



**REPORT AND RECOMMENDATIONS BY
THE PRESIDENT'S COMMITTEE
FOR THE EFFICIENT RESOLUTION
OF DISPUTES**

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NEW YORK CITY BAR ASSOCIATION
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I. INTRODUCTION

The main participants in litigation – the judges, clients and advocates – widely recognize that civil litigation often costs too much and takes too long. While the system for resolving disputes fosters the full discovery of facts to promote fair resolution, in too many cases the cost and duration of the litigation process competes powerfully with fairness in driving the terms of resolution. Litigation can be so expensive that unless the dispute involves a very significant principle or dollar amount or the dispute can be resolved on a dispositive motion, the cost of litigating to a decision is not affordable. For those who cannot afford to achieve a decision, access to justice may be effectively denied. Because courts are burdened by so many cases, the sheer volume of disputes often determines how judges can manage their cases.

These problems often arise because participants in the dispute resolution process take steps reflexively based on what they consider the accepted approach, without giving sufficient consideration to available steps that could be more cost and time efficient. This Report recommends that participants in litigation instead embrace changes in our litigation culture and in standard practice that would accelerate what has been a slow but steady evolution toward greater emphasis on efficiency and avoidance of unnecessary cost and delay. Even where parties are, for understandable reasons, committed to expensive and lengthy litigation, taking some or all of the recommended steps would significantly increase the cost effectiveness of the process.

To address the excessive cost and duration of dispute resolution, in 2017 the New York City Bar Association (“City Bar”) formed a President’s Committee for the Efficient Resolution of Disputes (the “Committee”), including representatives of several City Bar committees. Over the past 18 months, the Committee has gathered information, perspectives and wisdom from many of our City’s and State’s most thoughtful and engaged judges, judicial administrators, advocates, clients and neutrals. With those inputs, the Committee has developed specific recommendations for change in the dispute resolution process to increase efficiency and reduce cost, and a list of Best Practices for the Efficient and Cost-Effective Resolution of Disputes. We submit that seeking efficiency should become standard practice whether resolution is achieved through a negotiated or mediated settlement, through conventional litigation to a decision, or through arbitration or any other ADR method. In many civil matters, seeking greater efficiency is not just prudent but essential to assure that parties can have access to the justice our court system aims to provide.

Because of ingrained habits that have long been accepted, accomplishing the necessary changes called for by the Committee's recommendations and Best Practices will require a strong exercise of collective will by the bench and bar. To achieve the necessary changes, it will be essential that the judiciary use its authority, and that advocates engage cooperatively with adversaries to streamline the process and educate their clients on options for pursuing less expensive and faster resolution of their disputes. Bar associations will also need to exert leadership in urging participants in the dispute resolution process to understand and embrace the overall benefits of the proposed changes.

Because different civil practice areas and the differences between Federal and State courts will necessarily require varying changes in practice, each sensibly adapted to the circumstances, the City Bar and the Committee hope to work directly with the bench and bar to both promote and support change in specific areas of practice and the sharing of perspectives.

Members of the City Bar can and should play significant roles in promoting a collective will within the bench and bar in support of the recommended changes.

II. THE EVOLUTION OF THE LITIGATION PROCESS HAS LED TO EXCESSIVE COST AND DELAY

Our dispute resolution culture has long been driven by the admirable concept of reaching resolution based on full disclosure of facts rather than surprise. In the 1930s that idea, aimed at eliminating trials where gamesmanship could be a determining factor, led to adoption of the new Federal Rules of Civil Procedure. Those rules were designed to open discovery so that parties could either try or settle their cases with knowledge of all relevant facts. Over time New York and other states essentially replicated the relevant provisions of the Federal Rules. Under the rules, the filing of a complaint would set the parties and counsel onto a procedural path designed to put them in possession of the "relevant" facts, very broadly defined. Many parties and counsel expected that they could be on that path for years before a dispute was resolved; and they came to expect that various steps in the formal litigation process would be necessary before resolution. As a result, participants often did not focus on pursuing more efficient and cost effective steps to resolve their disputes, or on identifying and embracing ways the litigation process itself could be made more efficient.

As the concept of open discovery evolved, courts resisted early disposition of claims based on less than a "full" factual record. As disputes took more time to resolve, court dockets grew and the burdens of those dockets increasingly affected case management. Courts found that allowing the process to be self-executing meant less court time spent with each matter and a reduction in the burden of case management. But that also meant more expense and time spent by the parties.

