

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

Nancy J. Lamarche

v.

Stephanie A. McCarthy

No. 07-C-060

ORDER

This is a negligence action in which the plaintiff, Nancy J. Lamarche, seeks damages from the defendant, Stephanie A. McCarthy, based on a claim of injuries resulting from a motor vehicle collision. The court convened a structuring conference on December 5, 2007. An issue arose as to whether the parties would be subject to the new alternative dispute resolution (“ADR”) procedures established by Temporary Superior Court Rule 170 (effective January 1, 2008). The defendant orally moved for relief from the mandatory provisions of the rule based on a claim that they run afoul of Part 1, Article 14 of the New Hampshire Constitution. The plaintiff did not object. Because the New Hampshire constitutional claim has merit, the motion is GRANTED.

Temporary Superior Court Rule 170 imposes a mandatory ADR requirement for all writs of summons, transfers of actions from the district court, and certain equity actions. Parties must choose from a list of approved paid neutrals, where the parties split the neutral’s fees evenly unless otherwise provided, or they must choose from a list of volunteer neutrals. If the parties elect mediation with a volunteer neutral, each party must pay a \$50 fee to the Office of Mediation and Arbitration (“OMA”)—the bureaucracy established to administer the rule. The court, upon the petition of an indigent party, may waive the administrative fee.

As indicated above, the parties seek to be relieved of the mandatory provisions of the rule based on a claim that such provisions violate the New Hampshire Constitution. Consequently, the court will confine its analysis to those provisions and, in particular, to the mandatory payment requirement. The court will not address the voluntary aspects of the rule.

Part 1, Article 14 of the New Hampshire Constitution provides:

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it....

N.H. Const. Pt. 1, Art. 14. The purpose of Part 1, Article 14 is “to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts.” *Opinion of the Justices (Limitation on Civil Actions)*, 137 N.H. 260, 265 (1993), quoting *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 665 (1979).

Payments associated with litigation are constitutional in limited circumstances. For example, the court may require the payment of filing fees that aid court administration costs. *See State v. Basinow*, 117 N.H. 176, 178 (1977) (\$8.00 filing fee to appeal a parking violation in superior court does not violate Pt.1, Art. 14 of the NH Constitution). Litigants cannot, however, be required to pay a fee for the services of an adjudicatory official. *Christy & Tessier v. Witte*, 126 N.H. 702 (1985). Payments to adjudicatory officials that are not required—in other words, voluntary—are not prohibited by the constitution when **both parties were given an informed choice** between compensating a particular special adjudicatory official or accepting a general adjudicatory official assigned at **no cost**. *Id.*; *see also Follansbee v. Plymouth District Court*, 151 N.H. 365 (2004) (practice of requiring a special fee for bail commissioners upheld because the parties chose to avail themselves of a special accommodation which required the fee, namely earlier bail determination). Parties cannot be required to pay for judicial services, however, where no genuine choice is available. *See In re Estate of Henry Dionne*, 128 N.H. 682 (1986)

(forbidding the payment of special session fees to probate court judges hearing matters outside limited number of regular session days); *see also State v. Cushing*, 119 N.H. 147, 148 (1979) (“a criminal defendant cannot be required to purchase a jury trial—even for so nominal a sum as eight dollars.”). In sum, the court cannot impose required fees for access to justice and, in particular, access to an adjudicative official, other than a filing or appeal fee.

Temporary Rule 170 requires the parties to engage in ADR. If the parties do not volunteer to pay a mediator’s full fees, they must pay a mandatory fee of \$50 per party, unless the party is deemed indigent by the court. In this context, the court observes that the fee is not to be paid to an outside agency. The OMA is a part of the court system. It is housed in the offices of the Administrative Judge of the District Court. The issue, therefore, is whether the rule imposes a fee beyond an appropriate administrative filing fee for access to justice and, in particular, access to an adjudicatory official.

Juries, judges, masters, probate judges and arbitrators are all adjudicatory officials. While the court recognizes that the authority of a mediator is not binding, a mediator is nevertheless an adjudicative official often having a profound effect on the resolution of the parties’ dispute based on a weighing of the facts. Indeed, the imposition of mandatory ADR as established by Temporary Rule 170 (as well as the procedures under the longstanding previous version of Rule 170 administered by the Superior Court) is recognition of the critical place such procedures have in the dispute resolution process. Thus, the rule requires litigants to pay a fee for access to an adjudicatory official, without the presence of alternative options.

The court recognizes that Temporary Rule 170 allows for waiver of the OMA fee if a party can establish indigence. This measure is not sufficient to conform the rule to New Hampshire Constitutional requirements. State constitutional protections apply to all—not just the poor

or indigent. Moreover, an indigent party who obtains a fee waiver is left to wonder whether he or she is getting the same access to justice as a party who paid. This is one of the central evils that Pt. 1 Art. 14 of the NH Constitution is designed to foreclose.

Based on the foregoing, the court concludes that the mandatory payment requirements of Temporary Rule 170 violate Part 1, Article 14 of the New Hampshire Constitution. Accordingly, the defendant's motion for relief from Temporary Rule 170's mandatory fee provisions is GRANTED.

So ORDERED.

A handwritten signature in black ink that reads "Larry M. Smukler". The signature is written in a cursive, flowing style.

Date: January 10, 2008

**LARRY M. SMUKLER
PRESIDING JUSTICE**