INTRODUCTION:
RECONCILING DIVERGENT VIEWS

A discussion about alternative dispute resolution (ADR) in New Hampshire typically evokes a passionate response from those who are involved with the process from either within or outside the court system. Attorneys, judges, dispute resolution professionals, consumers, ADR trainers, and other professionals involved with the process are either passionately positive or passionately negative about the impact of ADR on the Court system. Ironically, a middle-ground on this issue is hard to find. Reconciling the polarized positions would be the holy grail of dispute resolution for the Office of Mediation and Arbitration.

While that goal may not be within reach of this article, what this analysis will do is explore the history of dispute resolution in New Hampshire, both privately and within the court system, to evaluate how ADR is viewed by its current users and to explore what dispute resolution may look like in the next five years.

I. THE PAST AND PRESENT OF ADR IN NEW HAMPSHIRE

Dispute resolution has been part of our culture for years. Community mediation programs developed in the 1960s and 1970s. Many of these programs use mediation, facilitation, and other intervention with families and community groups to assist them to solve problems. They rely on trained volunteer mediators or neutrals to work with families or other groups to find solutions.

Private dispute resolution has become the norm. The American Arbitration Association, JAMS, and other organizations offer private processes for resolution without trial. There are many mediators and arbitrators in private practice, conducting dispute resolution processes outside the court system; and in many cases they are conducting these proceedings pre-suit. The growth of pre-suit ADR has evolved, in large part, due to the fact that many commercial contracts include a requirement that the parties submit to non-binding arbitration or mediation before a case can be litigated. Many contracts require binding arbitration, with no access to the courts, at all.

For example, insurance contracts require arbitration of certain first party claims, rather than litigation. Other organizations require mediation before suit. The United States Postal Service requires mediation through its REDRESS Program. In the postal service system, if an employee is having a workplace dispute, the employees involved, including supervisors, must attend mediation. The EEOC and the Human Rights Commission also require mediation of many workplace disputes. In addition, school districts and families must engage in mediation over special education needs. Clearly, individuals and organizations are using private dispute resolution instead of the court system.

During the past 21 years, the New Hampshire Judicial Branch has made great strides in integrating ADR into the court system. Beginning with the Rule 170 program, launched as a pilot program in 1987 and then expanded and more fully developed in the mid-1990s; adding the Probate Court mediation program in 2003, small claims mediation in District Court in 2005, presumptive marital mediation in Family Division in 2005 along with voluntarily mediated adoptions that year. The Judicial Branch has dramatically expanded ADR as a tool to work in tandem with traditional court processes.

Prior to July of 2007, these Judicial Branch ADR programs were administered separately by each of the Courts’ administrative offices (Family Division, District Court, Probate, and Superior Court) with help from individual court clerks’ offices. Senior Associate Supreme Court Justice Linda S. Dalianis chaired a committee of judges, lawyers, court staff, and ADR professionals that was formed to work toward legislative creation of a central office to administer Judicial Branch ADR programs. The purpose of the office would be to review, improve and
oversee existing court ADR programs and to develop new programs. In July of 2007 with the support of the legislature, the Judicial Branch proudly launched the Office of Mediation and Arbitration (“OMA”) and completely revamped the way that ADR programs are administered within the Court system.

According to the legislation creating the OMA, its purpose was to “authorize the Judicial Branch to develop and institute dispute resolution processes which will increase citizen satisfaction with the legal system; provide affordable justice; reduce protracted and repetitive litigation; empower participants to make decisions affecting their future, and enhance court efficiency.” The mandate for the OMA at its creation was to bring under one roof all of the existing ADR programs and to handle all of the administrative, supervisory, planning, training, and contracting of ADR professionals within those programs. The professionals who staff these programs adhere to the highest standards in both skills and ethics making them a valuable resource within the court system. There are currently 29 mediators on the District Court Small Claims roster, 41 family mediators working in divorce, parenting, civil union dissolution, 7 Probate mediators handling cases such as adult guardianships, wills, charitable trust disputes and voluntarily mediated adoptions, and 191 Superior Court mediators, who either volunteer or are paid market rates for their work in a wide variety of civil and equity cases.

The OMA sponsors, facilitates, participates in, or acts as a conduit for information about training programs for each of the court sponsored ADR programs to help the mediators meet their training requirements. The OMA’s focus on training assures users of the courts’ programs that they can have confidence in the quality of the ADR professionals assigned to their cases.

