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NATIONAL CENTER FOR STATE COURTS

SUPERIOR COURT RULE 170 PROGRAM AND OTHER ALTERNATIVE DISPUTE RESOLUTION PROSPECTS FOR NEW HAMPSHIRE TRIAL COURTS

VOLUME ONE: SUMMARY AND RECOMMENDATIONS

Final January, 1997

Project Consultants

*David C. Steelman, Senior Staff Attorney
Susan L. Keilitz, Senior Research Associate
Paul C. Gomez, Court Management Consultant
Adam L. Fleischman, Court Management Consultant*

Vice President

James D. Thomas

**COURT SERVICES DIVISION
1331 Seventeenth Street, Suite 402
Denver, Colorado 80202
(303) 293-3063**

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VOLUME ONE: SUMMARY AND RECOMMENDATIONS

A. Introduction

Trial courts in New Hampshire are in the midst of a pattern of significant evolutionary change. With regard to the handling of noncriminal matters, recent developments have included the introduction in the Superior Court of heightened attention to caseflow management, steps toward the institutionalization of alternative dispute resolution (ADR), and experimentation with major structural changes to address family matters. In the context of these developments, the leadership of the New Hampshire court system engaged the National Center for State Courts (NCSC or the National Center) to assess ADR for civil matters at law in the Superior Court and to assist with the consideration of broader ADR use in all New Hampshire trial courts.

B. Background

Effective January 1, 1987, the New Hampshire Supreme Court adopted Superior Court Rule 170 and provided that ADR was to be implemented on an experimental basis for 18 months in one or more counties as determined by the Chief Justice of the Superior Court. Amending that rule in 1992, the Supreme Court provided that pilot ADR programs operate in three counties. Under Rule 170, ADR is now mandatory for civil cases at law in four counties -- Sullivan, Hillsborough (both north and south locations), Merrimack and Rockingham. It is voluntary based on the availability of neutrals in New

Hampshire's other counties. The rule provides for counsel to select one of four ADR procedures:¹

- **Neutral evaluation** -- an informal, abbreviated presentation of case facts and issues by all parties to an attorney evaluator who is responsible for assessing the strengths and weaknesses of the case and assigning a dollar value or range.
- **Mediation** -- one or more sessions with parties and counsel in which a neutral third party, who does not have authority to render a decision or impose settlement on the parties, seeks to facilitate a settlement acceptable to the parties.
- **Nonbinding arbitration** -- a single adversary hearing before a neutral third party in which each party has one hour to present his or her case, with direct and cross-examination limited to the parties or their representatives. After the hearing the arbitrator files a report of award with the court that becomes final and has the attributes and legal effect of a verdict unless either party files an appeal to the Superior Court within 30 days after notice of the award, whereupon the case is restored to the Superior Court calendar.
- **Binding arbitration** -- a proceeding in a trial format, before a single arbitrator or three-person panel, with opening and closing arguments and direct and cross-examination of witnesses. After the hearing the arbitrator or panel files a report of award that is final and binding on the parties and has the legal effect of a verdict on which the Superior Court will enter judgment, appeal from which is to the Supreme Court of New Hampshire.

While some evaluations have been done of both training sessions and program success, an assessment of the efficiency of ADR has not been done for the purpose of seeking further funding specifically for ADR in the Superior Court.

In addition, the Superior Court had a pilot marital mediation information program in operation in Merrimack County in 1995. That pilot effort operated under a proposed Superior Court Rule 170-B, which provided for referral of parties in domestic relations cases to a mandatory information session conducted by a certified marital mediator, who

¹ The descriptions here of ADR methods are based on those in the rule. Section (b)(1) of the rule provides that plaintiff's counsel be provided an ADR election form by the court at case initiation. If opposing counsel do not concur in the ADR method to be used, the court is to choose the less binding of the methods selected by counsel (with neutral evaluation being least binding, followed by mediation, nonbinding arbitration and then binding arbitration). Under section (c) of the rule, an ADR proceeding is to be held no

would describe the mediation process, the role of the mediator, and what mediation fees would be if parties elected to undertake mediation. The program was discontinued at the end of calendar year 1995, however. Meanwhile, legislation has called for the commencement of a Family Division Pilot Program in Rockingham County and Grafton County as of July 1, 1996, and a proposal for ADR in the pilot program has been prepared. Preliminary observations on the role of ADR in the pilot program and in family matters are therefore desirable.

Finally, some consideration has been given by leaders of the New Hampshire court system to the potential for development of ADR programs in Probate Court, in District Court and for all three New Hampshire trial courts on a statewide basis. An experiment with mediation was being planned for probate matters in Rockingham County in early 1996. There are some ADR efforts underway in particular district court locations (such as the Concord and Goffstown District Courts). Yet more information and planning is needed before any comprehensive steps are taken.

