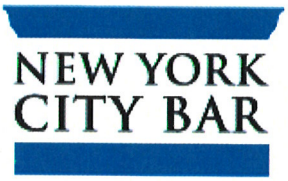

COMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION

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April 9, 2014

Via U.S. Mail and Email

The Honorable A. Gail Prudenti
Chief Administrative Judge
State of New York
Unified Court System
25 Beaver Street
New York, NY 10004

Dear Judge Prudenti:

Attached for your consideration is a proposal of the Alternative Dispute Resolution Committee (the "Committee") of the New York City Bar Association (the "Association") to amend Part 1215 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York ("Part 1215"). Specifically, the Committee's proposal would add a requirement to Part 1215 that attorney engagement letters inform clients about the information on alternative dispute resolution ("ADR") options and programs available on the New York State Unified Court System's website.

Background and Proposal

Part 1215 was added, effective in 2002, by joint order of the Appellate Divisions and requires attorneys, under certain circumstances, to deliver a written engagement letter to their clients. Pursuant to subdivision (b) of §1215.1 of Part 1215, the engagement letter is required to address these matters:

1. Explanation of the scope of the legal services to be provided;
2. Explanation of attorney's fees to be charged, expenses and billing practices; and where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.[1]

The Committee's proposal is intended to promote knowledge of ADR options by requiring the engagement letter also to inform clients about these alternatives. The Committee's proposal would add a requirement to Part 1215 that attorney engagement letters also inform clients about the information on ADR options and programs available on the New York State Unified Court System website.[2]

The modification of Part 1215 could be accomplished simply by adding the following language as a new subclause (3) of §1215.1's subdivision (b):

3. Where the representation involves an actual or potential litigation matter, citation or other reference to the explanation of Alternative Dispute Resolution options on the New York State Unified Court System's website.[3]

The Committee's proposal would not prescribe the specific engagement letter language for reference to the Unified Court System's website about ADR options. That choice would be left to each practitioner's judgment. But one could expect that attorneys would quickly adopt language along the following lines:

To the extent that the representation described herein involves or may involve litigation, you should be aware of The New York State Unified Court System's description of Alternative Dispute Resolution options, including mediation and arbitration, which can be found on its website at http://www.nycourts.gov/ip/adr/index.shtml, or a copy of which will be provided to you upon request.[4]

Notably, the Committee's proposal does not put practitioners in the potentially objectionable position of appearing to endorse ADR options – either generally or in the specific matter for representation. It requires a citation to an existing government public website, and nothing more.

But the required reference nonetheless will serve to heighten client awareness of, and deepen knowledge about, ADR options – and will do so in an unobtrusive and neutral fashion that can be controlled by the Unified Court System itself through management of its website.

Discussion

The Committee presumably does not need to inform Your Honor about the benefits of robust mediation and alternative dispute resolution programs both to the Court system and

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[1] The full text of Part 1215 is attached as Exhibit A.
[2] See, generally, http://www.nycourts.gov/ip/adr/index.shtml.
[3] *See* Exhibit B for the full content of what a potentially revised §1215.1 of Part 1215 would look like and Exhibit C for a draft proposed order implementing the change.
[4] Similarly, Part 1215 does not prescribe how a written engagement letter should discharge the obligation in subclause (2) of subdivision (b) to notify a client of the right to arbitrate fee disputes. The specific language is left to the attorney's discretion.

potential or actual litigants. The Unified Court System's own web site is testimony, at minimum, to the belief that ADR programs are appropriate tools, under the right circumstances, for a judicial system that is obliged to address a huge volume and wide panoply of disputes. However, reasonable minds certainly can, and often do, disagree on the specifics of how and to what extent ADR programs should be promoted or favored by the judicial system.

