# Change is Here: ADR and the NY Courts – The New Presumptive ADR Program

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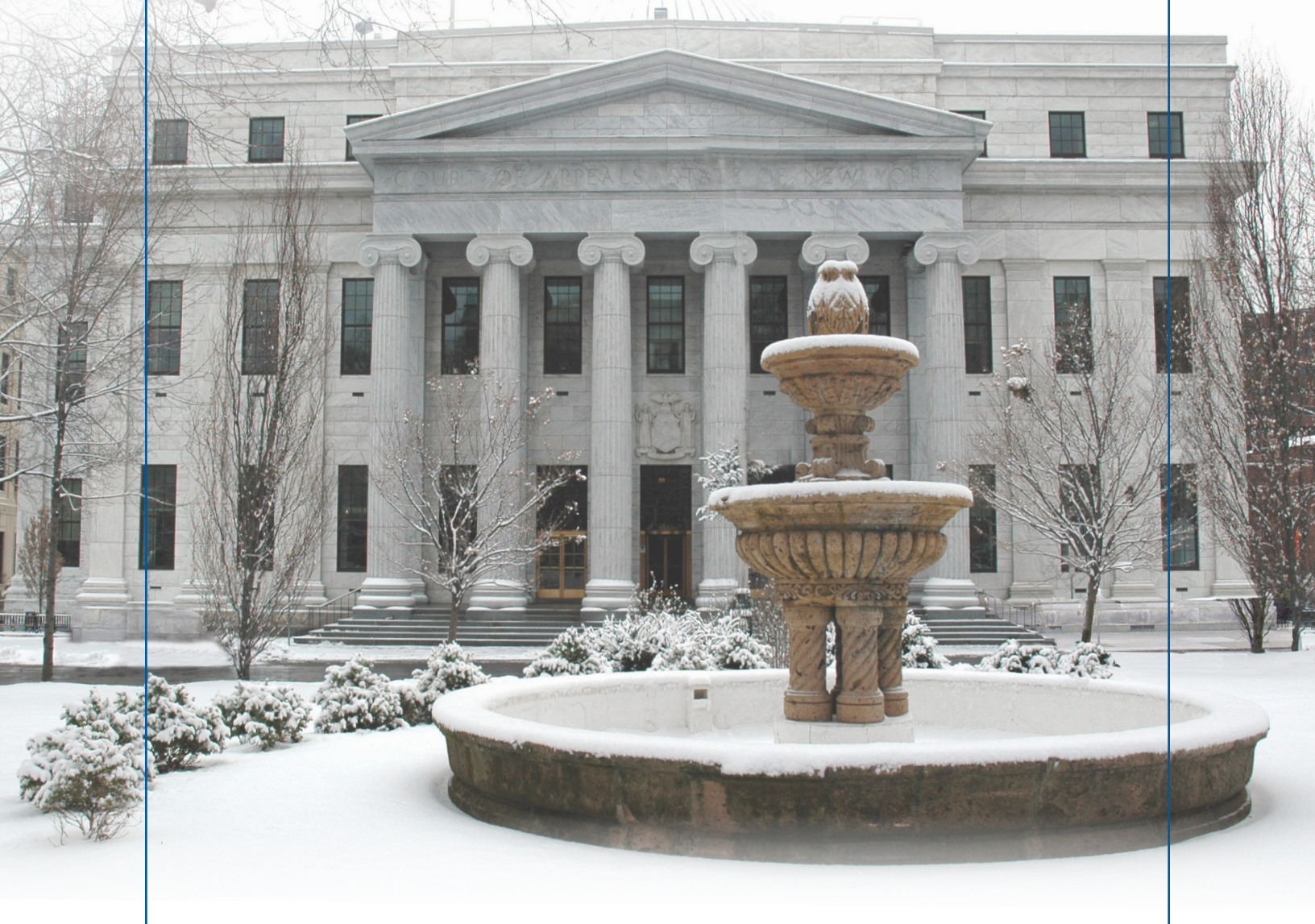
# The State of Our Judiciary 2018

## Chief Judge Janet DiFiore

New York State Unified Court System

Court of Appeals Hall

Tuesday, February 6




# *The State of Our Judiciary 2018*

JANET DIFIORE
CHIEF JUDGE OF THE COURT OF APPEALS
CHIEF JUDGE OF THE STATE OF NEW YORK

NEW YORK STATE UNIFIED COURT SYSTEM
COURT OF APPEALS HALL
ALBANY, NEW YORK
TUESDAY, FEBRUARY 6

**Janet DiFiore**
Chief Judge of the State of New York
Chief Judge of the Court of Appeals

**Lawrence K. Marks**
Chief Administrative Judge of the State of New York

## ASSOCIATE JUDGES OF THE COURT OF APPEALS

**Jenny Rivera**

**Leslie E. Stein**

**Eugene M. Fahey**

**Michael J. Garcia**

**Rowan Wilson**

**Paul G. Feinman**

## PRESIDING JUSTICES OF THE APPELLATE DIVISION

**Rolando T. Acosta**
First Department

**Alan D. Scheinkman**
Second Department

**Elizabeth A. Garry**
Third Department

**Gerald J. Whalen**
Fourth Department

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# *The State of Our* Judiciary 2018

## I. Introduction

Welcome to Court of Appeals Hall and the 2018 State of Our Judiciary.

For more than 30 years, my predecessors in this office – Chief Judges Jonathan Lippman, Judith Kaye and Sol Wachtler – have used this annual address to update the public and our partners in government on the priorities of the Judiciary and the challenges we face in administering justice.

In this State of Our Judiciary Address, I will have the pleasure of summarizing for you the considerable progress we have made to improve our court system; the identified areas of concern where we are working hard to overcome difficult challenges; and the many reforms we have implemented to address what I believe to be a most important goal for us: building a dynamic and flexible court system capable of responding promptly and effectively to the changing dynamics of our caseloads.

Indeed, the delivery of justice must keep pace with the needs of our modern society if we are to maintain public trust in the rule of law and the people's confidence that our courts remain, in the words of our first President, "the firmest pillar of good government."

## II. The Excellence Initiative: A Progress Report

At my investiture as Chief Judge in February of 2016, I announced the Excellence Initiative. By now, you are all aware of – and many of you are actively engaged in – our systemwide campaign to promote efficient court operations and support high quality judicial decision-making and court services. Our overarching goal is simple, and it goes to the very heart of our constitutional obligation – to fairly and promptly adjudicate every case that comes before us.

As you will hear today, we are making real progress to improve promptness and productivity and the overall quality of justice in every corner of our State. Our court leaders, our trial and appellate judges and our court staff are working hard, and with a strong sense of purpose, to carry out their responsibilities and build a foundation of excellence to support our ability to

deliver fair and effective justice outcomes to the litigants who appear before us. Thanks to their individual and collective efforts, the state of our Judiciary continues to grow stronger with each passing day.

So after almost two years of sustained, intensely-focused attention on court operations, I am pleased to report the following: outside New York City our caseloads are being resolved more efficiently and promptly, and our backlogs are shrinking rapidly; in New York City, we have made significant progress in many of our highest volume courts, and our leadership team has made operational changes to set the stage for further improvement in those courts where we need to do better. More broadly, we are poised to introduce important systemic reforms to make our entire court system fairer, more efficient and more accessible.

Let me begin with our criminal courts, where justice delayed harms everyone – crime victims waiting for justice to be done, prosecutors who watch cases grow stale as witnesses move away and memories fade, and defendants, presumed innocent under the law, who far too often languish in jail because they can't make bail, while their families suffer the consequences and society bears the heavy costs of their incarceration.

## A. MISDEMEANORS

Last year, the lead item in the State of Our Judiciary was the problem of delays in adjudicating misdemeanor cases in the New York City Criminal Court. I pledged that we would move aggressively to change this dynamic by managing cases more actively, eliminating unproductive appearances and wasteful adjournments, and increasing trial capacity.

Our focus has been trained on resolving the oldest cases in our inventory by re-working court processes and reassigning judges to expand our trial capacity. I am pleased to report that we have made excellent progress in reducing the misdemeanor inventory throughout the City. Since the Excellence Initiative was launched, we have reduced the number of our oldest misdemeanor cases by 80% in Manhattan; 71% in Bronx County; and 61% Citywide.

And we have made meaningful progress outside the City as well, with a 28% reduction in the number of misdemeanors pending over standards and goals in our City and District Courts statewide.

Thank you to Supervising Judge George Grasso in Bronx County, and Judge Tamiko Amaker – the Supervising Judge in New York County until last December – now our Administrative Judge of the New York City Criminal Court, and to the many District and City Court Judges who have dedicated themselves to clearing backlogs in their courts outside the City.

## B. FELONY CASES

We have also made noteworthy progress in reducing backlogs in our felony cases. Outside New York City, the number of felony cases over standards and goals has been reduced by 53% overall since we started the Excellence Initiative, with the 9th Judicial District achieving an extraordinary 91% reduction, together with impressive reductions of 77% in the 7th; 65% in Suffolk County; and 56% in the 4th – all but eliminating the backlogs in those areas.

Thank you to our leadership team: Judge Alan Scheinkman in the 9th – our new Presiding Justice of the Appellate Division, Second Department; Judge Craig Doran in the 7th; Judge Randy Hinrichs in Suffolk; and Judge Vito Caruso in the 4th.

In New York City, eliminating our felony backlogs has been more challenging, due largely to the sheer volume of cases in those courts. Nonetheless, we are making encouraging inroads. In Bronx County, the number of felony cases pending over standards and goals is down by 28% since the start of the Excellence Initiative; Queens County is down by 15%; and in Kings County that number is down by 16% in just the last year. Thank you to Administrative Judges Robert Torres, Joseph Zayas and Matthew D'Emic.

In 2018, we are determined to aggressively build on this progress, change what has become a culture of delay in too many jurisdictions, and accelerate our momentum Citywide, including in Richmond County, under our newest Administrative Judge, Desmond Green, and in Manhattan, where Administrative Judge Ellen Biben has been reorganizing operations and working with District Attorney Cyrus Vance and the defense bar to foster earlier case dispositions – more on that topic later.

## C. SUPREME COURT CIVIL CASES

On the civil side, court congestion and delay make litigation more expensive, which limits access to justice for working families, people of modest means and small business owners. Delay harms people seeking redress for their injuries in tort actions (the largest segment of our civil caseload), matrimonial litigants, and so many others who often feel compelled to forego meritorious claims, accept lower settlements or even enter into disadvantageous settlements just to avoid or put an end to the personal and financial burdens of litigation. Delay in the civil courts harms our economy as well, adding to the costs and uncertainty of doing business in our State, and creating an unwelcome climate for investment, economic growth and job creation.

For these reasons, we have made it a very high priority to speed the civil litigation process and eliminate backlogs and delays. I am pleased to report that we are making progress.

Outside New York City, the number of cases pending over standards and goals has been reduced by 69% in Nassau, by 57% in the 3rd Judicial District, 49% in the 5th, and 37% for foreclosures alone in the 8th. This has been accomplished largely because our Administrative Judges

in those Districts – Judges Thomas Adams, Thomas Breslin, James Tormey and Paula Feroleto, and their trial judges – are focused on proactive case management and using their authority and skills to move cases through the system with speed and purpose. This same approach has enabled the New York State Court of Claims, under the leadership of Presiding Judge Richard Sise, to substantially reduce the backlog of prisoner claims.