C. National Center for State Courts Study and Report

In light of these developments, NCSC was engaged to evaluate the New Hampshire Superior Court Rule 170 program, to review proposed Superior Court Rule 170-B, to offer recommendations for the further development of the marital mediation pilot program, and to make preliminary recommendations for the development of ADR in all New Hampshire trial courts. More specifically, NCSC was to perform the following services within the limits of the evaluation budget and the availability of relevant information:

earlier than 120 days after the return date on the writ initiating a case, but it may not delay the completion of discovery or trial commencement beyond any timetable established by the court.

1. With regard to the Rule 170 ADR program:
 - Compare the costs of litigation for the courts in comparison to the courts' costs for ADR;
 - Based on interviews with attorneys, estimate the costs of litigation for parties in comparison to parties' costs for ADR;
 - Compare voluntary ADR with mandatory ADR;
 - Identify external factors that affect mandatory ADR and assess their impact;
 - Evaluate the operational consequences of having volunteers serve as neutrals in the ADR program, rather than receiving fees or salaries; and
 - Estimate the cost of converting to a court-annexed professional ADR program.
2. With regard to the pilot marital mediation information program under proposed Rule 170-B:²
 - Evaluate the proposed rule in light of what is known about rules and operation of marital mediation programs in other states;
 - Make recommendations on the parameters of the pilot marital mediation program and any eventual statewide program; and
 - Help identify data needed for evaluation of the pilot program and offer recommendations for the effective and efficient gathering of such data.
3. With regard to the prospect of ADR in all trial courts:
 - Make recommendations on whether there should be a single statewide ADR program for all trial courts, and, if so, whether all ADR proceedings should be held in a single location or in multiple locations throughout the state.

This report presents the results of the study of the above matters. In the following section, ten findings are listed. Volume One concludes with Section E, which presents twelve recommendations offered by the National Center. Volume Two gives more detailed discussion of the findings, along with appendices.

D. Summary of Findings

² Since agreement was reached in Spring 1995 for NCSC to undertake the evaluation and study reported here, there have been two major developments that have altered the nature of the work to be done by NCSC with regard to marital mediation experiments. First, the pilot Rule 170-B program was discontinued at the end of calendar-year 1995. Second, the New Hampshire court system undertook to implement the legislation calling for a family division pilot program to operate in two New Hampshire counties. In light of these developments, this report comments briefly on the Rule 170-B pilot effort, but it gives more attention to the role of ADR in marital and other family matters under the possible changes in court

Based on their study of the issues shown in the preceding section, the National Center project team has made ten findings, which are discussed in detail in Volume Two. Those findings relate to the Superior Court Rule 170 program; ADR under proposed Superior Court Rule 170-B and as proposed for the Family Division Pilot Program; and ADR in Probate Court and District Court.

Finding No. 1: Relative Cost to Courts. *The comparison of a random sample of cases exposed to ADR under the Superior Court Rule 170 program with a random sample of cases filed before commencement of mandatory ADR indicates that higher court costs (as reflected by the number of events per case) were incurred in the earlier stages of ADR sample cases than in the earlier stages of pre-ADR sample cases. As a result, however, a much higher percentage of cases in the ADR sample were disposed and the age of still-pending cases in the pre-ADR sample was much higher. Moreover, cases in the pre-ADR sample had much higher court costs associated with events that occurred later in the pendency of such cases.*

Court costs to schedule and hold nontrial predisposition hearings before judges were virtually the same in the two samples, although such hearings came much sooner in ADR sample cases. There were higher court costs to schedule and hold nonjury trials in the pre-ADR sample than in the ADR sample, and such costs came later. Court costs for jury trials came much later in pre-ADR sample cases. While there may ultimately be greater costs for jury trials in the pre-ADR case sample, the ADR case sample had higher costs associated with early jury-trial commencements.

(See Chapter I in Volume Two for discussion of the above finding.)

Finding No. 2: Estimated Costs to Parties. *Members of the bar with civil litigation practices who have served as ADR neutrals generally indicated in interviews that ADR is less costly for clients than traditional litigation; but their answers were not without qualification. A primary reason given for cost savings was that cases often settle earlier after exposure to ADR, so that more expensive discovery activities (such as depositions of doctors or other expert witnesses) are often avoided. Some attorneys pointed out, however, that ADR adds an additional pretrial event at which counsel and parties must appear, and that it can therefore add a substantial layer of additional costs for clients if cases do not settle at or soon after the ADR session.*

structure that may come about as a consequence of the family division pilot program implementation

(See the first chapter of Volume Two for discussion of Finding No. 2.)

