediators already on existing Federal Court mediation panels, New York State Commercial Division panels, and any other established New York State court panels be waived onto the new State Court panels, subject to the limitation that, if a panel-listed mediator has not actively served on the panel in the prior two years, such a mediator need not be waived into the program.

Although it will be up to the Court to determine what expertise may be required for particular areas, we note that skill in mediation process is at least as important as particular subject matter knowledge in helping to resolve cases.[2] Some court-annexed mediation programs have provided

[1] We recommend such cases be sent to mediation only if (1) there is a preliminary screening of the case, (2) the parties agree, and (3) the court approves.

[2] *See, e.g.*, Section 6 of the standards for court-annexed mediation programs from the Center for Dispute Settlement, The Institute of Judicial Administration: https://s3.amazonaws.com/aboutrsi/594428b132c16660b4360f46/NationalStandardsADR.pdf.

training in certain subject matter areas for mediators who have then mediated cases in those areas with great success.[3] We suggest there is no one-size-fits-all model for mediator competency and prerequisites. Many members of the Section serve as mediators with Community Dispute Resolution Centers ("CDRCs"), State and Federal Courts, AAA, JAMS, etc. and are successful at resolving a wide variety of cases. NYSBA, through the Section, already sponsors mediation training programs, and such programs could be expanded to include subject matter areas where needed.

The CDRCs often provide mediation services in the Small Claims Court and other courts of limited jurisdiction. It is anticipated and recommended that they continue to do so. Mediators for the courts in which the CDRCs provide mediators should be required to meet the requisite training described above and any other additional training or subject matter experience that the Administrative Judges for those courts deem necessary. While training programs established by a particular CDRC may be accredited to provide that training, participation in the particular CDRC training program should not be required to mediate in those courts.

Non-Attorney Mediators: Provisions should be made for non-attorneys participating in court-annexed programs. Non-attorney mediators have effectively been used by CDRCs, and continued participation by CDRCs will be essential for successful implementation of presumptive mediation programs. The same training requirements for attorney mediators should apply to non-attorney mediators. We recommend that non-attorneys who have successfully mediated with a CDRC and completed the relevant training for such programs also be waived onto the appropriate presumptive court mediation program.

2. Mediation CLE

We agree completely with the Interim Report's emphasis on educating stakeholders on the value of ADR. We therefore propose that CLE programs about presumptive mediation, and mediation more generally, be widely offered. All attorneys should be encouraged to attend these CLE, especially over the next 2-4 years until presumptive mediation has become a normalized part of the court process. The CLE programs can be broad-based and address, for example, not only the new court-annexed programs, but also basic skills for mediators and advocates, or mediation in specific subject matter areas. We also suggest that consideration be given as to whether certain programs should count toward satisfying the training requirements for new mediators. It would be helpful to include at least 30 minutes addressing the new court presumptive programs.

3. Informing Parties

Parties in lawsuits are also stakeholders – perhaps the most important stakeholders – in our system. Therefore, we recommend that attorneys be required to advise their clients on information about mediation and other relevant court-annexed mediation programs. The transmission of such

[3] The Southern District of New York provided training for employment cases, ADEA cases, FLSA cases and § 1983 cases to mediators on its mediation panel. The success rate for mediations in those areas is typically 50% or more. *See* S.D.N.Y. Mediation Program Annual Report (Jan. 1, 2016-Dec. 31, 2016), available at www.nysd.uscourts.gov/docs/mediation/Annual_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf.

information will be essential to inform the public of the new programs, an objective previously identified by the Advisory Committee.

We also suggest that a line be added to a form Preliminary Conference Order (or other similar such document where one exists) whereby attorneys would affirm that they have advised their clients of the available court-annexed programs and discussed those programs with them.

Further, we recommend that a short notice be created, explaining mediation and other relevant court-annexed dispute resolution programs, which can be distributed to *pro se* litigants when filing their initial pleadings with the court. For convenience, the notice could also be available on-line.

