NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

BRINGING ADR INTO THE NEW MILLENNIUM -- REPORT ON THE CURRENT STATUS AND FUTURE DIRECTION OF ADR IN NEW YORK

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I. EXECUTIVE SUMMARY[1]

New York is now at a crossroad in the evolution of alternative dispute resolution ("ADR"). In May 1996, Chief Judge Judith S. Kaye's Task Force on Alternative Dispute Resolution recommended ten major initiatives to advance ADR in this State.[2] Several of these initiatives have yet to be implemented. Others are still in experimental stages. As we move into the new millennium, it is an appropriate time for the New York State Bar Association ("State Bar") to reflect on what role ADR should play in our legal profession and to formulate a long-term view regarding how to develop ADR within the State.

A wide variety of ADR options are available to help resolve disputes. These options include: arbitration, mediation, early neutral evaluation and summary jury trials.[3] The most important distinction to bear in mind in reading this Report is

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[1] The views expressed in this report are those of the ADR Committee and are not necessarily those shared by any organization with which any of the Committee's members may be employed or affiliated.

[2] *See* Section V below.

[3] The principal ADR options are explained in Section III below.

between: binding ADR processes such as arbitration in which a neutral decides the dispute; and non-binding ADR processes such as mediation in which a neutral seeks to help the parties agree to a consensual resolution of the dispute. This Report will largely focus on non-binding ADR.

When used appropriately, ADR offers many benefits over conventional litigation, including a wider range of solutions to clients' problems, speedier resolution of disputes and reduction of unnecessary legal expenses. Accordingly, ADR addresses some of the complaints that litigants express about going to court. ADR can also serve to make legal services more accessible to those who currently lack access to the courts. As a result of these benefits, ADR has become popular in many areas of the country.

There are many innovative ADR initiatives in New York, and ADR is a growing area of practice in the State. Unfortunately, despite its many benefits, ADR has not yet received the level of widespread acceptance in New York that is required for it to move into the mainstream of the legal practice. Thus, much remains to be done to increase awareness about ADR and raise the quality and depth of ADR practice in this State.

There are several reasons why the New York Bar has not yet fully embraced ADR. First, because ADR is a relatively recent innovation, there is a fear of the unknown and a concern that ADR will be a threat to a lawyer's practice -- as opposed to an additional tool in the lawyer's toolbox. Second, non-binding forms of ADR require a different mind set than conventional litigation strategy. In order for this new way of thinking about disputes to gain wider usage, some impetus for the change is

needed. Third, a coordinated effort to launch ADR programs has been absent. Finally, there has not been adequate information and training regarding ADR. As a result, many New York lawyers and litigants have not been exposed to ADR to the extent they are elsewhere in the country.

This Report examines what ADR services are currently available in New York. It then addresses the following critical issues that need to be faced as we move into the new millennium:

1 What further education and information about ADR is needed;

2 What additional qualifications, education and training of ADR neutrals is needed;

3 How court-annexed ADR programs can be expanded and improved;

4 What legislative initiatives should be made in the ADR field; and

5 What role the State Bar should play in the ADR arena.

This Report makes recommendations about how to address those key issues in order to continue to move ADR forward in this State. Confronting these issues is important not only so that ADR can develop further in New York but to ensure that the public has confidence in our ADR systems.

A. Current ADR Offerings

New York has long been an important center for binding arbitration. Not only is New York the home of several major ADR providers, it is a hub of business arbitration in important fields such as securities, textiles and labor. In addition, many

international arbitrations are sited in New York and New York lawyers frequently participate in or assist their clients with international arbitrations held abroad.

To date, New York has not been a leader in evolving areas of ADR such as mediation, early neutral evaluation and other non-binding ADR processes. States such as California, Texas, Florida, and more recently New Jersey, have moved much further ahead in these fields than New York.

A wide range of private ADR services has sprung up in New York, including nationwide providers of ADR services, small ADR firms, solo practitioners, experimental court programs and government programs. ADR services are available in a broad range of fields, including torts, family, commercial, securities, landlord-tenant and labor law.

ADR services tend to be more widely available in major metropolitan areas of the State. Every county of the State is serviced by a Community Dispute Resolution Center ("CDRC"). Several private ADR programs service rural communities of the State. There may be less need for ADR services in rural areas because of the collegial nature of the practice in those areas. Or, the collegial nature of rural practice may make non-binding ADR more likely to be successful because its success depends on the good faith commitment of the litigants. However, there are some small and medium-size municipalities where more ADR services are needed.

In the tort field, there has been significant ADR usage, particularly non-binding ADR. Many tort lawyers have found that mediation and early neutral evaluation help resolve cases more quickly and efficiently than conventional litigation. On the

other hand, there has been a fear among the tort bar that ADR may pose a threat to the lawyer's practice.

There are many ADR programs addressed to aspects of matrimonial disputes, such as custody, support and equitable distribution. The ADR model offers great promise for helping to resolve family disputes where emotional issues can dominate. Nonetheless, matrimonial lawyers are concerned that lawyers feel welcome in some ADR programs.

Many ADR services are available to the corporate community.[4] These include: national and international ADR providers who handle commercial disputes, self-regulatory organizations which handle disputes in particular industries such as securities and both private and government ADR programs in fields of law such as employment, construction and environmental. Many institutional clients are adopting ADR contracts and corporate policies and are encouraging their outside lawyers to make greater use of ADR. There are concerns about protecting individuals -- particularly employees and consumers -- from having rights diminished and losing due process protections.

At the community level, the CDRC model has had widespread success in resolving many types of disputes, including: neighborhood, landlord-tenant, merchant-consumer, family relationship and custody-visitation disputes. The CDRC programs

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[4] A recent survey by Cornell University and Price Waterhouse LLP found that 88% of corporations had used mediation in the last three years and 79% had used arbitration.

often use non-lawyer volunteers as neutrals. Some CDRC initiatives are expanding beyond their original community missions into areas where legal training may be more important.

B. Need for Education and Information about ADR

The Committee believes that the New York Bar should embrace ADR as a valuable tool in the legal process. To that end, there is a compelling need for more education about ADR processes. When most of our profession attended law school, ADR was not even part of the legal vocabulary, much less taught in our educational institutions. As a result, many among the Bar and the judiciary are not sufficiently cognizant of the various ADR options that are available, the benefits that ADR can offer to the legal profession and the different strategies and techniques used in ADR. In particular, many of those involved in the legal system do not understand the differences between binding and non-binding ADR processes. Lawyers play an important role in the ADR process and the Bar needs further education about advocacy techniques in this evolving area.

New York's law schools now offer a range of ADR courses and clinics but the depth and substantive areas covered vary widely. The law schools should take further steps to coordinate their programs with one another as well as with other institutions and organizations that are teaching ADR. The law schools should consider offering CLE courses in ADR. In addition to encouraging new lawyers to familiarize themselves with ADR processes, an ADR component should be added to New York's Bar Exam.

The advent of mandatory CLE offers an opportunity for the Bar to become more educated about ADR. As a result, CLE programs which teach the profession about ADR are much needed. In particular, most local bars do not present educational programs on ADR, and several have advised that they lack the resources to do so, suggesting a void that the State Bar and law schools could fill. Moreover, there is a heightened need for public education about ADR given the extent to which consumers, employees and other members of the public are being exposed to ADR processes. The Committee believes that more educational programs about ADR should be offered to instill a better understanding of ADR for lawyers, judges and the public-at-large.

An issue which should be examined is whether lawyers have an ethical duty to educate themselves about ADR options and inform their clients of them at the appropriate stage of a dispute. The Committee believes that this should be part of every lawyer's duty but the current Code of Professional Responsibility does not necessarily reflect such a duty.

New York lacks a central compendium of the various ADR services that are available in the State. Even those who are informed about their options have difficulty pinpointing the best place to turn in order to seek ADR services. The Committee believes that a central registry of ADR programs and providers is needed so that practitioners and the public can better investigate their ADR options.

C. Standards for ADR Neutrals

Currently, there are no centralized standards in New York governing the qualifications, training or ethics of an ADR neutral. Each ADR program, service or

professional organization can devise its own standards and some may fall below the minimum competencies that are desirable for a neutral. Although the Committee recognizes the need for flexibility among ADR providers and programs, a set of minimum standards for ADR neutrals is needed, particularly in court-annexed programs. The public deserves to know that when they use ADR, they will receive competent services which adequately address their needs. When an ADR neutral handles a matter, whether within a court program or outside the court system, it is an integral part of the administration of justice. To the extent that an ADR system fails to meet the level of quality which the Bar deems acceptable, it would reflect poorly on the justice system itself.

The Committee also recognizes the need for heightened sensitivity concerning the diversity of neutrals. The available neutrals should reflect the diverse backgrounds of the populations that ADR serves. As a result, the State Bar should consider efforts to promote diversity among those who provide ADR services.

D. Need to Protect Confidentiality and Immunity

One of the central features of the non-binding ADR process is the confidentiality of communications made during the process. It is this confidentiality which encourages candor and facilitates resolution of the dispute. Unfortunately, there is currently no statutory protection to prevent third-parties from invading this confidentiality. Legislation is needed to protect the confidential nature of non-binding ADR.

In addition, the Legislature should confirm by statute that neutrals who participate in court-annexed or court-referred ADR programs are protected against any liability that may arise from such service.

E. Need to Promote Court-Annexed ADR

Court-annexed ADR services in New York should be expanded and improved. Court ADR programs have been implemented on an experimental basis in various courts in the State. However, there are areas of the State where no court ADR services are available and some court ADR programs are under-utilized.

The Unified Court System has an ADR Office headed by an ADR Coordinator and it is organizing an ADR Advisory Committee. These initiatives are designed to stimulate ADR use in the court system and to coordinate ADR efforts in the State.

Further steps need to be taken to advance court-annexed ADR in New York. Since many of the current court ADR programs depend on the assigned judge to select or recommend the case for ADR, further efforts should be made to educate the judiciary about the benefits that ADR can offer and how to make better use of ADR as a case management tool.

In order to expand usage of court ADR programs, ADR could also be made mandatory at certain stages of the litigation process, an approach that other states have adopted. Making mediation mandatory would certainly jump-start the use of ADR in New York. The Committee is aware that a significant portion of the Bar may resist such wholesale implementation of ADR at this time. Therefore, a less drastic step

could be to design measures to inform litigants about their ADR options at important points in the judicial process, such as at the filing of a complaint or a Request for Judicial Intervention or in a Preliminary Conference Order. Another approach would be to put a random selection of cases into court ADR programs at critical junctures of a case when settlement opportunities are at their peak. Regardless of which steps are taken, the Unified Court System should seek to expand the current usage of its court ADR programs.

The Unified Court System should continue to allow local courts to experiment with pilot ADR programs. However, there are still many areas of the State which lack court-annexed ADR programs. New York should consider enacting legislation or court rules requiring the administrative judge in each judicial district to implement an ADR program for civil and matrimonial matters. A similar initiative has been taken at the Federal level through the enactment of the ADR Act of 1998.[5]

An important issue in seeking to expand court ADR programs is funding. To a large extent, New York's court ADR programs depend on pro bono mediators to provide the ADR services. If court-annexed ADR is expanded, such pro bono efforts will not suffice as a permanent solution for the provision of ADR services within the court system. Moreover, the court system will need more staffing in order to expand its ADR programs. As a result, an effort should be made to examine potential funding sources to expand court ADR services -- whether from the court budget, grants, court

[5] Pub. L. No. 105-315, 112 Stat. 2993-2998 (1998).

fees, or payments by parties. Such funding will likely raise the quality of professionalism of neutrals in these positions.

F. Role of the State Bar in ADR

The State Bar needs to define what role it should play in the development of ADR. The Committee believes that the State Bar should serve as a leader in the ADR field, helping to inspire the legal community and serving as a liaison for various ADR efforts in the State. The State Bar -- through its leadership, its standing ADR Committee and the ADR Committees of its Sections -- should help coordinate efforts to promote ADR in New York.

The Committee does not believe that the State Bar should offer dispute resolution services as a competing ADR provider except perhaps for disputes among lawyers where the State Bar would have special competence. Rather, the most beneficial role for the State Bar lies in promoting further education about ADR and coordinating referral and information services about ADR offerings in New York. The State Bar should assist in updating the legal ethics and disciplinary rules to reflect the changing ADR practice. Further, the State Bar should seek legislation to confirm the confidentiality of non-binding ADR processes and the immunity of ADR neutrals in court programs and in private processes by agreement.

The State Bar should consider forming a separate dispute resolution section -- as the American Bar Association and other state bars have done -- in order to recognize that the practice of ADR is a substantive field which merits a separate section of the Association. For its ADR efforts to be successful, the State Bar should also

consider creating an ADR Coordinator position, as it has done in other areas of importance to the Bar.

II. THE WORK OF THE COMMITTEE

In preparing this report, the Committee solicited input from a variety of sources in order to gather information about the ADR landscape in New York.

The Committee met with leaders of the State's court system and representatives of various ADR providers. The Committee sought input from each section and standing committee of the State Bar as well as all local bar leaders in the State.[6]

The Committee examined many of the various ADR programs that are available in New York. While we have attempted to list as many of the major ADR programs in the State as possible, this Report does not purport to contain an exhaustive list of all such programs. For comparative purposes, the Committee also looked at selected ADR structures and processes used at the Federal level and in other states. The Committee believes that New York can learn from the experience of other jurisdictions that have been leaders in this field.