Finding No. 3: Voluntary ADR and Mandatory ADR. *The advantage of mandatory ADR over voluntary ADR is that it forces parties to give earlier attention to the risks of litigation and the possibility of settlement. A majority of the judges, court staff and attorneys interviewed for this study therefore expressed support for making Rule 170 ADR mandatory throughout the state. Yet many observed that waiver of ADR should be more readily available for cases considered unsuitable for ADR. Moreover, concern was expressed that mandatory ADR in low-volume court locations would impose excessive burdens on clerk's office staff members and any local attorneys who are certified and available to serve as volunteer ADR neutrals.*

(For discussion of the above finding, see Chapter I in Volume Two.)

Finding No. 4: External Factors Affecting ADR. *There are several factors that have an impact on ADR proceedings under Rule 170. An increased number of Superior Court judgeships, the opening of the new Hillsborough County (South) courthouse in Nashua, and a drop in the number of civil and felony filings has meant that the Superior Court has more resources relative to the volume of work facing it, so that it can provide greater certainty that cases will be reached for trial promptly if cases are not resolved in ADR sessions. The likelihood of early and firm trial dates is also increased by the court's greater attention to caseload management, as reflected by its holding early structuring conferences, which also increases pressure on parties to settle cases in ADR. Finally, an apparent trend toward lower jury verdicts has meant that insurance companies are more willing to litigate cases than have them settled through pre-litigation ADR. Meanwhile, plaintiffs are more willing to settle cases in Rule 170 ADR because they may have less success trying cases to juries.*

(Chapter I in Volume Two offers discussion of Finding No. 4.)

Finding No. 5: Operational Consequences of Having Volunteer Neutrals. *With members of the bar serving as volunteer ADR neutrals, the Superior Court has had additional quasi-judicial resources to reduce the size and age of its pending civil inventory, although coordination of volunteer service has required a reallocation of responsibilities among clerk's office personnel. The investment of time by attorneys serving as volunteer ADR neutrals has returned qualitative benefits to compensate somewhat for lost fee income and helped to ensure the success of the Rule 170 program because of lawyer commitment to the achievement of positive*

effort. See Chapter II in Volume Two, Finding No. 7 and Finding No. 8.

results. It may also contribute to a changed perception of the trial court process, involving greater acceptance of ADR as a means to save time and cost and reduce the adversarial nature of the process. There was a general consensus among those interviewed that there is not yet a need for ADR neutrals to be paid for their service, as long as demands on volunteers' time do not increase. While there is evidence of variations in the quality of service by volunteers, the general perception is that they have been consistently effective.

(Discussion of the above finding is presented in the initial chapter of Volume Two.)

Finding No. 6: Cost of Converting to Court-Annexed Professional ADR Program. *If the full-time equivalent of seven experienced and reasonably well-paid professional ADR neutrals (perhaps including retired judges or attorneys serving on a part-time basis) are needed for a statewide ADR program, and if a modest amount of state-level coordination is needed while much of the day-to-day scheduling of ADR sessions is largely done locally by existing court staff at each superior court location (with the addition of one person to aid the operation of the program in more rural counties), a court-annexed ADR program would cost an estimated \$811,000 per year.*

(In Volume Two, see Chapter I for discussion of the above finding.)

Finding No. 7: Outcome of Proposed Rule 170-B Pilot Program. *There appear to be two primary reasons for the failure of the pilot project. First, the proposed rule apparently had broad provisions for parties to opt out of participation in the information sessions. Second, staffing in the Merrimack County clerk's office was inadequate to monitor party compliance with the requirements of the program.*

(Chapter II in Volume Two offers discussion of Finding No. 7.)

Finding No. 8: ADR for Domestic Relations and Juvenile Matters. *The emphasis placed in the Family Division Pilot Project on the value of ADR information and education programs for parties and counsel is supported by national research on divorce mediation programs. The final report of the Family Division ADR Committee recommends ADR methods that are practicable because they can be implemented with existing resources available in the two counties for the pilot project -- the parent/child mediation programs available in each county; the certified marital mediators; and experienced members of the domestic relations bar who would be asked to serve as volunteer "neutral evaluators." Certified marital mediators might be employed for resolution of support, visitation or other issues in paternity cases as they are in some other states; and the*

use of parent/child mediators in juvenile neglect, dependency and abuse cases might build upon the experience of some juvenile courts in Connecticut and California. Victim-offender mediation is employed in some jurisdictions in other states for juvenile delinquency cases.