Lawyers were trained to see pursuit of all facts and legal theories as a mark of professional diligence and excellence, leading them to pursue extensive discovery and claims, defenses and motions having only very limited prospects of providing a return for the effort. Often parties and counsel pursued aggressive and burdensome steps as accepted practice without carefully considering whether such an approach would likely result in net benefits. Technology,

first the copier and then e-discovery, led to exponential increases in the costs and burdens of discovery. Legal fees meanwhile grew at rates much faster than inflation.

In civil disputes it became common for parties to turn matters over to their lawyers and, even though the disputes could have significant effects on their business or personal interests, not to remain closely involved with the process as they would with their other matters. Parties and counsel, and often courts, considered settlement to be achievable only after the litigation process was significantly advanced, often to the eve of trial. Posturing by clients and counsel, the determination to inflict pain on the adversary, delay to make the opposition yearn for settlement, and avoidance of overtures to settle or streamline the dispute as signs of weakness all contributed to the avoidance of options for resolving disputes early. For large numbers of disputes the prohibitive cost of litigating to a final judgment frequently came to outweigh the merits as a primary factor affecting the terms of settlement.

Often lost as the process evolved was the goal of ensuring the affordability of a resolution based on the merits. Although both the Federal and New York State Court Rules begin with language emphasizing the objectives of “just,” “speedy” and “inexpensive” resolution, in far too many cases such a result became unattainable. Pursuit of the formal litigation process was presumed to be in the best interests of the parties, but very often it denied parties access to justice because those same parties could not afford it.

III. EFFORTS TO ADDRESS THE PROBLEM

Reflecting the recognition by many that accepted litigation practice needs to be changed, important efforts have been made to make dispute resolution less expensive and time consuming. The American Bar Association, Federal Judicial Center, and American College of Trial Lawyers, along with the City Bar and others, have issued reports emphasizing the excessive cost and delay in litigation, and recommending changes. Federal Rule changes, including the adoption of the seven-hour deposition rule and introduction of the concept of proportionality in discovery, are examples of rule-based efforts aimed at reducing cost and delay. Efforts in our state courts such as “Settlement Days” for insurance disputes and “Residential Foreclosure Days” in real estate, and direct involvement by federal and state court judges early in proceedings to encourage cost effective case management and resolution, have frequently brought benefits. Groups such as the Advisory Council for New York’s Commercial Division have, together with the courts, sponsored helpful innovations aimed at greater efficiency. Positive steps have included: setting limits on the number of depositions and interrogatories, emphasizing options for accelerated procedures to reach trial (or “mini-trials” of discrete, potentially pivotal issues) with parties’ agreement, requiring counsel to certify that they have discussed mediation and other forms of ADR with their clients, and introducing procedures for streamlining trial procedures.

Court systems and individual courts, including each of New York’s federal district courts and several of New York State’s courts, have adopted forms of court mandated or recommended mediation, including mediation early in cases before parties have spent large amounts on legal fees that could be used to bridge the gap between the parties. While there have been missteps, some of these programs have achieved striking success through settlement of a large percentage of cases with evident efficiency and significant reductions in cost.

Also, many judges, clients and counsel have undertaken the steps that we recommend below in order to promote efficiency. Those steps have included a significant increase in the practice of including dispute resolution clauses in contracts, often requiring high-level negotiations or mediation before a complaint is filed.

There is much to be admired in these efforts, and much can be learned from them. But a significantly enhanced commitment by the bench and bar is still needed to achieve a broad consensus in favor of changing our litigation culture to focus more intently on efficiency and access to justice.

IV. WHAT THE CITY BAR SHOULD DO

When our Committee met over the past year with judges, judicial administrators, advocates, clients and neutrals and heard their many helpful observations and suggestions, we regularly asked them what the City Bar should do. The two suggestions consistently offered were that the City Bar should (1) present strong recommendations for change to promote greater efficiency in resolving disputes; and (2) publish a list of Best Practices for Efficient and Cost-Effective Resolution of Disputes. Recognizing that taking such action to promote greater fairness and efficiency in the administration of our courts is consistent with the City Bar's history and mandate, this Report follows those recommendations. Our objective is to promote as standard practice a significantly enhanced commitment by courts, counsel and parties to efficiency. That would mean replacing current practice – often driven by reflexive, costly and sometimes purposefully burdensome posturing and steps – with a culture in which thoughtful decisions by both counsel and the parties as to the most cost efficient ways to reach a resolution become standard.