[6] This survey is summarized in Appendix 1 hereto.

III. ADR DEFINITIONS AND OPTIONS

ADR has become more popular in recent years as a less expensive and more time-efficient alternative to conventional litigation. Generally, ADR is used when parties agree to use the process either before or after a dispute arises, or when a court orders it.

There are a wide variety of ADR options.[7] The two most common forms of ADR are arbitration, which is generally binding, and mediation, which is by definition non-binding. Other forms of ADR include early neutral evaluation ("ENE"), summary jury trials and mini-trials.

Arbitration involves an informal and confidential trial conducted by one or several impartial arbitrators.[8] Attorneys for each side generally present the arbitrators with briefs, documentary evidence, opening and closing statements, and oral or written testimony by witnesses subject to cross-examination. At the conclusion of the hearing process, the arbitrators render decisions or awards which are usually binding and not appealable.[9]

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[7] A summary of the key ADR processes may be found in Appendices 2-3 attached hereto.

[8] In some forms of arbitration, each party appoints an arbitrator who need not be impartial.

[9] There is case law endorsing parties' ability to add by agreement the right to a judicial appeal from an arbitration award. *See* Fils et Cables d'Acier de Lens v. Midland Metals, 584 F. Supp. 240 (S.D.N.Y. 1984); *see also* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997).

Agreements to arbitrate are enforceable under the Federal Arbitration Act, 9 U.S.C. 1-16, and Article 75 of the New York Civil Practice Law and Rules. Courts may only vacate arbitration awards on very narrow grounds such as bias, fraud, misconduct, excess of authority, manifest disregard of the law or irrationality.[10] Arbitrators are not generally bound to follow the law or the rules of evidence, and they do not have to explain their decisions.[11] Arbitrations are governed by the specific rules and procedures of the organization administering the process, unless the parties agree that a specific set of rules should apply.

Mediation is a process of negotiation between the parties facilitated by a neutral mediator with the goal of reaching a consensual settlement. The mediation process is designed to explore the interests of the parties to the dispute and generate options for resolving the dispute. Mediation also assists parties in narrowing their disputes.

Lawyers are usually present at the mediation. Mediations generally involve active participation by the client. As a result, mediations are most constructive if a client representative with authority to settle the case attends. Mediators often

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[10] *See generally* Silverman v. Benmore Coats, Inc., 61 N.Y.2d 299, 473 N.Y.S.2d 774 (1984); Boguslavsky v. Kaplan, 159 F.3d 715, 719 (2d Cir. 1998); Coppinger v. Metro-North Commuter R.R., 861 F.2d 33, 39 (2d Cir. 1988); Kenneth R. Davis, When Ignorance of The Law Is No Excuse: Judicial Review of Arbitration Awards, 45 Buff. L. Rev. 49 (1997).

[11] *See* Silverman, 61 N.Y.2d at 308, 473 N.Y.S.2d at 779. *Cf.* Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998) (vacating arbitration award in part because no reasons were stated).

encourage parties to speak on their own behalf, and usually ask to meet with each side privately. Mediations are typically conducted in joint sessions, with all parties and lawyers present, and in separate confidential caucuses.

By nature, the mediation process is extremely flexible, and there are fewer rules for mediation than in arbitration. There are different styles of mediation, including: facilitative styles where the mediator helps the parties communicate about their dispute without injecting the mediator's own views; and evaluative styles where the mediator assesses the merits of the case in an effort to spur a resolution. Mediations are generally confidential and the parties usually agree that nothing communicated in the mediation may be introduced during subsequent court proceedings.

In ENE, brief presentations are made to a neutral early in a case. The neutral then evaluates the merits of the case and its settlement value with the purpose of helping the parties reach a more informed settlement.

In mini-trials, the parties agree to retain a neutral -- often a retired judge -- to preside over a private trial and to render a non-binding decision. This non-binding decision provides the parties with a more realistic assessment of the case, which may facilitate settlement. Summary jury trials are similar except that they are held before a mock jury which renders an advisory verdict that can be used as a basis for settlement discussions. Both mini-trials and summary jury trials tend to be used later in the litigation process when discovery is complete or nearly complete.

IV. RECOMMENDATIONS

The Committee recommends that a coordinated, statewide effort be made to develop ADR in New York. Although there are many commendable initiatives by talented and committed professionals in the ADR field and New York's CDRC programs serve as a model for other states, ADR remains a practice that is used in an isolated, sporadic fashion in this State. In order to bring ADR into the mainstream of the New York legal community, more needs to be done. The Committee makes the following recommendations to achieve this goal:

A. Role of the State Bar

1. The State Bar should assume a leadership role in the development of ADR.

2. The State Bar should organize an ADR Section and staff an ADR Coordinator position.

3. The State Bar should update the existing Code of Professional Responsibility to reflect the changing nature of ADR practice.

B. Need for Education

1. Law schools should coordinate their ADR expertise and expand their activities as educators about ADR. The Board of Law Examiners should add an ADR component to the New York State Bar Examination, requiring familiarity with the essential features of ADR processes, practical skills and ethical issues in ADR.

2. The State Bar and local bars should promote educational efforts about ADR for lawyers, the judiciary and the public, and should serve as clearinghouses

for ADR information. The State Bar should offer CLE courses about the ethics, skills and practice of ADR. All substantive CLE courses offered by the State Bar, to which ADR has potential application, should include information about ADR. The CLE rules issued by the Unified Court System should require that CLE courses address ADR whenever it may have application.

3. As CDRCs expand into mediating cases more heavily involving legal issues, CDRCs and other ADR programs and services that utilize non-lawyer neutrals should develop mediation training which encourages non-lawyer neutrals to further welcome lawyers into the process and educates mediators to recognize legal issues that may arise so that parties can be encouraged to seek legal counsel when appropriate.

4. Members of the judiciary should receive training about ADR options and how to effectively use ADR as a tool for managing and resolving their cases.

C. Court ADR

1. The Unified Court System should develop a set of minimum education, training and ethical standards for neutrals who serve in court annexed and court-referred ADR programs.

2. Whether by court rule or legislation, the Administrative Judge for each judicial district should be required to develop and evaluate pilot ADR programs for use in civil and matrimonial actions and other areas where ADR may have application. The Unified Court System should take steps to increase the utilization of existing court-annexed ADR programs.

3. The State Bar and the Unified Court System should seek further funding from the Legislature for court ADR programs. The Unified Court System should explore potential avenues of funding so that the services of paid neutrals can be made available in court ADR programs.

D. Confidentiality and Liability

1. The State Bar should seek legislation recognizing a privilege preserving the confidentiality of communications made in confidential, non-binding ADR processes.

2. The State Bar should seek legislation confirming the immunity of all third-party neutrals, including arbitrators, mediators and neutral evaluators, for their acts or omissions in court-annexed or court-referred ADR processes, and of private neutrals who are covered by agreements granting them immunity for their ADR services.

V. THE FINAL REPORT OF CHIEF JUDGE KAYE'S ADR TASK FORCE

Chief Judge Judith S. Kaye's Task Force on Alternative Dispute Resolution delivered its final report ("Kaye Report") on May 1, 1996. Pursuant to the Chief Judge's mandate to promote expedited and streamlined dispute resolution options for litigants, and after analyzing the status of ADR in New York and around the country, the Task Force made the following recommendations:

1. The Unified Court System should encourage expanded use of ADR and development of pilot projects in all judicial districts of the State by: a) continuing existing uses of ADR in the courts of the State; b) enhancing use of the CDRC Program

and court-annexed arbitration to include: mobile home matters, juvenile delinquency cases, small claims cases and selected felonies; and c) implementing additional pilot ADR programs to duplicate the successful role that similar court-annexed pilot programs have played in institutionalizing ADR. The Task Force recommended that each judicial district administrative judge appoint an ADR coordinator for the district.[12] Finally, the Kaye Report recommended that the jurisdictional amount for court-ordered arbitration be raised to $25,000 and that experimental mandatory arbitration programs for claims in excess of $25,000 be established for no more than two years in duration, in no more than four counties.[13]

2. To ensure some level of consistency and quality throughout the State, the Task Force recommended that all ADR programs be implemented in accordance with the following basic statewide standards:

a) Judges should ensure that program goals are clearly articulated and are related to the litigants' and the court's specific needs;

b) Judges referring cases to ADR should screen cases carefully for ADR suitability on an individual, case-by-case basis;

c) Judges should ensure that the litigants understand clearly the nature of the ADR process to which they are being referred and have some involvement in the referral decision; and

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[12] This has not yet been done in many judicial districts of the State.

[13] *See generally* Kaye Report at 31-34. Despite this recommendation, these jurisdictional amounts were never changed.

d) The design of ADR programs for domestic relations cases should include a number of additional critical components such as explicit opt-out provisions, heightened screening of which cases are appropriate for ADR and close judicial oversight of the ADR.[14]

3. During the initial experimental period, most ADR procedures should be available at no extra cost to the courts or to the users. Courts that have been providing ADR services for a substantial period of time without paying their neutrals should be allowed to apply to the State Court ADR Office for funding so that the neutrals may begin receiving compensation.

This recommendation contemplated an era of fiscal austerity and concerns about requiring litigants to pay for the ADR services to which the courts refer them. It was believed that members of the Bar and dispute resolution practitioners would be willing to provide *pro bono* services as neutrals in new pilot ADR programs during the initial period of experimentation. The Task Force recognized the need for a more permanent solution through funding options such as legislative appropriations, filing fees, user fees, practitioner fees and bar association grants, or a combination thereof.[15]

4. Each district administrative judge should be responsible for compiling lists of neutrals in their own judicial district. These lists should be compiled in accordance with statewide qualifications criteria that emphasize experience and

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[14] *See generally id.* at 35-39.

[15] *See generally id.* at 40-48.

training. Litigants should be able to choose their own neutrals from these lists or from the private sector.

The Task Force recommended the adoption of qualifications criteria that would provide sufficient flexibility, would avoid excluding experienced and competent neutrals and would ensure that neutrals are both well-trained and have credibility with judges and litigants. To encourage local courts to take responsibility for their own ADR programs, the Task Force suggested that each district administrative judge compile their own lists of neutrals rather than relying on a statewide list. Nonetheless, the neutrals selected for such lists would have to meet certain requirements established by the State Court ADR Office.[16]

5. The Unified Court System should create a State Court ADR Office. The office should: i) oversee all ADR programs within the Unified Court System; ii) provide technical assistance to all district administrative judges in developing and implementing ADR projects and programs; iii) approve funding for neutrals' fees on a project-by-project basis; iv) approve training programs for court neutrals; v) monitor lists of neutrals in each judicial district; vi) coordinate and disseminate information about all ADR programs throughout the State; and vii) evaluate ADR programs.

The establishment of a State Court ADR Office was viewed as a critical step for the success of ADR in the State. The Task Force conceived the role of the Office (which has since been created) not only as collecting and disseminating

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[16] For the complete guidelines*, see id.* at 51-59.

information about existing ADR programs, but also encouraging each judicial district to submit proposals for new pilot programs and working collaboratively with those districts to ensure that their programs are implemented in accordance with recommended standards. Also, such a statewide office would initiate and stimulate ADR education programs for the bench, bar and public.[17]

6. All court-referred ADR proceedings should be confidential.

Although non-binding ADR procedures are usually covered by the confidentiality protections traditionally applied to settlement negotiations, there is some uncertainty about the scope of these evidentiary rules in court-annexed ADR.[18] Therefore, the Task Force urged that the Unified Court System promote legislative action and offered proposed confidentiality rules which could serve as a guide.[19]

7. All neutrals handling referrals from the courts should subscribe to a specific code of ethics.

To ensure the highest quality of practice among neutrals engaged in court-annexed ADR, the Kaye Report recommended that the State Court ADR Office adopt the specific provisions of a code of ethics developed in accordance with the

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[17] *See generally id.* at 61-63.

[18] *See* Section VIII(D) *infra*.

[19] These proposed rules were never adopted.

guidelines established by the Ethical Standards for Professional Conduct promulgated by the Society for Professional in Dispute Resolution ("SPIDR").[20]

8. The Unified Court System, the State Court ADR Office, bar associations, and other public and private institutions and organizations should offer educational programs about ADR for the bench, bar and public. The Unified Court System also should publish for wide distribution a brochure about the various ADR procedures in common use.

The Task Force recognized that in order for those involved in the justice system to make more use of ADR processes and to make informed decisions about ADR, a wide range of ongoing educational programs were needed. These programs should be offered by, *inter alia*, the courts, law schools, bar associations, business groups and non-profit organizations.

9. All court ADR programs should be monitored and evaluated carefully to assure quality control. Evaluations should include both statistical data and user surveys.