(Finding No. 8 is discussed in the second chapter of Volume Two.)

Finding No. 9: ADR in Probate Court. *The steps being taken by the administrative justice for the New Hampshire Probate Court toward experimentation with mediation in probate matters are consistent with the perceptions of many of those interviewed by NCSC staff members that ADR is appropriate for contested probate matters. National probate court standards support the use of mediation and arbitration in appropriate circumstances, and many probate issues of elderly citizens may be suitable for mediation.*

(See Chapter III in Volume Two for further discussion of the above finding.)

Finding No. 10: ADR in District Court. *Mediation is currently being used with apparent success in some New Hampshire district court locations. While many of those interviewed by NCSC staff members expressed support for the use of ADR in the District Court, others suggested that ADR may not be necessary given the already expeditious pace at which civil cases are now disposed in District Court. Programs in urban trial courts using volunteer mediators for small claims cases in other states settle many cases on trial day and have been found to be cost-effective. Referral to community mediation programs of minor criminal cases or minor civil matters involving parties in established relationships has been effective if cases are aggressively screened for mediatability by police or courts.*

(The third chapter in Volume Two has discussion of Finding No. 10.)

E. Recommendations for ADR in New Hampshire Trial Courts

Based on the findings summarized above and discussed in Volume Two II, the NCSC study team members offer the following twelve recommendations relating to future directions for ADR in New Hampshire trial courts. These recommendations are organized in terms of statewide ADR for all trial courts; ADR for Superior Court civil

cases under the Rule 170 program; ADR in family matters; and ADR in Probate Court and District Court.

Statewide ADR for All Trial Courts. Attention to current and possible applications for ADR in the Superior Court, Probate Court and District Court invites consideration of matters that might be common to all court-related ADR services in the courts and of whether a single comprehensive ADR program might be appropriate for all three courts. The following five recommendations follow from such a consideration.

***Recommendation No. 1.** All court-connected ADR programs for the New Hampshire trial courts should operate under rules and standards promulgated by the Supreme Court and be coordinated by a "Court ADR Section," staffed by a "state ADR coordinator" and "state ADR administrative assistant" in the Administrative Office of the Courts, and responsible to the Supreme Court through the Administrative Council. Management and coordination at the trial-court level should be carried out by the Clerk of Court at each court location pursuant to the Supreme Court rules and standards, the administrative requirements established by the Administrative Council, and the direction of each trial court's Chief or Administrative Justice.*

The phrase "court-connected" is used here to include both "court-annexed" ADR programs (those operated under the authority of the judicial system and that provide methods complementary to the usual adversarial process of dispute resolution) and "court-referred" ADR programs (those not under the direct supervision of the judicial system).³ The notion of a single statewide "Court ADR Section" in the Administrative Office of the Courts (AOC) is meant to refer to the overall ADR undertaking, under which various programs might operate in different trial courts. This recommendation reflects a judgment that the implementation of court-connected ADR programs in New

³ These definitions for "court-annexed" and "court-referred" ADR programs are from American Bar Association, *Standards Relating to Court Organization* (1990 Edition) [hereinafter, ABA, *Court Organization Standards*], Section 1.12.5(a) and (b). The definition of "court-connected" ADR as an "umbrella" phrase is from Center for Dispute Resolution and Institute for Judicial Administration, *National Standards for Court-Connected Mediation Programs* (1992) [hereinafter, *National Standards*], p. iv.

Hampshire should be subject to general guidelines and direction from the Supreme Court and the leadership of the trial courts, but that as much of the day-to-day administration of ADR programs should be responsive to local circumstances facing each trial court.

This recommendation generally follows the pattern of the ADR standard adopted by the American Bar Association (ABA) House of Delegates in February 1990 and endorsed in December 1990 by the ADR Committee of the Conference of State Court Administrators.⁴ While state-level coordination of all ADR programs might conjure up images of a large bureaucracy, it should be clear that the recommendation envisions only two people in the AOC -- a "state ADR coordinator" and a "state ADR administrative assistant" -- to perform state-level functions.

The ABA standard on ADR, the *National Standards for Court-Connected Mediation Programs*, and the publication, *Court ADR: Elements of Program Design*,⁵ can serve as initial reference points for the development of statewide rules and standards by the Supreme Court. Further guidance can be derived from the extensive literature on court-connected ADR. (See Appendix A in Volume Two for a bibliography on court-connected dispute resolution research.) Court leaders can also gain perspective on the development and operation of a statewide court ADR organization by reference to the experience of court officials with ADR in other states. (See Appendix B in the second volume for the names, addresses and telephone numbers of state court ADR officials.)