When the OMA was initially created, it was funded by the Legislature for one year only, after which the Judicial Branch intended to make the OMA self-funding. Currently, the office is funded through a variety of sources including small surcharges ($5.00 per case) on filing fees in Probate and District Court Small claims cases, rostering fees of $350 in the Superior Court program, a $50 administrative fee in superior court cases when using a volunteer mediator. Finally, the OMA did apply for and receive some grant money intended to be a financial bridge to insure that it has time to establish its funding sources in future years.

ADR professionals on the courts’ rosters are compensated in accordance with the statute or rule applicable to that program. In Probate Court cases generally, mediators on the court’s roster receive a fixed fee of $350 per case from the mediation fund for up to 12 hours of mediation. Mediators in small claims cases are compensated at $60 per case, also from the fund. In marital, civil union and parenting cases, mediators are compensated at the rate of $80 per hour, which is paid by the parties directly to the mediator at each session. However, in family cases, if the parties are indigent, arrangements can be made to have the payment made through the fund in the first instance (subject to repayment to the Office of Cost Containment), if the Judge approves the parties’ request. Finally in Superior Court cases, the parties or counsel can choose to have a volunteer neutral or a paid neutral. Typically, volunteer mediators are requested for cases that are reasonably straightforward and do not have the potential for large damage awards. In more complex cases, or cases where damages could be high, the parties or counsel can hire a neutral at the neutral’s market rate to assist with the ADR process. A waiver for indigent clients can be requested in Superior Court cases, where appropriate. Out of necessity, these programs are subject to different statutory or rules criteria, both in terms of procedure and compensation to the neutrals.

Currently, in accordance with the statute, small claims mediation in District and Probate courts is completely voluntary. Mediation in Family cases is presumptive; meaning that family cases in either Family Division or Superior court involving parenting, divorce or civil unions will typically go to mediation, unless there is a compelling reason for mediation not to be tried in the first instance. Domestic violence concerns, in family cases, for example, may be a reason for a case to by-pass mediation. In Superior court civil, and some equity cases, the Rule 170 ADR program is mandatory. In those cases parties and counsel may choose Neutral Case Evaluation, Mediation or Arbitration, prior to trial.

In addition to the above, the OMA serves two other important functions. First, the office serves as a resource to all users of the ADR programs. The office handles process questions and addresses concerns, complaints or kudos that are addressed to any of the courts ADR professionals or any of its programs. The OMA is responsible for reviewing and recommending amendments to the court and administrative rules to ensure that these programs are working most effectively and efficiently for program users. Maintaining the highest quality of professionals within the programs and making sure the programs work well are keys to OMA fulfilling its mission.

Second, the office researches and develops new ADR programs. To satisfy this objective, the OMA is currently developing several new proposals for consideration by the Supreme Court and Administrative Judges. Currently the OMA is incubating plans for an appellate mediation program, expansion of Neutral case evaluation in family matters, a landlord-tenant mediation program in District Court cases, a criminal diversion programs for minors in some District Court case types, mediation in District Court civil cases over the small claims jurisdictional amount, and an executive/administrative agency dispute resolution interface.

The new Business Court docket will provide an exciting and innovative opportunity for the Office of Mediation and Arbitration to develop, for the first time, a process to facilitate pre-suit mediation or arbitration in business disputes. Business Courts in other states such as Delaware, have adopted this pre-suit ADR model. Back in 2003, Vice Chancellor Leo E. Strine, Jr., with the support of the Delaware Chancery Court and the Delaware legislature, determined that a “Mediation Only” docket would enhance the work of the well-respected Chancery Court. In Vice Chancellor Strine’s view, a mediation-only docket could add value to its established business court process “...Because this mediation process permits the parties to shape their own solutions with expert assistance from the court at relatively low cost, it seems to have positive economic and social utility. Although Judge-conducted mediation differs in important ways from adjudication, it is a logical extension of the judiciary’s role as the
branch of government that helps citizens resolve their controversies peaceably, fairly and efficiently.” 11 In essence:

"In both the corporate and commercial realms, the Court of Chancery strives to fill gaps sensibly, by rendering after-the-fact judgments that result in incentives for future parties to conduct their affairs with each other in wealth-creating, but non-exploitative ways, and when possible to do so fairly and efficiently, to govern their relationships by clear contractual text. Those of us engaged in this adjudicative task on a more or less daily basis like to think that this is a valuable service that enables the procession of useful economic activity.