According to the Kaye Report, an independent, objective and uniform monitoring system should be incorporated in to the day-to-day operation of every court-referred ADR program. The monitoring system would collect both qualitative and

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[20] *See generally id.* at 68-79. To date, a statewide ethics code has not been adopted. *See* Section VIII(A) *infra*.

quantitative data that members of the judiciary and the Bar could analyze to identify emerging programmatic problems and potential program adjustments.[21]

10. The Legislature should amend the C.P.L.R. and the Judiciary Law, and the Chief Administrative Judge should amend the Uniform Rules for the Trial Courts to reflect the establishment of court-referred ADR programs.

The amendments proposed in the Kaye Report covered: i) the selection, qualification, training and designation of neutrals to whom courts would refer cases; ii) the approval of training programs; iii) the establishment of ethical standards for neutrals; iv) the education of the bench, bar and the larger public with respect to ADR; v) the establishment of a State Court ADR Office; vi) the ongoing evaluation of pilot programs; and vii) protection for confidentiality of ADR processes.[22]

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The Kaye Report did much to focus attention on ADR in New York and promote further utilization of ADR processes. Nonetheless, various initiatives recommended in the Kaye Report have yet to be implemented. It is thus appropriate to revisit some of these issues and to put the endorsement of the State Bar behind key changes that the Kaye Report recommended.

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[21] *See generally id.* at 85-88.

[22] *See generally id.* at 89-92.

VI. THE CURRENT ADR LANDSCAPE IN NEW YORK

A. Court-Annexed ADR in New York

1. Federal Courts in New York

Congress has authorized each district court to use arbitration in any civil action, including an adversary proceeding in bankruptcy. *See* 28 U.S.C. 651.[23] Each United States District Court in New York has established its own ADR program.

The ADR program in the Southern District of New York is limited to mediation. Either the court or the parties may initiate the mediation process. The court selects a certain number of cases for early mediation on a random basis. The ADR program is designed so that the district judge is screened from the mediation process and does not know the name of the mediator assigned to the case. Virtually all decisions concerning the conduct of the mediation are left to the mediator s discretion. The program relies on *pro bono* attorney mediators who have completed a two-day training course, and whom the court has selected for its panel.[24]

The Bankruptcy Court for the Southern District of New York has an extensive ADR program. The court encourages parties to participate in voluntary mediation. In discovery disputes, if mediation fails to resolve the dispute, the parties can agree to have the mediator act as an arbitrator. The parties pay the neutrals who

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[23] Details of court-imposed arbitration in the federal courts, such as when courts are authorized to mandate arbitration, may be found at 28 U.S.C. 652-657.

[24] For further information contact: George O'Malley, ADR Administrator (212) 805-0643.

must participate in a two-day training program before being put on the roster. Not all neutrals are attorneys. The court also maintains a *pro bono* panel. [25]

The Eastern District of New York has both arbitration and mediation programs. Its ENE program was eliminated in March 1998. Only cases involving money damages which do not exceed $100,000 are automatically designated for compulsory arbitration, except in special circumstances. Parties in any civil action may voluntarily submit their dispute to court-annexed arbitration. The court may designate any case for, or the parties may voluntarily agree to participate in, mediation.[26] This program uses pro bono mediators and arbitrators. All neutrals are attorneys who have paid for and completed a two-day accredited training course before being put on a panel. [27]

Beginning in 1992, the Western District of New York conducted a pilot, voluntary arbitration program.[28] This pilot program ended on October 1, 1998, and was not immediately continued because the program was not well-received and handled

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[25] For further information contact: Cecelia Morris, Clerk of the Court (212) 668-2892.

[26] *See* Local Rules for the Eastern and Southern Districts of New York, Rules 83.10, 83.11.

[27] For further information contact: Gerald Lepp, ADR Administrator (718) 260-2577.

[28] Details of this program are set forth in the Local Rules for the Western District of New York, Rule 16.2.

very few cases. The Western District has established a committee to determine the future of its ADR program. [29]

The Northern District of New York requires participation in mediation, arbitration or ENE in all contract and tort cases. If the parties cannot agree on the type of ADR process, a magistrate judge facilitates the decision.[30] The court has discretion to refer other civil cases to consensual, non-binding arbitration and parties may request a referral. Parties are not prejudiced by refusing to arbitrate. The mediators are *pro bono* attorneys admitted to practice for five years or professional mediators. A free, one-day training course administered by the Federal Mediation and Arbitration Center is required for the mediators and arbitrators.[31] The ENE neutrals are not required to complete any training but must be admitted to practice for fifteen years.[32]

2. New York State Courts

C.P.L.R. 3405 authorizes the Chief Judge to promulgate rules for the arbitration of claims, but sets a jurisdictional limit of $6,000 ($10,000 in the Civil Court of the City of New York).[33] The losing party has the option of *de novo* court review.

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[29] For further information contact: Sue Oogjen, ADR Administrator (716) 263-6263.

[30] *See* Local Rules for the Northern District of New York, Rule 83.7; General Order 25.

[31] *See* Local Rules 83.11, 83.12.

[32] For further information contact: John Domurad, Chief Deputy (315) 448-0446.

[33] The Kaye Report recommended raising this limit to $25,000.

The Kaye Report recommended continued experimentation with various forms of ADR for different types of cases throughout the state. While the New York courts have not yet established a uniform ADR process, many courts have implemented pilot programs for civil, commercial, and matrimonial proceedings. Additionally, ADR programs for the resolution of attorney/client disputes are in the planning stages. The Appellate Division in the First Department already has a program under which the Departmental Disciplinary Committee refers to mediation attorney-client grievances which do not rise to the level of a Disciplinary Rule violation.[34]

a. Appellate Programs

Several court programs have been implemented to help resolve civil appeals. The Appellate Division, First Department utilizes a Pre-Argument Conference Program.[35] Senior partners from large law firms are used as "special masters." Although they are not required to attend any special training programs, most of these neutrals have already received training from the AAA or similar organizations.[36]

The Appellate Division, Second Department has used its Civil Action Management Program for a number of years. The program uses former judges to settle

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[34] For further information contact: Mark Collins, CDRCP Coordinator and Assistant State ADR Coordinator (518) 238-2699.

[35] *See* N.Y.C.R.R. 600.17.

[36] For further information contact: Catherine O Hagon Wolfe (212) 340-0400.

cases on appeal with both attorneys and clients being present. Again, the neutrals are not required to take any special mediation training.[37]

During the last year, the Appellate Division, Third Department has utilized a program called Civil Appeal Settlement Program.[38] This program also uses former judges to settle cases and requires that both attorneys and clients be present. Again, no special mediation training is required.[39]

The Appellate Division, Fourth Department has no similar program.

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[37] For further information contact: Martin Brownstein, Clerk (718) 875-1300.

[38] *See* Rules of the Appellate Division, Third Department 800.24-A, 800.24-B.

[39] For further information contact: Michael Novak, Clerk (518) 474-3609, or Stanley Walker, Director of Settlement Program (518) 486-4572.

b. State Court ADR Programs for Civil and Commercial Litigation

The Erie County Supreme Court has created a voluntary ADR program for personal injury matters of less than $100,000, excluding professional liability, products liability and labor law cases. Participants in the program engage in mediation before a neutral. If the mediation is unsuccessful, the case proceeds to a pre-trial assessment before a justice or judicial hearing officer who oversees further settlement negotiations. The pre-trial assessment remains confidential unless both parties agree to submit it to the court. The mediators are attorneys who have completed a training course. They receive a fee of $250 for the first five hours of mediation. This fee is paid equally by the parties. After the initial five hours, the parties and the mediator make their own fee arrangements.[40]

The Monroe County Supreme Court offers a mandatory mediation program for civil cases. Parties in selected cases must attend one mediation session, after which the parties may terminate the process. Parties may also request that the judge remove unsuitable cases from mediation. The program relies on *pro bono* mediators. All mediators have to complete a twenty-five hour course administered by the Center for Dispute Settlement and paid for by the court.[41]

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[40] For further information contact: Nicholas Baich, Program Coordinator (716) 851-3236.

[41] For further information contact: Tom Polito, Principal Law Clerk to Judge L. Paul Kehoe, Administrative Judge of the Seventh Judicial District (716) 428-2616.

The Nassau County Supreme Court has a voluntary but binding arbitration program for tort cases. The parties may agree to use the program before jury selection, thereby obviating the *de novo* review requirement of C.P.L.R. 3405. Because parties participate in arbitration voluntarily, there is no need for an automatic grant of *de novo* review. All arbitrators are Judicial Hearing Officers ("JHOs") -- retired judges who have been screened by the Unified Court System. JHOs receive a daily fee, determined by state law. [42]

The Commercial Division of the New York County Supreme Court has authorized its justices to order parties to participate in ADR. Once the judge selects a case for ADR, the parties choose arbitration, mediation or ENE. The mediation program has been the most popular of the three. After one session, the parties or the neutral may end the ADR process. The program uses *pro bono* neutrals. If a neutral completes the minimum number of *pro bono* matters required in a year, the parties can elect to use the neutral's services for a fee. A private ADR provider sponsors a one-day program to train the neutrals. In addition, New York County Supreme Court has an ENE program for non-New York City cases (mostly tort matters) and minor commercial cases that the Commercial Division has transferred to the Civil Division. The cases are selected from the Trial Assignment Part. Once a case has been selected, participation

[42] For further information contact: Anthony Infurna, ADR Coordinator (516) 571-2684.

in ENE is mandatory, but the evaluator's opinions are non-binding.[43] The evaluator is a court employee who has the respect of the Bar. The court plans to add another court staff member to perform such evaluations.

The Chautauqua County Supreme Court has created a Summary Jury Trial Project for cases with demands under $100,000. The program is voluntary but can be ordered by the sitting justice in furtherance of settlement. The parties present their case to a mock jury of 6-8 people chosen by the court from the regular jury pool. Restrictions are placed on the number of witnesses and time for presentation. The verdict is non-binding, unless otherwise agreed by the parties, and is used to promote settlement. The Summary Jury Trial is considered an extension of the settlement process. The parties are not charged for the expense of the proceeding.

The Staten Island and Queens Housing Parts of the New York Civil Court initiated pilot ADR programs last year in which they refer cases where both sides are *pro se* to voluntary mediation. The court also occasionally refers cases to mediation where both sides are not *pro se*.[44]

All commercial cases in the Suffolk County District Court with claims of up to $3,000 must go to arbitration. The parties retain the right to *de novo* review.[45]

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[43] For further information contact: Doug Henderson, ADR Administrator (212) 748-5303. *See also* <http:\\ucs.ljx.com>.

[44] For further information contact: Gail Davis, ADR Coordinator (718) 262-7266.

[45] For further information contact: Robert Flynn, Arbitration Commissioner (516) 854-9679.

c. State Court ADR Programs for Matrimonial Litigation

The Monroe County Supreme Court refers all new matrimonial matters to mandatory ENE for a non-binding evaluation which is designed to foster amicable settlement. Post-judgment applications are also referred to mandatory mediation. Parties may request permission to "opt-out" of the mediation program if they consider their case inappropriate for mediation. The program relies on *pro bono* mediators. All mediators have to complete a twenty-five hour course administered by the Center for Dispute Settlement and paid for by the court.[46]

The Nassau County Supreme Court uses mandatory ENE for the full range of issues arising in matrimonial actions. *Pro se* litigants are not referred to ENE. The program is conducted as frequently as possible at the court. A three-member panel hears short presentations and reaches a collective evaluation of the likely outcome of the case. The neutrals are *pro bono* attorneys with at least five years of experience in an exclusively matrimonial practice, or with at least ten years of experience in a mainly matrimonial practice. All volunteers currently on the roster have participated in a training seminar, and new volunteers will receive training through observing ENE sessions.[47]

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[46] For further information contact: Tom Polito, Principal Law Clerk to Judge L. Paul Kehoe Administrative Judge of the Seventh Judicial District (716) 428-2616.

[47] For further information contact: Anthony Infurna, ADR Coordinator (516) 571-2684.

The Nassau County Family Court refers appropriate parties with custody and visitation cases to the custody and visitation mediation program administered by Education and Assistance Corporation. A cadre of specially trained and supervised mediators conduct the mediations. Parties can enter the program at any time during the court process. Beginning in the spring of 1999, the program is scheduled to expand into Nassau Supreme Court.[48]

The New York County Supreme Court has an ENE program for matrimonial cases in which the justices may order the parties to participate. Unless the parties agree, the court does not stay the proceedings during the pendency of ENE. In addition, the New York County Family Court has a program which allows a justice sitting in the Domestic Violence and Custody/Visitation Part to make referrals to a voluntary custody/visitation mediation program. This program is a joint effort of the Association of the Bar of the City of New York, the Society for Prevention of Cruelty to Children ("SPCC") and Victim Services which is a Unified Court System CDRCP. The SPCC and Victim Services alternate screening cases for appropriateness and conducting the mediations using their own staff attorneys together with Bar Association volunteers. The court itself does not provide mediators.[49]

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[48] For further information contact: Elayne E. Greenberg, Custody and Visitation Mediation Program Coordinator (516) 489-7733 ext. 1139.