We have also made strides in much of the City, with reductions of 36% and 30% respectively in Kings and Queens Counties under the leadership of Administrative Judges Lawrence Knipel and Jeremy Weinstein. And in Queens, a county with 2.3 million residents, when we separate our foreclosure docket, only 6% of the civil cases are over standards and goals. That is among the very best in the State, and proof positive that high case volume and court efficiency are not mutually exclusive terms. Kudos to Judge Weinstein and the judges and their staffs in Queens County.

As you will hear later, Judge George Silver, our new Deputy Chief Administrative Judge for the New York City Courts, has brought with his appointment energetic leadership and smart, creative ideas designed to move our enormous New York City civil caseloads with more speed, less expense and, above all, enhanced quality.

## D. FAMILY COURT

The Family Court is one of the most impactful courts in our system given the nature of the work done there to assist children and families in crisis. The Family Court outside New York City continues to keep its eye on the ball, with less than 5% of its total pending caseload over standards and goals. That is extraordinary.

In New York City, following a number of highly publicized tragedies, we have experienced an increase of over 50% in the filing of neglect and abuse cases over the last two years. These are among the most serious and complex cases adjudicated in the Family Court. Notwithstanding this dramatic jump in child protective filings, the overall number of cases pending over standards and goals is down 4% from the start of the Excellence Initiative.

That is not happenstance, but a reflection of the capacity we are developing to respond and adapt to changing conditions and trends through innovative leadership that is focused, proactive and willing to "change it up" when necessary, and of front line judges who understand and feel the sense of urgency which attends their work.

Thank you to Administrative Judge Jeannette Ruiz and our Family Court Judges and staff for responding to difficult challenges in thoughtful, prompt and effective ways.

* * *

Across the board, in every court, we are determined to develop a management culture that spots emerging trends and responds to changing dynamics in smart, flexible, appropriate and efficient ways. Simply repeating the same process, year after year, decade after decade, is not acceptable. We have the experience, the talent and the skill to do better – to be proactive in our management; bold in our approach to problems; and untethered to past practices and structures that no longer serve us well in meeting the needs of our litigants.

As you have just heard, the numbers are encouraging. The progress achieved to date proves that smart, agile operational and management support for our Judges is the key to their ability to perform their constitutional responsibilities effectively, efficiently, and in ways every New Yorker would expect.

We know we have a lot more work to do, and a long way to go, and as I said last year, we will not be dancing in the end zone until we achieve all of our goals. But I am supremely confident that our sustained commitment to a more muscular, proactive management philosophy will lead us to operational and decisional excellence.

Today, I am also pleased to inform you of some of the forward-looking initiatives we have introduced under the banner of our Excellence Initiative.

## III. Criminal Justice

Criminal justice reform is an absolute imperative for our courts on every level – from the quality of our decision-making, to the fairness and accuracy of the processes by which we do our work, to the elimination of an unacceptable culture of delay and procrastination that has evolved in some of our jurisdictions.

Let's begin with the process, because any substantive reforms adopted in New York must be supported by a system that operates with maximum effectiveness and efficiency.

Outside New York City, our criminal court operations, as I noted earlier, are performing well. Inside the City, we face severe challenges given the enormous size of our caseloads. We know we have to think differently about how to balance our obligation to ensure speedy justice while achieving fair and just dispositions consistent with due process of law. And every player in the system – judges, prosecutors, members of the defense bar, institutional defense providers, and every City agency key to efficiency – must do better.

On any given day, almost 9,000 men and women are being held on Rikers Island. Too many of them are being held on low-level felony or misdemeanor charges, unable to make bail. Many pose no real threat to public safety. This is fundamentally contrary to the original design of

our American criminal justice system – in which liberty is supposed to be the norm and pretrial detention a carefully limited exception. Moreover, the cost of incarcerating all these people strains the public fisc, to say nothing of the enormous indirect costs to our society when people lose jobs, homes and custody of children.

Clearly, we cannot continue down the same path we have followed for decades – not if we believe in the ideal of a criminal justice system where every person accused of a crime, whether rich or poor, is presumed innocent and guaranteed a fair and speedy process leading to a just outcome.

And so we welcome the proposed reforms recently announced by Governor Andrew Cuomo to overhaul our antiquated bail and speedy trial laws, and we look forward to working with the Governor, the Legislature and the entire criminal justice community to devise common sense solutions that will produce a more equitable and effective criminal justice system for our State.

The time for proactive change has come. We cannot simply stand by – content in the false confidence that we are doing all we can – processing case-by-case. We have to rethink and reorganize the way we are doing business. And there are ways to responsibly do that, without compromising either defendants' rights or public safety.

## A. SUPERIOR COURT INFORMATIONS (SCIS)

When I spoke earlier about the greater success we have had in processing criminal cases outside New York City, some of you may have been wondering why that is. Volume, of course, is a major factor, with the City hearing 43% of the State's criminal cases, but another factor is the very smart and responsible way in which felony cases are resolved on a regular basis outside the City through the use of Superior Court Informations or "SCIs," whereby defendants waive their right to prosecution by indictment, as allowed by our Constitution. With SCIs, prosecutors engage in early case assessment and, critically, provide defendants with early, expanded discovery, giving them the opportunity to make intelligent, informed decisions about whether to plead guilty or put the People to their proof at trial.

There are a great many cases which, by the nature of their facts, can be resolved expeditiously, without the need for numerous appearances stretching out over many months and sometimes years. And the benefits of SCIs are obvious, allowing prosecutors, defenders and courts to conserve limited resources while giving defendants – who should be the focus of the process – the opportunity to obtain fair dispositions that enable them to pay their debt to society and start the rehabilitation process.

SCIs are significantly underutilized in New York City. The average time to dispose of a case by indictment in the City is 277 days, while the average time to dispose of a case by SCI is 120 days. In Westchester County, which I am very familiar with, the use of SCIs has been an enormous factor in reducing the total number of felony cases pending over standards and goals to a single-digit number.

I am pleased to report that this past December we boosted our judicial capacity in New York County – and in recent days in Kings and Bronx Counties as well – in order to pilot the increased use of SCIs. We are encouraged by the fact that the number of SCI dispositions in New York County rose by 50% in the pilot's first month.

We are grateful for the support and thoughtful commitment of District Attorneys Darcel Clark, Eric Gonzalez and Cyrus Vance, each of whom has pledged to identify cases in which prosecution by SCI, and early discovery, are appropriate. We are grateful for the support and participation of the defense bar and our judges and staff, all of whom have committed to earnestly support the pilot in order to promote the imperatives of speedier justice, a fairer process for the accused, more efficient use of limited resources, and fewer defendants in pretrial detention in Rikers and local jail facilities.

Criminal justice reform has many moving parts, and this is an important one.

## B. ATTORNEY SCHEDULING CONFLICT SOFTWARE

Unproductive and wasteful court appearances are a source of frustration for every judge and participant in the criminal justice process. We are reducing the frequency with which hearings and trials must be adjourned and rescheduled due to scheduling conflicts on the part of defense counsel, whose heavy caseloads often require them to be in three places at once. Earlier this year, we installed new software in New York City that automatically displays when and where individual attorneys are scheduled to appear in court. This new case management tool will allow judges and court staff to schedule future trials and court dates without running into conflicts that create frustrating delays.

## C. CENTRALIZED ARRAIGNMENTS

In the last year, we have succeeded in implementing a significant legislative reform that will ensure that the right to counsel, one of our most cherished constitutional guarantees, extends to the arraignment of defendants on criminal charges.

To facilitate the presence of counsel at off-hour and weekend arraignments, we have piloted four new programs upstate – in Broome, Oneida, Onondaga and Washington Counties – counties where counsel at first appearance has in the past been difficult to ensure. By reworking

our processes, we are making sure that the State is in compliance with its constitutional obligation to provide effective assistance of counsel while at the same time striving to accommodate legitimate concerns over the financial and logistical burdens that compliance creates for Town and Village Courts, prosecutors, public defenders and county governments.

Deputy Chief Administrative Judge Michael Coccoma and our Administrative Judges in the 4th, 5th and 6th Judicial Districts – Vito Caruso, James Tormey, who has been especially helpful, and Molly Fitzgerald – deserve credit and thanks for the plans they put together to optimize countywide resources and ensure that judges, defense attorneys and law enforcement personnel are all available and present at arraignment proceedings – evenings and weekends, in one central location – so that defendants can receive constitutionally guaranteed legal representation.

The most satisfying aspect of this initiative is that the presence of counsel at arraignment is reducing the number of cases in which bail is set. Again, in appropriate cases, responsibly releasing defendants back to their communities is less disruptive to defendants and their families, and in the end saves taxpayer dollars.

In light of our success with these four pilots, we have requested funding in our Budget to support our plan to establish additional Centralized Arraignment Parts this year – in Ontario, Warren, Otsego and Livingston Counties.

## D. INDIGENT CRIMINAL DEFENSE

A fair criminal justice system requires a strong adversarial system, and I am proud that all three branches of government in New York State are working together to support our State Office of Indigent Legal Services as it seeks to extend the key terms of the Hurrell-Harring settlement – counsel at arraignment, caseload caps for attorneys, and improvements in the quality of representation – to each of our 62 counties. As Chair of the Board of Indigent Legal Services, I can assure you that Bill Leahy, our Executive Director, and his dedicated staff, are well on their way to ensuring that the funding authorized by Governor Cuomo and the Legislature is used as envisioned – to set the national standard for a properly-funded, high-quality public defense system.

## E. THE JUSTICE TASK FORCE

Continuing with the theme of improving the fairness, effectiveness and accuracy of our criminal justice system, I want to focus on the work of the New York State Justice Task Force, which is dedicated to criminal justice reform and led by former Court of Appeals Judge Carmen Beauchamp Ciparick and Acting Supreme Court Justice Mark Dwyer. The Task Force has already generated an extraordinary body of reforms addressing the systemic causes of wrongful convictions, including expansion of the DNA Databank, greater access to post-conviction DNA

testing by defendants, legislation requiring videotaping of custodial interrogations, improvement of identification procedures used by police and prosecutors, and admission of photographic identifications into evidence.

This past November, the Administrative Board of the Courts adopted a new rule that requires judges presiding over criminal trials to issue standing orders advising prosecutors and defense counsel of their professional responsibilities. The order addresses the prosecution's obligation to disclose exculpatory information, and defense counsel's obligation to provide constitutionally effective assistance of counsel, including what that obligation actually entails.

The order, colloquially referred to as the "Brady Order," addresses two identified causes of wrongful convictions: Brady violations and ineffective assistance of counsel. It is the first of its kind in any criminal court in the nation, and I want to thank Barry Scheck and Peter Neufeld of the Innocence Project for their wise counsel and support in helping us to achieve this significant reform.

Additional recommendations recently made by the Task Force – regarding attorney discipline and the proper use and understanding of the term "misconduct" to distinguish between good faith error and intentional wrongdoing, the circumstances under which lawyers and judges have an ethical duty to report attorney misconduct, and implementation of enhanced training of disciplinary authorities to properly investigate attorney misconduct in the criminal context – are now under review and, where appropriate, will be converted into practice.

I want to thank the Task Force's Co-Chairs; the highly-skilled and dedicated Task Force members; Counsel Angela Burgess, a busy partner at Davis Polk & Wardwell who always, at every turn, provides sound advice to the Task Force; and, of course, Davis Polk & Wardwell for its outstanding and generous pro bono and administrative support.

