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COMMENT REGARDING THE OFFICE OF COURT ADMINISTRATION'S PROPOSED RULE ON ALTERNATIVE DISPUTE RESOLUTION IN MATRIMONIAL LAW CASES

SUBMITTED BY THE NEW YORK CITY BAR ASSOCIATION'S COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, COMMITTEE ON DOMESTIC VIOLENCE AND COMMITTEE ON MATRIMONIAL LAW

The New York City Bar Association's Committees on Alternative Dispute Resolution, Domestic Violence and Matrimonial Law have reviewed the proposal by the Office of Court Administration (OCA) to give judges the discretion to order alternative dispute resolution (ADR) in matrimonial law cases. The committees commend OCA for tackling a very complicated issue.

As a general matter, the City Bar supports OCA's desire to increase the overall use of ADR in the court system. ADR can yield resolutions that parties are more satisfied with, while avoiding the cost, delay and angst of litigation. We also agree that such a rule must include exceptions with regard to cases involving domestic violence, child abuse, and a severe power imbalance between the parties.

The Committees have not been able to reach a consensus as to whether the court should have discretion to mandate ADR in matrimonial law cases. However, we do believe that the proposed rule is insufficiently developed and does not provide adequate guidance regarding implementation, and provide the following comments in that regard. In particular, we are concerned that OCA's laudable effort to screen out cases where there is domestic violence, child abuse or a severe power imbalance – and to protect potentially vulnerable parties in those cases – falls short and needs further clarification. This is especially problematic where litigants appear pro se.

In addition, we believe the rule could benefit from certain drafting changes that would provide greater clarity and facilitate consistent implementation. We offer the following suggestions as to how the rule might be clarified and where further deliberation and discussion might be helpful:

First, including "collaborative law" within the ambit of ADR options is problematic. It is unclear how parties represented by counsel can be ordered to collaborative law. Collaborative law requires that collaboratively trained and certified lawyers not represent their clients in court. Therefore, parties represented by lawyers would be required to hire collaborative lawyers to replace the lawyers representing them. This option may entail additional financial consequences for the parties and affects their right to retain counsel of their choice. Either collaborative law should be excluded from the rule, or further deliberation and clarification must be had before it is finally included.

Second, the rule should encompass some form of education regarding ADR for the parties. This can be done via pamphlet or videotape on the court's website or perhaps through volunteers at the courthouse. Parties can be educated about what ADR is, when it is or is not appropriate, and what the expectations will be once they start the process.

Third, the rule states that financial issues can be referred only after filing the note of issue, unless the parties agree otherwise. There should be no restriction on the timing of when financial issues may be referred (or, as contemplated by the rule, ordered) to ADR. If an ADR option is considered and undertaken at an earlier stage of the litigation, referring financial issues to ADR will not interrupt the progress of the case and may have a greater chance of success because the parties will not yet be fully entrenched in their positions.

Finally, and arguably most importantly, the rule suffers from a lack of guidance as to how it should be carried out. Ideally, uniform protocols should be put into place to guide implementation so that the rule is consistently applied throughout the court system. Some questions raised by the rule include, "How is the judge to make a determination regarding the exceptions?" "What if the party does not self-identify as falling within one of the exceptions – does a judge have a duty to affirmatively inquire?" "For those ADR professionals who volunteer for the program and then find themselves in a position to charge a fee, how will sliding scale fees be encouraged and

implemented?" "What if the judge finds that ADR is appropriate but the ADR professional does not?" "What happens if the ADR professional proceeds with the first session and then later suspects that one of the exceptions exists?" The rule should provide answers to these questions and a concrete plan for implementation. Ensuring that the exceptions are applied correctly will protect potentially vulnerable parties, boost the parties' confidence in the ADR process, and promote the transition of appropriate cases to ADR.

By way of example, the rule could explicitly provide that: (1) the assessment for the exceptions must be done in each case, first by the court and again (separately) by the ADR professional; (2) the court and the ADR professional have an affirmative duty of inquiry and an ongoing duty to terminate ADR if one of the exceptions emerges; (3) the court and the ADR professional must expressly inform the parties that they need not attend ADR if there is a history of domestic violence, a history of child abuse, or a severe power imbalance between the parties, or if one of the parties feels it is unsafe to proceed with ADR, and that they are not required to settle the case or proceed with ADR after the first session. In addition, the rule could explicitly address the sliding scale fee issue, as well as the educational component.

We mean these suggestions to be preliminary and, given the complexity of the issues, we recommend that a further iteration of the rule be made available for comment. We are happy to participate in further deliberations on the rule's development and implementation. Thank you for your consideration.

Committee on Alternative Dispute Resolution
By: Chris Stern Hyman, Chair

Committee on Domestic Violence
By: Anna Ognibene, Chair

Committee on Matrimonial Law
By: Michael Mosberg, Chair

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