Recommendation No. 2. The comprehensive statewide set of court-connected ADR programs for the trial courts should be developed

⁴ See ABA, *Court Organization Standards*, Section 1.12.5(a)(3); see also, Conference of State Court Administrators, Committee on Alternative Dispute Resolution, "Report to the Membership" (December 1, 1990) [hereinafter, COSCA ADR Committee Report].

⁵ Elizabeth Paplinger and Margaret Shaw, *Court ADR: Elements of Program Design* (New York: Center for Public Resources [now the CPR Institute for Dispute Resolution], 1992) [hereinafter, *ADR Program Design*].

through a careful systemwide consensus-building process that invites and reflects the perspectives of all the different categories of participants in the court process whose interests will be affected by the operation's different programs and whose commitment and support will be necessary for its success.

The design of the statewide court-connected ADR effort can benefit greatly from the involvement of a wide variety of participants, including not only those responsible for setting court policy, but also judges who will refer cases to ADR, court personnel who will be responsible for the day-to-day administration of the operation, attorneys and parties whose cases will be referred to ADR, and professional or volunteer ADR neutrals. Without meaningful participation and commitment from these stakeholders, the chances for the success of the statewide effort may be greatly diminished.

Recommendation No. 3. *The operation of the Court ADR Section of the AOC should take advantage of and coordinate the use of all the existing ADR resources that might be employed in either court-annexed or court-referred programs.*

While part of the overall statewide ADR effort (such as the Superior Court Rule 170 program) may be court-annexed and operated by the court system, and while there may be state-salaried professional ADR neutrals employed by the agency (see recommendations below on Rule 170), it is likely that other parts of the operation will involve (a) volunteer neutrals in court-annexed programs or (b) paid or volunteer neutrals who are part of private organizations to which cases are referred by the courts. New Hampshire does not need a monolithic framework in which all levels of ADR are organized, structured and administered in the same fashion. Rather, it is desirable that the Court ADR Section of the AOC take advantage of the wide array of ADR resources that

already exist in the state and coordinate their use to serve parties in court-connected disputes and make efficient use of finite public resources.

***Recommendation No. 4.** For court-annexed ADR programs, the Court ADR Section of the AOC should establish program goals, structures, procedures and qualifications for those serving as ADR neutrals. In circumstances where the courts refer cases to dispute resolution programs outside the court system, the Court ADR Section should establish mechanisms for periodic review of the quality of services provided by such programs. In addition, the section should have means to determine that the ADR neutrals to whom cases are referred have the qualifications needed for the types of cases with which they are dealing.*

Whether ADR programs are operated by the courts or simply receive cases referred to them by the courts, the court system is giving its imprimatur to such programs and has a direct or indirect responsibility to ensure program quality.⁶ Since the persons serving as neutrals are the key figures in ADR programs, the individual competence and quality of the neutrals is a matter of great concern. Research suggests that a neutral's effectiveness appears "to be derived from a mixture of sources, including personal characteristics, training and experience," and that attention must be paid not only to educational background and training, but also to subsequent monitoring and evaluation of performance, in order to ensure quality of service.⁷

The quality of ADR programs and ADR neutrals is important for every ADR program in any of the New Hampshire trial courts. All programs and neutrals for the Superior Court, the Probate Court, the District Court and the Family Division ought to be subject to appropriate means of quality assurance.

⁶ See ABA, *Court Organization Standards*, Section 1.12.5; see also, COSCA ADR Committee Report, p. 4.

⁷ Margaret Shaw, "Selection, Training, and Qualification of Neutrals," in Susan L. Keilitz (ed.), *National Symposium on Court-Connected Dispute Resolution Research* [hereinafter, S. Keilitz, *National*

***Recommendation No. 5.** A significant element in the activities of the statewide Court ADR Section of the AOC should be the development of education programs and information about the nature and availability of ADR programs in the trial courts. Judges should recognize that commitment to statewide use of ADR in all the trial courts involves commitment to a trial court process that includes less adversarial methods of dispute resolution at every level.*

National standards for mediation programs emphasize the importance of providing information for judges, court personnel and users about the mediation process; the availability of programs; differences between mediation, other ADR processes and traditional court processes; the possibility of savings in cost and time; and the consequences of participation.⁸ Guidelines for the development of ADR programs indicate that court-connected ADR initiatives cannot succeed without an educated bar.⁹ Ongoing outreach and education efforts to introduce and explain the nature and objectives of new ADR programs have been identified as one of the necessary and important steps in the process of institutionalizing ADR programs in the courts.¹⁰ In the draft final report of the Family Division ADR Committee (see Finding No. 8 and related discussion in Chapter II of the second volume), considerable attention was given to the importance of providing education and information to parties, attorneys, court staff and judges about ADR as part of the court process in the Family Division Pilot Project.