The Committee itself has a history of different efforts to promote knowledge and use of ADR options through specific notice requirements. Most recently, the Committee in 2010 endorsed the proposed "Notice of Mediation Alternative" that was being considered by the New York State Bar Association's House of Delegates.[5] Before that, the Committee in 1998 wrote to Justice Stephen Crane recommending that New York courts implement a rule requiring lawyers to inform their clients about ADR options.[6] And in 1995, the Association adopted an "ADR Policy Statement" recommending that lawyers should be knowledgeable about ADR processes and should be obligated to advise their clients about these alternatives to litigation.[7]

Proposals in this area over time, including the above ones, have typically met a significant level of resistance, with objections ranging from the underlying concept itself, to concerns over impeding an attorney's freedom of advice or implying that mediation is appropriate in all instances, to the specific content or reach of any proposed notice.[8]

It is with this background in mind, with which your Honor is no doubt familiar, that the Committee has developed its current proposal. The Committee believes that a lower-key approach, relying on existing information materials of the New York State Court system, might still adequately serve the interests of the Court system and actual and potential litigants, but be less susceptible to the charge that it is overly-prescriptive or inappropriately biased towards ADR.

The Committee believes that its proposal has the following benefits:

1. The proposal will familiarize attorneys and their clients with the Uniform Court System website, which contains a trove of resources (in addition to its information about ADR options) with which many are not familiar.
2. By simply referencing the Unified Court System's website, and going no further, the proposal will heighten familiarity with ADR options without requiring an attorney to be seen as potentially endorsing ADR or being prescriptive of the situations in which it is appropriate or suggestive that it is, indeed, always appropriate.
3. By referencing the Unified Court System's website, the substantive content of what the Unified Court System wishes to make known about ADR options can be refined and updated, without further rule-making, by changes or additions from time-to-time to the website itself.
4. By embedding the website reference as part of Part 1215's engagement letter delivery requirement, the reference will presumably be read and noticed by clients. (By contrast, the Committee considered and rejected proposing the website reference be included in the

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[5] *See Letter of Peter H. Woodin*, dated October 22, 2010, attached as Exhibit D.
[6] *See Letter of Michael A. Cooper*, dated July 14, 1998, attached as Exhibit E.
[7] *See* ADR Policy Statement, dated October 18, 1995, attached as Exhibit F.
[8] *See, e.g.*, "New York Lawyers Riled Up Over Mediation Plan" in New York Law Journal, November 12, 2010, attached as Exhibit G.

Statement of Client's Rights,[9] because law office postings or handouts may not always be read or readily observed by clients.)

5. By making the website reference required only when the matter involves or may involve litigation, the obligation is targeted to a limited and appropriate audience.
6. Part 1215 already references the potential, under Part 137, for resolving a fee dispute through ADR; the proposal would simply add another, albeit more general, reference to ADR options.
7. By not mandating the specific content of the required reference, the proposal is flexible enough to allow attorneys to use their judgment on how they wish to inform their clients about the website within the confines of their engagement letter, even to the extent, if they wish, of stating that the reference is included pursuant to court rules.

And, although not a specific benefit of the Committee's proposal itself, we believe there may be an ancillary benefit simply in amending Part 1215 in any fashion that requires broadly publicizing the change – and, therefore highlighting the underlying engagement letter delivery requirement itself. Although it is beyond the Committee's ability to survey, anecdotally we believe that today, more than ten years after its adoption, there are a sizeable number of practitioners who are simply not familiar with Part 1215 or with all of its details.

The proposal outlined herein has the full support and endorsement of the Committee. Please let me know if I can furnish any additional information or answer any questions you may have about any aspect of it.

Sincerely,

Chris Stern Hyman
Chair, Alternative Dispute Resolution Committee

Encls.

cc: Carey R. Dunne, Esq.
President, New York City Bar Association

Alan Rothstein, Esq.
General Counsel, New York City Bar Association

Roger E. Schwed, Esq.
Member, Alternative Dispute Resolution Committee

Charles M. Newman, Esq.
Member, Alternative Dispute Resolution Committee

[9] *See* Part 1210.1 of Title 22.