If judges, parties and counsel have the will and commitment to make the necessary changes, New York could be a leader and achieve more than other states have in promoting efficiency in litigation. Parties might consider such a change in favor of efficiency as a mark of distinction for New York and, as a result, be drawn more often to resolve disputes and conduct their business here.

V. PRINCIPAL RECOMMENDATIONS

To achieve such essential changes in accepted practice, we must temper the long accepted idea that full fact-gathering and the need to impose litigation burdens on adversaries should be principal drivers in the resolution of disputes. While full development and discovery of “truth” is better than surprise, a system focused on efficiency would be superior to the current system that frustrates the pursuit of resolution on the merits by imposing excessive cost and delay.

Inspired by recent changes in the Federal Rules and the Commercial Division Rules favoring proportionality in discovery, we believe that the concept of proportionality – keeping cost and time in proportion to what is at stake – should be a focus for efficient management and resolution of all aspects of the litigation process. Just as new rules are now aimed at eliminating

the burdens of excessive discovery, there should be a similar commitment to avoid unnecessary claims, defenses, motion practice and other procedures that increase cost and delay.

Limiting the scope and duration of the dispute resolution process should not be a step back from fair resolution on the merits of the parties' positions. Instead, it should direct participants in disputes toward the cost-effective and efficient pursuit of fair resolutions - whether through decisions or through settlements. While expeditious, relatively low cost resolution cannot be achieved in all disputes, it can be achieved in many that are today caught up in a formal litigation process too burdensome to be effective. The goal should not be completing all or any specific part of the formal process but, instead, achieving either a sensible and mutually acceptable negotiated settlement or an affordable decision. It will in many - likely most - cases be in the parties' economic self-interest to treat efficiency and proportionality as goals that will promote, not detract from, resolution on the merits.

To achieve the necessary efficiency, we recommend that as a matter of accepted practice the participants in the dispute resolution process regularly take the steps set out below. We believe that it would also be beneficial to include the recommended steps in training law students as to what should be standard practice in our litigation culture.

A. Manage Disputes Efficiently from the Outset

At the outset of a matter, even before a complaint has been filed, rather than just plunging into the adversarial process and seeing where it may take the parties, counsel should instead proactively consider and discuss with their clients the most efficient potential approaches to a favorable and affordable resolution. Early objective consideration of the strengths and weaknesses of the parties' positions, the prospects for ultimate success, the likely course and expected cost of litigating to a decision and the possible options for pursuing a more cost effective resolution (whether by settlement, determination by a court or by achieving a decision through an alternative method) should be undertaken in virtually every case. The instinct to treat single-minded efforts to defeat the adversary as the exclusive approach until the dispute is thought to have fully ripened should be resisted from the outset. Civil disputes should instead be treated as problems to be solved and/or as commercial risks to be evaluated and managed.

There is ample evidence of the value of early objective evaluation of claims and defenses as compared to deferring rigorous evaluation until the completion of discovery and motion practice. The strengths and weaknesses of each party's position, and forces apart from the merits that may influence the terms of a resolution, are often readily discernible at the outset. Counsel's evaluation of these factors often does not significantly change as facts are later developed or discovered at substantial cost.

The presence of requirements in many commercial contracts that parties negotiate before litigating reflects a recognition of the potential value of such early discussions that should apply equally when parties have not agreed to such processes in advance. Whether based on a contractual provision or not, thoughtful early evaluation can often lead to beneficial pre-complaint negotiation or mediation in most if not all forms of civil disputes.

While many participants in disputes observe that the passage of time can encourage parties to settle, the cost associated with time passing can skew the results, allocate to litigation expense funds better used to achieve a settlement, and result in a denial of access to justice.

B. Consider the Benefits of Early Negotiation and Mediation

With the objective of keeping costs in proportion to the nature and scale of the dispute, counsel and the parties should as soon as practicable engage in discussions to explore the possible options for resolution. If early settlement is not achievable before a complaint is filed, or shortly thereafter, the parties and their counsel should – as standard practice – work together to manage the process of resolving the dispute with efficiency and proportionality as priorities. Especially when parties have ongoing business relationships or frequent litigation disputes with each other, they should cooperate in trying to develop time and cost-efficient methods for resolving such matters. One party's proposals for greater efficiency should not inspire the other party's instinctive opposition. Reasonable cooperation in sensible management of the controversy will often produce better results for the parties than adversarial conduct.

