

**NEW YORK STATE BAR ASSOCIATION  
COMMERCIAL AND FEDERAL LITIGATION SECTION  
COMMENT ON THE NEW PART PROFFERED  
BY THE STATEWIDE ALTERNATIVE DISPUTE RESOLUTION  
ADVISORY COMMITTEE TO ESTABLISH GENERAL  
STATEWIDE RULES FOR PRESUMPTIVE ADR<sup>1</sup>**

**SUMMARY**

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

**COMMENT**

**I. OVERVIEW**

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

**II. THE PROPOSED NEW RULE**

The Proposed Part broadly authorizes the Chief Administrative Judge, with the advice and consent of the Administrative Board of the Courts, to establish rules for the referral of disputes to ADR. The Proposed Part provides a set of basic rules to govern referrals to ADR, including rules relating to the determination of whether a dispute should or should not be referred (Ex. B, p. 2), the choice of neutral third parties to conduct the ADR process (Ex. B, pp. 3-4), and the confidentiality of the ADR process (Ex. B, pp. 4-5).

The proposed rules require that all civil disputes be referred to ADR at the earliest practicable time after commencement unless (i) referral is prohibited by local court rule or order of the Chief Administrative Judge, (ii) the court determines that referral will not serve the interests of justice, (iii) a party to the dispute objects and opts out in accordance with local court rule or order of the Chief Administrative Judge, or (iv) the court determines that insufficient ADR resources are currently available. The proposed rules subject mediators in court-referred ADR to certain standards of conduct now being reviewed. When those standards are approved, their location will be specified in proposed section 160.3(d) of the rules.

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<sup>1</sup> Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

### **III. IMPORTANCE OF THE PROPOSED NEW RULE**

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

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

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

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

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

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

March 23, 2022

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

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