

April 4, 2022

VIA FIRST-CLASS MAIL AND E-MAIL (rulecomment@nycourts.gov)

Eileen D. Millet, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: New York County Lawyers Association Alternative Dispute Resolution Committee Public Comment on Proposal to Adopt a New Part 60 of the Rules of the Chief Judge and a New Part 160 of the Rules of the Chief Administrative Judge, to Establish General Statewide Rules for the Referral of Civil Disputes in the Trial Courts to Alternative Dispute Resolution

Dear Ms. Millett:

We write on behalf of the New York County Lawyers Association's ("NYCLA") Alternative Dispute Resolution ("ADR") Committee (the "Committee") to inform the Office of Court Administration ("OCA") that the Committee joins with the many dispute resolution sections or committees of bar associations throughout the Empire State, including but not limited to those of the New York State Bar Association ("NYSBA"), the New York City Bar (a/k/a Association of the Bar of the City of New York), and the Nassau County Bar Association in enthusiastically endorsing the proposed statewide New Part 60 of the Rules of the Chief Judge and the New Part 160 of the Rules of the Chief Administrative Judge (the "Proposed Rules").¹

In May 2019, Chief Judge Janet DiFiore announced the rollout of the Presumptive ADR Program, requiring local courts to develop processes for referring cases to mediation and other forms of ADR early in the life of each contested matter. Since then, NYCLA's ADR Committee has actively partnered with OCA to provide a broad array of continuing legal education ADR training programs such as a virtual Part 146 Advanced Divorce Mediation Training program (run in the summers of 2020-21) and a February 2022 statewide virtual Part 137 Attorney-Client Fee Dispute Arbitration training program that have featured OCA personnel and

¹ This statement of support was approved for dissemination by the NYCLA President as a Committee statement. This statement has not been approved by the NYCLA Board of Directors and does not necessarily represent the views of the Board.

members of the judiciary as guest speakers. These individuals as well as the Committee's leaders and members have—both independently and in conjunction with other bar associations—publicized and promoted Presumptive ADR relentlessly, thereby setting a solid foundation for a statewide culture change.

Promulgation of the Proposed Rules is the next vital step to secure the continued progress and a unified acceptance of Presumptive ADR, and the Committee applauds the work of the members of the Statewide ADR Advisory Committee for crafting the Proposed Rules and for dedicating valuable time to attend a March 23rd Committee meeting (*see generally* <https://youtu.be/xRQJSNwz6xE>) in which they explained their history and operation. Of particular importance, the Proposed Rules clearly authorize New York courts to send cases to an appropriate ADR process at the earliest practicable time and mandate that they do so. This presumptive scheme will serve to allay the hesitancy of some judges to order cases to mediation or other ADR processes.

The Proposed Rules are flexible and dynamic, prudently leaving certain areas open for our local courts to address, including but not limited to: (i) the selection/referral process; (ii) the manner in which opt-outs are implemented; (iii) handling of complaints about the process; (iv) addressing situations where parties are unable to pay costs incurred; and (v) most importantly, neutral compensation.

Indeed, the issue of neutral compensation—which some Committee members have studied and discussed extensively over at least the past two years (*see generally* <https://tinyurl.com/State-Neutral-Comp-Statutes>)—is a complicated one best left for decision by local courts (and perhaps individual judges within local courts if authorized by District Administrative Judges) on a case-by-case basis, insofar as case type and complexity, regional judicial needs, availability of public funding/charitable donations, socioeconomic considerations, and many other variables present a plethora of challenges to instituting one or more statewide uniform compensation rules at this time.²

² To be sure, New York is not yet one of over forty-five states that have at least one in-state court-annexed ADR civil dispute resolution program providing for some minimum neutral compensation (a/k/a “floor compensation”) due upon commencement of an ADR session (*see Analysis of State Neutral Comp. Rules & Stats.* Worksheet at <https://tinyurl.com/State-Neutral-Comp-Statutes>) such that speedy neutral compensation reform in the Empire State is at least worthy of serious discussion and has garnered popular support both within and beyond the Committee. (*See generally* <https://www.change.org/NY-ADR-Compensation>). However, attempting to effectuate such reform prior to official adoption of the Proposed Rules would be akin to putting the proverbial cart before the horse or trying to build the second floor of a building without having completed the first. Our state courts first have to be cloaked with the legal authority to address the issue of neutral compensation—which is currently provided for by the Proposed Rules—much as the federal courts are cloaked with similar authority. (*See* 28 U.S.C. § 658(a)). Once this occurs, the time will then be ripe to establish

In conclusion, the Committee wholeheartedly endorses the Proposed Rules, supports their promulgation, and acknowledges and appreciates the enormous effort and skilled expertise that went into the Statewide ADR Advisory Committee drafting process. The Committee also thanks OCA for its significant assistance in developing the Proposed Rules and looks forward to their adoption soon, resulting in enhancement of the dispute resolution experience for parties, advocates, and neutrals throughout the State of New York.

Respectfully submitted,

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equitable, fair, and reasonable compensation schemes for neutrals working in state court-annexed ADR programs that provide at least a modicum of financial support to these honorable facilitators of justice.