EXHIBIT A

ATTORNEYS

- Attorney Directory
- Attorney Registration
- CLE
- Grievance Committees
- NY Lawyer Assistance Trust (alcohol & substance abuse)
- Pro Bono Opportunities
- Rules of Profressional Conduct
- Secure Pass ID Cards

ATTORNEY-CLIENT RELATIONSHIP

- Client's Responsibilities
- Clients Rights
- Fee Arbitration Program
- Lawyers' Fund for Client Protection
- Letters of Engagement Rules
- Retainer & Closing Statements

PROFESSIONAL AFFILIATIONS & QUALIFICATIONS

Letters of Engagement Rules

Joint Order Of The Appellate Divisions

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby add, effective March 4, 2002, Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," as follows:

Part 1215 Written Letter of Engagement

§1215.1 Requirements

a. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

b. The letter of engagement shall address the following matters:

   1. Explanation of the scope of the legal services to be provided;

   2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

c. Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§1215.2 Exceptions

This section shall not apply to:

1. representation of a client where the fee to be charged is expected to be less than $3000,

2. representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or

3. representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR), or

4. representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As amended April 3, 2002

Part 1215 Written Letter of Engagement

§1215.1 Requirements

a. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

b. The letter of engagement shall address the following matters:

    1. Explanation of the scope of the legal services to be provided;

    2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator;

    ~~2.~~3. Where the representation involves an actual or potential litigation matter, citation or other reference to the explanation of Alternative Dispute Resolution options on the New York State Unified Court System's website.

c. Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

EXHIBIT C

JOINT ORDER OF THE APPELLATE DIVISIONS

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby amend, effective [immediately] [date], Part 1215 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," and do hereby add, effective [immediately [date], a new subclause (3) to subdivision (b) of §1215.1 of Part 1215 of said Title, as follows:

Part 1215 Written Letter of Engagement

§1215.1 Requirements

a. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

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1. Explanation of the scope of the legal services to be provided;

2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator~~.~~; and

3. Where the representation involves an actual or potential litigation matter, citation or other reference to the explanation of Alternative Dispute Resolution options on the New York State Unified Court System's website.

c. Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

EXHIBIT D

NEW YORK
CITY BAR

COMMITTEE ON
ALTERNATIVE DISPUTE RESOLUTION

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robin.gise@gmail.com

October 22, 2010

Via Email (spyounger@pbwt.com)

Stephen P. Younger, Esq.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, New York 10036

RE: Notice of Mediation Alternative

Dear Mr. Younger:

I write to convey the support of the New York City Bar Association and its Alternative Dispute Resolution Committee, which I chair, for the proposed "Notice of Mediation Alternative" that will shortly be considered by the NYSBA's House of Delegates. We urge the House of Delegates to accept the recommendation of the Section of Dispute Resolution that a notice requirement be adopted.

I expect you are aware that in 1995 the Association adopted an "ADR Policy Statement" recommending that lawyers should be knowledgeable about ADR processes and should be obligated to advise their clients about these alternatives to litigation. For your information, I have attached a copy of that ADR Policy Statement, as well as a 1998 letter from Michael Cooper, then President of the Association, to Justice Stephen Crane, conveying the Association's recommendation that New York courts implement a rule requiring lawyers to inform their clients about alternative dispute resolution options.

The considerations that supported the Association's recommendations in 1998 are even more compelling today. Therefore we believe the time is ripe for a renewed recommendation to the judiciary that such a requirement be adopted in New York. If the NYSBA's House of Delegates concurs, we would anticipate joining with the NYSBA in urging the New York courts to adopt a requirement that lawyers advise their clients about the availability of dispute resolution alternatives.

With best regards,

Peter H. Woodin

w/ attachments:
1) ADR Policy Statement – 1995
2) Cooper 1998 letter

cc: Kathleen Mulligan Baxter, Esq.
(via email: kbaxter@nysba.org)

EXHIBIT E

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NY 10036-6689
FAX: (212) 768-8116

MICHAEL A. COOPER
PRESIDENT

PHONE: (212) 382-6700
E-MAIL: MCOOPER@ABCNY.ORG

July 14, 1998

Honorable Stephen G. Crane
Unified Court System
First Judicial District
Supreme Court, Civil Branch
60 Centre Street
New York, New York 10007-1474

Re: Recommendation to the New York State Unified Court System, First Judicial District, Supreme Court, Civil Branch, To Encourage Parties to Agree to Mediate Civil Cases

Dear Justice Crane:

In October, 1995 this Association adopted the following policy statement:

> For many disputes there may be more effective methods of resolution than traditional litigation. Alternative dispute resolution procedures, either in conjunction with litigation or independently, can often reduce the costs and burdens of litigation and result in solutions not available in court. Accordingly —
>
> Every lawyer should be knowledgeable about alternative dispute resolution processes, and should advise the lawyer's clients of the availability of any appropriate alternatives to litigation so such clients can make an informed choice concerning resolution of present and prospective disputes.

