COUNCIL ON JUDICIAL ADMINISTRATION

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Re: Proposed Rules for Presumptive Alternative Dispute Resolution

Dear Ms. Millett:

Thank you for the opportunity to offer these public comments, responding to your and Chief Administrative Judge Marks's memorandum dated February 3, 2022. OCA's proposal is 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."

First and foremost, the Council on Judicial Administration ("CJA") of the New York City Bar Association ("City Bar") is pleased to support the promulgation of proposed Part 60 of the Rules of the Chief Judge and Part 160 of the Rules of the Chief Administrative Judge (the "Proposed ADR Rules"). We are delighted the New York Courts are taking this wise step.

The New York City Bar Association ("City Bar") is a voluntary organization with approximately 24,000 members. CJA's membership is comprised of judges, litigators, neutrals, chairs of court-related City Bar committees, and other members whose work is impacted by, or

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

impacts, the state and federal courts in New York State.[1] CJA consulted with many of its constituent committees and other interested City Bar members to better understand the needs and interests of members, and many of their contributions are contained in this public comment. CJA is grateful for their invaluable input.

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 view ADR, and particularly mediation, as strong methods both to complement and achieve the goals of the court system. ADR is a proven way to foster and implement — for litigants, lawyers, judges and other stakeholders — efficient, party-centric approaches to resolving disputes in creative and enduring ways, often using techniques and gaining results far beyond the power of a judge to order.

Since early in her tenure, Chief Judge DiFiore has centered "Excellence" as the theme of her efforts and of her term. In mid-2019, Judge DiFiore and Judge Marks announced the Presumptive ADR program ("PADR"). Half a year later, the COVID lockdowns temporarily stymied the rollout of PADR, but also had an unexpected but positive effect. Mediators and other ADR neutrals were able to pivot swiftly and move their processes to be almost entirely online. The benefits of that pivot were readily clear, especially as the courts were confronted with expanded dockets and delays and barriers to handling all the cases in the traditional way. In the experience of many of our members, those benefits were often acknowledged by the parties, their counsel and other stakeholders.

As you know, the chair of the Chief Judge's Statewide Advisory Committee on Alternative Dispute Resolution, John Kiernan, was several years ago the President of the City Bar. A theme of his presidency was to promote the efficient resolution of disputes in the face of ever-spiraling litigation time, cost and discontent; a theme which has been continued by Mr. Kiernan's successors. Among the approaches championed by the City Bar was to encourage the use of ADR in the courts.[2] The Proposed ADR Rules benefit not only the bar, but more importantly, the clients, other stakeholders and the courts.

One important feature of the Proposed ADR Rules is the clarity with which Section 160.2(a)(1) creates the new, unambiguous expectation in New York trial courts: that all civil disputes "*shall"* promptly be referred to an appropriate ADR process, with appropriate exceptions and conditions (emphasis added). ADR refers to "any one of a variety of processes designed to help parties resolve civil disputes alongside or apart from litigation. These processes include, but

[1] The City Bar committees represented on CJA include the ADR Committee, the Arbitration Committee, the Civil Court Committee, the Federal Courts Committee, the Housing Court Committee, the Litigation Committee, and the State Courts of Superior Jurisdiction Committee.

[2] *See* New York City Bar Association Report, *Recommendations for the Efficient Resolution of Disputes*, June 2018, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/recommendations-for-the-efficient-resolution-of-disputes-1; CPR Institute, *Progress Report: New York Courts' 'Presumptive ADR' Settles In*, Jan. 2020 (summarizing City Bar panel discussion among Administrative Judges), https://blog.cpradr.org/2020/01/27/progress-report-new-york-courts-presumptive-adr-settles-in/.

are not limited to, mediation, neutral evaluation, and other dispute resolution processes offered by community dispute resolution centers."