In their assessment of the operational impact of having attorneys serve as volunteer ADR neutrals under Superior Court Rule 170 (see Finding No. 5 and related discussion in Chapter I of Volume Two), NCSC project staff members observed from

Symposium] (Williamsburg, VA: National Center for State Courts, 1994), p. 166; *ADR Program Design*, Chapter 5, Sections 5.03 and 5.04; and *National Standards*, Sections 2 and 6.

⁸ See *National Standards*, Section 3.

⁹ See *ADR Program Design*, Section 9.07.

interviews with judges, court staff members and attorneys that participation in the program may result in a changed perception of the nature of the trial-court process. In that changed perception, ADR would be seen as a less formal, less adversarial, more “user friendly,” and often less costly complement to the more traditional aspects of the court process. This kind of change was contemplated in the establishment of the Family Division Pilot Project. (See Volume Two, Chapter II.) It can be anticipated that broader commitment to ADR processes in the Probate Court and the District Court will have similar operational consequences.

Several of the judges who were interviewed for this study by NCSC project staff members knew little about the nature of mediation or other ADR mechanisms and the details of scheduling ADR sessions as part of the pretrial process under orders issued from structuring conferences. Some practicing attorneys indicated in interviews that the availability of ADR has caused some judges to “withdraw” from attention to the pretrial progress of cases, and to be less attentive to opportunities when they themselves might be able to promote the negotiated resolution of cases, whether in pretrial conferences or in the context of hearings on pretrial motions. (See Finding No. 5 and related discussion in the first chapter of Volume Two.)

ADR for Civil Cases Under Superior Court Rule 170. National Center project staff members devoted a considerable amount of effort during this study to an assessment of the Rule 170 ADR program for civil cases at law in Superior Court. Based on the findings presented in Chapter I of Volume Two, the following three recommendations are specifically addressed to the operation of the Rule 170 program.

¹⁰ See Wayne D. Brazil, “Institutionalizing ADR Programs in Courts,” in Frank E. A. Sander (ed.), *Emerging ADR Issues in State and Federal Courts* (Chicago: American Bar Association, Section of Litigation, 1991) [hereinafter, Sander, *Emerging ADR Issues*], pp. 75-77.

***Recommendation No. 6.** With modifications, the Rule 170 ADR program should be made mandatory statewide. Consideration should be given to making ADR voluntary for such matters as contract cases in which only damages are at issue or other matters that can be set for early trial with little or no time needed for discovery. If ADR is elected in such cases, it should be scheduled to be held about one week before the scheduled trial date. For all other cases, referral to ADR should remain mandatory unless waived by the court; and requests for waiver of ADR should be filed in writing before structuring conferences are held and ruled on by the court in such conferences, with the court's reason for allowing waiver included in the order entered after any such conference. Consideration should also be given to the addition of a "rural ADR coordinator" to assist clerk's office personnel with arrangements for ADR sessions in low-volume court locations with limited staffing.*

Although sample data comparing cases exposed to ADR under Rule 170 with those filed before the commencement of mandatory ADR under the rule are not absolutely conclusive, they suggest that the Rule 170 program is cost effective for the courts. ADR clearly results in more early case dispositions, and it reduces the age of the court's pending inventory. Moreover, the use of ADR neutrals means a saving of judge-time for other matters. (See Finding No. 1 and related discussion in Chapter I of Volume Two.) Interviews conducted by National Center staff members for this study indicate that ADR is less expensive for parties than the traditional court process. (See Finding No. 2 and related discussion in Volume Two.) Finally, ADR (and especially mediation) provides a less formal, less adversarial and more "user-friendly" court process for parties. Even without a need for ADR to help reduce court backlog, mandatory statewide ADR is desirable for its positive influence on the court process.

Interviews also indicated that there is general support for making Rule 170 ADR mandatory throughout the state. (See Finding No. 3 and related discussion in the second volume.) Concerns were expressed, however, about waiver of participation in ADR sessions and the possible impact of introducing mandatory ADR in the counties that have

low case volume, limited court staff, and only a limited number of qualified and available volunteer ADR neutrals. The modifications suggested in this recommendation address this and other concerns, and they may serve to delay the need for changing the Rule 170 program to one with salaried professional ADR neutrals. (See Recommendation No. 8.)