## IV. The Opioid Crisis

I think everyone assembled here would agree that justice must be tempered by compassion and a thoughtful approach to the societal problems reflected in our court dockets. This is especially true for the many New Yorkers who have fallen victim to the tragic and frightening consequences of the opioid epidemic. Here in New York State we are adjusting our court processes to reflect our belief that justice without compassion can be unacceptably cruel.

According to the latest numbers from the Centers for Disease Control and Prevention, over 64,000 people died from drug overdoses in the United States in 2016, more than the number of American lives lost during the entirety of the Vietnam War.

## A. BUFFALO OPIOID INTERVENTION COURT

In response, we have opened our first Opioid Intervention Court – the first of its kind in the nation – in the City of Buffalo, a City hit hard by this national public health crisis.

In this court, charged offenders identified as high risk for opioid overdose are immediately linked to intensive treatment. Within 24 hours of arrest, consenting participants represented by counsel are placed in a medication-assisted treatment program. That treatment regimen is followed by up to 90 days of daily court monitoring, with the legal process held in abeyance. What makes the Opioid Intervention Court so unique, in addition to its treatment protocol, is that the treatment plan is prioritized above prosecution, even more so than in other problem solving courts, with the legal process being flipped in order to save lives.

I want to publicly acknowledge the work and commitment of the Presiding Judge of the Buffalo Court, Craig Hannah, a remarkable individual, perfectly suited to lead this Court, the Erie County District Attorney, John Flynn, who agreed to suspend prosecution during treatment to achieve the end result we all hope for – a disposition that supports sobriety, public safety and the well being of our communities, and Project Director Jeff Smith, who took the lead role in developing the Opioid Court model and has worked tirelessly to foster its effectiveness.

Since opening last May 1st in a jurisdiction that experienced the overdose deaths of dozens of defendants over the course of several years, the Court has experienced just a single overdose death among its 204 participants. Extraordinary.

While the Court's original mandate was to treat 225 people over a three-year period, it is now on track to triple its original goal, overseeing anywhere between 45 and 60 active participants at any given time.

Recognizing that this Court holds great promise for the rest of the State, we asked the New York State District Attorneys Association to reach out to the defense bar and the treatment community to formulate a Statewide Opioid Action Plan that incorporates the latest knowledge and best practices in this field to guide our courts, the broader justice system and the treatment community in fashioning more effective responses for defendants caught up in the deadly cycle of opioid abuse.

## B. BRONX CRIMINAL COURT OVERDOSE AVOIDANCE AND RECOVERY TRACK (OAR)

Inside New York City, in Bronx County, where 261 people died from opioid overdose in 2016 – with the final numbers likely to be higher for 2017 – District Attorney Darcel Clark, in partnership with Bronx County Criminal Court Supervising Judge George Grasso, Bronx

Community Solutions, the defense bar, and treatment providers have adopted the Bronx version of an Opioid Treatment Court – a specialized case track called OAR – the Overdose Avoidance and Recovery Track – for misdemeanor offenders at high risk of opioid overdose.

District Attorney Clark, like District Attorney Flynn in Buffalo, has wisely determined to suspend prosecution of cases at arraignment for accused persons who enter treatment immediately and agree to waive speedy trial and motion practice. The protocol adopted in Bronx County highly incentivizes treatment as the District Attorney has agreed, where no new arrests occur while the case is pending, and upon completion of treatment, to dismiss the case and have the record sealed.

We look forward to expanding the OAR approach to the rest of New York City. I have asked Judge Grasso to coordinate this effort and to work with our Administrative Judges, District Attorneys, defense bar and the treatment community to institutionalize the OAR approach Citywide. Judge Grasso has already begun his work, and we look forward to reporting on our efforts to stem the rising tide of opioid cases.

## C. STATEWIDE NARCAN TRAINING FOR COURT OFFICERS

The final piece of our Opioid initiative rests on the shoulders of our well-trained, highly-skilled and compassionate New York State Court Officers who last year received the training required to administer "Narcan," the critical antidote drug that miraculously -- and instantaneously -- reverses an opioid overdose.

Our training investment has already paid off. In just a few months, Court Officers have saved the lives of four people overdosing on opioids in and around our courthouses. Thank you, Chief Michael Magliano, Chief Joseph Baccellieri, and all our uniformed Court Officers who do an outstanding job, day in and day out, serving and protecting the millions of people who enter our courthouses every year. You make us all proud, and we are grateful for the safe environment you provide.

I take great pride in leading a court system that is responding to the complex societal problems reflected in our caseloads through innovative approaches like the Buffalo and Bronx Opioid Courts. And I want to thank Judge Sherry Klein Heitler, our Chief of Policy and Planning, and her staff, for the work they are doing statewide to make sure we are a court system capable of meeting the unique needs of every class of litigant.

# V. The Future of the New York City Housing Court

High on our list of reform priorities is the future of the New York City Housing Court. Last year, mindful of the fact that New York City is experiencing its highest levels of homelessness since the Great Depression, and that the City has enacted the Universal Access to Legal Services Law to provide legal assistance to low-income tenants facing eviction, I announced at the State of Our Judiciary the formation of the Commission on the Future of the New York City Housing Court, co-chaired by Appellate Division Justice Peter Tom and Supreme Court Justice Joan Lobis.

As fate would have it -- and somewhat ironically -- after delivering that State of Our Judiciary Address, as we were driving away from the Bronx Hall of Justice up the Grand Concourse past 166th Street, I saw a large crowd of people standing in the cold on the sidewalk outside of a building. I asked Officer Sam Torres, who was accompanying me that day, if he knew what was going on. He quietly said to me: "Judge, that's your Bronx Housing Court."

Needless to say, that sobering image is the very reason why I am so grateful to Justices Tom and Lobis and the Commission members for promptly getting to work and providing us with recommendations that are insightful, practical and meaningful.

Not surprisingly, the Commission found that the New York City Housing Court is one of the busiest, most overburdened courts in the nation. And as you might imagine, the litigants in this court are overwhelmingly people of modest means, frightened of losing their homes, or frustrated by living conditions that threaten the health and well being of their families. Landlords, too, come to Housing Court with legitimate issues and concerns about losing their properties and livelihoods, and falling into financial difficulty.

The Commission's report comes at a critical time in the Housing Court's history, with the new legislation expected to greatly reduce the enormous volume of unrepresented tenants who appear in that court every day -- in person -- to respond to notices of eviction and other petitions. This welcome change simultaneously presents us with the opportunity to improve the delivery of justice, and the challenge of making sure our already overcrowded dockets do not become more unwieldy and slow moving in the future.

Fortunately, the Commission's recommendations provide the roadmap we need to strengthen Housing Court operations and improve the efficiency and quality of the litigation experience. And we are wasting no time in implementing the Commission's excellent recommendations. Chief Administrative Judge Marks will personally lead a group of high-level judges and court managers responsible for implementing the recommended changes, including Judge Anthony Cannataro, our new Administrative Judge of the New York City Civil Court (who will also undertake a broader review of Civil Court operations). This implementation group will

follow through on major operational changes, adoption of court rules and legal forms, relocation and redesign of facilities, access to justice enhancements, and expanded technology, ADR and court security.

I want to thank the Commission for providing a strong vision and excellent direction for the future of the New York City Housing Court.

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The Excellence Initiative is about much more than standards and goals. Ultimately, it is about decisional excellence – supporting the ability of judges to make fair, timely and wise decisions, and the ability of our courts to deliver high quality, cost-effective justice services.

The state of our society is reflected in our court dockets. And whether it is criminal justice reform, Rikers Island, homelessness, foreclosures, opioid abuse, or an alarming increase in child abuse and neglect cases – it is our responsibility to respond.

I know first-hand that our judges and court personnel are highly motivated to respond. That is the energy, commitment and vision that fuels our Excellence Initiative as we work at every level of the justice system to meet the challenges of delivering justice in a complex, fast-changing society.

# VI. Families and Children

## A. IMPLEMENTATION OF RAISE THE AGE LEGISLATION

We have trained our focus on children whose lives intersect with the justice system as we implement the new "Raise the Age" legislation. Going forward, we anticipate that approximately 18,000 16- and 17-year olds will be diverted from the criminal courts to our family courts. We are pleased and excited that New York is finally putting the focus where it should be – on helping young people stay on track for productive lives.

We will be ready and prepared for a smooth transition from criminal to family court, mindful of the complex operational and legal hurdles we must address around the provision of legal counsel, appropriate housing of children who must be detained, training of judges and court staff, as well as new data delivery protocols essential to managing this sensitive caseload.

All of these issues are being carefully examined by our Administrative Judges and nonjudicial managers across the State. We are relying on the implementation plan and protocols being developed by our committee of Criminal and Family Court Judges and managers, under the leadership of Deputy Chief Administrative Judges Edwina Mendelson and Michael Coccoma, who have been working closely with judges; staff; the State Office of Children and Family Services;

the State Division of Criminal Justice Services; State and local departments of social services; the Mayor's Office of Criminal Justice; corrections and probation; District Attorneys; counties and their county attorneys; the defense bar; and attorneys for children.

## B. MENTORING PROGRAM IN THE NEW YORK CITY FAMILY COURT

For every child – rich or poor; a child lucky to live in a stable environment; or a child, by chance, living in a less than desirable environment – a meaningful relationship with a strong mentor can make all the difference in the world.

I am so pleased and proud to announce that we have partnered with the New York State Mentoring Program to match young people aging out of the foster care system with inspirational adult mentors who can help them develop the confidence and self-esteem they need to make positive life choices and succeed in the adult world. Experience has shown that committed and competent role models can help children overcome enormous personal, economic and social disadvantages. Under the unique New York State Mentoring Program model, vetted mentors meet one-on-one with their mentees on a weekly basis in a supervised environment to establish that special bond and interest that can make the great difference in a child's life.

I want to thank the founder of the New York State Mentoring Program, Matilda Raffa Cuomo, for recognizing and promoting the power and value of mentoring in the lives of children, and for her commitment to providing safe mentoring services to children in our Family Courts. Thank you, Mrs. Cuomo, New York State Mentoring, Judge Jeannette Ruiz – for getting this program off the ground, and Judge Andra Ackerman, for planting the seed.

## C. COMMISSION ON PARENTAL LEGAL REPRESENTATION

We are also focused on supporting the well being of children by supporting the legal needs of their parents. New York's parental representation system has suffered from many of the same systemic deficiencies that once afflicted our indigent criminal defense system, including excessive attorney caseloads, inadequate training, and insufficient funding for support staff and services.

I have asked the former Presiding Justice of the Appellate Division, Third Department – Karen Peters – to lead a new Commission on Parental Legal Representation to examine the current state of mandated Family Court representation and determine how best to ensure the future delivery of quality, cost-effective parental representation.

Judge Peters' broad experience, including as a former Family Court Judge, will be invaluable to leading the work of the Commission. She and the judges, legal service providers, child welfare experts, and county and state officials on the Commission will work with the Office

of Indigent Legal Services – particularly Director of Quality Enhancement, Angela Burton – to build upon the groundwork being done across the State to improve the quality of parental legal representation.

## D. FAMILY COURT – PAPERLESS FAMILY COURT

It is imperative that our courts make smarter use of technology to support the complex, substantive work they perform. I am pleased to say that our New York City Family Court – with over 200,000 new case filings each year – is leading the way in this regard, having recently become the largest paperless court in the State, and one of the largest in the country.