4. Mediator Compensation

Mediators should be paid for their work as are court personnel, judges, litigators, and others who have significant roles in our justice system. Payment models are increasingly common in state and federal court mediation programs.[4] Although payment does not always guarantee quality, programs of the scope envisioned here cannot possibly provide high-quality, broad-based service over time if mediators are not properly compensated. The failure properly to compensate mediators may also make it difficult for many skilled mediators to accept more than a few cases a year, especially for newly-admitted attorneys, those practicing in smaller firms, or those in a solo practice. Even lawyers who work in larger law firms may find themselves restricted in serving as mediators on a *pro bono* basis except in limited circumstances. Further, it may suggest to some participants that the court does not place a real value on mediation. In sum, we believe it is important to encourage practices, such as compensation, that support the professionalizing of the mediation field.

In general, as funding presently does not exist for mediators to be paid by the courts, mediators should be paid by the parties with fees equally shared.[5] This model has worked wherever it has been used. It is unrealistic at present for mediators to be paid in Small Claims Court matters, and mediating in Small Claims Court can serve as useful training for new mediators. CDRCs generally provide mediation services for free and presumably will continue to do so, at least initially. Mediators who participate in those programs should be given *pro bono*/CLE/CE credits for that work.

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[4] In New York's Federal District Courts, the Western, Northern, and Eastern District mediation programs all require that mediators be paid. Only the Southern District still retains a court-annexed mediation program where mediators are unpaid for their work. New Jersey State Courts provide for two free hours of mediation allocated equally between preparation and the first mediation session, and which shall be at no cost to the parties. *See* New Jersey Court Rules 1:40-4(b), available at https://www.njcourts.gov/attorneys/assets/rules/r1-40.pdf; Disclosure Concerning Continuation of Mediation and Mediation Preparation, available at https://njcourts.gov/forms/11183_med_disclose.pdf?c=D0G.

[5] As the use of mediation becomes more prevalent in our courts, which should result in greater efficiency and cost reductions, consideration might later be given to court funding of mediator compensation, in whole or in part.

State, local, and county bar associations should work with the Administrative Judges of the various courts in each jurisdiction to set compensation rates for mediators that are appropriate for the court and jurisdiction.[6]

We believe that if a certain amount of uncompensated time is to be provided, it should not exceed 90 minutes, in addition to one pre-mediation telephone conference with the mediator lasting no longer than one hour. In Supreme Court, the parties should be required to spend at least three hours in mediation.[7]

We recommend that the rules should provide for *pro bono* mediation where the parties meet developed standards of need. Parties ineligible for *pro bono* mediation but who cannot afford their share of the hourly rate can be afforded the opportunity to apply for a reduced fee. As hourly fees will be split among the parties, given the benefits of mediation, mediator cost should not impose too great a burden, especially in contrast to the fees most parties will be paying litigating counsel and given the benefits of mediation.

Pro Bono Work: All attorneys on court mediation panels should be encouraged to do some *pro bono* related mediation work in cases involving low-income parties so that no party is denied the ability to participate in the program.[8] *Pro bono*-related mediation work can include doing a certain number of *pro bono* mediations per year and/or serving as appointed counsel for *pro se* or indigent litigants for the limited purposes of the mediation. The Southern District of New York currently has a program under which counsel are appointed for such limited purpose. We believe that mediators should receive CLE credit for this *pro bono* work (which may require some modification of the current CLE rules).

5. Mediator Selection and Initiation of the Mediation

The Section's views on mediator selection in the context of court-annexed programs was set forth previously in, among other places, a letter dated September 14, 2018 that was sent in response to OCA's request for public comments on a proposed amendment to Rule 3 of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 3[a]), which sought to insert the following language: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending." In that letter, we supported the proposed amendment and reiterated our prior view that efforts to make court-annexed mediation more successful would be enhanced if the parties were first given the opportunity to agree on a mediator, instead of having the Court make a selection in the first instance. Proponents of

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[6] The rules of the Commercial Division for the Supreme Court, New York County provide that mediators assigned from the Panel are compensated by the parties at the rate of $400 per hour, beginning after three hours of mediation, although there is no compensation for any preparation preceding the mediation. Panel mediators chosen by the parties are compensated by the parties at the rate of $450 per hour, commencing from the outset of the first mediation session.