[49] For further information contact: Doug Henderson, ADR Administrator (212) 748-5303. *See also* <http:\\ucs.ljx.com>

The Orange County Supreme Court has established a court-referred mediation program for divorce cases. Justices consider the parties wishes in referring cases to mediation. Either the parties or the mediators may terminate the mediation after one session. All mediators must complete a twenty-four hour training program. Additionally, those mediators who are not attorneys must complete a fifteen hour training program in matrimonial law.[50]

Under the Erie County Family Court program, parties who have visitation cases in Family Court may participate in the court s voluntary mediation program. Parties can enter the program either before or after filing a petition. The mediators are attorneys who have completed a twenty-five hour, three-day training program and a twelve hour custody/visitation training. The program is administered by the local CDRC in Buffalo.[51]

d. ADR Programs in Planning

The Appellate Division s Joint Program on Mediation of Attorney-Client Minor Grievances is formulating procedures to implement N.Y.C.R.R., Part 1220, enacted on December 31, 1997, which authorizes a mediation program for minor attorney-client grievances. Attorney volunteers will serve as mediators. A mediation

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[50] For further information contact: Brett Peter Linn, ADR Coordinator (914) 291-3148.

[51] For further information contact: Julie Loesch, Better Business Bureau Foundation Director (716) 883-5960.

program of this type already has been in place in the First Department for some time.[52] Planning is also underway by a statewide committee to create an arbitration program for any fee dispute between lawyers and their clients.

The Commercial Division of Westchester County Supreme Court, which was created at the start of this year is in the process of establishing an ADR program. The program will focus on mediation. The program will utilize volunteer lawyers. The parties will be able to select a mediator from a list of pro bono neutrals.

[52] Similarly, in 1997, the Bar Assocication of the City of New York issued its revised Procedures for Mediation and Rules for Arbitration of Disputes Among Lawyers in connection with its program for resolving disputes between lawyers.

3. Community Dispute Resolution Centers

New York's CDRC program has served as a model for other states.[53] At least one CDRC exists in each county of the State, with several centers in the New York City area. The Unified Court System is the primary source of funding for CDRCs. They also receive public and private funding at the local level. Contractors such as Victim Services, New Justice Conflict, and The Institute for Mediation and Conflict Resolution run the various CDRCs.

The CDRCs take referrals from the courts and in some cases from government agencies such as the New York State Division of Human Rights. Alternatively, parties involved in a dispute may independently turn to the CDRCs which handle landlord-tenant, employment, family and relationship, merchant-consumer, and custody-visitation matters. Additionally, the N.Y.S. Dispute Resolution Association ("NYSDRA") is a statewide membership organization for ADR professionals including CDRCs. NYSDRA has contracts with the New York State Department of Education, the State Attorney General, the New York State Department of Health and the New York State Division of Housing and Community Renewal to provide ADR services in education disputes between parents and school districts, Lemon Law cases and manufactured housing disputes. Mediation is the most frequent mode of conflict resolution used by CRDCs,

[53] For information about other states' community mediation programs, see Daniel McGillis, Community Mediation Programs: Developments and Challenges (July 1997).

but arbitration is also offered. Additionally, CDRCs provide training and certification for mediators.[54]

B. Private ADR Programs

ADR clauses have become standard in many commercial contracts used by a diverse range of businesses throughout the United States and the world. Even when a dispute between parties is not governed by a contractual ADR clause, many litigants, or potential litigants, elect to use ADR in an effort to resolve or narrow the issues involved. In some industries, such as the securities field, membership in or affiliation with a self-regulatory organization ("SRO") requires participation in ADR because either the contract contains an arbitration clause or the SRO rules require industry members to arbitrate. These SROs and private ADR providers administer most of the business-related ADR processes using paid neutrals.

1. Self-Regulatory Organizations

SROs that provide ADR programs exist in various industries, such as securities and textiles. SROs follow their own arbitration rules and usually use their own arbitrators. The organizations listed below are the principal examples of SROs in the securities industry.

The National Association of Securities Dealers ("NASD") handles about 80% of all securities arbitrations. For the last three years, the NASD has offered a

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[54] For further information contact: Mark Collins, CDRCP Coordinator and Assistant State ADR Coordinator (518) 473-4160; and Lisa Hicks, Executive Director, NYSDRA (518) 465-2500.

voluntary mediation program as well, and has found that 20% of its cases opted for mediation. NASD arbitrations and mediations cover disputes between customers and broker-dealers, disputes between broker-dealers and their employees, and disputes between broker-dealers. To serve as a NASD mediator, one must submit four letters of recommendation and participate in formal mediation training. The NASD then proposes a list of mediators from which the parties select their mediator or the parties propose their own agreed-upon mediator.

Arbitration before the NASD is generally mandatory under the parties contracts or through NASD membership. The NASD Code of Arbitration Procedure governs the arbitration process. Arbitration panels for customer disputes use one industry arbitrator and two arbitrators who are unaffiliated with the securities industry. For industry disputes, the panel is drawn from the securities industry.[55]

The New York Stock Exchange ("NYSE") provides neutral arbitration panels to hear and decide disputes. Panels typically consist of one arbitrator with securities experience, and two arbitrators who are not affiliated with the securities industry. Arbitration is generally mandatory under the parties contracts and governed by NYSE Rule 600 *et seq*. The NYSE is also developing a mediation program.[56]

2. Private Providers

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[55] Further information can be obtained on the internet:<http://www.nasdr.com>. The American Stock Exchange was recently acquired by the NASD, and no longer has an independent ADR program.

[56] For further information contact: NYSE (212) 656-3000.

There are numerous private providers in New York State which offer ADR services to disputing parties. Large, nationwide and international providers that are located in New York include: the American Arbitration Association ("AAA"), the CPR Institute for Dispute Resolution ("CPR"), and JAMS/Endispute.[57] Many corporations have adopted CPR's pledge to make use of ADR to resolve disputes. New York also has many small and mid-sized providers of ADR services, including boutique firms that service a regional clientele and solo practitioners.

C. Government ADR Programs

An increasing number of government agencies are developing their own ADR programs and are making use of existing programs. Depending on the work of an agency, the use of ADR may resolve disputes in a less antagonistic manner, limit the number of formal complaints filed, decrease the cost of litigation, and/or speed up conflict resolution.

The New York City Commission on Human Rights has an Office of Mediation and Conflict Resolution which provides free and confidential mediation services to parties involved in complaints filed with the Commission. Participation in mediation is voluntary, and parties can choose to discontinue it at anytime. Mediations take place in joint sessions as well as private caucuses. An attorney from the Commission's Law Enforcement Bureau is present during each mediation to represent

[57] CPR also provides ADR training and education through publications, seminars and working groups. Further information can be obtained on the internet at: <http://www.cpradr.org/aboutcpr.htm>.

the Commission's interest in each complaint. The Commission employs two staff members as mediators, an attorney and a human rights specialist. Both have received in-house training in mediation.[58]

The New York State Division of Human Rights refers appropriate disputes to mediation at Victim Services in New York City and the CDRC in Rochester. All investigators employed by the Division are trained as certified mediators and are encouraged to use mediation techniques in their daily work. The Division wishes to implement a more formal mediation program but currently lacks funding to do so.[59]

The use of ADR in Federal agencies has been growing steadily throughout the last decade.[60] For example, the Equal Employment Opportunity Commission ("EEOC") refers appropriate cases to voluntary mediation. Volunteers and EEOC staff experienced in mediation and trained in EEOC policies conduct the mediations. The parties or the mediator may terminate mediation at any time. During the mediation process, the EEOC suspends the investigation for up to 60 days. The

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[58] For further information contact: Cheryl Howard, General Counsel (212) 306-7528.

[59] For further information contact: John Lind (212) 961-8797.

[60] ADR has been encouraged by President Clinton's Executive Order directing agencies to utilize ADR, as well as by specific agency initiatives. *See* Exec. Order No. 12988, 61 C.F.R. 4729, 1996 WL 46665 (Pres.).

EEOC requires mediators to complete a two-day training program which it offers in conjunction with Cornell University.[61]

In 1996, the United States Postal Service began a pilot mediation program for the resolution of equal employment opportunity disputes. The agency made efforts in early 1998 to expand the program, including expansion to the New York region. Over 200 mediations have been held with most resulting in the resolution of these internal employment disputes.

The Environmental Protection Agency ("EPA") has an ADR program, under which appropriate disputes are referred first to a convener who educates the parties about the ADR process and then to mediation or allocation. Allocation is a process in which a neutral helps the parties allocate the cost of a clean-up between responsible parties. Most cases in the program are CERCLA or "Superfund" disputes, but some are regulatory disputes. The EPA has contracts with approved neutrals, and the agency pays the cost of the ADR process. Most of the EPA's mediations are conducted under a contract with Resolve, an industry provider. Resolve maintains a roster of trained and certified neutrals with backgrounds in environmental law or environmental engineering. The EPA also provides in-house mediation administered by EPA staff members who have participated in a week-long training program.[62]

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[61] For further information contact: Michael Bertty, Mediation Program Coordinator (212) 748-8397.

[62] For further information contact: Tom Lieber, N.Y. Regional ADR Contact (212) 637-3158.

The Department of Justice refers appropriate ADA cases to voluntary mediation. The mediation program is administered through the Key Bridge Foundation.[63]

D. Regional Summary

New York State is spread over a very large and diverse geographical area, ranging from rural and remote areas of upstate New York to the vast metropolis of New York City and its suburban neighbors. The villages, small towns and cities of New York State differ not only in their size and location, but also in their socio-economic make-up, and in the businesses and industries that sustain them. Accordingly, the types of disputes that arise in the different parts of the State vary, as do the difficulties that ADR programs face. The advantages of ADR or of particular types of ADR are at times particular to a given region as well, but many of the pros and cons of ADR are common across the State.

Over the last fifteen years, ADR programs in rural areas have developed from virtually non-existent to extremely successful in some communities. The most rural areas of New York are often among the poorest, and many area residents lack the resources to retain legal representation. Additionally, many disputes are family, neighbor-to-neighbor, or small business matters. ADR administrators report that these types of disputes are well-suited for resolution through mediation because they benefit from a less adversarial approach that allows personal relationships to continue. CDRC-

[63] For further information contact: Dr. Peter Maida (703) 528-1667.

trained volunteers meet the demand for mediation and other forms of ADR in most rural areas of the state. However, program administrators believe that the demand for ADR could easily exceed the current supply if there were either a higher degree of endorsement from attorneys and judges, or if there were more community outreach and education about the existence and availability of ADR. On the other hand, some perceive less of a need for ADR services to resolve legal disputes because their communities are less impersonal and dispute resolution can often be handled informally. In terms of successful resolutions, ADR programs in rural New York have performed well.

Over the last several years, there has been a tremendous growth in the number of ADR programs in New York State's major urban areas outside of New York City. These programs, whether court-annexed, CDRCs, government-sponsored or private, have had varying degrees of success. While program administrators perceive a need for ADR services in their communities, the centers do not receive as many referrals as they would like. This could be due to a lack of enthusiasm for ADR on the part of attorneys and judges. These programs have had a high success rate in the resolution of disputes that they have handled.

New York City has the highest concentration of ADR programs in the State. As in rural and other urban areas, there has been a trend over the last several years to further expand the programs in New York City. Both the federal and state courts in New York City have extremely busy calendars, and accordingly the wait for judicial attention and a possible trial can be long. This makes ADR particularly

attractive to parties who need or desire a speedy resolution of their dispute. Nevertheless, ADR program administrators in New York City suspect that the number of disputes being referred to ADR does not reflect the true need for ADR services. As a possible reason, they cite a lack of sufficient awareness about ADR both by the public and by members of the Bar.

VII. THE ADR EDUCATIONAL LANDSCAPE

Despite educational initiatives in certain areas of the State, the final recommendations of the Kaye Report for extensive educational programs about ADR for the bench, bar and public have not been implemented for the community-at-large.[64] The Kaye Report concluded that extensive educational programs about ADR are a predicate for mainstreaming ADR services into New York's justice system. The Task Force believed that the judiciary, bar, litigants and public would be more likely to consider ADR once they understand the different ADR processes and how they may be used.[65]

Since the Kaye Report, there have been pockets of educational initiatives by law schools, bar associations, CDRCs, courts and private providers. Bar associations have sponsored a growing number of programs about ADR. There have also been more ADR training sessions for neutrals, articles about ADR in legal and other publications, courses about ADR offered by educational institutions and ADR

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[64] Kaye Report at 80.

[65] *Id.*

clinics in law schools. Nevertheless, there is still no coordinated, system-wide educational effort in New York. Instead, ignorance and misunderstandings about ADR remain commonplace within the New York legal community and the general public.

This Section surveys the status of ADR and the educational programs offered by segments of the State's legal community. It begins by discussing whether lawyers have an ethical duty to consider ADR. Section B reviews the ADR courses that are offered by New York's law schools. Next, Section C identifies the educational programs offered by the Bar. Section D contains a discussion of the educational programs conducted by CDRCs. Section E addresses education of the judiciary. Section F reviews the ADR education being offered by private ADR providers. Section G discusses the new CLE guidelines and how they may be used to promote ADR education for the Bar. Finally, Section H examines educational opportunities for the public.