The benefits of going all digital in newly-filed cases are obvious. It improves efficiency and accessibility, streamlines case commencement, allows parties to view and print signed orders and petitions remotely, and facilitates efficient management of the court's staggering caseloads.

Thank you to Chief Clerk George Cafasso; Deputy Chief Clerk Michael McLoughlin; and Chip Mount and Sheng Guo from our Division of Technology.

I, too, sat as a Judge in the Family Court, and I know personally what an important difference we can make in the lives of so many families and young people who come before us. To all our hard working judges and staff in the Family Courts – thank you.

## E. BILINGUAL ORDERS OF PROTECTION

In recognition of the amazing diversity of our communities throughout the State, and our responsibility to ensure access to justice for all, we launched a pilot program enabling judges to issue orders of protection in both English and the language of the petitioner. Last year, the Legislature endorsed and codified our pilot program and authorized its expansion. Since its start in March 2015, judges have issued about 25,000 bilingual orders of protection, in Spanish, Russian, Chinese and Arabic, in our Family, Criminal, Integrated Domestic Violence and Matrimonial courts. By the end of 2020, orders of protection will be available, statewide, in the ten languages most frequently spoken here in New York.

I want to thank Judge Deborah Kaplan, recently appointed to serve as the Administrative Judge of the New York County Supreme Court, Civil Term, and who was our Statewide Coordinating Judge for Family Violence Cases, for the excellent job she did leading the work of that office.

# VII. Civil Justice

## A. NEW CIVIL PRACTICE RULES

Our Commercial Division of State Supreme Court has built a reputation for excellence and earned the respect of court and business leaders around the globe. The Commercial Division has led the way in adopting innovative reforms to streamline civil litigation, improve efficiency, and reduce litigation costs, including: limits on interrogatories and depositions, quicker resolutions of discovery disputes, time limits on trials, and direct testimony by affidavit.

There is no reason to keep our successes confined to the Commercial Division. I have asked our Advisory Committee on Civil Practice to evaluate the Commercial Division rules and amendments, and recommend which of them should be adopted broadly throughout our civil courts. The process is underway and the Committee will submit its report and recommendations to us by May 1st.

## B. PILOT PROGRAM: FAST-TRACKING INSURANCE CASES

Anyone reviewing our civil docket would immediately recognize the high percentage of cases involving major insurance company defendants. For many reasons, these cases have taken an inordinate amount of time to resolve. The litigants in these cases need their matters resolved promptly, and our Deputy Chief Administrative Judge for the Courts inside New York City has responded by setting up four pilot programs that have been a smashing success, consistently settling between 60% and 100% of calendared cases in New York, Kings, Bronx and Richmond Counties.

The program differs from prior efforts involving major insurance carriers because the assigned judges are intervening at an earlier stage, before significant time and resources have been expended on discovery and trial preparation. Cases that ordinarily would drag through our system for years are now being resolved within a year of filing. The pilot has been so successful that additional carriers and high-volume litigants have asked to participate. As you would expect, we are expanding the program.

I think Judge Silver would be the first to agree that this is not about rewriting the code. It's about understanding the charge, and thinking outside the limitations and constraints of past, dated protocols and practices. Thank you, Judge Silver, the judges and staff in the pilot parts, and all of the participants.

Thoughtful approaches like this one, and our demonstrated willingness to try new ideas and implement new practices, reflect our commitment to deliver high-quality services to the people who come to our courthouses in search of justice.

### C. NEW YORK CITY SMALL CLAIMS COURT.

The New York City Small Claims Court is where tens of thousands of individuals and small business owners appear each year – typically without a lawyer – to resolve disputes under $5000. It is truly the "People's Court." While the issues may not be as complex as those heard in our other civil courts, they are critical to the people who appear in Small Claims Court every day. By making some fundamental adjustments to our operations, including expanding our staffing levels and hours of operation, we have reduced the average time between the filing of a claim and the first court appearance by more than half, resulting in timely and improved services for the litigants in this court.

## VIII. Access to Justice

Our commitment to the prompt adjudication of cases and controversies goes hand in hand with our commitment to meaningful access to justice. Our Permanent Commission on Access to Justice, led by Helaine Barnett, has been a catalyst behind New York's status as a national leader in addressing the civil legal needs of low-income people.

### A. A STRATEGIC ACTION PLAN FOR NEW YORK

This year, thanks to the wisdom and commitment of Governor Cuomo and the Legislature, we anticipate that $100 million dollars will again be included in our Budget for civil legal services funding. This funding is absolutely critical to our efforts, but we have learned that money alone – without a plan – cannot close the justice gap.

We have been careful, strategic and smart in our approach to legal services funding. Going forward, I want to assure the Governor, the Legislature, New York State taxpayers, members of the legal services community, and every New York lawyer, general counsel, law student and law school that has demonstrated the moral vision and generosity necessary to help close the justice gap, that we are well on our way to devising a Strategic Action Plan for our State that will integrate all of the resources and services at our disposal into an efficient and effective delivery system that avoids duplication and potential waste and fills existing gaps in services.

My role is to lead us to the place where we are leveraging, to the maximum extent, every private and taxpayer dollar and every hour of lawyer pro bono service that has been dedicated to our civil legal service efforts.

Our Strategic Action Plan for New York State, led by Chair Barnett and the Commission, and funded by a grant from the National Center for State Courts, is underway – featuring the launch of a pilot project in Suffolk County focused on developing a technology platform and

community resource model that together will significantly enhance access to justice at the local level. The Suffolk Pilot will spawn local strategic plans around the State, with the goal of knitting those plans together into an overall statewide network that makes the most effective use of all available resources. This is a high priority for us, and we look forward to working with our partners throughout the State to implement the Action Plan.

Thank you to Helaine Barnett, members of the Commission, Judge Hinrichs and all the stakeholders from Suffolk County who are providing the blueprint for us to take statewide.

### B. STATEWIDE OFFICE FOR JUSTICE INITIATIVES

Access to justice is advanced in many different ways and through countless worthy initiatives across the justice system. And, here, I would like to acknowledge our Deputy Chief Administrative Judge in charge of Justice Initiatives, Judge Edwina Mendelson. Judge Mendelson and her staff have a broad portfolio of initiatives to promote access to justice from within the court system, including court-based programs that provide pro bono legal and informational assistance to litigants as well as a wealth of web-based resources that reach well over a million people a year.

Judge Mendelson's mission crosses every court – criminal, civil, family and housing – as she works to eliminate access to justice barriers and ensure that the two million New Yorkers who are fluent in 150 different languages are able to participate meaningfully in court proceedings, and that no person is denied meaningful access to the courts because of a disability.

## IX. Pursuing Excellence

### A. BRINGING THE EXCELLENCE INITIATIVE TO SURROGATE'S COURT

Timeliness and efficiency are priorities in all of our courts, and especially so in our Surrogate's Courts, where surviving family members or minors and the developmentally disabled in need of guardianship should not be exposed to unnecessary delay.

As we undertook to examine the way we have been conducting business in the Surrogate's Court, our first challenge was to identify the number and types of cases pending, and the ages of those cases. The Surrogate's Court Clerks and our IT staff got to work and started the process of collecting detailed caseload data. They are now preparing the statistical reports necessary to track caseloads, measure court performance, and implement the operational changes and adjustments necessary to expedite and thereby improve our services.

Effective this Spring, for the first time, standards and goals will be in place for Surrogate's Court proceedings. And thanks to new case management software and dashboards, we are tracking our caseloads, measuring our performance, and better managing our work in every area of this important court's services.

I want to thank the Surrogate's Court Judges Association, led by Oneida County Surrogate Louis P. Gigliotti, for being so helpful and receptive to this effort.

## B. APPELLATE JUSTICE

This address would not be complete without recognizing our terrific Appellate Division, led by Presiding Justices Rolando Acosta, Alan Scheinkman, Elizabeth Garry and Gerald Whelan – all of whom are constantly striving to achieve excellence in their courts.

Last year, we began the effort to develop a uniform set of rules to harmonize appellate practice across the State in key areas such as service and filing procedures, general motion practice, and methods of perfecting an appeal. Under the direction of the Presiding Justices, the Chief Clerks of each of the four Departments – Susanna Rojas, April Agostino, Robert Mayberger, and Mark Bennett, who was preceded by Fran Cafarell – worked closely with OCA Counsel, John McConnell, to draft joint rules. The rules were issued for public comment over the Summer, amended to incorporate the excellent commentary received, and I am pleased to inform you today, have been approved by the Administrative Board. They will take effect on September 15, 2018. There is no question in my mind that the new uniform rules will have a positive impact on New York appellate practice.

The four Departments have also adopted joint e-filing rules, to take effect shortly, on March 1st. Kudos to the Presiding Justices, including the recently retired Presiding Justices in the Second and Third Departments – Randall Eng and Karen Peters and their excellent staffs – for bringing the convenience and savings of e-filing to our appellate courts.

And since we all recognize that transparency is a most important step in building public confidence and respect for our courts, we are proud to showcase the live streaming of oral arguments from each of the four Departments and the Court of Appeals. Enabling the public to watch our work from internet-connected devices, and digitally archiving our proceedings, is a wonderful way for everyone to see our appellate process at work.

## C. GUIDE TO NEW YORK STATE EVIDENCE

In July 2016, I established the New York Evidence Committee, co-chaired by former Court of Appeals Judge Susan Read and retired Nassau County Supreme Court Justice William Donnino, with Albany Law Professor, Michael Hutter, serving as Counsel. I charged the Committee

with developing a definitive Guide to New York Evidence in response to the fact that New York is one of the very few states in the nation not to have a statutory code of evidence. In fact, our law of evidence is scattered in many different statutes, judicial decisions and court rules.

The Committee has already published three installments of the Guide, – General Provisions, Relevance, Hearsay, and later this month, Impeachment and Other Witness Rules. While several more chapters remain to be completed, there is no doubt that the ultimate product – a single, accessible guide to New York's law of evidence – will be of enormous value to the Bench and Bar in our State. It is also an important component of our Excellence Initiative, reflecting our commitment to provide a strong foundation for decisional excellence.

Along with my judicial colleagues and the entire legal profession, I look forward to future chapters and the eventual completion of the Guide to New York Evidence. I want to thank the Co-Chairs and Committee members for their commitment to this important effort.

## D. TRAINING FOR EXCELLENCE

Judicial education and training lie at the core of excellence and productivity, enabling judges to stay current on developments in the law, science and technology, and countless other fields affecting the delivery of justice. This is why we have re-introduced our annual Summer Judicial Seminars, enhanced the curriculum at our annual New Judges program, convened new Appellate Training Seminars for both judges and court attorneys, and integrated principles of effective case management into the training curriculum for judges and nonjudicial managers.

I want to thank the Dean of the Judicial Institute, Judge Juanita Bing Newton, and her staff, for the extraordinary job they do to ensure a modern and robust training regimen for judges, court attorneys and court clerks.

## E. JUDICIAL TASK FORCE ON THE NEW YORK STATE CONSTITUTION

In our pursuit of excellence, we have often experienced frustration with barriers that hinder our progress. We are supposed to be a "unified" court system, but the reality is that we have eleven separate trial courts with many outdated jurisdictional restrictions that prevent us from properly and efficiently managing our people and resources.

