

## MEMORANDUM

TO: Officers and Board of Governors of the  
New Hampshire Bar Association

FROM: Bruce W. Felmly

DATE: August 13, 2007

RE: Proposed Modification of Superior Court Rule 170

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### **INTRODUCTION**

This memorandum will set forth reasons why the New Hampshire Bar Association (“NHBA”) should support the New Hampshire Supreme Court and the newly formed office of ADR (Karen J. Borgstrom, Director, Office of Mediation and Arbitration) in improving and expanding the volunteer-based Superior Court Rule 170 Mediation Program. There is pending with the Court for public comment a proposed revision to that Rule, which would, as drafted, abandon the voluntary system and implement a market rate, paid mediator plan. Chief Justice Broderick has indicated that the Court has been persuaded by comment and opposition to the proposed paid mediator plan and that it is inclined to support a revitalized volunteer model. It will be essential to the success of that plan that the New Hampshire Bar Association and other constituencies provide support as the Court moves in that direction.

### **BRIEF HISTORICAL PERSPECTIVE**

Superior Court Rule 170 (“Rule 170”) has served New Hampshire’s Justice System for many years by providing mediators and other ADR services through the efforts of trained volunteer attorney neutrals. The program has operated in four counties and suffered throughout that period as the court system never had adequate funding to administer or oversee the program. Individual court clerks in various counties did their best to coordinate the efforts of the mediators, but the level of that support and the quality of administration has always been in need of substantial improvement. Despite the difficulties and problems facing the Rule 170 program, it has been seen as providing an important service to the public and achieved reasonable settlement results. It has also involved a terrific effort by a large number of lawyers in a fashion that has contributed powerfully to the image and public service commitment of the Bar.

In the past several years, the court system has studied the expansion of ADR services, and a study committee eventually recommended a drastic revamping of the Rule 170 program. That proposed new system emerged from the Rules committee process and is now pending before the Court, with comments required to be received by the Supreme Court before August 31, 2007.

The proposed Rule essentially terminates the volunteer program and has as its essential features the following:

- 1) Litigants will be required in most cases to mediate civil Superior Court cases. This will be a state-wide program.
- 2) Mediators under this program will charge litigants for their services at “market rates”. While the rates will no doubt vary, it is anticipated that the cost per party might be \$300 to \$500 per case.
- 3) Mediators participating in the program will be required to undergo an initial forty (40) hours of training, with an additional eight (8) hours of continuing ADR training each year. Mediators will also be required to pay a \$200 per year fee in order to enroll.
- 4) Administration of the program will be under the Court’s new office, the Office of Mediation and Arbitration, which was commissioned on July 1, 2007. Attorney Karen Borgstrom is the administrator of that office and will coordinate state-wide oversight of the services, training, recruitment, and other features of the ADR system.
- 5) It is unclear from the Rule what the procedure for a party opting out of the mandatory mediation will require. The proposed Rule contemplates this would be by motion, but the level of Court’s scrutiny or examination of the reasons for opting out in favor of private mediation are unclear.

The proposed Rule has drawn sharp criticism and comment. I prepared a detailed comment memorandum to the Court, which I served on July 20, 2007.<sup>1</sup> My memorandum outlined my analysis of the proposed Rule, and advocated for a continuation of a much improved volunteer-based system. Conferences with Chief Justice Broderick and ADR Director Borgstrom ensued. Other comments were received from other interested parties, and presumably continue to flow into the Court. The Chief Justice has now indicated that he expects the Court will support the voluntary model, particularly if the leadership of the Bar fosters and assists in the revitalization of that program.

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<sup>1</sup> This memorandum was also provided to the New Hampshire Bar Association and anyone interested in my more detailed analysis of the issues relating to the proposed Rule is encouraged to obtain a copy of my memorandum from the New Hampshire Bar Association staff or from the undersigned.

**WHY THE NHBA SHOULD ACCEPT THE COURT'S REQUEST TO SUPPORT THE ENLARGEMENT AND EXPANSION OF THE VOLUNTEER-BASED RULE 170 PROGRAM**

The reasons why the NHBA should support the Court's effort to enlarge and expand the volunteer model and reject the "pay as you go" proposal from the Rules Committee, combine both strategic and practical determinations or factors:

- 1) The NHBA and New Hampshire lawyers have a large stake in the volunteer model. This program is a unique, highly visible opportunity for lawyers to provide support and service to the public and the Justice System. It is a critical opportunity for the integrated Bar Association and has historically provided significant public service.
- 2) While the Rule 170 Program has historically suffered from underfunding and inadequate administration, particularly on a centralized basis, we are at a crossroads of opportunity to change that situation. The Legislature has provided funding and the Justice System has now implemented an office to operate and administer ADR services. There is no reason to believe that a dramatic improvement in mediation scheduling, communications, litigant compliance with mediation procedures, training, recruitment of qualified neutrals, and evaluation of mediators will not be put into place. The historic inefficiencies or inability of the Rule 170 process were never the result of the volunteer status of mediators, but stem from the reality that the System simply could not properly support the Program. This will clearly change under new leadership and resources, and now would be the worst possible time to abandon that opportunity in favor of a "paid mediator" model.
- 3) It is probable that the "pay as you go system" simply will not be widely used, the parties and counsel will opt out in favor of widely available privately paid mediators. They abound. If parties are going to pay market rates for mediators, they will self-select those of their choice, not draw on a court-sponsored list, which comes with its own level of administrative detail. The lack of use of the paid mediator system in the U.S. District Court program is testament to this phenomena. Only approximately ten (10) cases a year are reportedly mediated under that program.
- 4) The training requirements of the proposed "pay as you go" rule effectively preclude many qualified people from participating. Existing Rule 170 mediators are not likely to sign up for forty (40) new underlying new hours of training. There are people who have already undergone prior training, plus have years of experience. While training and continuing education will be an important aspect of our ADR system, the provisions of the Rule are way overdone. There remain unique opportunities to enhance the collegiality, stature, cohesiveness, and satisfaction of participation as a neutral in this system. There are qualifications

and training requirements that should be reasonably imposed, but the Rule as drafted will discourage the participation of many of the specific people we most want to serve.

### **QUESTIONS AND ANSWERS**

- 1) Question: While the Rule 170 volunteer model is admirable, litigant compliance has slipped, scheduling is often not adequate, and a variety of other inefficiencies plague the program. Why not move to a paid system where parties will have more to lose if they are not prepared?

Answer: This recommendation to support the volunteer model is founded on the fact that for the first time New Hampshire will have a well-run, funded, administration for ADR. Lax compliance with Rules is not seriously addressed or changed by charging market rates by mediators, but by good administration, communication and standard techniques to achieve Rules compliance. Very specific recommendations for how to precisely achieve these objectives are being compiled and are workable.

- 2) Question: Isn't the paid mediator rule modeled on the Maine Rule which supposedly works quite well?

Answer: The Maine Rule 16 Program is a mandatory mediation model where the parties obtain their own mediators. While there is a court-registered list of mediators, parties are not limited to it. There is no history of a volunteer system in Maine, and an overwhelming number of actual mediations are centralized and only eight (8) neutrals. An expanded enhanced volunteer system serves interests which go beyond the Maine plan and our volunteer system provides opportunities for the Bar that are simply unaddressed in Maine.

- 3) Question: Lots of parties currently opt out of the volunteer model. Is that a problem and will that change under this proposal?

Answer: It will probably not change extensively, although a well-run, efficient and effective system that provides mediators at minimal costs should be attractive in many cases. Certain cases are not suitable for mediation, and it is likely that extensively complicated cases will still opt out. This should not discourage our establishing a system that will serve a wide variety and number of cases.

- 4) Question: Will there be any cost to this new expanded volunteer program?

Answer: It is proposed that a very small administrative ADR fee will be charged to each party to assist in funding the ADR system. This may run \$50 or so per case, per party. This fee honors the court system's representations to the Legislature that some funding of the new office would be borne by the system. It

is also possible that a separate list of mediation specialists might be created as a referral center for interested parties. This list could be published by the Court's ADR system, and draw a registration fee from mediators seeking to be listed. Such a program would further assist funding.

### **RECOMMENDATION**

In order for the revitalized volunteer-based plan to work, the Court will clearly need the NHBA to provide encouragement and support. Here are specific things I propose be undertaken as part of that effort:

- 1) Develop a Board of Governors resolution supporting this Plan, to be filed with the Court prior to August 31, 2007. There should be little controversy in my view regarding this since the Court has welcomed this proposal, seeks the Bar's support, and the program at issue is a longstanding institution, worthy of a major upgrade.
- 2) The NHBA should use its publications and communications vehicles to encourage participation of volunteer neutrals and use of program.
- 3) The Committee on Cooperation with the Courts should be charged to work closely in support of the new ADR office to develop excellent programs dealing with:
  - a. Recruitment, evaluation and training of neutrals.
  - b. Clear rules and communications to assure litigant compliance and system efficiency.
  - c. Communications, awards, participant recognition, all to encourage and celebrate neutrals' performance.
  - d. Liaison and partner with other constituencies to generate support for this important and visible action of New Hampshire lawyers.

I appreciate your consideration of this request and welcome the opportunity to answer questions. I believe the timing is perfect for this to succeed, dramatically improving the often frustrating experience that many of us have experienced as Rule 170 mediators. I believe it is important to support the Supreme Court on this issue and I hope that the Association undertakes to do so.

Respectfully submitted,

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Officers and Board of Governors of the  
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