In the Hillsborough County (North) location of the Superior Court, NCSC staff members understand that civil cases are assigned after filing to differentiated case management (DCM) tracks, and that cases assigned to “Track I” (the expedited track for cases with little or no discovery requirements, such as “collection” cases in which the only issue is the amount due the plaintiff) are scheduled for trial when track assignment is made, without having either a structuring conference or a mandatory ADR session date assigned. While such cases do not have ADR sessions set for them, most are resolved by negotiation, and the incidence of cases that must be tried before a judge might be reduced even further if ADR were made available on a voluntary basis. While not all locations of the Superior Court have the case volume or clerk’s office staff to introduce a full DCM tracking system like that employed in the Hillsborough (North) location, this part of the recommendation might be introduced by (a) having counsel identify cases at filing that are appropriate for assignment of early trial dates, and (b) providing a date before which parties must give notice of an ADR election.¹¹

Many of the attorneys who were interviewed for this study indicated that there are many cases not suitable for ADR sessions, and that the operation of the Rule 170 program allows insufficient opportunity for parties in such cases to “opt out” of ADR. (See discussion under Finding No. 3 in Volume Two, Chapter I.) The Superior Court must be extremely careful not to make “opting out” so easy that Rule 170 starts to suffer

¹¹ For discussion of the relationship between ADR and case management, see *ADR Program Design*, Section 9.06.

from problems similar to those experienced with the pilot program for proposed Rule 170-B. (See Finding No. 7 and related discussion in Chapter II of Volume Two.) It should be possible, however, to achieve more refinement in the “sorting out” of cases suitable for ADR from those not suitable. To help maintain the “presumptively mandatory” character of ADR for the kinds of cases that would seem most likely to benefit from it,¹² this recommendation suggests that there be procedural steps for requesting and granting waivers. (A special form might be developed for waiver requests and the court orders on such requests, so that reasons for waivers can be included in written orders.) During interviews, attorneys identified different types of cases for which they considered ADR ill-suited. (See discussion of Finding No. 3 in Chapter I of Volume Two.) The requirement that reasons for granting waivers be put in writing can assist efforts to develop discussion and consensus among judges and practicing lawyers about the circumstances in which waiver of ADR would be most appropriate.¹³

The suggestion in this recommendation that there be a “rural ADR coordinator” addresses the concern among some clerks with limited staffing that the commitment of time and resources called for by adoption of ADR might be too burdensome for their staff members. (See Finding No. 3 and related discussion.) The recommended coordinator would in effect be an addition to clerk’s office staff and might have the responsibility to administer ADR scheduling and make arrangements with ADR neutrals for two or more counties in the New Hampshire “North Country.” It would be most appropriate for the

¹² Judge Wayne D. Brazil has offered the phrase “presumptively mandatory” to describe what he considers the most appropriate approach to ADR programs. See Brazil, “Why ‘Volunteer’ ADR Programs are Likely to Attract Few Cases, and Thus, Why Volunteer Cases are Not Likely to Contribute Significantly to Cost and Delay Reduction,” in Sander, *Emerging ADR Issues*, p. 123.

¹³ See *National Standards*, Sections 4.1 and 4.2, for discussion of criteria for selecting cases to refer to mediation and considerations that may militate against the suitability of referring particular cases to mediation.

person in this position to be working in one of the clerk's office locations, rather than at the AOC or the Superior Court Center in Concord.

***Recommendation No. 7.** Special attention should be given to the timing of ADR sessions during and after structuring conferences, so that ADR can be held at optimal times after counsel have done enough discovery to understand the nature of their cases but before the most expensive costs of discovery have been incurred.*

When attorneys were asked in interviews how the operation of the Rule 170 program might be improved, they frequently suggested that greater attention should be given to the timing of ADR sessions. (See discussion of Finding No. 3 in Volume Two, Chapter I.) If an ADR session is held too soon after case initiation, counsel may not know enough about their cases to participate effectively.¹⁴ If it is held too near the trial date set in the structuring order, on the other hand, counsel and parties may have committed so much of their resources to discovery and other pretrial activities that positions may have hardened and a mediated resolution may appear less cost effective. Comments by counsel suggest that judges may want to give more time in structuring conferences to discussion with counsel of the proper timing for ADR. Keeping in mind the provision of Rule 170 that ADR proceedings must be held within the time deadlines set in structuring conferences, clerk's office personnel scheduling ADR sessions may also want to be as flexible as possible with counsel in setting the dates on which ADR sessions are actually held.¹⁵

***Recommendation No. 8.** The New Hampshire court system should develop further appropriate ways to show its appreciation for the*

¹⁴ Rule 170(c) provides that ADR proceedings "shall not be held earlier than one hundred twenty (120) days from the return date."

