

**TO:** Commercial and Federal Litigation Section Executive Committee  
**FROM:** Civil Practice Law & Rules Committee  
**DATE:** November 16, 2016  
**RE:** Pilot ADR Project

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The Civil Practice Law & Rules Committee (the "Committee") of the Commercial and Federal Litigation Section of the New York State Bar Association is pleased to submit these comments in response to the proposal by Honorable Peter H. Moulton, Administrative Judge for Civil Matters, First Judicial Department, dated October 6, 2016, proposing a new pilot ADR project (the "Proposal").

### **I. EXECUTIVE SUMMARY**

The Committee recommends supporting the new pilot ADR project, which would provide for mandatory mediation of certain breach of contract cases with an amount in controversy of less than \$500,000. The Committee believes that mediation of these cases is in the interest of judicial economy.

### **II. SUMMARY OF PROPOSAL**

The Proposal describes a proposed new program that would require counsel to file an ADR Initiation Form at the preliminary conference in breach of contract cases that do not meet the requirements to be filed in the Commercial Division. Under the rule, each case would be entitled to four hours of mediation at no charge to the parties. The proposed mediation would not stay discovery.

### **III. RESPONSE AND SUGGESTIONS**

The Committee feels that the proposed "unreasonable hardship and burden" ground for a party to seek an application for exemption from mandatory mediation under the proposed rule is quite high. As an alternative, we suggest parties should be able to opt out by agreement between or among themselves, subject to court approval, that the case is not suitable for mediation. We believe this is sufficient basis for opting out of mediation because as long as the default is "opt in", parties will have to justify to the court why they are agreeing to opt out, which would encourage parties to proceed with the default mandatory mediation. We believe that the "unreasonable hardship and burden" standard for opting out is not appropriate, because as practitioners know, there are some cases that are simply not amenable to mediation no matter how low the burden of attending a mediation is, and parties should not be forced to expend resources to prepare for and attend a mediation in those situations.

Regarding the Order of Reference, not providing for a stay of proceedings in the litigation, we suggest that there be a partial stay; *i.e.*, limiting discovery to only that which is needed for mediation. Parties would be required to share information and documents that would assist each other and limit the mediator in conducting a realistic assessment of the value of the dispute. Without a limited stay of proceedings, client funds would still be spent on discovery, with some of the costs shifted to an earlier stage in aid of mediation. The Committee would recommend that the rule require that the preliminary conference order also direct what documents must be produced at a date sufficiently in advance of the mediation, and order that the mediation take place within a certain timeframe, after which the discovery stay would be lifted. This would encourage the parties to mediate swiftly, without delay.

The lesson learned from the recently ended Pilot Project of automatic referral of one-in-five Commercial Division cases to mandatory mediation appears to be that every case may not be a candidate for mediation. To the extent that the Commercial Division ADR Program panel of experienced mediators is underutilized, your proposal would make optimal use of these neutrals.

The Committee agrees with the suggestion of the Dispute Resolution Section's Committee on ADR in the Courts that parties be given the opportunity to choose their mediator, for the reasons stated in the letter by Mr. Hochman dated October 24, 2016. Not only would that have the likely effect of increasing the percentage of cases settled, but it would also reduce the burdens on the courts.

**New Business & Announcements**

Section Chair Mark Berman described reports from the EDiscovery, Social Media and Commercial Division Committees, which are expected to be submitted in the upcoming months. Additionally, two upcoming CLEs by the eDiscovery Committee will be a Best Practices CLE that will focus on the Committee's soon to be issued third version of its Best Practices Report and a webinar in February directed to smaller firms with smaller ediscovery projects.

The meeting adjourned at approximately 7:40 p.m.