



NEW YORK
CITY BAR

**COMMITTEE ON
ALTERNATIVE DISPUTE
RESOLUTION**

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April 30, 2020

Via Email

Honorable Janet DiFiore
Chief Judge of the State of New York
New York State Unified Court System
25 Beaver Street
New York, NY 10004

Honorable Lawrence K. Marks
Chief Administrative Judge
New York Unified Court System
25 Beaver Street
New York, NY 10004

Dear Chief Judge DiFiore and Chief Administrative Judge Marks:

Re: Applying alternative dispute resolution principles as part of COVID-19 short-term recovery and in long-range planning post-recovery

Dear Judge DiFiore and Judge Marks:

On behalf of the New York City Bar Association's Alternative Dispute Resolution Committee (the "ADRC"), we applaud the actions of the New York State Court system to keep our public safe and to recognize the efforts being taken to restore all court functions as quickly and as safely as possible. The challenges brought on by this pandemic have also created a unique opportunity to reimagine the courts' various pathways of dispute resolution now and in the future, in particular by building upon the Presumptive ADR initiative rolled out last year. We are writing to share some observations, some collective suggestions and offer our assistance.

It is important to highlight that while the courts were forced to close to all but emergency matters, mediations continued in many different substantive practice areas, in both the State and Federal Courts as well as privately. These included the many mediations commenced under the various ADR programs developed by OCA and individual judges. Mediators were able to pivot quickly to remote work and have been conducting on-line sessions. In fact, on-line dispute resolution has been gaining traction over the past several years as an effective and efficient means to resolve conflicts.

Going forward we believe court-endorsed and court-annexed ADR can support the courts in reducing the inevitable backlogs that will result from the pandemic. To that end, the ADRC encourages Your Honors to invite individual judges, as they conduct their docket reviews, to strongly recommend or assign cases to mediation, particularly in those jurisdictions that already have mediation panels in place. Individual judges, while mindful of various issues including those of self-represented parties¹, would have discretion as to which cases they direct to mediation, both in matters that are well along in the litigation process and in newly-filed cases. To the extent that judges actively support sending cases to mediation, the parties may be more inclined to quickly resolve disputes, thus making the mediation process more attractive.

Over the past weeks, it has become increasingly clear that video or telephone conferencing is a viable way for parties to convene with neutrals to resolve their disputes. Under most circumstances the process is streamlined and saves time and money for all parties. These benefits can be used by OCA to help the courts reopen more fully, easing backlogs, and serving as many parties as possible. Several possibilities come quickly to mind:

1. Since no new actions can be started at this juncture in the New York State courts and many cases are pre-RJI, we urge the court system to encourage parties to consider mediation on their own (*i.e.*, without waiting for direct court reference). Such voluntary mediations may result in cases being resolved without further or any litigation, thus helping parties and reducing the burden on the courts.
2. On-line mediations have the potential to immediately support the efforts by the bench and bar to enhance diversity and inclusion. Remote mediations make possible the use of bi-lingual mediators, attorneys or interpreters without concern for geographic limitations. The closed captioning capabilities of the on-line services could also be explored. All this can happen with limited expenditure of court resources.
3. By eliminating the need for parties to convene in person, and only requiring a telephone or computer, there might even be the potential to now provide a meaningful, safe and efficient means for parties to take part in mediations who might otherwise not have been suitable candidates for mediation. In the case of domestic violence survivors, in particular, pursuing this course of action would, of course, require careful consideration and input from all stakeholders.

The above points are just a few initial suggestions that could be implemented quickly to help the court system continue to expand its operations.

¹ See, e.g., Letter from New York City Bar Association Civil Court Committee and Housing Court Committee to Hon. Anthony Cannataro (Oct. 8, 2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019577-PresumptiveADR_FINAL_10.8.19.pdf (urging further study and consideration prior to rollout of Presumptive ADR in New York City's housing and civil courts). (All links in this letter were last visited on April 29, 2020).

For the long term, the Covid-19 pandemic is more than a pause or even an inflection point. It is a rare opportunity to rethink what the courts can offer our citizens. In all likelihood, post-pandemic, the courts, like other institutions, will face new challenges and opportunities. It is our belief that ADR processes should have an important place in re-configuring court processes. While this may not be the time to present specific ideas on the long-term future, we encourage the bench and the bar to embrace this opportunity to consider the extent to which supporting ADR reinforces the goal of our courts being “Problem Solving Courts” in the full meaning of those words.

The ADRC welcomes the chance to assist the courts in envisioning and designing a workable system for restoring all the courts’ functions in the immediate aftermath of social isolation. Equally, we are eager to be a resource for the courts in applying ADR concepts, precepts, attitudes and proven methods, to assure *long after the pandemic* that the bar, litigants and the public have multiple methods for dispute resolution that are expeditious, appropriate for the dispute and parties, thoughtful, inclusive and which deliver results that are satisfying, successful and enduring.

Respectfully,

Charles M. Newman

Charles M. Newman
Chair, Alternative Dispute Resolution Committee

Cc:

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