We also agree with the Proposed ADR Rules' approach of separating the issues that should have statewide application, such as confidentiality and quality standards, on the one hand, from the issues that are better left, with flexibility, to local needs, customs and resources, such as issues specific to different types of courts and litigants and cases. The variety of local rules, protocols and procedures that have developed across the state since the 2019 announcement of PADR are a mix of independent local thinking, planning and needs, plus a healthy sharing of experience among attorneys, neutrals, judges and administrators in OCA, the Judicial Districts, and individual courts. The wisdom of distinguishing statewide uniformity of overarching subjects that *should* be uniform (for example, confidentiality or quality standards) from the kinds of issues that are best addressed with local experience and experiments (for example, issues specific to different types of courts and litigants and cases) has been effective and well-received.

We also note that, importantly, the proposed rules provide for exceptions to the mandate (Section 160.2 (a) (1) (i) – (iv)) and, in addition, provide the courts with the flexibility to select ADR processes believed to be suitable for the cases at hand.[3] Further, the proposed rules enable local courts to manage and even withdraw cases referred to ADR (Section 160.2 (a) (5)). They enable future protocols to address important issues, such as the selection and compensation of mediators, how to address complaints regarding the ADR process and neutrals, and options where one or more parties may not be able to afford the costs of ADR (Section 160.2 (b) (2)). Taken as a whole, CJA believes that these terms provide the courts, and the parties, with sufficient flexibility to address issues that may pertain to a particular case.

CJA views the Proposed ADR Rules as an important step forward, and we urge their adoption. While supportive of the goals of the proposed ADR Rules, CJA received some comments and suggestions from the City Bar committees and individuals who were gracious enough to share the benefit of their thinking. We offer them for consideration now, as appropriate, and for consideration by local Administrative Judges as they implement the operational rules that are called for under OCA's currently Proposed ADR Rules.

[3] These exceptions and conditions include that the referral is prohibited under local rule of court or administrative order of the Chief Administrator of the Courts (or designee); that the court determines such a referral will not serve the interests of justice; that a party to the dispute objects to and opts out from such referral in accordance with local rule of court or administrative order of the Chief Administrator of the Courts (or designee); and that the court determines insufficient ADR resources are currently available. In addition, the proposal requires that the court consider other relevant factors when deciding which process is most suitable for a particular case, including, whether a party or parties to the dispute are unrepresented and whether there are allegations of violence or harm, or risk of harm to any person.

Exceptions to Presumptive Referral in Certain Courts and the "Interests of Justice" Exception

The application of PADR to certain kinds of proceedings and actions has been a continued focus of the City Bar. We think it is very important that the "interests of justice" exception to Section 160.2(a) allows the court to carve out most Housing Court proceedings and certain Civil Court proceedings from ADR, unless and until the necessary resources and counsel are available to support it. The experience of those who practice in the Housing Court since the implementation of the PADR initiative in the Fall of 2019 was that the interests of justice were not served by ADR in most Housing Court proceedings due to the expedited and complex nature of Housing Court actions, the lack of physical facilities, one side frequently lacking counsel, and shortages of interpreters and other resources.

We are particularly concerned that the power imbalance that often exists in the Housing Court and in many Civil Court actions needs to be addressed, both systemically and in a delicate way in any individual ADR process.[4] The need for this is obvious in, for example, consumer debt cases and residential non-payment proceedings, where plaintiffs and petitioners are routinely represented by counsel and the defendants or respondents frequently are not.[5] On October 8, 2019, the City Bar, while acknowledging the benefits of ADR, expressed these concerns to then-New York City Civil Court Administrative Judge Anthony Cannataro.[6] Justice Cannataro was aware of and responsive to these concerns, and we urge that the current New York City Civil Court Administrative Judge Carolyn Walker-Diallo continue to respect these concerns when the New York City Civil Court promulgates and monitors local court implementation.