Neither the federal courts nor any other state court system labor under the same kinds of archaic restrictions. In fact, Article III of the United States Constitution, which totals fewer than 400 words, states very simply: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By contrast, Article VI – our Judiciary Article in the New York State Constitution – contains over 16,000 words spread over 37 sections, and dictates details of our existence best decided by the Legislature or Court Administration.

Amending the Judiciary Article to modernize our organizational structure is a top concern for us, as it should be for every elected official who cares about court efficiency and the considerable savings which can be achieved. We are not deterred by last year's "thumbs down" vote on a Con Con. Yes, I saw all the lawn signs and bumper stickers and heard the radio ads, but it was crystal clear that the voters were not at all focused on the Judiciary Article of the Constitution. We are determined to continue moving forward and working with the members of our Judicial Task Force to develop and propose practical constitutional amendments that can be achieved through the legislative and referendum process.

I want to thank the Task Force members, a uniquely qualified group of individuals, for their service. I encourage those of you who have reached out to our members to continue to do so and inform them of your views, ideas and experiences. We look forward to developing our plan, informed by the Task Force's recommendations, and presenting it to the Legislature for action.

## F. TASK FORCE ON LEGAL ASSISTANCE RELATED TO HURRICANES HARVEY, IRMA AND MARIA

In bringing this State of Our Judiciary address to a close, I want to turn, for a moment, to matters external to our courts yet integral to who we are as a caring legal profession.

Last Summer, as we watched the news coverage of Hurricanes Harvey, Irma and Maria in Texas, Florida and Puerto Rico, we all grieved for our fellow Americans. Not surprisingly, one could literally feel the sense of urgency developing in our New York legal community to respond to these disasters and assist in every way in which our training and experience as lawyers and court administrators would allow.

In very short order – literally over the course of a morning and a few simple phone calls – the New York State Task Force on Legal Assistance Related to Hurricanes was established, and as events unfolded, it quickly expanded from Harvey to encompass Irma and Maria. Under the leadership of John Kiernan, President of the New York City Bar Association and a partner at Debevoise & Plimpton, and Sharon Katz, Special Counsel for Pro Bono at Davis Polk & Wardwell, the lawyers and court officials on the Task Force moved with lightning speed to mobilize and coordinate pro bono efforts to assist the victims of these natural disasters with a staggering number of legal matters, especially FEMA applications and appeals.

On behalf of the Judiciary and the entire legal profession, I want to publicly thank the Task Force and the many lawyers, bar associations, legal service providers and law schools – too numerous to mention here, though the New York City and Puerto Rican Bar Associations deserve special mention – who responded so quickly and selflessly to alleviate the suffering of their fellow Americans by establishing clinics for displaced victims; arranging for placements of pro bono

representation; training volunteer lawyers; marshaling support from legal service providers and law firms outside the affected areas; raising and donating charitable funds to disaster relief groups; and providing expert consultation on FEMA and other legal disaster relief issues.

This is what we do as lawyers. And, I can assure you, the assistance we are all providing is critical and very much appreciated. I recently received a letter from the Chief Judge of Puerto Rico, Maite Oronoz Rodriquez, thanking us for our assistance and donation of needed technology equipment installed in courthouses throughout the Island – essential, in her words, "not only to reestablish judicial activity, but to help the community with legal aid and hurricane relief."

## X. Conclusion

Last year, I concluded the State of Our Judiciary with a story about the beautiful clock hanging in the lobby of the Manhattan Criminal Court building at 100 Centre Street.

Our experience with repairing that clock – after years of being frozen in time – has come to symbolize who we are as a court system. As you have heard today, the judges and staff of the New York State courts have been working diligently over the last year to fix what's broken and to build and maintain a well-functioning court system. To them I say – the road to excellence is long and arduous, but the destination is worth the hardest effort.

I am grateful to all of my colleagues here at the Court of Appeals; our trial and appellate judges, and staff, for your hard work on the front lines; Chief Administrative Judge Marks; the Presiding Justices of the Appellate Division; Deputy Chief Administrative Judges Mendelson, Coccoma and Silver; our team of Administrative and Supervising Judges; Executive Director Ron Younkins and our non-judicial court managers; and our Public Safety leadership and Uniformed Court Officers – thank you all for leading the way as we work together to build a system that supports both operational and decisional excellence in every court throughout the State.

We can look back on the last two years with great pride and a sense of accomplishment. And while there is more to do, we look to the future with confidence and optimism, because we are poised and positioned to build upon everything we have achieved to date.

I look forward to working together with all of you as we strive for excellence.

Congratulations to you all. We have every good reason to be excited about the future of our Judiciary.

Thank you for your kind attention.


# REPORT AND RECOMMENDATIONS BY THE PRESIDENT'S COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES

JUNE 2018

NEW YORK CITY BAR ASSOCIATION
42 WEST 44TH STREET, NEW YORK, NY 10036

NEW YORK CITY BAR

# REPORT AND RECOMMENDATIONS BY THE PRESIDENT'S COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES

## I. INTRODUCTION

The main participants in litigation – the judges, clients and advocates – widely recognize that civil litigation often costs too much and takes too long. While the system for resolving disputes fosters the full discovery of facts to promote fair resolution, in too many cases the cost and duration of the litigation process competes powerfully with fairness in driving the terms of resolution. Litigation can be so expensive that unless the dispute involves a very significant principle or dollar amount or the dispute can be resolved on a dispositive motion, the cost of litigating to a decision is not affordable. For those who cannot afford to achieve a decision, access to justice may be effectively denied. Because courts are burdened by so many cases, the sheer volume of disputes often determines how judges can manage their cases.

These problems often arise because participants in the dispute resolution process take steps reflexively based on what they consider the accepted approach, without giving sufficient consideration to available steps that could be more cost and time efficient. This Report recommends that participants in litigation instead embrace changes in our litigation culture and in standard practice that would accelerate what has been a slow but steady evolution toward greater emphasis on efficiency and avoidance of unnecessary cost and delay. Even where parties are, for understandable reasons, committed to expensive and lengthy litigation, taking some or all of the recommended steps would significantly increase the cost effectiveness of the process.

To address the excessive cost and duration of dispute resolution, in 2017 the New York City Bar Association ("City Bar") formed a President's Committee for the Efficient Resolution of Disputes (the "Committee"), including representatives of several City Bar committees. Over the past 18 months, the Committee has gathered information, perspectives and wisdom from many of our City's and State's most thoughtful and engaged judges, judicial administrators, advocates, clients and neutrals. With those inputs, the Committee has developed specific recommendations for change in the dispute resolution process to increase efficiency and reduce cost, and a list of Best Practices for the Efficient and Cost-Effective Resolution of Disputes. We submit that seeking efficiency should become standard practice whether resolution is achieved through a negotiated or mediated settlement, through conventional litigation to a decision, or through arbitration or any other ADR method. In many civil matters, seeking greater efficiency is not just prudent but essential to assure that parties can have access to the justice our court system aims to provide.

Because of ingrained habits that have long been accepted, accomplishing the necessary changes called for by the Committee's recommendations and Best Practices will require a strong exercise of collective will by the bench and bar. To achieve the necessary changes, it will be essential that the judiciary use its authority, and that advocates engage cooperatively with adversaries to streamline the process and educate their clients on options for pursuing less expensive and faster resolution of their disputes. Bar associations will also need to exert leadership in urging participants in the dispute resolution process to understand and embrace the overall benefits of the proposed changes.

Because different civil practice areas and the differences between Federal and State courts will necessarily require varying changes in practice, each sensibly adapted to the circumstances, the City Bar and the Committee hope to work directly with the bench and bar to both promote and support change in specific areas of practice and the sharing of perspectives.

Members of the City Bar can and should play significant roles in promoting a collective will within the bench and bar in support of the recommended changes.

## II. THE EVOLUTION OF THE LITIGATION PROCESS HAS LED TO EXCESSIVE COST AND DELAY

Our dispute resolution culture has long been driven by the admirable concept of reaching resolution based on full disclosure of facts rather than surprise. In the 1930s that idea, aimed at eliminating trials where gamesmanship could be a determining factor, led to adoption of the new Federal Rules of Civil Procedure. Those rules were designed to open discovery so that parties could either try or settle their cases with knowledge of all relevant facts. Over time New York and other states essentially replicated the relevant provisions of the Federal Rules. Under the rules, the filing of a complaint would set the parties and counsel onto a procedural path designed to put them in possession of the "relevant" facts, very broadly defined. Many parties and counsel expected that they could be on that path for years before a dispute was resolved; and they came to expect that various steps in the formal litigation process would be necessary before resolution. As a result, participants often did not focus on pursuing more efficient and cost effective steps to resolve their disputes, or on identifying and embracing ways the litigation process itself could be made more efficient.

As the concept of open discovery evolved, courts resisted early disposition of claims based on less than a "full" factual record. As disputes took more time to resolve, court dockets grew and the burdens of those dockets increasingly affected case management. Courts found that allowing the process to be self-executing meant less court time spent with each matter and a reduction in the burden of case management. But that also meant more expense and time spent by the parties.

Lawyers were trained to see pursuit of all facts and legal theories as a mark of professional diligence and excellence, leading them to pursue extensive discovery and claims, defenses and motions having only very limited prospects of providing a return for the effort. Often parties and counsel pursued aggressive and burdensome steps as accepted practice without carefully considering whether such an approach would likely result in net benefits. Technology,

first the copier and then e-discovery, led to exponential increases in the costs and burdens of discovery. Legal fees meanwhile grew at rates much faster than inflation.

In civil disputes it became common for parties to turn matters over to their lawyers and, even though the disputes could have significant effects on their business or personal interests, not to remain closely involved with the process as they would with their other matters. Parties and counsel, and often courts, considered settlement to be achievable only after the litigation process was significantly advanced, often to the eve of trial. Posturing by clients and counsel, the determination to inflict pain on the adversary, delay to make the opposition yearn for settlement, and avoidance of overtures to settle or streamline the dispute as signs of weakness all contributed to the avoidance of options for resolving disputes early. For large numbers of disputes the prohibitive cost of litigating to a final judgment frequently came to outweigh the merits as a primary factor affecting the terms of settlement.

Often lost as the process evolved was the goal of ensuring the affordability of a resolution based on the merits. Although both the Federal and New York State Court Rules begin with language emphasizing the objectives of "just," "speedy" and "inexpensive" resolution, in far too many cases such a result became unattainable. Pursuit of the formal litigation process was presumed to be in the best interests of the parties, but very often it denied parties access to justice because those same parties could not afford it.

## III. EFFORTS TO ADDRESS THE PROBLEM

Reflecting the recognition by many that accepted litigation practice needs to be changed, important efforts have been made to make dispute resolution less expensive and time consuming. The American Bar Association, Federal Judicial Center, and American College of Trial Lawyers, along with the City Bar and others, have issued reports emphasizing the excessive cost and delay in litigation, and recommending changes. Federal Rule changes, including the adoption of the seven-hour deposition rule and introduction of the concept of proportionality in discovery, are examples of rule-based efforts aimed at reducing cost and delay. Efforts in our state courts such as "Settlement Days" for insurance disputes and "Residential Foreclosure Days" in real estate, and direct involvement by federal and state court judges early in proceedings to encourage cost effective case management and resolution, have frequently brought benefits. Groups such as the Advisory Council for New York's Commercial Division have, together with the courts, sponsored helpful innovations aimed at greater efficiency. Positive steps have included: setting limits on the number of depositions and interrogatories, emphasizing options for accelerated procedures to reach trial (or "mini-trials" of discrete, potentially pivotal issues) with parties' agreement, requiring counsel to certify that they have discussed mediation and other forms of ADR with their clients, and introducing procedures for streamlining trial procedures.

