October 8, 2019

Hon. Anthony Cannataro
111 Centre Street, Room 838
New York, NY 10013

Dear Judge Cannataro:

We are writing regarding the rollout of the Presumptive ADR Initiative (the "Initiative") in the New York State courts. First, we would like to thank you for taking the time to discuss the Initiative with numerous lawyers, including many members of the New York City Bar Association (the "City Bar"), over the past several months. We hope you have found the meetings to be a productive way to hear from practitioners directly. We have expressed our appreciation to Lisa Courtney and Lisa Denig, as well.

As you know, the City Bar has long supported the use of ADR as an efficient, less costly and less burdensome way for litigants to resolve disputes. We have several active committees in the ADR space and we're pleased that they have been invited to express their views about the benefits and challenges of implementing the Initiative on such a large scale. They stand ready to assist the court system in effectuating a successful rollout, including with respect to information dissemination, mediator training and diversity goals.

Notwithstanding our general and longstanding support for ADR, we are writing today to express certain concerns regarding implementation of the Initiative in New York City's Civil Court and Housing Court. We trust you will take these concerns in the spirit with which they are intended, i.e., borne out of a desire to ensure the fair and effective administration of justice for all litigants, regardless of income level. We believe more time is needed before the Initiative can roll out in the Civil and Housing Courts, and would urge that practitioners have an opportunity to review and publicly comment on the plans as it applies to these particular courts.

I. CIVIL COURT

We believe that Presumptive ADR would be inappropriate, and potentially harmful, in Civil Court cases where one side is a business entity represented by counsel and the other side is an unrepresented litigant. This type of situation creates an imbalance of power that is inextricably linked to the legal problem at hand. The purpose of ADR is to afford the opportunity for parties to work together towards thoughtful and mutually agreed-upon settlements that create fair and efficient results. This laudable goal is unrealistic when an extreme imbalance of power exists between the parties.

As you know, most of the cases in the Civil Court where one side is a represented business entity and the other side is an unrepresented individual are consumer credit actions.[1] In 2018, over 100,000 consumer credit actions were filed against alleged debtors in New York City Civil Court.[2] Of those alleged debtors, a mere 4% were represented by counsel. Unrepresented litigants are ill-equipped to represent themselves in ADR when faced with an experienced attorney with far greater knowledge about the process. Indeed, many consumer defendants do not understand the legal documents they receive, or understand basic precepts of legal procedure, such as to inquire as to whether the plaintiff has standing to bring its case, how to tell if a complaint is missing critical information, how to raise jurisdictional defenses, that the burden of proof is on the plaintiff, or what kind of evidence is admissible. This problem is even more acute among limited-English proficient defendants. Consequently, unrepresented New Yorkers cannot evaluate the strength of the claims against them or determine an appropriate settlement value of the lawsuit—both of which are crucial components of a successful ADR process. Unrepresented litigants would be vulnerable to pressure to waive their defenses and accept an unfair settlement.

ADR also would impose undue logistical pressures on unrepresented litigants by requiring additional appearance dates. Many unrepresented litigants do not have paid time off, are hourly workers, have disabilities that limit their ability to travel, or are unable to afford child care. Thus, attending court dates on more occasions than is necessary results in lost pay, additional physical burdens, dragging a child to court, or having to make unaffordable arrangements for childcare. All of these factors create pressures to settle even when not advisable just to avoid returning to court and taking further days off of work.

What is more, consumer debt litigation is characterized by profound information asymmetry and abuse: expert debt collection attorneys who are in court daily too frequently employ overreaching and sometimes misleading litigation tactics against unrepresented consumers.[3] For most debt collectors, the goal in filing a debt collection case is to either obtain a default judgment or intimidate the defendant into settling – not to actually litigate the claims. In fact, many creditors would not be able to meet their burden of proof were their cases to be adjudicated, which few are. But most of the people they sue do not know this, and do not test plaintiffs' cases.

For these reasons, when it comes to New York City Civil Court, we do not believe that ADR will result in thoughtful and mutually agreed-upon settlements where one side is an attorney armed with legal knowledge and intimately familiar with the court process and the court staff, while the other side is an unrepresented, economically-distressed New Yorker who is unfamiliar with the law and court procedure. We appreciate the role Civil Court judges often play in holding creditor and debt-buyer plaintiffs to legal standards, even when there is no defense counsel asking them to do so. It is our view that judicial involvement is critical and these cases warrant greater scrutiny from the bench, not less. Therefore, we recommend that the Initiative focus on those Civil

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[1] Although we focus primarily on unrepresented defendants in consumer credit actions, a lack of counsel can create a power imbalance in any case being heard in Civil Court. This would include many of the cases on the Part 11 calendar where one side is a represented business entity and the other side is an unrepresented individual.

[2] The number of consumer debt cases filed in the Civil Court is likely higher because many consumer debts, such as rental arrear debts, are not defined by the Civil Court as consumer credit actions or designated as "C" cases.

[3] Human Rights Watch, *Rubber Stamp Justice US Courts, Debt Buying Corporations, and the Poor*, (Jan. 20, 2016) *available at* https://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor. (All websites cited in this letter were last visited on October 8, 2019

Court cases where both parties are represented by counsel or where both are pro se individuals. These types of cases are appropriate for ADR because they do not present the issue of extreme power and knowledge imbalances between the parties.