We recognize that a judicial adjudication is no more than a second-best solution even when parties in a business relationship have reached a stage in their relationship when they are litigating against each other. Indeed, it is often the case the parties are at odds precisely because their relationship confronted circumstances that they did not anticipate, rather than because one of the parties is engaging in clearly forbidden behavior. Put another way, many of the corporate and commercial cases that our court addresses are painted in shades of gray, rather than in black and white. They often turn on the interpretation of arguably ambiguous contractual terms, the implied duty of good faith and fair dealing, or an assessment of the economic fairness of a plausibly useful transaction tinged with self interest. Not infrequently, the parties to a business- to-business dispute have a larger relationship that they wish to preserve, notwithstanding the litigable controversy that divides them. Many of these arguments are best resolved by an expeditious, if imperfect settlement that results from an additional, after-the-fact negotiation.

Undoubtedly, many commercial parties who reach this point in their relationship do engage in another round of contracting to work out their problem short of judicial intervention. A small industry has also arisen to provide alternative dispute resolution (or “ADR”) services to parties who desire third-party assistance in the process of working out their differences outside of the judicial process. In no small measure the explosion in the use of ADR has been driven by the spiraling costs and time-consuming nature of traditional litigation.”

The concerns that lead the Delaware Chancery court to integrate a “mediation-only” option into its business dispute processes are identical to those here in New Hampshire. Pre- or post-suit ADR options in the business court docket means that for the first time, New Hampshire courts will be moving at the speed of New Hampshire business. 12

III. FINDING OUR VISION: ADR IN THE NH COURTS 13

Finding a way, through the use of ADR, to enhance the traditional litigation model and not undermine it, is essential. The Judicial Branch must be open to meaningful input from those who use work within the system. Such input is a critical first step toward honestly assessing the effectiveness of current court processes and the ADR programs integrated within them, and to take the necessary steps to insure that these programs will continue to work effectively in the future.

Since the Fall of 2007, the OMA has been reaching out to a variety of groups and individuals, in the legal and ADR communities, to get a sense of where people stand of the question of:

(i) the use and growth of ADR privately,
(ii) ADR as a resource within the Court system, and
(iii) the construction and integration of specific court annexed program initiatives.

The responses the OMA received were as diverse as the people whose views were solicited. However, the bulk of responses can be grouped into two categories. One group believes that ADR is a panacea. From family disputes, to school and community issues, to business and other civil disputes, this group feels that disputants should have the right to craft a resolution to their own conflicts. Conversely, there are those who are dismayed by the upsurge in use of ADR both privately and within the court system. This group feels that litigation is the only proper way to resolve disputes and that alternatives to traditional litigation processes (private or court sanctioned) can be detrimental to the administration of justice.

Recent changes to the Superior Court Rule 170 program seemed to serve as a lightning rod for these polarized views. Recognizing that, it became incumbent upon the OMA to seek more in-depth input from various groups to obtain all viewpoints on the proposed changes to the program. The OMA sought and received (and is still seeking and receiving) input from the New Hampshire Bar Association generally and the ADR section specifically, the New Hampshire Association for Justice (formerly New Hampshire Trial Lawyers), the New Hampshire Conflict Resolution Association, individual users of the program, attorneys, and ADR professionals. Reaching out to these groups and individuals has been enlightening and extremely beneficial.

In addition to the external feedback about the Rule 170 program, the OMA also received feedback from within the Judicial Branch, from Superior Court Judges and staff about the new Rule. Chief Justice of the Superior Court, Robert J. Lynn, in a letter to Justice Linda Dalianis Chair of the Advisory Committee on Rules, expressed concerns on behalf of the Superior Court Judges with the revamped version of temporary Rule 170. In that letter, he encouraged the Rules committee to consider extending the Rule on a temporary basis. 14 Judge Lynn explained that the Superior Court Judges felt that it was “much too early to adopt the new Rule 170 on a permanent basis. . . The new rule only became operational as of January 1 of this year; and because of judge and staff shortages as well as normal lag time in the progression of a case, it has only been within the last month or two that judges have begun holding Rule 62 structuring conferences in cases that were filed after January 1. Thus to date, we have had very little experience with how the rule actually operates on a day-to-day basis.” 15 In his letter, Judge Lynn also indicated that it would be advisable to proceed with caution, noting that “while the new rule offers increased flexibility by allowing litigants to select their own neutrals and make their own arrangements for when and where a mediation will take place, the ‘downside’ of this flexibility is a loss of court control over the ADR process.” 16

Essentially, the Superior Court Judges expressed concerns about:
(i) the mechanics of the new rule,
(ii) the ability for pro se litigants to navigate the system,
(iii) the constitutionality of the $50 administrative fee and
(iv) whether the new system will cause increased paperwork for
the courts in administering the program.