A. Attorneys Ethical and Professional Obligation to Consider ADR

Courts, practitioners and legal commentators throughout the country have endorsed ADR as an essential lawyering tool to be considered in the representation of clients. The Committee believes that in today s legal culture, it is professionally irresponsible for lawyers to think that litigation is the only strategy for handling clients' problems. Attorneys should have both an ethical and professional obligation to educate themselves about ADR options, to advise their clients about the available dispute resolution options and to familiarize themselves about the different lawyering techniques that ADR requires.[66] Some commentators have concluded that a lawyer's failure to do so may constitute a breach of ethical duties and malpractice.[67]

Culling from the Model Code of Professional Responsibility,[68] legal commentators argue that attorneys have an implicit ethical obligation to consider ADR throughout their representation of their clients. A lawyer s duty extends beyond litigating a client s legal rights. It also includes promoting a client s other interests

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[66] *See* Widman, Attorneys Ethical Duties to Know and Advise Clients About ADR,The Prof. Law. 18 (1993); Breger, Should An Attorney Be Required to Advise a Client of ADR Options?, ABA Annual Meeting 231 (Aug. 3, 1998); Pedone, Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interests of the Children, 36 Fam. & Concil. Cts. Rev. 65 (1998); speech by Attorney General Janet Reno at AALS Conference, New Orleans, La. (Jan. 10, 1999).

[67] *See* Widman, supra; Breger, supra at 231.

[68] The applicable Model Rules include: Rules 1.2(a), 1.4(b), 2.1 and 3.2. Although New York's Code of Professional Responsibility has different ethical provisions than the Model Code, it contains provisions which are similar to the cited rules.

through creative resolutions that may be achieved in an ADR forum, but not in court. From the initial client interview, attorneys should develop a full understanding of the client's legal interests, as well as non-legal interests that may bear on the dispute, such as social and economic issues. Attorneys should educate their clients about available options and strategies, including ADR. As the case progresses, the attorney should consider the viability of ADR options to expedite litigation consistent with the client's interests. Nevertheless, there is no express provision in New York's Code of Professional Responsibility requiring lawyers to consider ADR as one of the available options.

Because an increasing number of courts and administrative agencies direct cases to ADR forums, attorneys must be prepared to represent their clients there.[69] For example, in New York, the court rules of the Commercial Division of New York County direct that all parties to commercial actions "shall be obligated to attempt in good faith to achieve early resolution of their dispute by use of appropriate forms of nonbinding Alternate Dispute Resolution."[70] In the Eastern and Southern Districts of New York, the court and counsel are directed to "address . . . the feasibility of settlement or alternate dispute resolution" at the case management conference.[71] As a result of these court-mandated ADR initiatives, attorneys should be familiar with the

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[69] *See* Section VI above.

[70] N.Y. Ct. Rules, App. G.

[71] U.S. Dist. Ct. Rules S. & E.D.N.Y., App. H.

available ADR options and the distinct ADR lawyering strategies that will advance their client's case. Selecting the appropriate ADR forum, choosing the most appropriate neutral, preparing the client for participation in ADR and representing the client in the ADR process are all necessary skills for practicing attorneys.

B. Law Schools as Providers of ADR Education

As ADR is mainstreamed into the legal culture, law schools[72] bear much of the responsibility for educating the next generation of lawyers about ADR.[73] Because ADR is a fairly new addition to the law school curriculum, members of the Bar who graduated more than ten years ago may not have learned about ADR in law school. Now, all fifteen New York law schools offer ADR courses, many taught by eminent leaders in the ADR field.[74] Although some law schools offer just one course, various others offer a number of ADR courses and an ADR clinic. ADR tends not to be taught in substantive law courses. If ADR were included among the subject areas tested on the New York State Bar Exam, law schools would be more motivated to teach ADR and law students would be more inclined to learn about it.

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[72] Colleges and universities also offer ADR programs for both lawyers and non-lawyers such as a certificate program offered by NYU. However, this Section will focus on the education offered by law schools.

[73] Speech by Janet Reno at AALS Conference in New Orleans, La. (Jan. 10, 1999).

[74] The fifteen law schools in New York are: Albany Law School, Brooklyn Law School, Cardozo School of Law, Columbia University School of Law, Cornell Law School, CUNY School of Law, Fordham University School of Law, Hofstra University School of Law, New York Law School, New York University Law School, Pace University School of Law, St. John's University School of Law, SUNY at Buffalo School

As laboratories of learning, law schools are beginning to offer additional educational opportunities beyond the regular law school curriculum.[75] First, some schools are offering CLE courses. Hopefully, more law schools will draw on their ADR talent and offer CLE courses in ADR lawyering. Second, law schools may form liaisons with legal clinics, bar associations, community mediation centers, court programs and public forums to promote ADR. Third, law schools can fund creative lawyering initiatives by attracting grant money. For example, CUNY School of Law was one of four law schools awarded a grant by the Soros Foundation which, in part, funded experimentation with non-litigation models for resolving disputes. In another grant, the Hewlett Foundation funded the CUNY consortium to provide a coordinated forum for ADR providers. Fourth, law schools should consider offering an L.L.M. program in ADR to provide advanced training in the field. For example, in 1995, the University of Missouri-Columbia School of Law introduced an L.L.M. program in Dispute Resolution.

Overall, the Committee believes that more coordination is needed among the various ADR educational efforts at the law school level in order to ensure that ADR continues to grow in New York.

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of Law, Syracuse University College of Law and Touro College Jacob Fuchsberg Law Center.

[75] *See generally* Directory of Law School Alternative Dispute Resolution Courses and Programs (2d ed. 1997).

C. The Local Bar Associations and ADR

The Committee surveyed the State's local and specialty bar associations to determine the extent to which they are involved in ADR. Of the local and specialty bars we surveyed, 29% responded.[76]

Although the local bars serve as clearinghouses for legal information for their membership and their respective communities, only a few bar associations in New York offer ADR programs or committees. There are isolated pockets of activity, mainly centered in New York City. There were various expressions of interest in learning more about ADR.

The local bars in New York City are by far the most active sponsors of a wide variety of programs, including luncheons, evening seminars, training sessions and a thirty-hour certificate training program. A number of these programs qualify for CLE credit. In addition, these bars seek to educate the public on the use of ADR. Other counties which have no ADR committees or programs of their own, nonetheless report active CDRC programs which promote ADR in their communities.

The State Bar should assume a leadership role in assisting local bars to establish ADR committees, to sponsor education and training programs for lawyers, and to promote education for the public. Local bars should also develop liaisons with law schools to offer CLE and public education programs about ADR.

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[76] A synopsis of this survey may be found in Appendix 1 hereto.

D. Education Offered by CDRCs

The CDRCs have expanded beyond their initial educational mandate of providing basic mediation skills training for neutrals in community mediations. Now, CDRCs also offer skills training in many areas, including custody and visitation, divorce, special education, small claims, parent-child and victim-offender mediations. In addition, there is training in the arbitration of fee disputes in domestic relations matters and Lemon Law cases. Not all CDRCs offer training in each mediation area. This expansion in education follows the CDRCs' provision of expanded ADR services.

All CDRC training is conducted by state-approved trainers. Each training must cover material in the state-approved curriculum. However, each CDRC may modify the required training to address the needs of the individual program. Following the training, many CDRCs require their mediators to observe one mediation and to be supervised while conducting two mediations. Moreover, volunteer mediators are required to take six hours of continuing education each year to maintain their certification. Of note, many CDRCs provide ADR internships for law students.

As CDRCs continue to handle more cases beyond the traditional community disputes and address disputes where legal issues are more heavily involved, it is necessary to re-evaluate the CDRCs mediation skills training and policies. For example, neutrals should be required to have sufficient familiarity with substantive legal issues to recognize when there is a legal issue that warrants a party seeking legal counsel. Moreover, because more parties are now represented by counsel in mediation, CDRCs and their neutrals need to develop strategies to effectively

include attorneys in the ADR process. CDRCs should develop policies and procedures that encourage attorney participation in the mediation. Furthermore, neutrals should be trained on how to work with both attorneys and their clients.

CDRCs should take a more active role in educating the bar and public about ADR. They should strengthen their liaisons with their local bar associations and educate them about ADR and its importance in lawyering. For example, CDRCs could offer educational courses for lawyers which meet CLE requirements. In addition, CDRCs should continue to publicize ADR within their local communities.

E. Education for the Judiciary

To date, the judiciary as a whole has not received sufficient education about ADR. Because many cases depend on a judicial referral to get ADR, it is important that judges understand the various ADR options and how ADR can assist parties in resolving their disputes. Steps are being taken to provide further educational programs for the judiciary. The Unified Court System's ADR Coordinator, Dan Weitz, gave an ADR presentation to newly-appointed judges at their seminar in December 1998. There are plans to offer a similar program as part of the judicial training program this coming summer. The Unified Court System's ADR Office is developing an educational component for judges and court personnel. In addition, members of our Committee have met with judges in New York and Erie counties to discuss ADR options.

The State Bar's Committee on Judicial Administration offered the following recommendations to promote ADR use by the judiciary. First, more education about

ADR is needed to clarify the existing confusion about which programs are included under the ADR rubric. Second, judges should be required to explain ADR options to litigants, instead of providing litigants with written materials. Third, ADR programs should be readily available at the courthouse.

In order for ADR to gain more acceptance within the judiciary and to promote more referrals of cases to ADR, it is essential to expand the educational effort so that the bench will be sufficiently knowledgeable about how ADR can be used as an effective case-management tool.

F. Education Offered by Private Providers

The Committee surveyed three private ADR providers: AAA, CPR, and JAMS/Endispute. Each provider offers training for their neutrals and provides information for their targeted service population that is based on the philosophy of that program. In addition, representatives of these and other ADR providers frequently participate in conferences and seminars addressed to ADR issues.

The AAA offers a comprehensive range of educational programs including ADR workshops, seminars, conferences, skills-building sessions, as well as specialized training. As a public service, non-profit organization, the AAA has committed staff and resources to promote education. AAA programs are directed at individuals, law firms, corporations and governmental agencies.

In contrast, CPR focuses on tailored, on-site training for its members, bar associations and the courts. It does not offer training courses to the general public. CPR's mission is to integrate ADR into the daily practice of corporate law departments

and law firms. CPR emphasizes ADR research, skills development and education to promote a wide range of ADR practices.

Although JAMS/Endispute makes its education and training available for public and private organizations, JAMS/Endispute concentrates on delivering its ADR services and the specialized dispute resolution programs it has designed for areas such as employment, environmental and construction ADR. Representatives of JAMS/Endispute often speak at ADR seminars.

G. CLE -- An Opportunity to Integrate ADR into Our Legal Culture

The enactment of mandatory CLE offers a fertile opportunity for New York attorneys to learn about ADR. ADR has now evolved from a revolutionary lawyering strategy to a requisite lawyering skill. Nevertheless, many lawyers never learned about ADR in law school and there is a significant lack of education among the Bar about ADR. Because ADR has become a critical option for resolving disputes, ADR should be addressed in the ethics, skills and professional practice subsections of the CLE scheme.

Attorneys should learn how to use ADR as an effective lawyering tool. Even those practitioners who regularly participate in ADR forums, can refine their ADR techniques by attending advanced programs about such topics as hybrid-processes or strategic considerations in negotiating and implementing multi-step ADR clauses. In a recent study about ADR use in corporate America, researchers from Cornell University and Price Waterhouse LLP concluded that "the reality of corporate ADR experience is

one of significant breadth but little depth."[77] Therefore, ADR education may benefit both the skeptical and the converted.

If New York is serious about mainstreaming ADR into the legal culture, ADR should be addressed as a core component of each substantive CLE offering which affects civil or matrimonial litigation. For example, a CLE program about litigating employment discrimination cases should include lawyering strategies for evaluating the appropriateness of ADR. Similarly, family law, special education, and corporate CLE courses are some areas that should cover ADR in their syllabus. Although a review of the Fall 1998 State Bar CLE schedule includes "Securities Mediation and Arbitration -- Effective Advocacy," ADR was conspicuously absent from courses on family law, special education, and trusts and estates law. Because lawyers who are educated about using ADR as an effective lawyering tool are more likely to integrate ADR into their practices, it is critical to offer CLE courses on ADR.

A survey of other jurisdictions indicates that ADR-friendly cultures include ADR throughout their CLE offerings. For example, a review of California CLE courses reveals many ADR courses, including "Basic Training for Litigators -- Civil Procedure Before Trial," which advises about considering ADR before commencing litigation. Similarly, in Texas, a CLE course on "Guardianship in Probate Courts" addresses mediation and ADR.

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[77] ADR Report, Vol. 2, No. 24 at 3.

New York should view mandatory CLE as an opportunity to integrate ADR into the State's legal culture.

H. Public Education

The public needs to be educated about ADR. Confusion about the differences among mediation and arbitration is common. As ADR choices increasingly have to be made by a generally uninformed public, it is important to spread information about the differences between ADR and conventional litigation.

The Association of the Bar of the City of New York has issued a useful brochure entitled, "How to Resolve Your Dispute Without Going To Court." To date, dissemination has not been widespread.

The State Bar should generate literature and disseminate public information about ADR. The State Bar can do so by commissioning advertising, public service announcements, brochures, articles, information for its website and information hotlines. However, any advertising or public announcements about ADR should be designed in a way that supports, instead of undermines the practice of law.