In addition to early negotiation, counsel and clients should consider the potential advantages of an early, well-conducted mediation. Mediation should not be seen as an intrusion on fact-gathering or on efforts to prevail outright but, instead, as a constructive step toward a sensible end to the dispute. Counsel and parties who believe they cannot be ready for mediation – or negotiations – until the litigation process has run all or much of its course often find that a well-conducted mediation can facilitate cost-effective fact gathering and bring the parties to a resolution much earlier than they expected.

Parties and counsel can avoid significant unnecessary cost by agreeing with a mediator – or on their own – to exchange the important information they need informally. While voluntary early informal exchanges of limited essential information may seem counter-intuitive for many advocates steeped in our adversarial litigation culture, the cost of such exchanges is often much less than the cost of fighting over production and gathering the same facts through the formal litigation process. Often reflexively holding such facts back or objecting to their production until they inevitably must be produced in discovery will serve no purpose and significantly increase expense. By contrast, parties who keep document requests focused and reasonable through exchanges overseen by a mediator – or on their own – will often best serve their clients by avoiding unnecessary motion practice and needless expense. While in some cases deferring such exchanges will be in the best interests of the parties and, for some parties, may be affordable, there will be many cases where that is not so. Our system needs to be geared to make dispute resolution affordable in those cases.

Because mediations require skilled mediators, if mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers.

To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts.

More frequent early evaluation and negotiation that prompts early resolution of cases would, as an important collateral benefit, free more court resources for attention to matters best resolved through litigation to a decision. Many matters that should, for good reasons, be more fully litigated currently move through the system slowly because of crowded dockets and resulting triage-style case management. Accelerated movement of those cases through the process should, among other things, make achievement of necessary decisions affordable. For matters where advocates and clients make thoughtful decisions to continue with the formal litigation process, an orientation toward efficiency and proportionality can be very beneficial.

C. Counsel Should View Efficient Management of Disputes as a Primary Professional Responsibility

Embracing an obligation to avoid excessive cost and delay, counsel should more readily accept that it will not always be their duty to pursue *every* fact or develop *every* argument. Instead, professional excellence should be found in the sensible management of the matter toward a “just, speedy and inexpensive” result. Strategies of delay or imposition of burden on adversaries are unethical (*see* New York Rules of Professional Conduct 3.2 and Comment 1), and should be viewed as carrying substantial risk of imposing extra cost on all parties without a corresponding benefit to any party. Courts should help to prevent successful application of such strategies.

A zealous advocate should act in the client’s interest, and that should mean efficiently seeking a good result in the circumstances.

D. Courts Should Be Proactive in Encouraging Efficiency and Proportionality

To bring about the necessary changes to reduce cost and delay, the judiciary should take an even stronger hand than in the past – through active oversight of disputes, experimentation with new approaches to efficient resolution, revision of rules as needed, and explicit pursuit of less expensive and earlier settlements or decisions. Rather than keeping hands off and allowing the process to be self-executing, courts should actively engage in promoting the negotiated resolution of disputes and their efficient management to affordable decision. Judges known to be effective in such efforts have earned justified renown.

Impressive settlement rates in jurisdictions where court-mandated mediation has worked reflect the potential to achieve significant system-wide increases in efficiency through mediation, whether court mandated or by agreement of the parties. Rules such as Federal Rule 26(f), requiring that opposing counsel confer early, and NYS Commercial Division Rules 10 and 11, requiring advocates to certify at the initial case conference and thereafter that they have discussed ADR options with their clients, should be enforced. Just eliminating the reflexive

view that an early proposal to pursue early negotiations will be taken as weakness will advance cost and time efficient resolution in many cases.

Courts should use their rule making authority to promote affordable decisions without unnecessary or inefficient steps. The federal court rule limiting depositions to seven hours illustrates what the judiciary can do. Criticized initially as an unworkable constraint on fact-gathering, the rule has caused lawyers to focus on what is and is not necessary, without impeding access to justice. Such assessments as to what is really necessary should become an essential element of cultural change favoring greater efficiency.

So too, presumptively limiting the number of depositions and interrogatories and adopting discovery limits based on proportionality, as in New York's Commercial Division and Federal Rules, are significant steps that warrant judicial reinforcement and extension to other parts of the court system. Directing that essential factual information be produced quickly without argument is yet another way the judiciary can help counsel and the parties achieve a better understanding of how to be efficient.

