

**REPORT OF THE DISPUTE RESOLUTION SECTION
OF THE NEW YORK STATE BAR ASSOCIATION
AND ITS COMMITTEE ON ADR IN THE COURTS IN
SUPPORT OF ITS PROPOSAL FOR AMENDMENTS TO PART 1210 TO
PROVIDE FOR A NOTICE OF MEDIATION ALTERNATIVE**

Introduction

The following Report is submitted by the Dispute Resolution (“DR”) Section in support of the April 23, 2010 memorandum by the Hon. Jacqueline Silbermann (ret.), Chair of the DR ADR in the Courts Committee, and Jonathan Honig, Section Chair (the “DR Section Memo”), seeking the Executive Committee’s endorsement of proposed amendments to 22 NYCRR Part 1210 (the “Proposed Part 1210 Amendments”) to require prompt delivery of the annexed Notice of Mediation Alternative by counsel being retained to engage in a litigation matter¹ and to make the option of mediation one of the legitimate objectives of clients that counsel is required to respect.

The Notice of Mediation Alternative is an educational tool designed to inform the client about the availability and benefits of the mediation process and to prompt early discussions with counsel about the options available in lieu of litigation. It provides early notice of the fact that the vast majority of cases settle, describes the mediation process and the mediator’s role, informs the client about mediator selection and mediator styles, and encourages the client to discuss any questions concerning mediation with counsel. The Notice highlights that mediation is an option so that clients may engage in informed decision making; it does *not* require parties to engage in mediation.

The timeliness and utility of this proposal is illuminated by first undertaking a brief overview of developments in ADR over the last decade and of the New York State Bar Association’s role in assessing the condition of ADR in New York and of demonstrating leadership in connection with ADR.

¹ The Dispute Resolution Section believes firmly in coordinating with other Sections when producing Reports, and when considering or taking action that affects other areas of the Bar. Outreach for this project utilized a procedure similar to one recently recommended by John F. Zulack at the last two meetings of Section representatives regularly held before the House of Delegates Meeting. When the ADR in the Courts Committee began its work on the Notice of Mediation Alternative, it sought from the State Bar staff the names of Sections with ADR Committees that might have an interest in this question. Stephen Hochman of the ADR in the Courts Committee sent an inquiry to the designated representatives of all Sections or Committees identified by NYSBA as potentially having an interest, received several responses, and has shared the proposed Notice of Mediation Alternative and Proposed Part 1210 Amendments with those who responded. The responders were also invited to participate, either by phone or in person, in the April 12 meeting of the ADR in the Courts Committee at which the proposed amendments were being submitted for approval. Two of those joined that meeting by phone and made contributions to the drafting of the Notice of Mediation Alternative.

The Younger Committee Report & Kaye Task Force Report

Eleven years ago, under the leadership of the now incoming President of the New York State Bar Association, Stephen P. Younger, what was then the ADR Committee of the State Bar issued a report entitled: “Bringing ADR into the New Millennium – Report on the Current Status and Future Direction of ADR in New York.” (the “Younger Committee Report”) That Report, adopted by the Association, began with the observation that New York, in 1999, stood at a crossroad in the evolution of ADR.²

Using the May 1996 report of Chief Judge Judith S. Kaye’s Task Force on Alternative Dispute Resolution (the “Kaye Task Force Report”) as a marker, the Younger Committee Report reflected on ADR developments in New York during the latter half of that decade and made a number of recommendations for the future, particularly with an eye towards ways in which the Bar Association and its members might be able to contribute to promoting and enhancing quality dispute resolution processes for the benefit of the public.

The Younger Committee Report observed and foresaw a number of things. There was a need for education and information about ADR.³ Standards needed to be developed for ADR Neutrals.⁴ Court-annexed ADR needed promotion.⁵ There was a need to protect confidentiality and neutral immunity.⁶ And the State Bar could become a leader in promoting ADR, through furthering education about ADR, coordinating ADR referral and information services, updating legal ethics and disciplinary rules to reflect changing ADR practice, and seeking legislation to support confidentiality in ADR and immunity for neutrals.⁷

² A sign of how far the dispute resolution field has come is that the term “ADR”, while used here for consistency and to distinguish the processes from litigation, has become a bit archaic. “Alternative Dispute Resolution” yielded in California to “appropriate dispute resolution” and, in the court-annexed context is termed “complementary dispute resolution” in New Jersey. Accordingly, when the Section was formed, it adopted “Dispute Resolution” to imply no greater legitimacy or primacy of one process over the other. Some firms have renamed their litigation departments “dispute resolution” departments for similar reasons – advertising to clients that they are comfortable navigating the waters of a wide range of dispute resolution processes, and implicitly committing to use the process that is most appropriate, given the client’s needs, interests, goals and means.