Court systems and individual courts, including each of New York's federal district courts and several of New York State's courts, have adopted forms of court mandated or recommended mediation, including mediation early in cases before parties have spent large amounts on legal fees that could be used to bridge the gap between the parties. While there have been missteps, some of these programs have achieved striking success through settlement of a large percentage of cases with evident efficiency and significant reductions in cost.

Also, many judges, clients and counsel have undertaken the steps that we recommend below in order to promote efficiency. Those steps have included a significant increase in the practice of including dispute resolution clauses in contracts, often requiring high-level negotiations or mediation before a complaint is filed.

There is much to be admired in these efforts, and much can be learned from them. But a significantly enhanced commitment by the bench and bar is still needed to achieve a broad consensus in favor of changing our litigation culture to focus more intently on efficiency and access to justice.

## IV. WHAT THE CITY BAR SHOULD DO

When our Committee met over the past year with judges, judicial administrators, advocates, clients and neutrals and heard their many helpful observations and suggestions, we regularly asked them what the City Bar should do. The two suggestions consistently offered were that the City Bar should (1) present strong recommendations for change to promote greater efficiency in resolving disputes; and (2) publish a list of Best Practices for Efficient and Cost-Effective Resolution of Disputes. Recognizing that taking such action to promote greater fairness and efficiency in the administration of our courts is consistent with the City Bar's history and mandate, this Report follows those recommendations. Our objective is to promote as standard practice a significantly enhanced commitment by courts, counsel and parties to efficiency. That would mean replacing current practice – often driven by reflexive, costly and sometimes purposefully burdensome posturing and steps – with a culture in which thoughtful decisions by both counsel and the parties as to the most cost efficient ways to reach a resolution become standard.

If judges, parties and counsel have the will and commitment to make the necessary changes, New York could be a leader and achieve more than other states have in promoting efficiency in litigation. Parties might consider such a change in favor of efficiency as a mark of distinction for New York and, as a result, be drawn more often to resolve disputes and conduct their business here.

## V. PRINCIPAL RECOMMENDATIONS

To achieve such essential changes in accepted practice, we must temper the long accepted idea that full fact-gathering and the need to impose litigation burdens on adversaries should be principal drivers in the resolution of disputes. While full development and discovery of "truth" is better than surprise, a system focused on efficiency would be superior to the current system that frustrates the pursuit of resolution on the merits by imposing excessive cost and delay.

Inspired by recent changes in the Federal Rules and the Commercial Division Rules favoring proportionality in discovery, we believe that the concept of proportionality – keeping cost and time in proportion to what is at stake – should be a focus for efficient management and resolution of all aspects of the litigation process. Just as new rules are now aimed at eliminating

the burdens of excessive discovery, there should be a similar commitment to avoid unnecessary claims, defenses, motion practice and other procedures that increase cost and delay.

Limiting the scope and duration of the dispute resolution process should not be a step back from fair resolution on the merits of the parties' positions. Instead, it should direct participants in disputes toward the cost-effective and efficient pursuit of fair resolutions - whether through decisions or through settlements. While expeditious, relatively low cost resolution cannot be achieved in all disputes, it can be achieved in many that are today caught up in a formal litigation process too burdensome to be effective. The goal should not be completing all or any specific part of the formal process but, instead, achieving either a sensible and mutually acceptable negotiated settlement or an affordable decision. It will in many – likely most – cases be in the parties' economic self-interest to treat efficiency and proportionality as goals that will promote, not detract from, resolution on the merits.

To achieve the necessary efficiency, we recommend that as a matter of accepted practice the participants in the dispute resolution process regularly take the steps set out below. We believe that it would also be beneficial to include the recommended steps in training law students as to what should be standard practice in our litigation culture.

### A. Manage Disputes Efficiently from the Outset

At the outset of a matter, even before a complaint has been filed, rather than just plunging into the adversarial process and seeing where it may take the parties, counsel should instead proactively consider and discuss with their clients the most efficient potential approaches to a favorable and affordable resolution. Early objective consideration of the strengths and weaknesses of the parties' positions, the prospects for ultimate success, the likely course and expected cost of litigating to a decision and the possible options for pursuing a more cost effective resolution (whether by settlement, determination by a court or by achieving a decision through an alternative method) should be undertaken in virtually every case. The instinct to treat single-minded efforts to defeat the adversary as the exclusive approach until the dispute is thought to have fully ripened should be resisted from the outset. Civil disputes should instead be treated as problems to be solved and/or as commercial risks to be evaluated and managed.

There is ample evidence of the value of early objective evaluation of claims and defenses as compared to deferring rigorous evaluation until the completion of discovery and motion practice. The strengths and weaknesses of each party's position, and forces apart from the merits that may influence the terms of a resolution, are often readily discernible at the outset. Counsel's evaluation of these factors often does not significantly change as facts are later developed or discovered at substantial cost.

The presence of requirements in many commercial contracts that parties negotiate before litigating reflects a recognition of the potential value of such early discussions that should apply equally when parties have not agreed to such processes in advance. Whether based on a contractual provision or not, thoughtful early evaluation can often lead to beneficial pre-complaint negotiation or mediation in most if not all forms of civil disputes.

While many participants in disputes observe that the passage of time can encourage parties to settle, the cost associated with time passing can skew the results, allocate to litigation expense funds better used to achieve a settlement, and result in a denial of access to justice.

### B. Consider the Benefits of Early Negotiation and Mediation

With the objective of keeping costs in proportion to the nature and scale of the dispute, counsel and the parties should as soon as practicable engage in discussions to explore the possible options for resolution. If early settlement is not achievable before a complaint is filed, or shortly thereafter, the parties and their counsel should – as standard practice – work together to manage the process of resolving the dispute with efficiency and proportionality as priorities. Especially when parties have ongoing business relationships or frequent litigation disputes with each other, they should cooperate in trying to develop time and cost-efficient methods for resolving such matters. One party's proposals for greater efficiency should not inspire the other party's instinctive opposition. Reasonable cooperation in sensible management of the controversy will often produce better results for the parties than adversarial conduct.

In addition to early negotiation, counsel and clients should consider the potential advantages of an early, well-conducted mediation. Mediation should not be seen as an intrusion on fact-gathering or on efforts to prevail outright but, instead, as a constructive step toward a sensible end to the dispute. Counsel and parties who believe they cannot be ready for mediation – or negotiations – until the litigation process has run all or much of its course often find that a well-conducted mediation can facilitate cost-effective fact gathering and bring the parties to a resolution much earlier than they expected.

Parties and counsel can avoid significant unnecessary cost by agreeing with a mediator – or on their own – to exchange the important information they need informally. While voluntary early informal exchanges of limited essential information may seem counter-intuitive for many advocates steeped in our adversarial litigation culture, the cost of such exchanges is often much less than the cost of fighting over production and gathering the same facts through the formal litigation process. Often reflexively holding such facts back or objecting to their production until they inevitably must be produced in discovery will serve no purpose and significantly increase expense. By contrast, parties who keep document requests focused and reasonable through exchanges overseen by a mediator – or on their own – will often best serve their clients by avoiding unnecessary motion practice and needless expense. While in some cases deferring such exchanges will be in the best interests of the parties and, for some parties, may be affordable, there will be many cases where that is not so. Our system needs to be geared to make dispute resolution affordable in those cases.

Because mediations require skilled mediators, if mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers.

To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts.

More frequent early evaluation and negotiation that prompts early resolution of cases would, as an important collateral benefit, free more court resources for attention to matters best resolved through litigation to a decision. Many matters that should, for good reasons, be more fully litigated currently move through the system slowly because of crowded dockets and resulting triage-style case management. Accelerated movement of those cases through the process should, among other things, make achievement of necessary decisions affordable. For matters where advocates and clients make thoughtful decisions to continue with the formal litigation process, an orientation toward efficiency and proportionality can be very beneficial.

### C. Counsel Should View Efficient Management of Disputes as a Primary Professional Responsibility

Embracing an obligation to avoid excessive cost and delay, counsel should more readily accept that it will not always be their duty to pursue *every* fact or develop *every* argument. Instead, professional excellence should be found in the sensible management of the matter toward a "just, speedy and inexpensive" result. Strategies of delay or imposition of burden on adversaries are unethical (*see* New York Rules of Professional Conduct 3.2 and Comment 1), and should be viewed as carrying substantial risk of imposing extra cost on all parties without a corresponding benefit to any party. Courts should help to prevent successful application of such strategies.

A zealous advocate should act in the client's interest, and that should mean efficiently seeking a good result in the circumstances.

### D. Courts Should Be Proactive in Encouraging Efficiency and Proportionality

To bring about the necessary changes to reduce cost and delay, the judiciary should take an even stronger hand than in the past – through active oversight of disputes, experimentation with new approaches to efficient resolution, revision of rules as needed, and explicit pursuit of less expensive and earlier settlements or decisions. Rather than keeping hands off and allowing the process to be self-executing, courts should actively engage in promoting the negotiated resolution of disputes and their efficient management to affordable decision. Judges known to be effective in such efforts have earned justified renown.

Impressive settlement rates in jurisdictions where court-mandated mediation has worked reflect the potential to achieve significant system-wide increases in efficiency through mediation, whether court mandated or by agreement of the parties. Rules such as Federal Rule 26(f), requiring that opposing counsel confer early, and NYS Commercial Division Rules 10 and 11, requiring advocates to certify at the initial case conference and thereafter that they have discussed ADR options with their clients, should be enforced. Just eliminating the reflexive

view that an early proposal to pursue early negotiations will be taken as weakness will advance cost and time efficient resolution in many cases.

Courts should use their rule making authority to promote affordable decisions without unnecessary or inefficient steps. The federal court rule limiting depositions to seven hours illustrates what the judiciary can do. Criticized initially as an unworkable constraint on fact-gathering, the rule has caused lawyers to focus on what is and is not necessary, without impeding access to justice. Such assessments as to what is really necessary should become an essential element of cultural change favoring greater efficiency.

So too, presumptively limiting the number of depositions and interrogatories and adopting discovery limits based on proportionality, as in New York's Commercial Division and Federal Rules, are significant steps that warrant judicial reinforcement and extension to other parts of the court system. Directing that essential factual information be produced quickly without argument is yet another way the judiciary can help counsel and the parties achieve a better understanding of how to be efficient.

Courts can also promote less costly and faster resolution of disputes by deciding dispositive motions early and, if unable fairly to resolve a dispute by deciding such a motion, by resolving as many legal issues as possible so that the parties can better focus their litigation efforts or settle with an outcome influenced by the court's input. Taking into account the low statistical probability of a trial, courts should view their analyses of dispositive motions as likely to be the parties' only opportunity to receive judicial input as to the merits. If, as is often the case, cost and other burdens make "full" fact gathering and trial unlikely, delaying the court's decision will not promote a fair resolution based on the merits.

Courts should also do more to discourage motions and other litigation tactics that unnecessarily delay resolution or make litigation more burdensome. Counsel should be discouraged from taking steps that have little or no reasonable prospect of advancing efficient resolution of the litigation, and from proposing approaches to case management that will make obtaining a decision unaffordable. Courts should use such efficiency-oriented techniques as required pre-motion letters to the court and/or court conferences to help reduce the number of unnecessary motions, and should consider proposing processes for accelerated resolution of limited factual issues when resolution of those issues may permit a final decision.