Consistent with that policy statement, the Committee on Arbitration and the Committee on Alternative Dispute Resolution of this Association have studied ways in which our courts can effectuate that policy by increasing the voluntary use of mediation and other alternative dispute resolution ("ADR") mechanisms in settling commercial and other civil litigations. Both Committees have recommended that it would be desirable for our courts to adopt rules wich would require attorneys representing parties in commercial and most other civil cases (a) to deliver to their clients a Notice of Dispute Resolution Alternatives in order to advise their clients of their ADR options and (b) to complete and submit to the court answers to an ADR Certification and Attorney Questionnaire. The Questionnaire would advise the court as to each party's willingness to enter into mediation (or an alternative ADR process) at the outset of the litigation. If any party is not willing to agree to ADR at that time, the attorney answering the Questionnaire may (but is not obligated to) explain to the court the reasons for such unwillingness. Proposed forms of the Notice of Dispute Resolution Alternatives and the ADR Certification and Attorney Questionnaire are enclosed.

This Association wholeheartedly endorses these Committee Recommendations. Accordingly, we recommend that the First Judicial District of the New York State Supreme Court, Civil Branch, promulgate court rules to implement these proposals in the Civil Branch of the Supreme Court in New York County. We applaud the fact that, under your leadership, the Commercial Division has initiated an ADR program which has received much praise from members of the Bar as well as their clients. We hope that you will be able to expand the use of ADR Procedures in all Divisions of the Civil Branch of your Court by implementing this recommendation. We believe it will encourage a greater voluntary use of mediation or other ADR procedures in resolving disputes early in the litigation process.

If you and your Court agree with our recommendation, our Committees will be pleased to assist in drafting the appropriate court rules to implement these proposals.

If you would like further assistance or have any questions, please feel free to contact the undersigned or any of the following: Carroll E. Neesemann (212-468-8138) or Roger M. Deitz (212-838-2288), chairs, respectively, of the Committees on Arbitration and the Committee on Alternative Dispute Resolution, or Kenneth L. Andrichik (212-858-3915), Stephen A. Hochman (212-750-8700) or Amy Rothstein (212-619-3730), co-chairs of the joint subcommittee who worked on the project.

Respectfully,

Michael A. Cooper

Michael A. Cooper

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Amy Rothstein, Esq.
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Floor 23
New York, New York 10271-0002

EXHIBIT F

10/18/95
Final

ADR Policy Statement

Legislators, courts*, clients and bar associations increasingly expect all lawyers to understand alternative dispute resolution processes ("ADR"), including binding and non-binding arbitration, mediation, private judging, minitrials, summary jury trials, neutral evaluation and fact-finding (as well as combinations and variants of these processes). We believe that every lawyer should be informed and be prepared to counsel clients about alternative processes for dispute resolution, whether or not such processes are provided for in court rules.

Model Rule 1.4(b) of the ABA Model Rules of Professional Conduct provides in part:

> "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Similarly Model Rule 1.2(a) requires that:

> "A lawyer shall abide by a client's decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued."

And EC 7-8 of the New York Lawyer's Code of Professional Responsibility requires that:

> "A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations."

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* In New York, local, state, and federal court rules provide for the use of ADR processes, either on a mandatory basis or by agreement of the parties.

EC 7-8 calls on lawyers to advise clients of

> "the possible effect of each legal alternative" and those "factors which may lead to a decision that is morally just as well as legally permissible,"

and states that:

> "In the final analysis, however, the lawyer should always remember the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and for the lawyer."