II. HOUSING COURT

Housing Court is already a form of alternative dispute resolution. Prior to going to an expedited trial, parties are assigned to Resolution Parts where each case is conferenced to foster speedy settlements. When attorneys represent the litigants, both sides discuss the case and often resolve the issues without the need for a trial. In fact, the vast majority of Housing Court cases are resolved quickly by stipulations of settlement, overseen by the necessary and critical eye of judges.[4] An additional resolution process imposed by the Initiative may lengthen the proceeding or increase the complexity of the action.

Although we have not yet seen the Initiative's rollout plan, it certainly appears that adding another form of ADR to Housing Court proceedings would be incompatible with Article 7 of the Real Property and Proceedings Law, which governs Housing Court cases. Housing Court cases are summary proceedings, which move much faster than traditional litigation. Time limits and case structure are statutory, and must be strictly enforced. There are no provisions in Article 7 for additional alternative dispute resolution, and none are expected to be enacted by the Legislature. Thus, to the extent the Initiative would add additional steps to the process, there is a strong argument to be made that such a change would conflict with the law. In addition, judges in existing mediation parts often cannot so-order or enforce mediated settlements and still comply with the law. Alternative forms of relief fashioned by mediators are often beyond the jurisdiction of the court to uphold.

As you know, Housing Court is in the midst of two sea changes: first, the historic rollout of the citywide Right to Counsel Law for low income tenants; second, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), which became law in June. Judges, court staff, and tenant and landlord attorneys are working hard to keep up with these changes.

New York City is the first jurisdiction to ensure legal representation for all low income tenants in eviction proceedings. This groundbreaking right will correct the imbalance of power, and restore dignity to the process. New York City is setting an example for the nation, and is the test case for whether the civil right to counsel will be a successful model for other states. As such, the media devotes significant resources to covering the Housing Courts. Universities and organizations are gathering facts and data points for studies, and attorneys are adapting their practices to new complex norms. At this time, the focus and resources of the Housing Court should be on the success of the Right to Counsel Law, and not on the addition of new resolution processes to the mix. In short, we are very concerned that the Initiative will interfere with the successful rollout of the Right to Counsel Law in Housing Court.

The 2019 HSTPA drastically amended the statute that governs Housing Court cases. Time limits, requirements and notice provisions have changed, and judicial discretion has been broadened. Court decisions and orders on the new law are necessary to guide practitioners and

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[4] This letter does not encompass or relate to Housing Court cases where mediation is already taking place or perhaps where ADR techniques will be augmented once the Initiative is fully implemented, *i.e.*, roommate dispute cases or cases where neither party is represented by counsel.

establish new standards and practices in Housing Court. It is crucial that clear and understandable legal precedent be created with respect to the HSTPA. If cases are required to go to new forms of ADR, lawyers will be prevented from litigating the principles of the HSTPA, parties will be prevented from fully asserting their rights under the new law, and important judicial precedent will not be developed by judges. The inability to opt out of ADR curtails the functionality of the HSTPA, and infringes upon the rights of litigants.

Fortunately, there is a solution that can address these problems and still implement the Initiative in a way that makes sense and optimizes the chances for a successful outcome. Additional trained Court Attorneys (preferably one or more per courtroom) can implement ADR techniques during the mandated pre-trial conference. We believe that would keep the focus on successful implementation of the Right to Counsel Law, assist both sides and encourage resolutions that judges can enforce. No additional facilities or space would be needed, as Court Attorneys can function in the existing space and use judges' chambers. Making additional Court Attorneys the mediators also means that experienced court personnel, who understand the intricacies of changing housing laws, will preside over resolutions in a neutral and efficient manner. Implementing the Initiative with additional Court Attorneys also compliments the 2019 Housing Court Report Survey results, wherein nearly three quarters of Housing Court practitioners surveyed said more Court Attorneys are needed.[5]

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We acknowledge the difficulty of implementing a statewide court plan such as the Initiative. We also acknowledge the difficulty of changing hearts and minds when it comes to how lawyers and their clients litigate cases, something we addressed in a 2018 report on the need to re-think how to efficiently resolve disputes. At the same time, not all proceedings and litigants are the same, and in the context of the Initiative's rollout, we urge you to consider our above concerns and suggestions regarding Civil and Housing Court. We further suggest that a more formal stakeholder meeting be convened so that the bench and bar members who practice in those courts can fully discuss the issues and devise alternative ways to reach the intended goals of the Initiative.

As always, thank you for considering our views. We look forward to hearing from you and stand ready to assist in coordinating an in-person meeting if that would be helpful.

Respectfully,

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[5] The Housing Court Committee recently conducted a survey of Housing Court practitioners, culminating in the April 2019 report: State of New York City's Housing Court, which I attach for your reference. Nearly three quarters of Housing Court practitioners surveyed said more Court Attorneys are needed. Implementing the Initiative with additional Court Attorneys will complement the existing system and comply with the governing statute, as well as assist with the growing judicial needs surrounding the Right to Counsel Law.

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