The City Bar and its President's Committee for the Efficient Resolution of Disputes look forward to working with the judiciary and issuing additional reports focused on necessary changes in particular areas of practice.

## VI. BEST PRACTICES FOR THE EFFICIENT AND COST-EFFECTIVE RESOLUTION OF CIVIL LITIGATION IN NEW YORK

Just as the City Bar's previous reports on the importance of civility and the enhancement of diversity have provided important guidance to professionals, the Best Practices set out below should guide the conduct of participants in pursuing the resolution of civil disputes in New York.

The Best Practices are not intended to replace existing court or bar standards but are, instead, consistent with those standards. Thus, for example, a mandate that counsel seek to keep the cost and duration of disputes in proportion to the stakes is consistent with the ethical mandate that counsel act in the clients' interest.

1. Recognizing that efficient resolution of a matter may not require taking all the steps in the formal litigation process, the courts, parties and counsel should from the outset work to keep the cost and time of resolving disputes, whether by settlement or by decision, proportionate to the nature and scale of the matters at issue, and to avoid unnecessary cost and delay.

2. Parties and counsel should, early in the litigation process (if possible before a complaint is filed), objectively evaluate the merits of all parties' positions and the likely course and cost of litigation, so that they can manage their disputes efficiently and, when appropriate, sensibly pursue settlement.

3. Counsel should consider themselves professionally responsible for crafting, discussing with clients and pursuing with adversaries and courts approaches to disputes that offer the best prospects for efficient and affordable resolution.

4. Parties should not regard litigation as primarily a contest left to counsel with instructions to pursue victory, but should instead remain actively involved, treating civil disputes as a form of risk or opportunity to be evaluated and managed to achieve an appropriate and affordable result.

5. Beginning early in a litigation and continuing thereafter, courts should, where practical, proactively manage the dispute to promote a fair, efficient and affordable decision or settlement.

6. Courts should adopt rules and practices that feature inquiry of counsel and other oversight of the litigation process to foster achievement of effective settlements or decisions at a cost and in a time frame proportionate to the nature and scale of the dispute.

7. Courts should support – and in appropriate circumstances mandate – mediation as a vehicle for promoting more efficient case management and less expensive and faster resolution.

8. Courts should discourage and Counsel should avoid claims, defenses, motions, requests for discovery, appeals of non-dispositive decisions and other litigation steps or strategies that unnecessarily delay proceedings and burden parties.

9. Judges should decide dispositive motions as early as practicable, and decide as much of a motion as possible when they are not able to resolve the dispute entirely.

10. If the parties choose arbitration or another ADR method as a mechanism for dispute resolution, they should take advantage of the potential for efficiency that such a process can offer when compared with formal court-directed litigation.

June 2018

**PRESIDENTS COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES***

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* The President's Committee for Efficient Resolution of Disputes (the "Committee") is comprised of members of a number of City Bar standing committees, including the Alternative Dispute Resolution Committee, Arbitration Committee, Cooperative & Condominium Law Committee, Council on Judicial Administration, Council on the Profession, In-House Counsel Committee, In-House/Outside Litigation Counsel Working Group, International Commercial Disputes Committee, Litigation Committee, and State Courts of Superior Jurisdiction Committee. Members include lawyers in private practice, arbitrators and mediators, retired judges, and in-house counsel.

** The Committee's members are serving in their individual, personal capacities. They are not representing any organization or employer and nothing in this report should be attributed to an organization or employer with which a committee member was or is affiliated. Further, although the committee voted overwhelmingly in support of issuing this report, it should not be assumed that every member of the committee supports every recommendation as articulated in this report.

*** City Bar President (May 15, 2016 – May 15, 2018)

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
The Honorable Edwina G. Mendelson
The Honorable Thomas A. Breslin
The Honorable Felix J. Catena
The Honorable Molly Reynolds Fitzgerald
The Honorable Craig J. Doran
The Honorable Paul L. Feroleto
The Honorable Kathie E. Davison
The Honorable Norman St. George
The Honorable C. Randall Hinrichs
The Honorable Richard E. Sise
Lisa M. Denig
The Honorable Joel R. Kullas
Bridget M. O'Connell
Lisa M. Courtney

# DRS Form: NYS Unified Court System's ADR Initiative

Start of Block: Default Question Block

DRS Form: NYS Unified Court System's ADR Initiative Mediator Self-Identification Form

1. Please include the following:

- O Name (First and Last): (1) _____
- O Business entity (if any): (2) _____
- O Business address: (3) _____
- O Preferred phone number: (4) _____
- O Preferred e-mail address: (5) _____
- O If you maintain a website or webpage, provide the URL for it: (6) _____
- O How many years have you been practicing law? (7) _____
- O In what year were you admitted to the NY bar? (8) _____

1a. Are you in good standing with the NY Bar?

- O Yes (1)
- O No (2)

2. What practice area specialization(s) do you consider yourself to possess?

_____

_____

_____

_____

_____

3. How many years have you served as a mediator?

O 1-5 (1)

O 6-10 (2)

O 11-15 (3)

O 16-20 (4)

O 20+ (5)

4. How many matters have you mediated over the above time?

O 1-5 (1)

O 6-10 (2)

O 11-15 (3)

O 16-20 (4)

O 20+ (5)

5. What kinds of matters have you generally mediated over the above time?

_____

6. List all mediation trainings taken and include the years, trainers, and/or programs.
Priority will be given to applicants who have taken 40 hours of mediation training under Part 146 of the Rules of the Chief Administrative Judge (i.e., 24 hours in initial mediation training and 16 hours in additional and subject matter specific mediation techniques, such as commercial or matrimonial) or an equivalent mediation training (e.g., training through a law school mediation clinic, training through Community Dispute Resolution Centers Program).

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_____

7. Identify (by court or administering organization) all U.S. mediation rosters or panels to which you have been admitted and for which you are currently in good standing

_____

_____

_____

_____

_____

8. Are you certified to mediate through a Community Dispute Resolution Center?

O Yes (1)

O No (2)

If yes, which one(s)?

_____

9. Indicate which language(s) other than English you speak, and whether you have mediated in that language.

| | Speak (1) | Have mediated in this language (2) |
|---|---|---|
| Chinese - Mandarin (1) | ☐ | ☐ |
| Chinese - Cantonese (2) | ☐ | ☐ |
| French (3) | ☐ | ☐ |
| French Creole (4) | ☐ | ☐ |
| Gujarati (5) | ☐ | ☐ |
| German (6) | ☐ | ☐ |
| Hindi (7) | ☐ | ☐ |
| Italian (8) | ☐ | ☐ |
| Japanese (9) | ☐ | ☐ |
| Hebrew (10) | ☐ | ☐ |
| Korean (11) | ☐ | ☐ |
| Russian (12) | ☐ | ☐ |
| Spanish (13) | ☐ | ☐ |
| Spanish Creole (14) | ☐ | ☐ |

| | | |
|---|---|---|
| Urdu (15) | ☐ | ☐ |
| Yiddish (16) | ☐ | ☐ |
| Other (please specify below) (17) | ☐ | ☐ |

9a. Please use the space below to indicate which other languages you speak and whether you have mediated in that language.

_____

_____

_____

_____

_____

10. Indicate all New York counties in which you would be available to mediate:

- [ ] Albany County (1)
- [ ] Allegany County (2)
- [ ] Bronx County (3)
- [ ] Broome County (4)
- [ ] Cattaraugus County (5)
- [ ] Cayuga County (6)
- [ ] Chautauqua County (7)
- [ ] Chemung County (8)
- [ ] Chenango County (9)
- [ ] Clinton County (10)
- [ ] Columbia County (11)
- [ ] Cortland County (12)
- [ ] Delaware County (13)
- [ ] Dutchess County (14)
- [ ] Erie County (15)
- [ ] Essex County (16)
- [ ] Franklin County (17)
- [ ] Fulton County (18)

- [ ] Genesee County (19)
- [ ] Greene County (20)
- [ ] Hamilton County (21)
- [ ] Herkimer County (22)
- [ ] Jefferson County (23)
- [ ] Kings County (24)
- [ ] Lewis County (25)
- [ ] Livingston County (26)
- [ ] Madison County (27)
- [ ] Monroe County (28)
- [ ] Montgomery County (29)
- [ ] Nassau County (30)
- [ ] New York County (31)
- [ ] Niagara County (32)
- [ ] Oneida County (33)
- [ ] Onondaga County (34)
- [ ] Ontario County (35)
- [ ] Orange County (36)

- [ ] Orleans County (37)
- [ ] Oswego County (38)
- [ ] Otsego County (39)
- [ ] Putnam County (40)
- [ ] Queens County (41)
- [ ] Rensselaer County (42)
- [ ] Richmond County (43)
- [ ] Rockland County (44)
- [ ] Saratoga County (45)
- [ ] Schenectady County (46)
- [ ] Schoharie County (47)
- [ ] Schuyler County (48)
- [ ] Seneca County (49)
- [ ] St. Lawrence County (50)
- [ ] Steuben County (51)
- [ ] Suffolk County (52)
- [ ] Sullivan County (53)
- [ ] Tioga County (54)

- [ ] Tompkins County (55)
- [ ] Ulster County (56)
- [ ] Warren County (57)
- [ ] Washington County (58)
- [ ] Wayne County (59)
- [ ] Westchester County (60)
- [ ] Wyoming County (61)
- [ ] Yates County (62)

11. Indicate court/case types for which you seek to mediate.

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_____

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_____

12. Is there any more information you would like the NYS Unified Court System to know?

_____

_____

_____

_____

_____

# PRESS RELEASE

**New York State**
**Unified Court System**

**Hon. Lawrence K. Marks**
**Chief Administrative Judge**

**Contact:**
**Lucian Chalfen, Public Information Director**
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www.nycourts.gov/press

**Date: April 20, 2018**

## New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice

**New York** – Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks today announced a plan to revitalize the court system's commitment to Alternative Dispute Resolution, building upon the framework of the courts' existing statewide programs. The new plan will promote the goals of the Chief Judge's Excellence Initiative by helping to eliminate case backlogs and enhancing the quality of justice.

Alternative dispute resolution (ADR), comprising mediation, arbitration, neutral evaluation and collaborative law, among other approaches, has proven a meaningful, efficient and cost-effective way to resolve disputes in appropriate cases. It is generally confidential, less formal and less stressful than traditional court proceedings. ADR, and particularly mediation, can provide parties with greater opportunities to be more fully heard. ADR can also help parties gain insight into the strengths and weaknesses of their case in deciding whether to proceed with litigation.

The court system, through its ADR Office, collaborates with trial courts and Community Dispute Resolution Centers to offer parties access to free or reduced-fee ADR services in a wide range of disputes, from small claims to family matters to complex business disputes. The office also conducts ADR trainings, approves trainers and training programs, and supports courts in maintaining rosters of ADR practitioners, among other responsibilities.

Typically, parties are referred to these services by the judge handling the case, with ADR services provided by trained volunteer mediators on court rosters, or by court staff, depending on the program. While the court system's ADR Program has grown over the years, with thousands of New Yorkers obtaining referrals to and benefiting from ADR services, ADR continues to be an underutilized mechanism for resolving disputes and moving cases forward in the civil justice process.