VIII. PROVISION OF ADR SERVICES IN NEW YORK

This Section addresses a wide range of concerns relating to how ADR activities are now being conducted in New York. In general, this Section examines several ways to improve the delivery of ADR services in New York. The concerns addressed include: (i) the standards applicable to neutrals in New York; (ii) ethical considerations affecting ADR neutrals and the ADR process; (iii) qualifications for neutrals; (iv) the need for confidentiality of communications in non-binding ADR processes; (v) the exposure of neutrals to liability arising out of their ADR services; and (vi) the availability of immunity for neutrals in court ADR programs.

A. ADR Standards

In order for the public to have confidence in ADR processes, standards are needed to ensure a minimum level of quality.[78] Standards for ADR include rules of ethics, standards for ADR practice, and minimum requirements for education, training and qualifications. At times, this range of issues is covered in a single set of standards. However, existing standards often address less than the full set of concerns, focusing, for example, only on ethics and practice, or only on training and qualifications. While recognizing the overlap in this area, this Section will first address the ethics and practice component of such standards and then review standards relating to education, training and qualifications for neutrals.

1. Ethics and Rules of Practice

In reviewing ADR standards, it is critical to differentiate the type of ADR process for which standards are established. Standards for arbitrators tend to track standards for judges because both are adjudicators. For example, an arbitrator, who makes binding decisions must avoid *ex parte* communications with the parties to a dispute. In contrast, the usual behavior for a mediator includes caucuses involving private conversations with fewer than all parties to a dispute. As a result, standards for mediators or neutral evaluators diverge from those for adjudicators. This Section will

[78] In a recent study of corporations conducted by Cornell University and Price Waterhouse LLP, a majority of the respondents had concerns about the quality of ADR neutrals.

reference sources of arbitrator standards, but will focus on standards for neutrals in non-binding ADR.[79]

Despite the availability of standards from a variety of sources, including a proposed set of standards in the Kaye Report, New York lacks any uniform set of ADR standards for its neutrals. There is no governing set of standards which specifically focuses on neutrals in non-binding ADR processes. Nor is there any watchdog agency charged with ensuring that ADR neutrals perform competently and ethically.

Some might argue that the absence of uniform standards is appropriate for the non-binding forms of ADR such as mediation or ENE. The theory would be that such unstructured forms of dispute resolution should be able to flourish freely in a manner which reflects the needs of the parties to the dispute, without the imposition of uniform standards. Nonetheless, even the most active ADR supporters recognize the need for basic standards to ensure that parties receive quality ADR services which effectively serve their interests. As the ADR neutral profession develops and expands, the need for standards grows more acute.

Recognizing the need for standards does not mean that uniformity is required for every ADR process. The needs of parties in court-annexed commercial mediations, for example, may differ significantly from those in private family mediations.

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[79] While providing a set of standards for both adjudicative and non-adjudicative neutrals, the Kaye Report's proposed Ethical Standards for Neutrals Handling Cases Referred by the Courts recognized that as we gain more experience with court-connected mediation in New York, it may become necessary to have a separate set of standards for mediators. Kaye Report at 69, fn.34.

Any set of standards should permit sufficient differentiation to accommodate varying needs of ADR processes in different contexts and for different types of disputes. What is needed is a set of minimum standards to fix the basic level of quality and ethics that should be demanded of ADR processes.

While New York has no overarching legislative scheme or single set of court rules for all non-adjudicative neutrals, there are a number of sets of standards which may apply in a variety of ADR contexts. These include standards: (i) promulgated for general ADR application by national groups, such as the ABA, SPIDR and the AAA; (ii) issued for court programs; (iii) articulated by bar groups; (iv) developed by practitioners in a particular substantive arena; (v) created by private providers; and (vi) suggested by educators. Standards tend to come in two forms: (i) process rules and ethics guidelines, such as those of the ABA, SPIDR and AAA, or (ii) minimum educational guidelines and qualifications criteria which assume that process rules and ethics will be learned as part of the mandated skills training.[80] The major standards currently in existence are summarized in the sub-sections below.

a. The SPIDR Ethical Standards of Professional Responsibility

In 1986, the Society of Professionals in Dispute Resolution ("SPIDR") adopted a very useful set of general standards for neutrals (whether adjudicative or non-adjudicative) entitled Ethical Standards of Professional Responsibility ("ESPR").

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[80] *See* Appendix 4.

ESPR was promulgated to promote ethical conduct and a high level of competency among SPIDR members and associates.

The ESPR standards stress fairness, neutrality and lack of bias. They highlight the importance of informed consent by the parties to the process, and maintaining confidentiality, promptness and respect for the settlement by the parties. They address how to deal with unrepresented interests. They recognize the need for greater vigilance and the application of additional rules and standards where multiple ADR processes (such as mediation and arbitration) are utilized for a single dispute. They require disclosure of fees. They contain provisions governing fairness in advertising and solicitation practices. The ESPR served as a base model for the Ethical Standards for Neutrals Handling Cases Referred by the Courts that were proposed in the Kaye Report.[81]

b. The ABA/SPIDR/AAA Model Standards of Practice for Mediators

The ABA/SPIDR/AAA Model Standards of Practice for Mediators ("MSPM") set out a number of principles that are generally applicable to mediation. Many of the issues raised in SPIDR's ESPR are raised again in the MSPM.

A major difference from ESPR is MSPM's focus on party self-determination which involves a facilitative style of fostering resolution by the parties themselves. This theme is struck in Standard I, which asserts that a party's self-determination is the fundamental principle of mediation. Rules discouraging the

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[81] *See* Kaye Report at 69.

mediator from imposing an outcome on the parties, and rules encouraging the mediator to assist the parties in making informed decisions through consent rather than coercion, flow from this fundamental principle. Standard II requires the mediator to act with impartiality. Standard III requires disclosure, and avoidance, of conflicts of interest. Generally, Standard IV provides generally that mediators should obtain requisite training, education and experience so that their competence meets the parties' reasonable expectations. Standard V requires preservation of confidentiality. There are general standards, including: mandating truth in advertising (Standard VII); requiring reasonable fees (Standard VIII); and obliging mediators to improve the practice of mediation, not only by improving their own skills but also by educating the public, correcting abuses and making mediation accessible to users (Standard IX). Standard VIII specifically bars contingent fees in order to ensure that settlements are reached because they satisfy the parties, not because they enrich the mediator.

The MSPM has broad appeal, but lacks legislative or judicial teeth. While the MSPM has some institutional force for members of the associations that promulgated it, it cannot be assumed that the MSPM will govern the private mediator or neutral service provider except by agreement of the parties. Many sophisticated private ADR providers are likely to abide by the MSPM. Many ADR neutrals, however, might not have consciously adopted these standards or might simply pay lip service to them.

c. Standards in Court-Annexed or Court-Referred Programs

Court-annexed ADR programs in New York have not generally published a set of standards comparable to the MSPM.[82] Because the court programs are experimental, each court has developed its own program design. Some of these programs have offered training during which mediation techniques and principles, including ethics, have been discussed. Anecdotal experience, however, indicates that a range of practices is used by court-annexed mediators. While few horror stories have been told, there is no certainty regarding how closely the practices endorsed by the MSPM are followed.

The materials for the Orange County matrimonial mediation program, developed with the assistance of the CDRC program and in collaboration with the local bar, include standards which essentially replicate the MSPM model. Moreover, Robert C. Meade, Jr., Director of the Commercial Division of Supreme Court New York County, has been developing a set of Ethical Guidelines and Standards for ADR neutrals on the Commercial Division's ADR panel, which consists mainly of mediators.

The CDRCP has not published its own set of standards for the programs in each county of the State. Instead, it expects these standards to be internalized in the training sessions for neutrals conducted by certified CDRC trainers. As a prerequisite to certification, however, each CDRC trainer must prepare their own training manual. The training manual will typically contain a set of ADR standards, often the MSPM.

d. Bar Association Standards

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[82] *Compare* Fla. Stat. Ann 44.106 (West 1998) (requiring the Florida Supreme Court to establish qualifications for mediators in court connected programs).

It appears that most bar associations in New York do not have independent sets of mediation standards comparable to the MSPM. Both in the court-annexed programs, and in certain bar programs, however, the rules or procedures of the ADR processes contain some standards for mediation practice, such as rules preserving confidentiality or defining the role of the mediator as primarily a facilitator of communications. This is evident, for example, in the Procedures for Mediation and Rules for Arbitration of Disputes Among Lawyers promulgated in revised form in 1997 in connection with the Bar Association of the City of New York's program for the resolution of disputes among lawyers.[83]

[83] These rules may be found on the internet at <http://www.abcny.org/lawyerdisp.html.>

e. Private Provider Standards

Among private providers, the AAA has explicitly adopted the MSPM and has developed a variety of standards, for both adjudicative and non-adjudicative neutrals. JAMS/Endispute, has published the JAMS/Endispute Ethics Guidelines for Mediators. JAMS/Endispute also advises its neutrals of the availability of other published standards, such as the MSPM, copies of which are maintained as reference materials at the JAMS/Endispute offices. A divergence of ADR standards may be seen in the manner in which evaluative styles, as well as mixing of processes such as mediation and arbitration by a single neutral,[84] are permitted under the JAMS/Endispute rules, subject to the parties' informed consent, but are not expressly permitted under the MSPM. The JAMS/Endispute rules match, in large degree, the styles of that provider's neutrals, who tend to be former judges who are more inclined to use evaluative styles for resolving disputes.[85]

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[84] There is not yet consensus within the profession whether and under what circumstances a mediator may change hats in the middle of the process to become an arbitrator, in the event that the parties are not able to arrive at a resolution on their own.

[85] A comparison of the MSPM and JAMS/Endispute provisions on mediator competence shows an emphasis on mediation process skills by MSPM as opposed to an emphasis by JAMS/Endispute on knowledge of relevant procedural and substantive issues. George O'Malley, ADR Administrator for the mediation program of the United States District Court for the Southern District of New York, has a policy of selecting mediators without special substantive knowledge of the field of law involved in the dispute, on the theory that this would lead the neutral to avoid assuming an evaluative role.

f. Standards for ADR Use in Specialized Fields

Various sets of ADR standards have been developed for national application in specific fields of law. The Academy of Family Mediators and the Association of Family and Conciliation Courts have jointly published Standards of Practice for Divorce and Family Mediation. These standards are essentially consistent with the MSPM, while focusing on family and matrimonial concerns.

An ADA Mediation Standards Work Group[86] has released a draft of ADR standards relating to Americans with Disabilities Act ("ADA") claims and disputes. These standards have been tailored to suit the needs of an ADA case.

The U.S. Postal Service's mediation program for Equal Employment Opportunity disputes uses the transformative model of mediation developed by Professor Robert A. Baruch Bush.[87] The Standards of Practice for Postal Service Mediations, published by the Postal Service for its ADR program, are tailored to the transformative mediation model. This model emphasizes communication and relationship over settlement agreements, trading and definition of rights. It focuses on empowering parties to express their genuine needs and interests and cultivating the

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[86] A formal -- yet ad hoc -- ADA Mediation Standards Work Group was convened in January 1998 to develop standards of mediation practice unique to ADA mediation. The 14 ADA Mediation Work Group members include practicing mediators, trainers, program administrators, and representatives of mediation service providers and professional organizations. These draft standards may be found on the internet at <http://www.mediate.com/articles/adadraft.cfm.>

[87] *See* Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation (1994) .

ability of parties to the dispute to recognize and respect the perspective of the other party.

g. Development of Standards by Leaders in the Field

Discussion of the need to develop standards for mediators is percolating among bar groups, neutrals and educators. CPR, a longtime proponent of ADR, together with the Georgetown University Law Center, has formed a 65-member Commission on Ethics and Standards of Dispute Resolution Practice. During its initial phase, the Ethics Commission is focusing on: (i) the intersection of ADR and law practice; and (ii) the ethical responsibilities of ADR provider organizations and court programs. The Commission will consider a variety of questions including:

- How do conflicts questions affect the interplay between legal practice and mediation? *E.g.,* when is a law firm barred from representing a party on the ground that one of the firm's attorneys previously served as a mediator in a matter involving that party?
- What standards should be applicable to private ADR providers?
- What disclosures, *e.g.,* concerning conflicts of interest or ADR process style, should be made by neutrals to the parties?
- What disclosures should be made by neutrals, or by parties, concerning repeated use of the neutral's services by one of the parties?

The CPR Ethics Commission has slated two other areas of inquiry for later phases of the Commission's work: (i) refining standards for third-party neutrals; and (ii) mass tort ADR. The Commission will consider issues relating to confidentiality, conflicts of interest, obligations to courts or referring organizations, documents and record-keeping, liability, immunity, standards of performance, co-mediation with other

professionals, ancillary practice, fees, fee-splitting, advertising, claimed expertise and training.

2. Qualifications and Training

As mentioned above, a large number of ADR programs, while lacking written standards of practice and ethics, rely on training and education as a substitute for written standards. Again, there are no uniform minimum educational requirements or qualifications for neutrals in New York. Such requirements may be established by the various formal programs in which the neutrals serve. For private ADR services, the requisite qualifications may be fixed by the parties. Recommendations for selection, training and qualifications of neutrals in court ADR programs were made in the Kaye Report,[88] but these recommendations have not been implemented on a State-wide basis.