Confidentiality of ADR and Waiver of Confidentiality

One provision that has been the subject of discussion among both litigators and neutrals is Section 160.3 (b) (2), which sets forth circumstances in which confidentiality can be waived. Many City Bar members have expressed concerns regarding this provision. We view confidentiality as a key component to a successful ADR process, as it fosters an environment that allows participants to engage in open communication. Section 160.3 (2) provides that fewer than all participants may waive the strict confidentiality on which each person relied while they were participating in the process (including the mediator). This waiver could undercut the way mediation sessions work in actual practice. Many parties and lawyers have commented that it was

[4] Moreover, cases in which domestic violence has been alleged or identified or which present a risk of violence or harm to any party require particular sensitivity and training in order to properly assess power imbalances. This is an important topic for several City Bar committees and was raised by the Administrative Judges at the City Bar's January 2020 panel discussion, *see* n. 2, *supra,* and may be the subject of future communications with court officials as Presumptive ADR continues to roll out.

[5] The City Bar Housing Court Committee commented that although low-income tenants in New York City are covered by the groundbreaking Right to Counsel Law, the full expansion of the right to counsel is in its infancy.

[6] New York City Bar Association, *Presumptive ADR in NYC: Housing and Civil Courts,* Oct. 2019, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/presumptive-adr-in-nyc-housing-and-civil-courts.

the assurance of confidentiality that allowed the participants to speak frankly, candidly and collegially with each other.

We respectfully suggest that the waiver provision in Section 160.3(2) be omitted from the proposed rules.

ADR Neutral Immunity

In addition, neutrals have expressed concern that neither Section 160.3 (b) (2), nor any other provision, provides clear immunity for mediators and other neutrals. We acknowledge that Section 160.4 seeks to provide immunity protection for neutrals, although the provision has been read by some as being non-specific and unclear. Notably, immunity for neutrals is not a new concept and has been adopted in many ADR programs, which often rely on volunteer or unpaid neutrals who are and should be provided with protections that often apply to judges and other court personnel. The success of the state's presumptive ADR programs will depend, in large part, on attracting talented, committed and diverse neutrals.

We respectfully suggest that the Proposed ADR Rules incorporate more specific immunity protections as have been adopted by certain courts to date.[7] If there are concerns regarding the authority of OCA to provide such immunity protection, we recommend that such immunity be provided "to the maximum extent permissible by law."

Along the same lines as confidentiality and bolstering immunity to neutrals, we also recommend that additional language be added to protect neutrals from being compelled to appear in court or to respond to subpoenas for their work product or to testify. Again, these protections are not new and have been adopted in many NYC courts' PADR programs.[8]

Early Presumptive Referral, Exchange of Documents and Information, and Preliminary Conferences

As noted above regarding the presumption and direction that matters "shall" be referred as early as practicable, the Proposed ADR Rules envision ADR as an early and integral part of the litigation process. Concerns have been raised that the language, "at the earliest practicable time" can be interpreted to require mandatory ADR at the immediate inception of the case prior to the exchange of necessary evidence and other information, or to prevent ADR to take place other than at the immediate inception of the case or, stated differently, the "earliest possible time."

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[7] *See, e.g.*, New York County Commercial Division Rules and Procedures of the Alternative Dispute Resolution Program, Rule 9, https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Kings County Presumptive Mediation Program Rules, Rule VII(c), https://www.nycourts.gov/LegacyPDFS/courts/2jd/kings/civil/Kings%20County%20Supreme%20Court%20Presumptive%20Mediation%20Rules.pdf.

[8] *See, e.g.*, Commercial Division New York County, Rules and Procedures of the Alternative Dispute Resolution Program, Rule 8, https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf; Queens County Commercial Division, Rules of the Commercial ADR Program 2017, Rule 5, https://www.nycourts.gov/LegacyPDFS/courts/11jd/supreme/civilterm/adr/rules_comm_adr_2017.pdf.

CJA believes that the term, "at the earliest practicable time" (Section 160.2 (a) (1)) is sufficiently flexible to allow the parties to address limited "discovery" or, better stated, an exchange of evidence and other information necessary for a meaningful ADR process in which the parties and counsel are confident that they know enough to resolve a dispute.[9] This can be accomplished by agreement of the parties at the time the matter is referred to ADR, with limited involvement by the judge's clerk or referee at the time of referral[10], within the ADR process itself with the able assistance of the neutral or, if necessary and warranted, at a more fulsome Preliminary Conference with the court if a party properly opts out of ADR under the proposed ADR Rules or as a precedent to ADR. Indeed, nothing in the Proposed ADR Rules would deny counsel access to the court – either to facilitate ADR or to pursue litigation should ADR not be suitable based on a particular case.