Some commentators have suggested that these rules are broad enough to impose a duty on lawyers to advise clients of their ADR options.

Other jurisdictions have been even more specific. Colorado has added the following to its rules governing lawyer conduct:

> In a matter involving or expected to involve litigation, a lawyer <u>should</u> advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

(Emphasis added.) Colorado RPC 2.1, effective January 1, 1993.*

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* Apparently, the Kansas Rules of Professional Conduct require lawyers to discuss ADR methods with clients when ADR is proposed by the court or opposing counsel (4/14/94 Opinion). The opinion includes the following guidelines:

(1) A lawyer should keep reasonably informed of the ADR options available in the jurisdiction(s) where the lawyer practices . . . .

(2) When the lawyer's professional judgment indicates ADR is a viable option, the lawyer should discuss that option with the client, whether or not the issue is raised by opposing counsel or the court.

(continued...)

Neither the ABA Model Rule nor the Colorado rule expressly requires lawyers to discuss ADR options with their clients (note the Colorado rule's use of the precatory "should" rather than the mandatory "shall"). However, the Colorado rule at least focuses lawyers on the ADR issue.

Moreover, in the Southern District every twentieth case is currently being designated for mediation, and in the Eastern District virtually all cases seeking less than $100,000 in damages are designated for non-binding arbitration, while other cases are designated for early neutral evaluation or for mediation.

We believe that this Association should encourage lawyers routinely to discuss ADR options so that each client can make an informed decision as to whether it should utilize ADR processes, either in structuring or documenting relationships out of which disputes may arise or after a dispute arises. Unless lawyers raise the issue and discuss the pros and cons of ADR, it is unlikely that clients will have the opportunity to make the cost/benefit analysis necessary for an informed decision.

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*(...continued)

(3) If an ADR technique is proposed by opposing counsel or the court, the lawyer must advise the lawyer's client of the benefits and disadvantages of the ADR techniques proposed, and give the lawyer's professional advice to the client regarding use of ADR in the particular case.

It is the client who ultimately bears the risks and pays the costs of dispute resolution processes. Thus, clients should be fully informed to enable them to weigh these risks and costs against various interests (which may include considerations other than money).

Finally, the CPR Law Firm Policy Statement, to which the policy statement below is similar, has been endorsed by more than 1500 law firms in the United States, including more than 80 in New York City, and the CPR Corporate Policy Statement has been endorsed by more than 800 corporations on behalf of themselves and 2800 subsidiaries.

Accordingly, we believe that this Association should adopt the following policy statement:

> For many disputes there may be more effective methods of resolution than traditional litigation. Alternative dispute resolution procedures, either in conjunction with litigation or independently, can often reduce the costs and burdens of litigation and result in solutions not available in court. Accordingly --
>
> Every lawyer should be knowledgeable about alternative dispute resolution processes, and should advise the lawyer's clients of the availability of any appropriate alternatives to litigation so such clients can make an informed choice concerning resolution of present and prospective disputes.

New York Law Journal

EXHIBIT G

NY Lawyers Riled Up Over Mediation Plan

Joel Stashenko

New York Law Journal

11-12-2010

A proposal to require lawyers to notify their clients that disputes can be settled through mediation as well as litigation has stirred considerable opposition within the New York State Bar Association.

A resolution of the group's Dispute Resolution Section supporting the requirement was abruptly taken off of the House of Delegates' agenda Saturday after several objections were raised.

Critics are concerned the proposal would force attorneys to promote mediation even when they do not believe the technique would be effective or appropriate for their clients.

Simeon H. Baum, a mediation proponent who was to have presented the notification proposal to the House of Delegates, said in an interview Wednesday that it is "an open question" whether the resolution can be salvaged.

"The next steps will be to have further discussions, find out what the concerns are and try to address them," he said. "Is maybe a different approach altogether better? We are basically maintaining an open mind, which would certainly be in keeping with our model [of dispute resolution]."

The proposal would require the "prompt" delivery to a client when a retainer agreement is signed of a "Notice of Mediation Alternative."

