

## New York Must Guarantee Court Neutrals Fair Compensation

By **Elan Weinreb** and **Dorothy Kaldi** (September 20, 2023, 2:11 PM EDT)

Once again, summer draws to a close.

In New York, the transition to fall signals the time for bar associations and alternative dispute resolution provider organizations to offer ADR trainings focused on infusing the New York State Unified Court System, or UCS, with new crops of neutrals – mostly mediators with a smattering of arbitrators – to assist with the resolution of commercial, family, personal injury and other civil disputes as part of court-annexed presumptive or mandatory ADR programs.[1]

While these trainings – which cost hundreds and sometimes thousands of dollars – are generally excellent, they often pass over discussion of an inconvenient truth. Namely, based upon how New York court-annexed ADR programs currently provide for neutral compensation, the new UCS recruits will: (1) be expected to provide valuable ADR services for free; and (2) have little to no chance of recouping their training investment, i.e., breaking even, anytime soon.

Neutral compensation is an old ADR news topic, going back to at least 1992.

Then, Frank E.A. Sander, the late professor emeritus and associate dean of Harvard Law School, authored a prescient opinion piece in the American Bar Association Journal, in which he wrote, "If ADR is to develop responsibly as a practice, its practitioners need to be reasonably compensated." [2]

Approximately 10 years later, this very statement made its way verbatim into Section 13 of the Center for Dispute Settlement's National Standards for Court-Connected Mediation Programs, a groundbreaking work edited by the late ADR luminary Margaret Shaw, prefaced by the following warning: "While volunteers have a valuable role to play in many kinds of court-connected mediation programs, caution is needed." [3]

Over 20 years after that warning, Sander's statement remains aspirational ether instead of established reality for New York neutrals serving and aspiring to serve in state court-annexed ADR programs offering potential compensation, and the warning continues to be ignored.

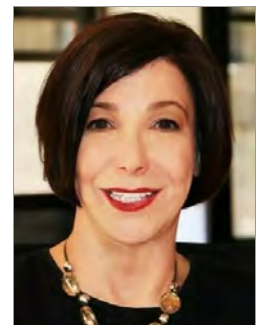
For, as noted above, with extremely limited exceptions, New York court neutrals have been – and still are – expected to provide valuable ADR services for free, notwithstanding that their counterparts in almost every other state are able to receive compensation for their services.

In this regard, over approximately six months in 2021, on the recommendation of New York and sister state bar association leaders,[4] we compiled a table of all 50 states' neutral compensation rules and statutes applicable to a variety of civil cases.[5] The results of our research were – and still are – appalling.

New York remains one of only two states – the other being New Jersey[6] – with effective statewide rules or statutes requiring court-annexed ADR program neutrals to provide parties with a certain amount of free time. This free time usually amounts to 90 minutes after many hours or even days of uncompensated preparation time before neutrals are able to receive one cent of compensation.



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In framing expectations for New York court neutrals to provide ADR services on a complimentary basis, the Empire State's free-time systems are open invitations for the application of Gresham's law, an economic principle that boils down to "bad money drives out good,"[7] or "why pay for something when you can get it for free?"

These systems discourage appreciation and respect for the experience, expertise and hard work of New York court neutrals.[8]

They frustrate support of neutrals' economic and psychological needs and interests by not providing them with much-needed income in a highly inflationary economy and depriving them of the sense of self-fulfillment that flows from receiving fair compensation.[9]

Worst of all, such free-time systems stand as textbook examples of injurious unjust enrichment.

The latter is defined as the enrichment of one or more parties (here, the parties to a dispute) with a valuable benefit (ADR services such as mediation, early neutral evaluation or arbitration) at the expense of another (namely one or more neutrals), where it is "against equity and good conscience to permit" the party or parties having received the benefit to retain it, as the New York Court of Appeals, quoting precedent, stated in *Mandarin Trading Ltd. v. Wildenstein* in 2011.[10]

This definition is in accord with the United Nations Universal Declaration of Human Rights, which in pertinent part provides: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity." [11] There's no exception made for New York court neutrals, their counterparts in sister states, or, for that matter, any other professional service providers.

Moreover, barring compensation to New York court neutrals until they exceed a free time threshold is particularly outrageous where: (1) all of the participants in court-annexed ADR processes except for parties are paid for their time and expertise from at least the moment a request for judicial intervention materializes (and often way before then, especially where attorneys are concerned); and (2) ancillary, nonjudicial court system employees such as court police officers and maintenance personnel receive at least a minimum hourly wage for their labor. Why must neutrals be treated differently?

It thus is not surprising that state courts of last resort have firmly pulled the plug on free-time systems in defending the right of court-annexed ADR neutrals to fair and reasonable compensation in appropriate cases such as commercial disputes involving established businesses or other parties capable of affording ADR services easily.