[7] If less than three hours may be required in some courts, the amount of uncompensated mediation time should also be reduced.

[8] We note that many court-annexed mediation programs require that panel mediators do some *pro bono*-related mediation work.

this selection method are of the view that mediation programs will be more favorably received by the users and generate a greater rate of resolution if the parties have the chance to select the mediator from the inception of the matter's referral to mediation. The proposed amendment was subsequently adopted.

We also observe that an alternate selection method – whereby the Court appoints the mediator from a court-approved panel in the first instance, with the parties then having the right within, for example, fourteen days of that appointment to select their own mediator (who may or may not already be on the panel) – is being practiced by other courts in New York, including the Commercial Division of Suffolk County,[9] as well as in New Jersey's state-wide court-annexed mediation program. This alternative method would still allow for party choice in the selection of mediators. It might facilitate the scalability of programs by automatically drawing on a larger pool of available mediators, and can help bring new mediators, including less experienced mediators and mediators of diverse backgrounds, into the field.

Whichever methodology is adopted, we recommend that mediators be required expeditiously to perform a conflicts check, confirm their availability to conduct the mediation, and facilitate contact with the parties. Thereafter, depending upon the program and/or the nature of the dispute, the parties can make a written submission to the mediator prior to the mediation, either as a requirement of the program or upon request by the mediator.[10]

Many judicial districts in the state cover large geographical areas and, therefore, might require parties to travel a significant distance to attend a mediation. There also may be fewer mediators to choose from in some judicial districts than in others. Under such circumstances and perhaps others, we suggest consideration be given to conducting mediations by videoconferencing.

Given the power imbalances that can exist where some parties appear unrepresented at a mediation, we suggest that consideration also be given as to whether, in certain courts, some initial judicial review of a case is appropriate before it is sent to mediation. In addition, in certain but not all situations, it may be advisable to have a settlement reached in mediation in such cases be reduced to writing and submitted to the court for review and approval to ensure that unrepresented parties understand the terms of the settlement and agreed to them of their own free will.

We also suggest that all mediation training programs include training of mediators for cases in which not all parties are represented by counsel and in which no parties are represented.

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[9] *See* Suffolk County Supreme Court Commercial Division Mediation Program at 2-3, available at https://www.nycourts.gov/courts/comdiv/PDFs/Suffolk_ADR_Protocols.pdf ("Along with the Order of Reference, the Referring Justice shall include the contact information for the mediator appointed by the Court. . . . If the parties and/or counsel object to the mediator appointed, they must notify the Court within fifteen (15) days or the objection is waived.").

[10] Rule 10 of the General Rules and Procedures of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County establishes effective procedures for the initiation of the mediation after the mediator is appointed. We recommend that this rule be considered for adoption state-wide.

6. Presumptive Disclosure

We suggest that the rules specify that counsel and parties will discuss with the mediator what disclosure, if any, is needed before a mediation session is held. The focus of such disclosure should be on obtaining information needed to engage in a meaningful mediation process. Protocols could also be developed as to what pre-mediation disclosure may be required in certain cases (*e.g.*, the exchange of medical records in personal injury matters). Members of relevant NYSBA sections and committees can also be consulted to help develop rules regarding what disclosure may be required in specific subject matter areas.