³ Younger Committee Report, pages 5 – 7, 41 - 52.

⁴ Younger Committee Report, pages 7, 60 – 66.

⁵ Younger Committee Report, pages 8 – 9, 39 – 41.

⁶ Younger Committee Report, pages 8, 68 – 70.

⁷ Younger Committee Report, pages 10 – 11, 14 – 15, 78 – 81.

ADR Developments over the Last Decade

It is remarkable to see just how far ADR and the State Bar have come since the time of the Kaye and Younger Reports. Over the first decade of this new millennium, there have been numerous CLE programs and training programs devoted to ADR, many with a focus on mediation – teaching counsel and mediators ways to be most effective in the mediation process. Law schools, which offered no ADR courses a quarter of a century ago, now universally offer courses in negotiation and mediation, as well as others devoted to arbitration or broad dispute resolution process design. Indeed, there is a growing interest in whether the time has come for ADR related questions to be included on the Bar exam and in Bar preparation courses.

Standards have been developed for ADR Neutrals. One year following the Younger Committee Report, the Commercial Division for New York County, under Administrative Judge Stephen G. Crane, issued one set of Ethical Standards of Conduct for Arbitrators and Neutral Evaluators to match another set of Standards of Conduct for Mediators on that Commercial Division panel. Since that time, with the expansion of ADR panels across the State, similar rules have been adopted and refined, with, *e.g.*, the Standards of Conduct for Mediators being reissued by Administrative Judge Jacqueline W. Silbermann in 2008. Standards have been promulgated in connection with other ADR programs across the State. In further promotion of ethics in ADR, the Office of Court Administration has created a Mediator Ethics Advisory Committee with opinions published online (<http://www.nycourts.gov/ip/adr/meac.shtml>) offering guidance to mediators, particularly those working out of Community Dispute Resolution Centers existing throughout the State. In June 2008, Chief Administrative Judge Ann Pfau issued Part 146, setting forth guidelines for qualifications and training for ADR neutrals on court-annexed panels. Today, the OCA ADR Office is on the verge of adopting and publishing criteria for the approval of training programs as mandated by these guidelines.

Around the time of the Kaye and Younger Reports, Jonathan Lippman, then Chief Administrative Judge and now Chief Judge of the Court of Appeals, voiced the philosophy of “let 1,000 flowers bloom” for the Court’s approach to the development of ADR. Panels of neutrals were permitted to grow organically, according to the needs and preferences of various jurisdictions. With hindsight, this permitted the dispute resolution field itself to work out various issues, such as whether the definition and role of mediator should be purely facilitative or also include directive and evaluative behavior. This had the salutary effect of permitting necessary time to unfold before implementing the Kaye Task Force Report’s call for uniformity of standards and definitions across the state. During this time, OCA worked with its ADR Advisory group, consisting of members of divergent sectors of the Bar and of ADR practitioners, to refine its thinking on Ethics, Qualifications and Standards, Training, Panels, and a variety of other areas relating to the development and refinement of dispute resolution processes.

As recommended by the Kaye Task Force Report, OCA created an Office of Alternative Dispute Resolution (“OCA’s ADR Office”) and hired an ADR Coordinator. OCA subsequently hired Daniel Weitz to fill the ADR Coordinator spot along with an

Assistant ADR Coordinator, and this office, under Mr. Weitz's leadership and with the support of Chief Administrative Judges Jonathan Lippman and Ann Pfau, has grown to include a number of OCA employees supporting, monitoring and evaluating ADR programs and panels across the state. OCA's ADR Office has overseen the growth of ADR panels in a variety of areas. The Commercial Division ADR Panel has grown from a single pilot program in New York County to programs in Kings, Queens, Westchester, Nassau, Suffolk, and Erie counties; and these counties also host matrimonial mediation panels.⁸ Community Dispute Resolution Centers ("CDRCs"), which were already in place statewide at the time of the Kaye and Younger Reports, have continued to develop, expand their scope, and flourish across the State over the last decade. The CDRCs have served as incubators of quality assurance measures with refinements in standards of conduct and development of ethical oversight and resources. Statewide they handle matters referred from criminal, landlord-tenant, and family courts. There are CDRC supported court-annexed mediation programs in New York and Nassau counties, and the 5th Judicial District. There are additional CDRC sponsored ADR panels in the New York City Civil Court, and the 8th Judicial District has its own offering of ADR panels for civil, commercial, family and matrimonial matters, as well.