For example, Georgia's Commission on Alternative Dispute Resolution, established in 1990 by an order of that state's Supreme Court, declared:

Although the contribution of volunteers to ADR programs throughout the country is inestimable, the Georgia Supreme Court believes that the comprehensive system of statewide ADR services envisioned by these rules cannot be handled entirely by unpaid volunteers. This court is convinced that in order to build and maintain a statewide system of ADR services of the extent and quality desired, there must be mechanisms for compensating neutrals at appropriate levels. This court also believes that the Georgia ADR program will require a combination of volunteers, salaried in-house neutrals, and free market neutrals in order to meet the highly varied demands and circumstances of courts in urban, rural, and suburban areas.[12]

Civil procedure rules of the Supreme Courts of Idaho, Michigan and Minnesota go farther in giving these Georgian aspirations legal teeth. In these states, in the event of nonpayment by parties or financially responsible attorneys, court-annexed ADR program neutrals have an explicit right to move for orders compelling payment without first commencing a plenary action.[13]

Prior in-person and virtual conversations at continuing legal education programs and general information sessions on court-annexed ADR with the UCS Office of Court Administration, or OCA, personnel going back to at least 2020[14] establish the UCS' awareness of the general inequity created by free-time systems as well as the nefarious, all-too-common practice of attorneys deliberately running out the compensation clock.

This tactic involves attorneys declaring the end of the allotted free time as a deadline for the parties to completely resolve their dispute either with or without neutral pressure or — in those much less common instances where the neutral acts in an evaluative or decision-making capacity — to have the ADR session completely wrapped up via neutral evaluation or decision.

No matter the outcome of the session, a neutral is guaranteed zero compensation, and as a practical matter, coercing or pressurizing anyone to settle or otherwise resolve a complicated dispute in a matter of hours rarely, if ever, succeeds.

The tactic of running out the compensation clock therefore has the net effect of torpedoing the tremendous dispute resolution potential of court-annexed ADR processes while ensuring that neutrals waste their time, energy and resources in conducting same. It is an abusive tactic that would not exist but for the uncompensated time that is at the heart of free-time systems.

Historically, the OCA claimed that in the absence of legislation or court rules enabling compensation for New York court neutrals,[15] state courts could not compel parties to pay neutrals for court-ordered ADR proceedings, notwithstanding the resulting contradiction of indirectly compelling these parties to compensate their attorneys for representation in these proceedings.

Almost every state has such enabling legislation or court rules, and in February 2022, New York finally got on the bandwagon in joining them when the OCA issued a proposed new Part 60 of the Rules of the Chief Judge and a proposed new Part 160 of the Rules of the Chief Administrative Judge. In this regard, proposed Rule 160.2(b)(2) provides:

Courts may establish protocols for (i) the selection of neutral third parties, (ii) the referral of disputes to them, (iii) their compensation, (iv) the manner in which complaints of the parties about their conduct may be addressed ..., and (v) the options available where the parties are unable to pay the costs of ADR. Nothing in this paragraph shall prohibit the Chief Administrator from prescribing, by administrative order, rules of general applicability regulating the compensation of neutral third parties in appropriate case types.

With Chief Judge Rowan D. Wilson's appointment in April 2023 to the New York Court of Appeals, the time for adoption of the proposed rules finally draws near.

The proposed rules' very text provides the key to freedom from the system that has existed for way too many years: The chief judge can direct the courts' chief administrative judge, also known as the chief administrator — currently Judge Joseph A. Zayas — to adopt an administrative order, with the advice and consent of the Administrative Board of the Courts, establishing one or more minimum guaranteed compensation floors for New York court neutrals.

Working together with these neutrals, the state judiciary will have to set the specific amounts of these floors — the equivalent of a minimum wage for New York court neutrals — for inclusion in that administrative order.

Doubtless, there will be many considerations to factor, including but not limited to:

- The nature, complexity, amount in controversy and relief requested in any given case;
- The financial status of the parties and related power imbalances;
- Whether a flat rate, hourly rate, sliding scale fee or hybridization of these compensation schemes is appropriate; and
- Whether and under what circumstances administrative judges or even individual judges should have authority to raise the floors.

But notwithstanding these challenges — which other states such as New Hampshire have addressed creatively in establishing parallel minimum compensation schemes corresponding to case type[16] — the proposed administrative order's very existence will establish a concrete, precedential foundation for equitable, fair, just and

reasonable compensation for New York court neutrals.

We therefore respectfully implore New York Gov. Kathy Hochul, Judge Wilson, the members of New York's Legislature and anyone else who cares about the future of New York court-annexed ADR to effectuate not only adoption of the proposed rules with all deliberate speed, but simultaneous promulgation of an administrative order firmly enshrining the concept of minimum guaranteed compensation for New York court neutrals as an essential and permanent aspect of presumptive ADR in every square inch of New York.[17]

May the current oppression of these neutrals cease once and for all through that order, which will affirm their basic human right to get paid for their training, expertise and many dedicated hours of work.

