

June 7, 2008

Honorable Linda Dalianis, Chair  
Advisory Committee on Rules  
New Hampshire Supreme Court  
One Charles Doe Drive  
Concord, NH 03301

Re: Temporary Superior Court Rule 170

Dear Justice Dalianis and Members of the Committee:

It is my understanding that, at its June 11, 2008 meeting, the Advisory Committee on Rules will consider the issue of whether the amendments to Superior Court Rule 170 that became operationally effective on a temporary basis on January 1, 2008, should be made permanent. At a meeting of the superior court justices held on June 6, 2008, the justices voted unanimously to recommend that the "new" Rule 170 not be made permanent but rather remain as a temporary rule for at least another year.

As the Committee knows, under the prior version of Rule 170, attorney neutrals volunteered their time at various superior courts on schedules that were arranged between the neutrals and the clerk of each court. Although not all court locations had "mandatory" mediation, all of the larger courts did so and an increasing number of smaller courts also had begun to mandate mediation as well. Moreover, even in courts where mediation was not mandatory, the clerks and judges made arrangements to make volunteer neutrals available when litigants requested it or when the judge felt mediation was likely to advance settlement in particular cases.

The new version of Rule 170 makes mediation mandatory for all superior court locations, except for those categories of cases which are exempt from the rule. It also replaces the prior process of pre-scheduled mediations at the court house with a procedure under which parties schedule their own mediations, which generally occur at locations other than the courthouse. Parties also may choose to engage either a paid mediator, who is free to negotiate his fee, or a volunteer mediator. If the latter choice is made, each party is required to pay a \$50.00 fee, which is used to support the newly created Office of Mediation and Arbitration (OMA). The other funding source for OMA is the rostering fees that are paid by those neutrals who desire to be included on the list of court certified paid mediators. The new rule also establishes more extensive training and continuing education requirements for neutrals and includes requirements for the filing of various documents that will permit OMA to track the progress of cases that have been ordered to mediation or some other form of alternative dispute resolution.

The superior court justices believe it is much too early to adopt the new Rule 170 on a permanent basis. As noted at the outset, 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.

More importantly, from what little experience we have had with the rule, we believe there are good reasons to proceed with caution. For example, two superior court justices have now found unconstitutional the \$50.00 fee required for accessing a volunteer neutral. Without commenting on the merits of the constitutional issue, particularly since that issue has now been appealed to the supreme court, it is fair to say that, regardless of whether the fee is or is not constitutional, many of the superior court justices find imposition of a fee – especially upon defendants, who have been involuntarily hailed into court -- as a condition of gaining access to justice a disturbing proposition. In addition, our limited experience to date suggests that payment of the fee at the structuring conference as now required will not occur as a routine matter and that subsequent collection efforts and show cause hearings may often be required. This of course will mean increased work for our already understaffed courts. We strongly believe that a different funding source for OMA should be sought in the next legislative session.

Another significant concern is 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 the mediation will take place, the “downside” of this flexibility is a loss of court control over the ADR process. Under the old system, litigants left the structuring conference knowing the exact date of the mediation, the courthouse where it would occur, and the neutral who would preside. Under the new system, unless the litigants have agreed upon these matters in advance and confirmed the neutral’s availability – something which almost never happens – they will leave the courthouse with only the names of their first, second and third choices for a neutral (without knowing whether any of the choices is actually available and when) and the understanding that they are required to make all the “arrangements” needed to actually schedule the mediation. We do not believe we are being overly cynical in saying that in many instances, particularly with *pro se* litigants, these “arrangements” will not be made or will not be made in a timely fashion. By requiring that they be part of the scheduling process (rather than simply appearing at the courthouse at the scheduled time, as under the old system), the new rule also places increased burdens on the volunteer neutrals – indeed, we have already begun to hear some complaints from neutrals on this score.

Lastly, we have received some indications that the increased paperwork involved in administering the new rule and tracking results of mediations are not viewed favorably by litigants and lawyers and that many parties may choose to “opt out” of Rule 170 altogether in favor of private mediation to avoid these paperwork requirements.

In sum, although we applaud the hard work and enthusiasm of OMA Director Karen Borgstrom and while we believe that the OMA office itself has the potential for making a significant contribution to the advancement of the mission of the judicial branch, for the reasons stated above we believe that the new rule 170 should remain as a temporary rule until we have had a significantly greater opportunity to assess its effectiveness in achieving its intended objectives.

Respectfully submitted,

Robert J. Lynn  
Chief Justice

cc: All superior court justices  
Chief Justice Broderick  
Karen Borgstrom, Esq.