This feedback, both pro and con, has resulted in the OMA proposing changes to the temporary rule to address these concerns and to make it easier for both practitioners and pro se litigants to get the information they need to make the system work most efficiently.

Changes to the temporary rule went into effect on July 1, 2008, which should address the procedural issues that were causing difficulties. New program options such as mediating cases either at the courthouse or at an off-site location are extremely beneficial for small firms whose volunteer mediators do not then have to travel to a courthouse to provide volunteer mediation services. Having counsel, the parties, and the neutral to determine the length of the process, and the type of process (neutral case evaluation, mediation or arbitration) will provide a more realistic time frame for cases to develop settlement scenarios. Permitting the parties and counsel to choose the neutral they felt was the best fit for their case is a positive change. Essentially, giving control of the ADR process to the hands-on users of the program can enhance the process for each individual case making more effective and thus increasing the chances of resolution. This type of flexibility can enhance the Rule 170 program as long as the courts can easily track the settlement status of the case prior to trial to ensure the courts can maximize use of their docket time, and as long as the OMA can statistically track the success of this (and other) court annexed ADR programs.

Clearly, determining whether the changes to the new Rule 170 program are working well will take some time and will require a willingness to adapt to the changes by those who use and administer the program. According to Chief Justice Broderick, we must make the court system “more affordable, more efficient, more productive and useful.” The changes to Rule 170 are one more way of accomplishing that goal.

Incorporating ADR not only in the Superior Court, but in all of the courts’ programs to improve access to justice for New Hampshire citizens is particularly important in the face of current challenging economic times. Budgets have been cut. The judicial branch has been unable to fill judicial vacancies or to staff support positions in many of the courts. Yet we must still provide access to justice for New Hampshire citizens. As noted by Chief Justice Broderick in a speech he gave to the New Hampshire Association of Justice on June 26, 2008:

This new and disquieting reality continues to escalate at the very same time that many people, other than the poor, struggle to afford lawyers and a private justice system is quietly being constructed in America for those who can more readily afford counsel. This new system offers options the courts often cannot match. The state courts, despite the efforts of many good people, may not be fulfilling their constitutional obligation to deliver affordable and timely justice and we do not have a monopoly on dispute resolution. Many who can afford to go elsewhere are doing so. To reverse or at least halt this trend, I remain convinced that state courts can and must compete to fulfill our constitutional obligation and to be certain that the rules of engagement governing personal and business conduct in our state are defined and enforced by the public—either directly through juries or less directly through judges. Every citizen in New Hampshire will be well served if the state courts remain relevant to the bulk of our population and ill-served if they do not. Law applied in private, without a public record or public scrutiny, if allowed to become the norm, is not in our long-term best interest as a free people. Public justice is the glue that cements our democracy. It’s that reality that has driven strategic planning and change in the judicial branch these last several years.

That stark reality means that in order to provide citizens of this state with the most efficient, most effective, most economical access to justice for their disputes, we must embrace both the traditional litigation model along with the ADR model. There is no reason why these two models cannot co-exist. Clearly, other states confronted with the same challenges as New Hampshire have found a common benefit to integration of ADR processes within the courts.

“Within the judicial process, courts across the country have embraced the idea of annexing ADR programs to their dockets, by implementing requirements ranging from mandatory arbitration of certain cases, to voluntary mediation, to required settlement conferences. The ADR movement in the courts has been motivated in large measure by concerns about burgeoning dockets, delays in case processing, and the expense of full-scale litigation. As important, however, judges have become increasingly sensitive to the value of processes that enable parties to shape their own solutions with appropriate assistance from a disinterested party.” According to Justice Dalianis our goal should be to make “ADR available for any case in the court system.”