¹⁵ See *National Standards*, Section 4.4, for further discussion of the timing of ADR.

enormous contribution that volunteer ADR neutrals have made to the rendition of justice and the resolution of civil disputes. The Superior Court should also be prepared within the next five years to convert the Rule 170 ADR program if necessary to one with paid ADR neutrals. The neutrals in such a program should be highly experienced, respected by the practicing bar, and reasonably well paid.

In their draft final report on the Rule 170 Program, evaluators from the University of New Hampshire indicated that “burnout” of volunteer attorney mediators might be inevitable over time, and that professional mediators might have to be used in the program.¹⁶ In interviews conducted for this study, a significant majority of those interviewed expressed the opinion that there is not an imminent need for ADR neutrals under the Rule 170 program to be paid, *as long as attorneys are not asked to serve as volunteer neutrals at a level appreciably beyond that at which they now serve.* (Most now give from one to three days of volunteer service a year.) (See discussion of Finding No. 5 in Chapter I of Volume Two.) Extension of the Rule 170 program to make it mandatory throughout the state, however, is likely to put pressure on the capacity of the pool of people who are qualified and available to serve as volunteer ADR neutrals. Some of that pressure may be relieved through steps such as those proposed in Recommendation No. 6.

It is desirable, however, that the court system monitor levels of satisfaction among practitioners serving as volunteer neutrals and have plans available for ADR neutrals to be paid if a sufficient number of attorneys can no longer continue to serve as neutrals without pay. A first step would be to provide ample public recognition and other means of expressing gratitude for the contribution that volunteers have made to the justice system.

A second step would be for ADR neutrals to be paid a per-case or per-day fee for their services. This is the most common way for ADR neutrals to be reimbursed. In such states as New York, New Jersey, Florida and Colorado, which have well-developed statewide ADR programs, neutrals are not state or court employees. (See Appendix B for the names of state ADR contact persons in those and other states.)

There may come a time, however, when the Rule 170 program must be staffed by professional neutrals. The National Center estimates that the full-time equivalent of seven ADR neutrals would be needed for a statewide program. (See Finding No. 6 and related discussion in the opening chapter of Volume Two.) Attorneys have indicated that respect for the ADR neutral in any case is one of the key factors contributing to the success of the Rule 170 program. This suggests that the program will fail if salaried ADR neutrals are not highly experienced and well respected by litigators. NCSC estimates that a statewide program with salaried ADR neutrals who are experienced and reasonably well paid would cost about \$811,000 per year. (See discussion of Finding No. 6, with cost estimates summarized in Table 2 in Volume Two.)

ADR in Family Matters. Beyond their appraisal of ADR under Rule 170, NCSC project staff members also looked at the operation of the pilot marital mediation information project in Merrimack County under proposed Rule 170-B and at plans for employment of ADR in the Family Division Pilot Project. (See the second chapter of Volume Two.) As a result of their findings with regard to family matters, NCSC project staff members offer the following two recommendations.

***Recommendation No. 9.** Before commencement of the Family Division Pilot Project on July 1, 1996, planning for evaluation of ADR programs employed in the program should be done and reasonable steps*

¹⁶ University of New Hampshire, Program on Consensus and Negotiation, "New Hampshire Superior Court Rule 170 Alternative Dispute Resolution Program Progress Report, November 1992 through December 1994," p. 18 (Draft Report, May 15, 1995).

taken to ensure the availability of information needed for that purpose. Key information to be maintained for evaluation should include (a) settlement rates; (b) disposition times; (c) costs per case; (d) compliance with agreements and orders; and (e) party satisfaction with ADR processes.

The legislation creating the Family Division Pilot Project and the report of the study committee on which that legislation was based emphasized the need for family proceedings in the court to be less adversarial and more “user friendly.” (See introduction to Chapter II of Volume Two.) The employment of ADR in family matters was consequently an important element in the design of the pilot project. The committee charged with recommending the kinds of ADR techniques most suitable for cases in the pilot project recommended the use of parent-child mediators for juvenile cases, along with certified marital mediators and volunteer neutral evaluators for marital matters. (See Finding No. 8 and related discussion in Volume Two, Chapter II.)

National standards provide that courts should monitor and evaluate the performance of ADR programs in order to determine if they are meeting the goals articulated for them and to ensure the quality of the programs to which cases are referred. They should require the collection of sufficient and accurate information to permit adequate ongoing monitoring and periodic evaluation. Program evaluation should play a formative role in program development and should be linked to decisions about program policies and procedures.¹⁷

Professor Craig McEwen, a leading figure in the evaluation of ADR programs, has articulated several key principles for successful evaluation of ADR programs:