State Bar ADR Leadership over the Last Decade

The State Bar, as urged by the Younger Committee Report, has taken dramatic steps to move into a leadership role during this period of ADR growth. Effective June 2008, on the motion of Jim Moore, former NYSBA President, and then ADR Committee Chair, the State Bar formed a Section of Dispute Resolution. Under the leadership of its first Chair, Simeon Baum, the Section grew from 93 former ADR Committee members to roughly 800 Section members, with 11 Standing Committees. For the last two years, again, consistent with the Younger Committee Report recommendations, NYSBA has placed support for enactment of the Uniform Mediation Act – promoting a mediation privilege to foster confidentiality in mediation – at the top of its legislative agenda.⁹ In educational efforts, through ADR Committees of various NYSBA Sections, as well as the former NYSBA ADR Committee and current DR Section, a wide range of CLE panels on mediation, arbitration and negotiation themes have been held over the last decade. Recently, the DR Section of the NYSBA expanded this educational effort by offering the first State Bar sponsored three day commercial mediation training – using the same curriculum and trainers (Simeon Baum and Stephen Hochman) who have trained Commercial Division mediators for the last decade; and has published "Dispute Resolution Lawyer," edited by the now incoming Section Chair Edna Sussman.

⁸ A chart issued by OCA's ADR Office listing Court-Annexed ADR programs can be found online at <http://www.nycourts.gov/ip/adr/CourtAnnexedADRPrograms.pdf>.

⁹ Earlier in the decade, NYSBA's former ADR Committee studied and reported on the Revised Uniform Arbitration Act ("RUAA"). The Association has also endorsed and sought legislative enactment of the RUAA.

ADR Currently – Ready for Greater Utilization

The foregoing, in abbreviated form, relates a success story of ADR's growth in the Courts and in New York, and of the State Bar's assumption of the mantle of leadership foretold by the Younger Committee. Indeed, there are statistics supporting this record of success. The CDRCs served nearly 100,000 people during the fiscal year 2008 - 2009.¹⁰ Resolution rates in the CDRCs have ranged from roughly 75% - 85% during the last decade.¹¹ Yet despite the probability that people leaving a mediation might be expected to feel that they did not get their preferred deal, one study showed that 96% of the users of CDRCs reported that they believed they participated in a fair process and that they would recommend use of mediation to others.¹² While statistics for resolution rates out of the Commercial Division are not quite as high, nearly 60% get resolved through those processes, and there is over a 16% increase in consensual resolutions overall in the Commercial Division since the introduction of the ADR panels.¹³

In sum, New York now offers a host of well developed dispute resolution options – CDRC mediation, Court-annexed panels, and mediators offering services privately. These services can help parties avoid expenditure of time, disruption, reputational damage, aggravation, and litigation expense, and offer tailored resolutions not otherwise available in Court. Mediation occurs in confidential settings in which a skilled neutral can facilitate communications that can enhance the quality of the parties' interaction and maintain, restore or even improve the parties' relationship. And the use of mediation can decrease the burden on courts' swollen dockets and resolve many matters.

The Notice of Mediation Alternative and the Part 1210 Amendments Will Further the Goals Articulated by the Younger Committee Report

Now that these services are in place, and are known to Courts and counsel, it is time to increase the use of mediation by parties who can benefit from this process. With roughly 2.5 million non-criminal cases filed in New York State each year,¹⁴ it is beyond doubt that parties and the heavily burdened, financially challenged courts could benefit greatly from wider use of mediation by the public. The first need described in the Younger Committee Report, and an essential function it identified for the State Bar, was

¹⁰ See, e.g., the statistics posted on OCA's website covering CDRC activity during this period: http://www.nycourts.gov/ip/adr/Publications/Statistical_Supplement/SS08-09.pdf.

¹¹ The Annual Report of the Chief Administrator for the Court, Unified Court System, calendar year 2007, at page 4, cites an 85% resolution rate for CDRC mediations.

¹² The Dispute Resolution Section gratefully acknowledges Daniel M. Weitz, Deputy Director, Division of Court Operations and Coordinator, Office of ADR and Court Improvement Programs, for his contribution of these statistics. The 96% figure came from one study done a number of years ago, but is presumed to be still representative of public satisfaction levels with the CDRCs, which have increased their training and quality assurance standards, and have developed richer resources for ethical guidance.