Typically, standards governing neutral qualifications fix minimum requirements for education (by number of hours, degrees, skills and method), experience (such as number of hours in mediation or experience in co-mediation with a recognized ADR professional), and for lawyers on court-annexed panels, number of years in practice (whether in general or in a specific field of practice relating to the type of dispute subject to ADR). For court mediators, the Kaye Report recommended:

1. At least 25 hours of approved training in mediation skills and techniques; and

[88] *See* Kaye Report at 49-59.

2. At least 15 hours of additional training in the law, rules and court procedures pertaining to the subject area of the cases referred (i.e., torts and contracts, domestic relations, and/or complex civil cases), unless the attorney-mediator already has at least five years experience in the subject matter.

The Kaye Report recognized the value of experiential training programs involving role-playing, feedback, mentoring and the need for special training on issues specific to particular fields of law. It also contemplated waivers of the training requirement for mediators who have already gained comparable understanding and skills over time through their experience in mediation.

Standards for education, training and qualifications of neutrals vary among court programs, professional associations and service providers. On the more stringent end of the range is the Academy of Family Mediators which requires: (i) at least two years of experience as a mediator; (ii) completion of at least 250 hours of face-to-face mediation involving at least 25 cases; (iii) submission of memoranda relating to two cases; (iv) 60 hours of specified mediation training; and (v) an additional 20 hours of training every two years.

Although most court-annexed ADR programs follow the Kaye Report's twenty-five hour minimum training recommendation, there are exceptions where a lower threshold is used. For example, the Commercial Division mediation program of New York County Supreme Court currently requires participation in a one-day training program due to lack of funding for more intensive training.

Unfortunately, the recommended standards of the Kaye Report have not been implemented in all court ADR programs. The Committee is concerned that the

absence of an acceptable minimum set of standards for neutrals could jeopardize the quality of these services.

3. Views of the Committee

While various groups, including courts, bar associations, ADR professionals and academics, have been developing a range of ADR standards, no uniform ADR standards have yet been adopted in New York. Given the growth in use of ADR in a broad array of fields, the time is ripe to adopt standards which will set a minimum level of competency for ADR neutrals, or a range of standards appropriate to the variety of ADR modes.

While many good services are currently being rendered by neutrals in a wide range of ADR programs, the Committee believes that some assurance is needed that neutrals will meet a minimum set of education, training, qualification and ethics standards. The public deserves to be protected from the risk of a mediator performing unethically or incompetently and thereby jeopardizing their rights. The establishment of minimum standards for education, training, qualifications and ethics would go a long way toward addressing this issue.

In addition, proper training of neutrals should involve a clear understanding of the nature of the ADR process that the neutral provides. Differences between evaluative, directive, facilitative and transformative styles should be taught to mediators so that they can understand what style they use and how it fits within the ADR program in which they participate. Moreover, ADR process skills can be enhanced through training, including role playing and co-mediation. While the Committee

suggests no particular minimum training requirement, it recommends futher study into how best to cultivate the skills of a mediator in the activities that they typically perform.[89]

Although mediation does not involve an adjudication of the parties• rights, as ADR spreads it will generate more consensual resolutions which involve the waiver of or creation of legal rights, duties and remedies. Some degree of substantive training in the legal issues involved in the subject at issue would help the mediator highlight issues which require consultation with counsel, and would assist in raising important questions for the parties to consider before agreeing to ADR resolutions. This is particularly true where unrepresented parties and/or non-attorney neutrals are involved. Consideration should be given to setting minimum requirements for substantive legal training or competence in certain areas of law.

A number of court-annexed panels of neutrals restrict service to attorneys with a minimum number of years in practice. This requirement serves the expectations of the users of the court ADR system and may substitute as a requirement of training in the particular field of law. On the other hand, it cannot substitute for ADR process skills which are an essential area of training. The question of whether there should be a requirement of specific ADR or substantive law expertise for all neutrals merits further review.

The Committee recommends that every court-annexed or court-referred ADR program adopt or develop an express set of standards for neutrals in that ADR program. Given the availability of the ESPR, MSPM, and the standards published in the

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[89] A study is now being conducted by Dr. Margaret Herrman of the University of Georgia to define what skills are needed to perform as a competent mediator.

Kaye Report, as well as other published standards, in most cases there will be no need to reinvent the wheel for each program. The Committee further recommends that the Unified Court System encourage and monitor court-annexed and court-referred programs in this initiative.

B. Current Certification of Neutrals

Related to the issues of ethics, training and qualifications of neutrals is the certification of neutrals. As with ethical and training standards, there is currently no unified licensing or certification system for neutrals in the State.

The term certification itself has varied meanings, essentially representing approval by a recognized authority. Thus, there are community mediation trainers who are certified by the Unified Court System and recognized by the CDRCs as competent to train their mediators. CDRCs certify as mediators those persons (including non-attorneys) who have received at least 25 hours of training by certified trainers and have completed a 12-hour apprenticeship training. The Unified Court System also certifies JHOs who are used in some court ADR programs. The New York State Department of Education authorizes schools to develop certificate programs. New York University's School of Continuing and Professional Development has a certificate program in ADR where students participating in five courses (25 hours each) receive a certificate in ADR.

Other neutrals who are certified to provide ADR services include: Small Claims Court arbitrators;[90] attorney disciplinary mediators;[91] mediators on the Mediation Register of the United States Bankruptcy Court for the Southern and Eastern Districts;[92] arbitrators in matrimonial fee dispute arbitrations administered by the Supreme Court.[93]

There should be further study of whether uniform requirements for the certification of neutrals in the State are necessary. Such uniform standards would reduce confusion by the public created by ad hoc "certifications" which involve different requirements for certification.

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[90] To qualify, the neutral must be an attorney admitted for five years and attend a half-day orientation.

[91] To qualify, the neutral must be an attorney admitted for five years, and complete a training program in mediation skills sponsored by the Unified Court System or the equivalent.

[92] To qualify, the neutral must be an attorney admitted for five years in the Southern District. The certification is made by the Chief Judge. A three-day training session is provided for Bankruptcy Court neutrals.

[93] To qualify, the neutral must attend a one-day training session in matrimonial fee dispute arbitration. Arbitrators must be admitted attorneys who work or reside in the judicial district. When the amount in dispute is more than $3,000, a three-member panel of both attorneys and lay persons must preside. To be a lay panel member, the arbitrator must be certified by a CDRC, must have attended the one-day training session and must work or reside in the judicial district.

C. Diversity of ADR Neutrals

The Committee has not compiled statistics on the degree to which the various ADR panels in New York, including private providers, SRO panels, court-referral panels, court-annexed panels, agency panels and bar association panels reflect the diversity of the communities that they serve.[94] Nonetheless, the Committee is concerned that the available ADR neutrals do not necessarily reflect the diverse backgrounds of the participants in ADR processes.

The Committee believes that there should be greater sensitivity to the issue of whether there is sufficient balance and diversity among the various ADR panels of neutrals. This issue merits further attention. This should include looking at whether outreach programs are in place to encourage well-rounded participation by a well-rounded group of neutrals.

D. Protection for Confidential Communications in ADR

A standard feature of non-binding ADR processes, including mediation and ENE, is the requirement that communications in the ADR process be kept confidential. In mediation, this feature encourages parties to speak openly with each other and with the mediator and to disclose facts or settlement positions that they might not otherwise disclose. Disclosure of this information enables the parties to recognize the existence of common interests and assists them, and the mediator, in generating options that may produce a workable settlement.

The Committee believes that preserving the confidentiality of ADR communications is a paramount interest. Unless the parties are adequately assured

that these confidential communications will remain confidential, the ADR process could be jeopardized.

It is typical for court-annexed programs to provide that all communications in the ADR process are confidential. These rules are bolstered in Federal court programs by Rule 408 of the Federal Rules of Evidence, and in State court by CPLR 4547. In private ADR processes, the parties generally agree to preserve confidentiality by contract.

Legislation establishing the CDRC program expressly provides for confidentiality: "Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding."[95] Although this provision applies to CDRCs, the confidentiality rule has been extended to other areas.[96]

Despite the widespread recognition of the importance of confidentiality to the ADR process, there is no statutory privilege protecting the confidentiality of communications in non-binding ADR processes in New York.[97] This legislative gap leaves open the risk that third parties, who did not participate in the ADR process, might

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[94] A study by the General Accounting Office of the demographics of arbitrators on the New York Stock Exchange panel concluded that these neutrals were mostly white males.

[95] N.Y. Jud. Law 849-b (6). A synopsis of other protections for the confidentiality of ADR processes may be found in Appendix 5 attached hereto.

[96] Bauerle v. Bauerle, 616 N.Y.S.2d 275, 276-77 (4th Dep t 1994) (records of private divorce mediator are confidential). *See also* Cohen v. Empire Blue Cross & Blue Shield, 142 F.3d 116 (2d Cir. 1998) (sanctioning attorneys who breached confidentiality of court mediation program); Bernard v. Galen Group, Inc., 901 F. Supp. 778 (S.D.N.Y. 1995) (sanctioning attorneys who breached confidentiality of court mediation program).

seek to subpoena the neutral and/or obtain testimony or records disclosing confidential ADR communications. Without legislative protection, there is no assurance that such communications will remain confidential.

In order to encourage the growth of ADR and preserve the public's expectations of privacy, the Committee recommends that the State Bar seek legislation expressly recognizing a privilege protecting confidential communications.[98] This legislation should also provide that communications in the ADR process do not result in a waiver of any privileges protecting (i) communications between attorney and client, (ii) attorney work product, (iii) confidential spousal communications or (iv) other privileges that might have been deemed waived had communication been made in a different context.[99] Confidential statements made in non-binding ADR processes, such as mediation or ENE, should not be deemed admissions which may be used to impeach witnesses in subsequent court proceedings. The umbrella of confidentiality should afford protection against discovery demands or subpoenas not only by participants in the mediation but against third parties as well. Nonetheless, documents which would otherwise be discoverable (such as business records) would not be immunized from discovery simply by being exchanged in a mediation.

E. Potential Liability of ADR Neutrals

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[97] *Compare* Fla. Stat. Ann. § 44.102(3) (West 1998).

[98] Proposed confidentiality legislation has been offered by the City Bar's ADR Committee and the Director of the Commercial Division of New York County Supreme Court.

[99] *See, e.g.,* C.P.L.R. §§ 4502-4503.

To consider what potential liability exposure an ADR neutral (arbitrators, mediators and others) might have in rendering services, the MSPM and the ESPR provide a useful benchmark.[100] Presumably, a deviation from those standards could create potential liability for a neutral providing ADR services absent recognition of mediator immunity.

Additional possible claims against mediators might include: violations of constitutional rights, tort actions for negligent performance of duties, interference with contractual relationships, breach of contract, conflicts of interest, breach of fiduciary duty, defamation, civil rights violations, rendering incorrect advice to parties, unauthorized practice of law, breach of confidentiality, defects in the negotiation process, and lack of fairness in the resulting settlement agreement, suits to recover fees and rescission of settlement agreements.[101]

Notwithstanding these potential causes of action against neutrals, Complete Equity Markets believes that none of these theories finds support in current law. Their experience is that most claims against mediators have been successfully defended. One commentator, Cassandra Joseph, has written that almost all claims against mediators and arbitrators are barred under various doctrines of immunity.[102] She concludes that courts have recognized mediator immunity based on the judicial or

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[100] Under these standards, a mediator must, *inter alia*: conduct the mediation in an impartial manner (Standard II), disclose all conflicts of interest (Standard III), have the necessary qualifications to satisfy the parties' reasonable expectations (Standard IV); and maintain the confidentiality expectations of the parties (Standard V). *See* Section VIII(A)(1) *supra*.

[101] *See, e.g.*, Complete Equity Markets, *Mediator Malpractice Liability*.

quasi-judicial nature of mediation.[103] This immunity has been extended to arbitrators conducting ADR on a voluntary basis outside the court-mandated context[104] and Joseph believes that the same reasoning should apply to non-judicial mediators.[105] In addition, many private ADR agreements contain express immunity clauses for neutrals.[106]

Even though most claims could be defended on immunity grounds, the risk of a claim is disturbing, and if made, would be expensive to defend. To help avoid such claims, Complete Equity Markets, the insurance carrier for SPIDR members, suggests that attorney neutrals: should explain in writing that they are not advocates of either party to the mediation, should confine any advice given to the parties to areas of the mediator□s expertise, should take steps to protect against disclosing information to the other side that was given to the mediator in confidence by a party and should advise unrepresented parties to seek legal advice in the drafting

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[102] Cassondra Joseph, The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity, 12 Ohio St. J. on Disp. Resol. 629 (1997).

[103] *Id.* at 634.

[104] *See*, *e.g.,* Wally v. General Arb. Council of the Textile & Apparel Indus., 165 Misc. 2d 896, 630 N.Y.S.2d 627 (Sup. Ct. N.Y. Co. 1995); Babylon Milk & Cream Co. v. Horvitz, 151 N.Y.S.2d 221, 224 (Sup. Ct. 1956); *see also* Austern v. Chicago Bd. of Options Exch., Inc.*,* 898 F.2d 882, 886 (2d Cir. 1990).