The initiative launched today will work to expand the use of ADR within the courts, with a focus on early resolution of civil disputes, provided they are deemed suitable for the ADR process. To assist in and guide this statewide undertaking, Judge DiFiore and Judge Marks today also announced the formation of an Advisory Committee on ADR, led by John S. Kiernan, a senior litigation partner at Debevoise & Plimpton LLC and outgoing president of the New York City Bar Association. This expert group of judges, lawyers, ADR practitioners and academics will examine the services currently accessible within the court system and make recommendations for improvement and expansion.

Among the existing programs is an early mediation pilot in New York County targeting certain contractual disputes that follows the "presumptive ADR" model (with a choice to opt out of the program in appropriate cases), in which parties must participate in mediation or some other form of ADR before the case can proceed in court. This ADR model, which does not require a judge's referral and has been successfully implemented in other jurisdictions, will be expanded to other courts and categories of cases.

The Advisory Committee will evaluate ADR practices and programs in place in courts around the country in its efforts to help fortify the court system's existing ADR programs, extend the range of ADR services, and facilitate the utilization of mediation and other forms of alternative dispute resolution in civil legal matters, where suitable.

"Though not a substitute for the court process, alternative dispute resolution, if used appropriately, can serve as a supplement to an effective, efficient civil justice system. We have made steady progress in bringing alternative dispute resolution into the mainstream, yet we must do more if it is to become an integral part of our court culture and civil justice process. I am thankful to the outstanding chair of our new Advisory Committee on ADR, John Kiernan, the advisory group's distinguished members, and the hardworking staff of the court system's ADR

Office, for their dedication toward these goals, which are critical to advancing the delivery and quality of justice in New York," said Chief Judge DiFiore.

"Mediation, along with other forms of ADR, has high rates of success, allowing parties to focus on the issues of their dispute and helping preserve relationships, among cost-saving and other benefits. A valuable case-management tool, ADR must play a greater role in the court system's efforts to expedite cases and enhance access to justice. The initiative announced today will lead to expansion of ADR in the Supreme Court, lower civil courts, Family Court and Surrogate's Courts. I look forward to working with the committee and the court system's ADR Office toward that end, as we strive to maximize the efficiency of court operations and better serve the justice needs of New Yorkers," said Chief Administrative Judge Marks.

"Litigation of civil disputes often costs too much and takes too long to be affordable by the parties, and inefficiency in resolution of disputes contributes to overburdened court dockets that place enormous demands on limited judicial system resources. The new Advisory Committee, focusing on possible alternative mechanisms for resolving civil disputes that are less expensive and faster than conventional litigation, will strive to enhance access to affordable justice, and save parties and courts time and money in achieving settlements or decisions, consistent with the Chief Judge's Excellence Initiative," said John Kiernan.

The roster of the new Advisory Committee on ADR follows.

**Advisory Committee on ADR**

*Chair*
John Kiernan
President, New York City Bar Association
Senior Litigation Partner, Debevoise & Plimpton LLC

*Members*
Simeon H. Baum
President, Resolve Mediation Services, Inc.

Sasha A. Carbone
Associate General Counsel, American Arbitration Association

Alexandra Carter
Professor and Director, Edson Queiroz Foundation Mediation Program, Columbia Law School

Hon. Anthony Cannataro
Administrative Judge, New York City Civil Court

Hon. Michael Coccoma
Deputy Chief Administrative Judge, Courts Outside New York City

Hon. Andrew A. Crecca
Supervising Judge, Matrimonial Matters, Suffolk County

Antoinette Delruelle
Senior Staff Attorney, Mediation Project

Hon. Paula Feroleto
Administrative Judge, Eighth Judicial District

Adrienne Holder
Attorney-in-Charge, Civil Practice, Legal Aid Society

Elena Karabatos
President-Elect, Nassau County Bar Association
Partner, Schlissel Ostrow Karabatos

Michele Kern-Rappy
Senior Settlement Coordinator, Supreme Court, New York County

Daniel Kolb
Senior Counsel, Davis Polk & Wardwell

Lela Porter Love
Director, Kukin Program for Conflict Resolution, Benjamin N. Cardozo School of Law

Hon. Rita Mella
Surrogate, New York County

Hon. Edwina Mendelson
Deputy Chief Administrative Judge for Justice Initiatives

Charles J. Moxley, Jr.
Principal, Moxley ADR LLC

Rebecca Price
Director, ADR Program, U.S. District Court for the Southern District of New York

Sarah Rudgers-Tysz
Executive Director, Mediation Matters

Hon. Brandon Sall
Surrogate, Westchester County

Paul Sarkozi
Partner, Tannenbaum Helpern Syracuse & Hirschtritt LLP

Hon. Saliann Scarpulla
Supreme Court, New York County, Commercial Division

Hon. Jeffrey S. Sunshine
Supervising Judge, Matrimonial Matters, Kings County

Daniel M. Weitz
Director, Professional and Court Services, New York State Office of Court Administration

*Adviser*
Lisa Courtney
Statewide ADR Coordinator, New York State Office of Court Administration

# # #

# IV. CIVIL JUSTICE

## A. ALTERNATIVE DISPUTE RESOLUTION

Turning back to our civil dockets, one of the main ways to streamline litigation and make our courts more affordable is to increase opportunities for settlement through Alternative Dispute Resolution options such as mediation and arbitration. After we announced the Excellence Initiative, many practitioners and bar associations, as well as our own trial and administrative judges, suggested that our court system was not taking sufficient advantage of ADR compared to the federal courts and other state court systems. They pointed out that mediation and arbitration have a proven track record of resolving a high percentage of civil cases, and of narrowing disputed issues, thereby reducing litigation cost and delay.

Last April, we responded by creating an ADR Advisory Committee populated with leading judges, practitioners, ADR professionals and academics who volunteered to serve under the very able leadership of John Kiernan, an experienced litigator and immediate past-president of the New York City Bar Association. The Committee got to work and now urges our court system to adopt presumptive early mediation as a standard component of our case management process for identified types of disputes known to be promising candidates for mediation. We are embracing that concept and will move toward a system in which, unless appropriate exceptions apply, most civil cases will be automatically presumed eligible for early referral to court-sponsored mediation.

Through our Office of ADR Programs, and guided by the Committee's expertise, our Administrative Judges will work hand-in-hand with local bar associations to expand the number of mediation programs in the New York State courts. At the same time, we will develop statewide rules to guide local program implementation, provide training for judges, attorneys and neutrals and appoint local ADR coordinators in our courts.

Our past experience with court-sponsored ADR programs has been positive, featuring high settlement rates and strong user satisfaction levels among participating litigants and lawyers:

- In New York County Supreme Court, a pilot program requiring early mediation of contract disputes under $500,000 has achieved a 60% settlement rate.

- In Erie County, former Court of Appeals Judge, Eugene Pigott, upon his return to the Supreme Court trial bench, started an early mediation program using court approved volunteers which achieved a 65% settlement rate in 800 referred civil, tort and estate matters in 2018.

- Our upstate child permanency mediation program has achieved a 73% resolution rate, and a similar program for custody and visitation cases in the New York City Family Court has a 70% resolution rate.

- Our Community Dispute Resolution Centers, operating in all 62 counties, mediate about 30,000 cases a year, including landlord-tenant, small claims and child custody and visitation matters, with a 74% settlement rate, averaging 25 days from first contact to settlement.

The time is right to provide litigants and lawyers with a broader range of options to resolve disputes without the high monetary and emotional costs of conventional litigation. We consider this vision of ADR to be an integral part of our Excellence Initiative, and we are excited to work with the Bar to make it a reality.

## B. COMMERCIAL DIVISION

Recognizing that New York State is the commercial and financial capital of the world, we have long been committed to resolving complex business disputes in a world-class forum -- the

Commercial Division of our Supreme Court. Last September, Judge Marks and I both addressed the Standing International Forum of Commercial Courts, a group of 100 judicial leaders from 35 countries who came to New York City to exchange ideas and learn from our state and federal judiciaries how they can promote the just and efficient resolution of commercial disputes in their home countries.

The Commercial Division has been a leader in adopting new procedures to streamline discovery and reduce litigation costs, which led me to ask our Advisory Committee on Civil Practice to evaluate the reforms implemented in the Commercial Division and recommend which of them should be adopted more broadly in our civil courts. The Committee recommended a range of procedural and discovery reforms which were posted for public comment, and the Administrative Board of the Courts, which I chair with our four Presiding Justices, is reviewing the commentary. We will be making decisions on the proposals this Spring.

Finally, in recognition of the economic resurgence taking place in the Bronx, reflected in the number of commercial cases filed in Bronx Supreme Civil, we will be expanding the Commercial Division to Bronx County, effective April 1, 2019. Bar to make it a reality.

**Summary of NY City Bar President's Committee Initiatives**

Potential steps in support of Court Annexed Mediation and other ADR programs initiated by the Chief Judge and based on recommendations from her ADR Advisory Committee chaired by John Kiernan

Potential steps in support of the extension of rules encouraging efficiency in the Commercial Division to other Courts in the State

In coordination with the Federal Courts Committee and possibly other City Bar Committees, planning for meetings for Members of the Bar and Clients with Judges in the Eastern and Southern Districts to discuss efficient case management. Also, ongoing discussions with Federal Court Judges Castel, Stong and Levy and possibly other judges interested in and committed to efficiency in the litigation process

Boot Camp held at the City Bar for In house counsel

Planning for Podcasts

Possible Preparation of Brochure to be provided to the Bench and Bar stressing the Best Practices and overall benefits and approach to promoting efficiency

Consideration of City Bar Year Dedicated to Efficiency in Dispute Resolution

Arbitration Committee CLE program emphasizing how arbitrators can and should be efficient in the management of disputes

Ongoing meetings and exchange of ideas as to the promotion of efficiency with Efficiency Subcommittee of the Judicial Counsel

Meeting and continuing exchange of ideas as to the promotion of efficiency with the ADR Committee

Meeting and continuing exchange of ideas with respect to the promotion of efficiency with the Federal Courts Committee and its Subcommittee on Efficiency

Development of list of specific suggestions as to ways to enhance efficiency by members of City Bar Committees

Proposal that Efficiency in Dispute Resolution become one of the City Bar's basic offerings for new counsel

Proposal that those calling the City Bar for a referral of counsel be asked if they would like assistance in getting a mediator

Proposal that a question be included on the Bar exam stressing efficiency in the Best Interests of clients

Discussion of efficiency as an important part of the Law School curriculum with Law School Deans in meetings this spring

Possible outreach to and coordination with the Federal Judicial Center with respect to initiatives as to efficiency in litigation

Possible outreach to law firm leaders, including Brad Karp, with respect to promotion within the firms of efficiency in dispute resolution.

Possible CLE Programs organized and Co-Sponsored by multiple City Bar Committees focused on key topics such as Proportionality

Promoting increased training in negotiation for litigators

Emphasis on increased training in efficient management and coordination of the exchange of facts, including documents, to support an efficient litigation process. That could include managed approaches to e-discovery, tiered discovery, a requirement that relevant document production be immediate in specified cases, such as 1983 Claims, and immediate production of insurance policies

Encouraging advocates with at least ten years' experience to begin service as mediators both to enhance their litigation skills and gain experience in effectively resolving disputes

Promote discussion of the benefits of early mediation and early meetings of Parties and Counsel and early case conferences to explore settlement and/or a shared commitment to efficiency and cost effectiveness in the process

Meetings with other Court Committees