¹³ *Id.*

¹⁴ See, e.g., Table 4 to the Annual Report of the Chief Administrator for the Court, Unified Court System, calendar year 2007, showing a five year comparison of filings in all New York State courts. It should not be overlooked that the CDRCs also take referrals from criminal court matters, which are excluded from this 2.5 million filing figure.

for the provision of education and information on ADR, not only to judges and counsel, but, notably, to clients and the public at large. The ADR in the Courts Committee, under the leadership of Hon. Jacqueline Silbermann (ret.) and the Dispute Resolution Section and its Executive Committee, under the leadership of its Chair, Jonathan Honig, have considered ways to increase public participation in mediation, and believe that a significant step in that direction can be made by having all counsel provide their clients with a Notice of Mediation Alternative at the commencement of representation in a dispute-related matter. The Section also recommends that Part 1210 be further amended to add mention of mediation in paragraph 7 of the Notice of Client’s Rights, letting clients understand that counsel will respect the client’s determination of whether to seek or agree to mediation. The Younger Committee Report cited a growing trend envisioning an ethical duty of counsel to educate themselves about ADR and to advise their clients of their ADR options.¹⁵ The underlying thought is that counsel must act in a manner best designed to meet the legitimate needs and interests of their clients. This can be furthered by utilizing processes most appropriate for those needs and interests in a cost effective and transparent manner. Involving clients in this choice up front is the best way to be sure that the client makes an informed decision and provides the client with a “first clear chance” to avoid the cost and disruption of litigation where a better option – enhanced by the guidance and representation that can be provided by sophisticated counsel – might be available.

It is submitted that the Notice of Mediation Alternative is an effective means to insure that clients entering litigation receive notice, up front, of their mediation option in a manner that will trigger serious reflection and consideration, will prompt serious dialogue with counsel, and will lead to greater use of mediation services that are now more broadly available in high quality, both on and off court-annexed panels. For the reasons articulated in the DR Section Memo, the Association’s Executive Committee is respectfully urged to lend its imprimatur to this proposal of the Dispute Resolution Section.

Thank you for your kind attention.

Respectfully submitted,¹⁶

Jonathan Honig, Dispute Resolution Section Chair
Hon. Jacqueline Silbermann (ret.), Chair, ADR in the Courts Committee

¹⁵ Younger Committee Report, at 43, fn. 66 and text, *supra*. See, also, e.g., Model Rule 1.4(b) of the ABA Rules of Professional Conduct, (which provides in part: “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); and Model Rule 1.2(a) (which requires that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation...and shall consult with the client as to the means by which they are to be pursued.”).

¹⁶ The DR Section and ADR in the Courts Committee gratefully acknowledge the work of Stephen Hochman in the initial drafting of the Notice of Mediation Alternative and of Simeon H. Baum in the initial drafting of this Report.

SUMMARY OF PROPOSED AMENDMENTS TO PART 1210

The Dispute Resolution Section has proposed that the Association recommend to the Administrative Board of the Courts that it amend Part 1210 of the Rules of the Chief Administrative Judge to reflect the growing need to educate both attorneys and their clients about mediation. The proposed amendment would make two changes to Part 1210 of the Rules. The first is to amend section 1210.1 to add a reference to mediation in paragraph 7 of the Statement of Clients Rights that attorneys with an office in the State of New York are currently required to post in their offices. The second change is to add a new section 1210.2 to require those attorneys to deliver to their clients a Notice of Mediation Alternative in connection with any engagement involving a lawsuit or potential lawsuit.

Enclosed with this Summary is a copy of Part 1210 marked to show these proposed changes as well as a copy of the proposed one-page Notice of Mediation Alternative that the new section 1210.2 would require be delivered to the client.

The purpose of the proposed amendments is to assist attorneys in discharging what some believe is an evolving ethical duty that attorneys may have to their clients to make them aware that mediation is available as a possible alternative to litigation. The Notice of Mediation Alternative was designed to explain the mediation process in simple terms so that the client, with the advice of counsel, can decide whether or not to seek or agree to mediation. Some have argued that requiring attorneys to give their clients the opportunity to make an informed decision as to the mediation alternative to litigation is similar to the requirement that physicians obtain the informed consent of their patients before they agree to proceed with a potentially risky surgery or other medical treatment.