May the UCS finally be enabled – as it should have been long ago – to convey meaningful and effective dispute resolution services to the people of New York who not only exclaim but embody the creed of "Excelsior."

May the upcoming fall crop of New York court neutral recruits be welcomed as ADR professionals not into an obsolete guild of repression, but rather an evolved fellowship of respect.

And may we all – politicians, parties, attorneys, neutrals, judges, ADR coordinators, other court system personnel and lay public – unanimously and finally transform the now 30-plus-year-old dream of Sander into the reality of a bright and glorious future for presumptive ADR in the Empire State.

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[1] See, e.g., New York State Bar Association ("NYSBA"), 3-Day Commercial Mediation Training – Fall 2023, <https://nysba.org/events/3-day-commercial-mediation-training-fall-2023/> (virtual training advertisement scheduled for October 2023 last visited Aug. 31, 2023); NYSBA, 2-Day Advanced Commercial Mediation Training – Fall 2023, <https://nysba.org/events/2-day-advanced-commercial-mediation-training-fall-2023/> (virtual training advertisement scheduled for November 2023 last visited Aug. 31, 2023); New York Peace Institute, Basic Mediation Training, <https://nypeace.org/become-a-mediator/> (in-person training advertisement scheduled for September 2023 last visited Aug. 31, 2023).

[2] See generally Paying for ADR [Alternative Dispute Resolution] - To make it work, we have to provide funds for it, ABA J., Vol. 78, No. 2 p. 105 (Feb. 1992).

[3] National Standards § 13.1 cmt.

[4] See generally [https://youtu.be/\\_5N5CrgPzLM](https://youtu.be/_5N5CrgPzLM).


[5] See generally <https://tinyurl.com/State-Neutral-Comp-Statutes>.

[6] See N.J. Ct. Rule 1:40-4(b).

[7] Parselle, Charles B., Gresham's Law: The Mediation Paradox (Mediate.com Mar. 22, 2005), <https://www.mediate.com/articles/parselle3.cfm>.

[8] See id. ("The bar is happy to use the services of [uncompensated] mediators, but do they still respect them in the morning?").

[9] See generally Frans de Waal, Two Monkeys Were Paid Unequally: Excerpt from Frans de Waal's TED Talk, TED Blog Video (Apr. 4, 2013), <https://www.youtube.com/watch?v=meiU6TxysCg>.

[10] See [Mandarin Trading Ltd. v. Wildenstein](#) , 16 N.Y.3d 173, 182 (2011) (quoting *Paramount Film Distrib. Corp. v. State of N.Y.*, 30 N.Y.2d 415, 421 (1972) (citing additional primary and secondary authorities)).

[11] United Nations Univ. Decl. of Human Rights art. 23 § 3 (adopted Dec. 10, 1948).

[12] Ga. Comm'n on ADR, *Alternative Dispute Resolution Rules VI*. cmt. (2021).

[13] See Idaho R. Civ. P. 37.1(h); Mich. Ct. R. 2.411(D)(4); Minn. Gen. R. Prac. 114.11(b).

[14] See generally <https://youtu.be/kKTuBmwHSgo>. The OCA personnel who responded to the neutral compensation question in this YouTube video excerpt that Mr. Weinreb asked at *How We Kept Things Running During a Pandemic – a New York County Lawyers Association ("NYCLA") March 4, 2021 CLE presentation on court-annexed ADR – did not wish for their responses to be available to the public such that Mr. Weinreb excised them from the video. For those interested in seeing their responses, please contact NYCLA's Director of CLE, Bari R. Chase, Esq. at [bchase@nycla.org](mailto:bchase@nycla.org) to purchase the presentation, of which more information can be found at [https://web.archive.org/web/20220525064828/https://www.nycla.org/ItemDetail?iProductCode=CLE\\_OD\\_ODRP](https://web.archive.org/web/20220525064828/https://www.nycla.org/ItemDetail?iProductCode=CLE_OD_ODRP) (May 25, 2022 archived program web page last visited Sept. 7, 2023).*

[15] See, e.g., 28 U.S.C. § 658(a); Ala. Civil Ct. Med. R. 15(b); Ariz. Rev. Stat. § 12-134(B); Ky. Model Med. R. 6; Mich. Ct. R. 2.411(D); Miss. Code § 25-7-35; Tex. Civ. Prac. and Rem. Code § 154.054.

[16] Compare N.H. Supreme Ct. Proc. R. 12-A(5) (minimum flat rate compensation of \$225 per party in certain civil cases) with N.H. Supreme Ct. Admin. R. 48-B(5) (minimum compensation of \$300 for four hours in certain family law cases).

[17] See generally <https://www.change.org/NY-ADR-Compensation>.

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