[105] Joseph, *supra* at 634-36, 657. Jurisdictions outside New York have recognized quasi-judicial immunity for court-appointed neutrals. *See, e.g.,* Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994); Howard v. Drapkin, 271 Cal. Rptr. 893 (Cal. App. 1990).

[106] Such provisions have been recognized by the courts to be enforceable as an agreement prospectively limiting liability. *See* Solodar v. Watkins Glen Grand Prix Corp.*,* 36 A.D.2d 552, 317 N.Y.S.2d 228 (3d Dept. 1970); Colton v. New York Hosp., 98 Misc. 2d 957, 414 N.Y.S.2d 866, 871 (Sup. Ct. N.Y. Co. 1979); Lago v. Krollage, 78 N.Y.2d. 95, 571 N.Y.S.2d 689 (1991). Furthermore, covenants not to sue are generally enforced so long as there are no intentional, willful or grossly negligent or malicious acts. Great N. Assocs., Inc. v. Continental Cas. Co., 192 A.D.2d 976, N.Y.S.2d 596 (3d Dept. 1993); Lago, 571 N.Y.S.2d at 692.

of a settlement agreement. Neutrals should also request immunity agreements before agreeing to serve as a neutral.

While the potential does exist for malpractice claims against neutrals under a variety of legal theories, most should be successfully defeated on immunity grounds.

F. Immunity for ADR Neutrals in Court ADR Programs

As suggested above, the same public policy justifications that support immunity for judicial officers apply to neutral third-parties in court-annexed ADR programs. While, as indicated, there are good defenses to potential claims against mediators, there is no certainty of immunity. Neutrals who are providing valuable services to the court and the public should not be deterred from performing these functions out of a concern that they may be subject to litigation expense and potential liability.

As indicated above, some court-annexed programs in New York already provide immunity for their ADR neutrals.[107] Some programs extend the defense and indemnification protections afforded by Public Officers Law 17 to neutrals.[108]

The Committee urges the State Bar to seek legislation confirming immunity and extending coverage under Public Officers Law 17 to all neutrals in court-

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[107] *See*, *e.g.*, the Rules for the Appellate Division, First Department, Departmental Disciplinary Mediation program (providing that mediators and staff shall be immune from suit for any conduct in the course and scope of their official duties.). *See also* Rules of the United States District Court for the Northern District of New York, Rule 83.11-83.5.

[108] Public Officers Law 17 has been extended to mediators in the Appellate Division, First Department, Departmental Disciplinary Mediation program.

annexed or court-referred programs. Such legislation should also cover private neutrals whom the parties agree to immunize by contract. The legislation should be drafted to ensure, for example, that conflicts of interest have been properly disclosed. Any such legislation should make clear that it is intended to supplement immunity doctrines available under common law.

IX. COURT-ANNEXED ADR IN NEW YORK

The Committee has met with various leaders of the Unified Court System to discuss the current status of court-annexed ADR in New York and how the existing court programs can be expanded and improved.[109] The Committee was impressed by the commitment shown by the Unified Court System and various administrative judges to further advance ADR in the State courts. There are now various pilot ADR programs in the courts, which are summarized in Section VI above. Many of these programs are well-designed and well-run. Nonetheless, much still needs to be done to expand and improve ADR usage within the court system. In order for ADR to advance to the next level in New York, the Unified Court System needs to play a leadership role in the field.

In his seminal work, Professor Frank Sander of Harvard, described a vision of the "multi-door courthouse."[110] Implementing this vision would offer litigants various opportunities to resolve their disputes within the court system which extend beyond the traditional manner in which court cases have been resolved through

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[109] This Report has focused on the State courts, not the Federal courts, given their importance to the Bar in this State.

[110] *See generally* Frank E.A. Sander, Varieties of Dispute Processing, The Pound Conference, 70 F.R.D. 111 (1976).

conventional litigation techniques. Many states -- particularly California, Texas, Florida and more recently New Jersey -- have taken Professor Sander's vision to heart and have embraced ADR as a key component of the litigation process. In contrast, ADR is still in an experimental stage in New York where pilot programs are developing and the Bar is being exposed to ADR through the court system. Nonetheless, court-annexed ADR programs remain an isolated experience for most of the Bar.

The Unified Court System currently has an ADR office headed by an ADR Coordinator with a staff of assistants who are focusing their efforts on developing court ADR in New York. In addition, the Unified Court System is organizing a state-wide ADR Advisory Committee.[111]

The Committee believes that some court ADR programs are not sufficiently utilized. For example, the excellent ADR program offered by the Commercial Division of the Supreme Court, New York County, only handles approximately 200 cases per year, out of a total docket in excess of 4,000. As a result, the typical case in the Commercial Division is not being sent to the Division's ADR program. In addition, although there are pockets of ADR programs in the courts, mainly in urban centers, there are many areas of the State which have no court ADR programs.

The most important question which should be addressed by the Unified Court System is how best to expand the court-annexed ADR programs in New York. The court system has several options. First, the court system could use an incremental

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[111] A similar ADR Advisory Group already exists for the Commercial Division ADR program in New York County Supreme Court.

approach of making litigants aware of the availability of existing court ADR programs at various stages in the litigation process. For example, New York County Supreme Court is considering a notice that lawyers will be asked to send to their clients within 45 days of initiating case, which would advise clients of their ADR options. Another approach would be to list ADR as an option to be considered at court conferences on the preliminary conference order. Alternatively, the court system could mandate participation in non-binding ADR at some stage of the litigation process. While mandatory ADR has been adopted in some states,[112] there is a concern that the Bar is not yet ready for such large-scale implementation of ADR. An alternative would be to place a certain proportion of cases into court ADR programs on a random basis at key time points in the litigation (such as the filing of a Request for Judicial Intervention).[113] By so doing, the courts would immediately increase the percentage of cases referred to ADR and the numbers of cases selected can be tailored to the case volumes which each ADR program can handle. Finally, by court rule or legislation, each judicial district could be required to implement an ADR program. This approach, was recently taken at the Federal level with the enactment of the ADR Act of 1998.[114] Whichever approach or approaches may be taken by the Unified Court System, active measures are needed to expand the pilot ADR programs now in place in the courts.

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[112] *E.g.,* Ariz. Rev. Stat. Ann 17B; N.H. Rules of Ct. R. 170 (West 1998); S.D. Codified Laws Ann. 25-4-56 (1990 & Supp. 1995).

[113] The United States District Court for the Southern District of New York has used this approach to place a percentage of new case filings into its court-annexed mediation program.

[114] Pub. L. No. 105-315, 112 Stat. 2993-2998 (1998).

Until recently, there was not much training of judges in the use of ADR. This appears to be changing. The Unified Court System's ADR Coordinator, Dan Weitz, has already put on a training program for new judges and is planning a section on ADR as part of the Unified Court System's summer training program for the judiciary. Because many of the court ADR programs rely on judicial referrals, it is important for the judiciary to understand the benefits of ADR, the differences between various ADR options (particularly between binding and non-binding ADR) and how best to use ADR as a case management tool.

Most of the court-annexed ADR programs in New York rely on pro bono services of neutrals to deliver ADR services.[115] The Committee is concerned about the court system's heavy reliance on such pro bono services. In order for court ADR programs to be expanded and provide quality ADR services to the public, it will ultimately be necessary to pay the neutrals. This has been done in many other states.[116] The Committee believes that in most cases, using the services of paid neutrals is preferable to pro bono neutrals and that the parties themselves would take the ADR process more seriously if a paid neutral is involved. Funding will be necessary to pay the neutrals. This could come from a variety of sources -- such as additional budgetary

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[115] Participants in the Erie County program pay neutrals a fee of $250 for the first five hours of mediation. Some CDRC programs pay neutrals by voucher or rely on services of paid staff. JHOs in the Nassau County arbitration program receive a daily fee.

[116] *E.g,* Alaska Stat. 25.20.080(e); Haw. R. Civ. Ct. Exh. A; Me. Rev. Stat. Tit. 19, 1752(4) (West 1964 & Supp. 1995); Neb. Rev. Stat. 25-2913; Nev. Arb. R. 24; Tex. Civ. Prac. & Rem. Code Ann. 154.002-.003 (West Supp. 1996); Utah Admin. R. 4.510(2); Wyo. R. Civ. P. 40(D).

funds, grants, court fees or payments by the parties. There is some reluctance to require the parties to pay neutrals if mediation is made mandatory. The issue of paying for court-annexed neutrals needs to be considered seriously if court-annexed ADR is to move to the next level in New York.

As discussed in Section VIII above, the Committee further believes that a minimum level of competence should be set for court-annexed ADR neutrals. This was one of the recommendations made by the Kaye Report. The Committee appreciates the court system's desire to allow pilot programs to experiment with different program designs. Nevertheless, the Unified Court System should fix a minimum level of training and certification that would be required for a neutral to participate in a court ADR program. In addition, many court programs do not have ethical standards for the performance of their neutrals. The Unified Court System should promulgate a set of ethical standards which would serve as a base point for court ADR programs in the State.

In addition, as discussed in Section VIII above, legislation is needed to protect the confidentiality of non-binding ADR processes offered by the court system. The success of these programs could be jeopardized unless parties are guaranteed that their confidential communications with ADR neutrals are not exposed to a subpoena in subsequent litigation. In addition, the immunity of neutrals from liability for services performed in court-annexed and court-referred ADR programs should be confirmed by statute.

Finally, the Committee has been the beneficiary of an excellent dialogue with leaders of the Unified Court System throughout the drafting of this Report. More of these bench-bar liaisons are needed to further promote ADR in New York.

X. ROLE OF THE STATE BAR IN THE ADR ARENA

The Committee believes that the State Bar should assume a leadership role in the ADR field. To a large extent, the future progress of ADR in New York depends on the organized Bar endorsing ADR as a useful tool for resolving disputes. In order for ADR to come of age in New York -- as it has in other states -- the endorsement of the State Bar is vital.

The State Bar's leadership role should take various forms. The State Bar should help coordinate efforts being made by various segments of the legal community to advance ADR. The State Bar should serve as a liaison with local bars, the court system, ADR professionals and providers and the public. This will help ensure that the progression of ADR follows a coordinated plan, rather than a series of isolated efforts.

The State Bar should serve as a resource for educational programs and as an information source with regard to ADR. The State Bar sponsors many important CLE offerings for the Bar. ADR should be incorporated as much as possible into the State Bar's CLE courses. This should take the form of both specific courses designed to educate the Bar about ADR processes and strategies, and sub-components of substantive courses in the civil litigation and matrimonial fields in which an understanding of ADR would be useful to litigating in the fields generally.

The Committee has been informed that local bars in rural areas feel ill-equipped to offer CLE courses about ADR. The State Bar should attempt to make more knowledge about ADR available to those in rural areas by assisting local bars to set up ADR programs and committees. Information can be disseminated through courses offered at distance learning centers, by providing local bars with seminar materials about ADR, by making information available over the internet or though the sale of coursebooks and videos on ADR processes and strategies.

The State Bar should also serve as a clearing-house for information about ADR. During the course of drafting this Report, it became apparent that even those who are experts in the field have difficulty obtaining information about many of the ADR programs that are now available in New York. Assembling a central compendium of information about ADR offerings would be a valuable service to the Bar at large. Such information should also be made available to lawyer referral services sponsored by the Bar.

The State Bar should seek to educate the public generally about ADR. Consumers are now being confronted with ADR choices more often than ever. Many consumers of legal services do not understand how ADR is different than conventional litigation. The State Bar could play an important public service role by educating the public about ADR. This could take the form of public service announcements, brochures, articles, seminars, website information and hotlines.

The Committee does not believe that the State Bar should assume the role of an ADR provider.[117] Various private providers are offering services in the State already and the State Bar would be duplicating their efforts. One exception could be in the area of disputes among lawyers, an area where the State Bar's special expertise would be useful. A program for resolving lawyer disputes is currently offered by the Association of the Bar of the City of New York.

The State Bar should seek to shape public policy about ADR in areas that need updating. For example, the State Bar should seek legislation protecting the confidentiality of non-binding ADR processes and provide immunity for neutrals in court-annexed or court-referred ADR programs.

The State Bar should also review existing legal ethics rules in order to update them to reflect the changing nature of ADR practice. Such a review should include issues such as: (i) whether ADR is the practice of law; (ii) what fee arrangements are acceptable in ADR; (iii) how conflicts rules should be applied in ADR; and (iv) what measures should be taken to preserve the confidentiality of ADR processes.

Finally, the State Bar should consider forming a Dispute Resolution Section of the Association in order to recognize that the practice of ADR is an important component of legal

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[117] The Massachusetts Bar Association has created an ADR referral service to refer parties to qualified mediators and arbitrators for a nominal fee. All neutrals on the panel must be members of the Massachusetts Bar Association.

practice. This has been done in other bar associations such as the ABA.[118] To support the leadership role that State Bar should play in this field, the State Bar should consider adding an ADR Coordinator position to its executive staff.

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[118] The ABA's Section of Dispute Resolution is one of its fastest growing sections and now has over 6,300 members. State bars that have dispute resolution sections include Connecticut and Georgia.

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