Courts can also promote less costly and faster resolution of disputes by deciding dispositive motions early and, if unable fairly to resolve a dispute by deciding such a motion, by resolving as many legal issues as possible so that the parties can better focus their litigation efforts or settle with an outcome influenced by the court's input. Taking into account the low statistical probability of a trial, courts should view their analyses of dispositive motions as likely to be the parties' only opportunity to receive judicial input as to the merits. If, as is often the case, cost and other burdens make "full" fact gathering and trial unlikely, delaying the court's decision will not promote a fair resolution based on the merits.

Courts should also do more to discourage motions and other litigation tactics that unnecessarily delay resolution or make litigation more burdensome. Counsel should be discouraged from taking steps that have little or no reasonable prospect of advancing efficient resolution of the litigation, and from proposing approaches to case management that will make obtaining a decision unaffordable. Courts should use such efficiency-oriented techniques as required pre-motion letters to the court and/or court conferences to help reduce the number of unnecessary motions, and should consider proposing processes for accelerated resolution of limited factual issues when resolution of those issues may permit a final decision.

The City Bar and its President's Committee for the Efficient Resolution of Disputes look forward to working with the judiciary and issuing additional reports focused on necessary changes in particular areas of practice.

VI. BEST PRACTICES FOR THE EFFICIENT AND COST-EFFECTIVE RESOLUTION OF CIVIL LITIGATION IN NEW YORK

Just as the City Bar's previous reports on the importance of civility and the enhancement of diversity have provided important guidance to professionals, the Best Practices set out below should guide the conduct of participants in pursuing the resolution of civil disputes in New York.

The Best Practices are not intended to replace existing court or bar standards but are, instead, consistent with those standards. Thus, for example, a mandate that counsel seek to keep the cost and duration of disputes in proportion to the stakes is consistent with the ethical mandate that counsel act in the clients' interest.

1. Recognizing that efficient resolution of a matter may not require taking all the steps in the formal litigation process, the courts, parties and counsel should from the outset work to keep the cost and time of resolving disputes, whether by settlement or by decision, proportionate to the nature and scale of the matters at issue, and to avoid unnecessary cost and delay.
2. Parties and counsel should, early in the litigation process (if possible before a complaint is filed), objectively evaluate the merits of all parties' positions and the likely course and cost of litigation, so that they can manage their disputes efficiently and, when appropriate, sensibly pursue settlement.
3. Counsel should consider themselves professionally responsible for crafting, discussing with clients and pursuing with adversaries and courts approaches to disputes that offer the best prospects for efficient and affordable resolution.
4. Parties should not regard litigation as primarily a contest left to counsel with instructions to pursue victory, but should instead remain actively involved, treating civil disputes as a form of risk or opportunity to be evaluated and managed to achieve an appropriate and affordable result.
5. Beginning early in a litigation and continuing thereafter, courts should, where practical, proactively manage the dispute to promote a fair, efficient and affordable decision or settlement.
6. Courts should adopt rules and practices that feature inquiry of counsel and other oversight of the litigation process to foster achievement of effective settlements or decisions at a cost and in a time frame proportionate to the nature and scale of the dispute.
7. Courts should support – and in appropriate circumstances mandate – mediation as a vehicle for promoting more efficient case management and less expensive and faster resolution.

8. Courts should discourage and Counsel should avoid claims, defenses, motions, requests for discovery, appeals of non-dispositive decisions and other litigation steps or strategies that unnecessarily delay proceedings and burden parties.
9. Judges should decide dispositive motions as early as practicable, and decide as much of a motion as possible when they are not able to resolve the dispute entirely.
10. If the parties choose arbitration or another ADR method as a mechanism for dispute resolution, they should take advantage of the potential for efficiency that such a process can offer when compared with formal court-directed litigation.

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* The President's Committee for Efficient Resolution of Disputes (the "Committee") is comprised of members of a number of City Bar standing committees, including the Alternative Dispute Resolution Committee, Arbitration Committee, Cooperative & Condominium Law Committee, Council on Judicial Administration, Council on the Profession, In-House Counsel Committee, In-House/Outside Litigation Counsel Working Group, International Commercial Disputes Committee, Litigation Committee, and State Courts of Superior Jurisdiction Committee. Members include lawyers in private practice, arbitrators and mediators, retired judges, and in-house counsel.

** The Committee's members are serving in their individual, personal capacities. They are not representing any organization or employer and nothing in this report should be attributed to an organization or employer with which a committee member was or is affiliated. Further, although the committee voted overwhelmingly in support of issuing this report, it should not be assumed that every member of the committee supports every recommendation as articulated in this report.

*** City Bar President (May 15, 2016 – May 15, 2018)