The recommended notice states, "As a party or potential party to a lawsuit, you have the right to a trial in which a judge or a jury decides your case," but it adds, "Mediation services are available that may help you settle your lawsuit faster and before substantial expenses are incurred."

The section also backs amendment of the Rules of the Chief Administrative Judge, ?1210.2, to add to the existing Statement of Clients Rights information about the benefits of mediation.

"Mediation is most effective in reducing costs if used early in the course of a lawsuit," the proposed rule change reads. "You should discuss with your lawyer the issue of whether mediation might be appropriate in your case and, if so, when and how to best make use of the mediation process."

According to a report from the Dispute Resolution Section, the development of both alternative dispute resolution panels and community dispute resolution centers has created forums for diverting disputes from the courts.

Some 100,000 people a year are being heard through dispute resolution centers, the section said.

"Now that these services are in place, and are known to Courts and counsel, it is time to increase the use of mediation by parties who can benefit from this process," the section reported. "With roughly 2.5 million non-criminal cases filed in New York state each year, it is beyond doubt that parties and the heavily burdened, financially challenged courts could benefit greatly from wider use of mediation by the public."

Peter H. Woodin, chairman of the New York City Bar's Committee on Alternative Dispute Resolution, endorsed the proposal, saying it is similar to a policy statement the city bar adopted in 1995.

But Joseph E. Neuhaus, chairman of the state bar's Committee on Standards of Attorney Conduct, wrote to the Dispute Resolution Section that his committee has several problems with the proposal.

For starters, according to Mr. Neuhaus, the notice "inappropriately intrudes" on the latitude lawyers have in giving advice to clients.

"The decision about whether and when to advise clients of the availability of mediation is one that should be left to each individual lawyer, who knows the client and the client's manner," wrote Mr. Neuhaus, of Sullivan & Cromwell.

He added that mediation is not a "one-size-fits-all" solution and that in some circumstances, a bitter marital dispute, for instance, mediation would stand little chance of success.

Also, Mr. Neuhaus said members of his committee are worried that mandatory notification could encourage legal malpractice actions if the required notification is not made or is not understood by the client.

'Imbalance of Power'

The state bar's Committee on Legal Aid also challenged the proposal as written, according to its chairman, C. Kenneth Perri of Legal Assistance of Western New York.

Mr. Perri wrote to the state bar expressing concern that access to justice will be curtailed if pro-bono lawyers are not exempted from the notification requirement and "the potential safety and other issues created by the proposal's failure to provide an exemption for attorneys representing domestic violence victims."

George H. Lowe, a federal magistrate judge for the Northern District and co-chair of the state bar's President's Committee on Access to Justice, said his committee has similar objections to those raised by Mr. Perri.

"Mediation is almost never an appropriate alternative for resolving a dispute between a domestic violence victim and the perpetrator of domestic violence in any litigation involving these parties, whether it be a family law or another type of dispute," the magistrate judge wrote to the bar. "The imbalance of power between an abuser and a victim is simply too great to believe that mediation will work. And the risk of further manipulation or victimization of the abused party is too significant to allow."

Mr. Baum said the Dispute Resolution Section regarded its proposal as "educational," and that it was important that lawyers did not feel it "was being shoved down their throats."

He acknowledged that the issue of mediation in domestic violence cases is complex, and said that opinions vary about its effectiveness. But he said a program in Dutchess County that mediates such cases has met with "a lot of success."

In general, he said, mediation has been successful in resolving disputes over business, trusts and estate, and insurance and reinsurance in particular.

"No one is suggesting here that we should back away from the use of mediation," Mr. Baum said.

State court administrators have tried to encourage the greater use of mediators.

In 2008, the Office of Court Administration established the first guidelines for the training of mediators and neutral evaluators, citing the growing popularity of alternative methods for resolving disputes.

The same year, the state bar elevated its dispute resolution committee to a section.

According to Mr. Baum, the state bar's ADR committee he chaired had 93 members when it became a section. It now has 2,500, he said.

"I think it is just a recognition of how important alternative methods of dispute resolution have become and how much interest there is in them," said Mr. Baum, president of Resolve Mediation Services in Manhattan.