IV. NOW IS THE TIME FOR A DIALOGUE ABOUT DISPUTE RESOLUTION

Of necessity, the Judicial Branch has become increasingly sensitive to the added value of ADR processes within the New Hampshire Court system for many of the same reasons noted by Chancellor Strine, of Delaware. Chief Justice Broderick in his June 26 remarks to the NHAJ stated:

We should not be afraid to examine whether every dispute, in the first instance, needs to be automatically tracked for the adversary process and whether some of the work we all do might be handled less contentiously, at least at the outset…

At the end of the day if we do not challenge ourselves to change and adapt, I am fearful that the critical role of the state courts will be undermined. If we let that happen, funding may not keep pace with needs and talented lawyers may not step forward to serve as judges and masters and skilled staff may be more difficult to attract and retain.
The courts need your counsel and support if they are to improve the delivery and efficiency of their critical services without undermining quality. In our efforts to improve, we need to be vigilant not to change or compromise what we are doing well but we need to be bold enough and open enough to constantly examine what we do, how we do it, and how we could improve it, so that justice is accessible, affordable and understandable to all who need it. Quality and efficiency are not mutually exclusive goals. Personal pride and public trust require that we do all we can to make the constitutional promise of access to justice a meaningful reality for those we serve.

The formation of the OMA has enabled the Judicial Branch to achieve, in part, the goal of improving access to justice for our New Hampshire citizens in a timely, efficient manner. The use of both private and court integrated ADR means that cases that would have otherwise required substantial amount of a judge’s time are moving off the court’s dockets.

Moving court dockets efficiently does not mean that the courts are becoming, or will become, inconsequential. Rather, it means that the users of the system will benefit because their cases will be able to be heard in a much more reasonable time frame than they would if ADR was not playing a critical role in docket management.

CONCLUSION

In sum, currently ADR is neither a panacea nor a problem. Rather, well-conducted, private and court-sanctioned ADR, holds a promise for the future. That is that ADR will provide a flexible, economical and efficient compliment to enhance traditional court processes. Creative integration of ADR programs into traditional court litigation models must occur within the court system so that it can stay competitive. We must acknowledge that the rise of the private justice system could diminish the importance of the court system, unless the court makes available under its umbrella, the same options now available for dispute resolution in the private sector. We must not be afraid to adapt to the changing landscape of justice in our state. We must embrace it. Alternative Dispute Resolution will never replace litigation, but it can enhance and add value to traditional in-court processes and make justice more affordable and accessible to the citizens of New Hampshire.

ENDNOTES

1. See RSA 490-E et seq.
2. See SB 170 344:1 (Purpose) establishing an Office of Mediation and Arbitration within the Judicial Branch effective July 1, 2007.
3. See RSA 490-E et seq.
5. At the time of publication of this article, the issue of the constitutionality of this administrative fee was on appeal at the New Hampshire Supreme Court. See Nancy J. Lamarche v. Stephanie A. McCarthy Supreme Court Docket No. 2008-0355.
6. See RSA 458:15-c, RSA 490: 27 RSA 490-D:12, RSA 490-D:13, RSA 490-D:13, RSA 490 E-4, RSA 503:4 and see NH Superior Court Rule 170, 170-A, 170-B and District Court Rule 4.29 and NH Supreme Court rule 48-B.
7. See footnote 6.
9. See RSA 491:7-a creating the Business Court Docket and signed into law on July 11, 2008.
11. Strine, Jr., Leo E. Id at pages 586.
13. The Office of Mediation and Arbitration sought and received input from numerous individuals in the legal and ADR communities. This section of this note reflects the input OMA received.
15. Id. Letter to Justice Dalianis at page 2.
16. Id.
17. For a more in-depth discussion on the changes to temporary rule 170, see N.H. Bar News Article on July 18, 2008.
18. The OMA has developed procedures for the ADR professionals to report to the Court the case status after the ADR process has been completed. The OMA has also developed procedures for tracking settlement rates.
23. See: www.ncsconlin.org/D_KIS/info_court_web_sites.html#State for a list of states that have court sanctioned ADR programs.
26. The OMA has been informally tracking mediation settlement rates in small claims district court and probate cases over the past few years. The (unscientific raw) data we have collected shows that in these two programs where participation in mediation is voluntary, that in small claims, about 47% of all cases elect to go to mediation rather than to a hearing and of that group, 82% of the mediated cases settle. In probate, 78% of the cases that mediate settle before trial.
27. Interview with Chief Justice Broderick on April 29, 2008.