7. Opting Out

Opting out of mediation participation should be permitted in limited circumstances with the burden being on the party seeking to opt out to show "good cause." The Western District of New York rule on opting out provides a good model. Among other things, that rule states that "Opting Out Motions shall be granted only for 'good cause' shown. Inconvenience, travel costs, attorney fees, or other costs shall not constitute 'good cause.' A party seeking relief from ADR must set forth the reasons why ADR has no reasonable chance of being productive." Judges can *sua sponte* exempt a case from the mediation requirement.[11]

8. Confidentiality and Mediator Immunity

Rules 8 and 9 of the General Rules and Procedures of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County, provide for, respectively, confidentiality and immunity for mediators. We believe that both are necessary requirements for a successful mediation program, that these rules should be adopted state-wide, and that they be distributed, in writing, to the participants at the commencement of a mediation. In addition, wherever possible, protection under Section 17 of the Public Officers Law should also be extended to mediators on court-annexed panels.

9. Data and Program Review

Collecting data on program outcomes is critical for program analysis and ensuring quality, and should be automated to the extent possible. For example, the Northern District of New York automatically updates its mediation data daily. That update does not include as broad a range of data as some other court-annexed mediation programs, but it shows that at least some automatic data collection and dissemination can be done, and once done, can provide useful information with little burden on court staff.

All courts maintain electronic case information. Therefore, program data should at a minimum be able to generate reports (1) as to cases resolved at a mediation session, and for any period up to 150

[11] The full Western District's ADR Plan is available here: https://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf.

days after the last mediation session and are (2) subject matter specific. Because the underlying data already exists electronically, this should be a relatively straightforward programming issue – one that other courts have previously resolved and implemented. Encouragement of data collection should be done in a manner that does not violate, and preserves, the confidentiality of the mediation process and of mediated settlement agreements.

We suggest that each court issue an annual report with relevant data for the prior year and a discussion of where the program has succeeded and where improvements are necessary. Feedback should be gathered from mediators and mediation participants. Again, this is something other court-annexed mediation programs do, and their means and methods can be drawn upon to establish how it can be most easily done in the New York State courts.

Mediators should be required to expeditiously report to the Court the status of the mediation and the outcome when the mediation is completed.[12] Courts are encouraged to solicit feedback from participants in mediation as to their satisfaction with the proceeding and with the mediator, as well as recommendations for how to improve the process.

10. Rule Implementation

We understand that OCA is working on developing rules for court-annexed ADR programs and look forward to reviewing and commenting on any proposed state-wide or district-wide rules in a manner that will assist in their timely implementation.[13]

11. Bar Association Assistance

Among other things, NYSBA and its various sections and committees can help implement this program by: (1) setting-up and staffing both training programs and the CLE programs referenced above; (2) providing additional mediation training outside of the New York City metropolitan area; (3) providing mediation training to court personnel; (4) providing mentoring opportunities for inexperienced mediators, including co-mediation and observation opportunities prior to appointment to court panels; (5) offering panels of mediators who qualify for service in court mediation programs; (6) developing disclosure protocols in particular subject matters as described above; (7) working with the Administrative Judges in their consideration of whether specific subject matter experience or knowledge is desirable for mediators in their particular courts and, if so, determining what that should be; (7) doing outreach to groups to announce the new programs, explain why they are being established, and suggest how participants can make them effective; and (8) developing procedures to solicit litigant and attorney feedback and recommendations for improvement, as described above.

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[12] As a matter of good mediation practice, mediators often reach out to the parties after a mediation has reached an impasse and the court has been advised that the mediation has concluded. Mediators should be encouraged to do so and to advise the Court if the parties and the mediator agree to continue the mediation.

[13] We also believe that the court-annexed mediation rules for New Jersey and the Western and Northern Districts of New York are simple yet thorough and should be consulted for possible guidance.

We thank you for your time and consideration in allowing us to provide you with these comments. We applaud the efforts of the Advisory Committee and firmly believe, as do the courts, that ADR, and mediation in particular, is an integral part of providing effective, high-quality, prompt, and efficient administration of justice. The Section stands ready to assist in this initiative in any way the Advisory Committee and OCA believe useful.

Respectfully submitted,

Theodore K. Cheng
Chair
NYSBA Dispute Resolution Section

cc: The Honorable George J. Silver
The Honorable Vito C. Caruso
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