Given the foregoing points, and to address the concerns that have been raised about the "at the earliest practicable time" language and clarify any potential confusion, we respectfully suggest that OCA consider adding the following provisions:

> Notwithstanding anything to the contrary set forth herein, the term "at the earliest practicable time": (1) contemplates the exchange of evidence and other information that will assist in making the mediation as efficient and productive as possible prior to the first ADR session, including as may be provided by local court rule; (2) does not prevent a court from directing parties who have not participated in ADR pursuant to the exceptions in this Rule at the outset of the action, or who have had an unsuccessful early ADR process, to proceed to or restart any ADR process during the pendency of the action; and (3) does not prevent the scheduling or conducting of a Preliminary Conference although such scheduling and conference should not delay ADR from taking place should the court determine that the case and timing are appropriate for ADR.

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[9] This information exchange could be part of or parallel to discovery, of course. But as often already happens in mediation, the parties may ask for less than, and more than, they would be entitled to under discovery. It is in aid of coming to an agreement, not a search for smoking-gun evidence. This would allow the parties to request and obtain before the first session starts evidence and information such as key documents in a commercial dispute; medical records in a personal injury or malpractice action; or, if a party will argue an inability to pay regardless of merits, some financial information – which would be information beyond the scope of normal discovery prior to judgment.

[10] One example of how local rules and practice can expedite information exchanges in support of ADR is in Supreme Court, New York County. A Supplemental Administrative Order ("AOC") issued on September 27, 2017, modified a pilot program, such that certain commercial cases that are not eligible for assignment to the Commercial Division, could nonetheless be mediated under the Commercial Division's ADR program. *See* https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/AO-Pilot92717.pdf. The AOC provides for early conferences before a court or staff attorney – not necessarily the assigned judge -- to provide for production by each party of information "tailored to the mediation … that will assist in making the mediation as efficient and productive as possible." Notably, cases subject to mandatory mediation in the pilot program may be exempted from such mediation "upon a satisfactory showing that an applying party would be subjected to unreasonable hardship or burden by participation in the mediation."

In this way, the intent of the ADR Rules – that ADR take place early on in cases – would be realized, while providing the parties with the information they need to engage in meaningful ADR. It would also not delay the case from proceeding in the event ADR does not fully resolve the case. It would provide a mechanism for the court to address and attempt to resolve issues that may be viewed as an impediment to early ADR, or to recognize one of the exceptions that would render a particular case unsuitable for early ADR.[11]

Additional Minor Suggested Revisions

We also respectfully suggest the following minor revisions to Section 160.2, which we believe are consistent with the intent of the subsections:

In Section 160.2 (a) (1) (i), after the word "under," insert the word "statute," so that the subsection will provide, "(i) such referral is prohibited under **statute**, local rule of court….."(emphasis added).

In Section 160.2 (b) (2) (v), after the word "where," insert the words "one or more of" so that the subsection will provide, "(v) the options available where **one or more of** the parties are unable to pay... ." (emphasis added)

Also, while there is a Section 160.3 (d), there is no 160.3 (c).

These suggestions can be considered and addressed now or at a later date, when the rules inevitably are subject to analysis after the courts and others gain experience with them. Moreover, some of these suggestions could be considered by local Administrative Judges and courts as they develop their own rules as required by the statewide rules.

The City Bar is very appreciative of the effort and expertise of those who drafted the Proposed ADR Rules, is eager to see them enacted, and offers its assistance to the courts, now and in the future, in their implementation for the further enhancement of ADR in New York State Courts.

Respectfully submitted,

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[11] It bears repeating that while CJA endorses early ADR, not all cases will be suitable for ADR prior to some exchange of evidence and other information and/or limited discovery.