If adopted, the proposed amendments to Part 1210 should encourage a greater use of mediation, which can benefit both the parties and the courts. Of course, the proposal would not require the parties to agree to mediation or their attorneys to recommend it. However, it is hoped that delivery of the Notice of Mediation Alternative will make clients aware of the opportunity to discuss the mediation alternative with their attorneys at the earliest possible stage of litigation. Although over 90% of all lawsuits are resolved or settled prior to a final adjudication, many of the settlements occur late in the litigation process, after the completion of expensive and time consuming discovery. Making clients aware of how the mediation process works may result in their deciding to engage in mediation in an attempt to achieve an early settlement rather than embarking on or continuing the more expensive and uncertain process of litigation.

These amendments to Part 1210 were first proposed by the ADR in the Courts Committee of the Dispute Resolution Section, chaired by Hon. Jacqueline W. Silbermann (Ret.), and then endorsed and recommended by the Executive Committee of the Dispute Resolution Section.

Proposed Amendment To Part 1210

Revised Section 1210.1 and addition of a new Section 1210.2

Section 1210

Section 1210.1 Posting

Section 1210.2 Requirement to Give Notice of Mediation Alternative

§ 1210.1. Posting

Every attorney with an office located in the State of New York shall insure that there is posted in that office, in a manner visible to clients of the attorney, a statement of client's rights in the form set forth below. Attorneys in offices that provide legal services without fee may delete from the statement those provisions dealing with fees. The statement shall contain the following:

STATEMENT OF CLIENTS RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.
5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.

7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters) and whether or not to seek or agree to mediation.
8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Code of Professional Responsibility.
10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

§ 1210.2 Requirement to Give Notice of Mediation Alternative

In addition to the Posting requirement of §1210.1, if the client's matter involves a conflict or dispute that may result in a lawsuit, or if the client is a party to a lawsuit, every attorney shall, promptly upon being retained to represent the client, deliver to the client a Notice of Mediation Alternative; provided, however, that attorneys who are not required to post provisions dealing with fees in their Statement of Clients Rights pursuant to §1210.1 shall not be required to deliver such Notice. The Notice shall state as follows:

NOTICE OF MEDIATION ALTERNATIVE

As a party or potential party to a lawsuit, you have the right to a trial in which a judge or a jury decides your case. However, over 90% of all lawsuits are resolved or settled before a trial takes place, even where the parties initially believed that settlement was not possible. Settlement reduces the expense and inconvenience of litigation and the uncertainty about the results of a trial and any appeals.

Mediation services are available that may help you settle your lawsuit faster and before substantial expenses are incurred. Mediation is most effective in reducing costs if used early in the course of a lawsuit. A mediator can assist the parties and their attorneys in obtaining the information they need to evaluate their case more quickly and efficiently than by traditional formal discovery. You should discuss with your lawyer the issue of whether mediation might be appropriate in your case and, if so, when and how to best make use of the mediation process. Participation in mediation is entirely voluntary unless ordered by the court. The services of a mediator may be obtained privately or with the assistance of the court.

What Mediation Is and How It Works

Mediation is a confidential process in which the mediator helps the parties reach a settlement. The process is private, informal and non-binding. The parties, assisted by their lawyers, participate fully in the process and retain control of the outcome.

Mediators can help the parties communicate constructively and overcome hostilities that may interfere with making a rational cost/benefit or risk/reward analysis between settlement and the costs and uncertainties of litigation. Mediators may also serve as unbiased “agents of reality” who help the parties objectively assess their litigation alternatives. By meeting privately in separate confidential sessions with each party and its counsel, the mediator can help the parties ascertain their real interests and concerns and objectively assess the weaknesses as well as the strengths of their case, hopefully leading to a mutually agreeable settlement. In addition, a mediator can help generate solutions not previously considered by the parties that may reach beyond the scope of the remedies available in a court determination. If the mediation does not result in a settlement, the parties can continue their lawsuit and proceed to a trial. If the mediation results in a settlement, the resulting settlement agreement is binding.

Selecting a Mediator

Some mediators are facilitative in that they generally will not make settlement proposals or give their evaluation as to the likely outcome in litigation if the dispute does not settle. Others may be willing to be evaluative when necessary in order to help a party be more realistic about its case (usually in a private and confidential meeting with that party). You and your lawyer should consider these different styles and approaches to mediation when selecting a mediator. Your lawyer will be available to help you select a mediator and serve as your representative throughout the mediation process. You should discuss with your lawyer any questions you may have about mediation and how it might be beneficial in your case.

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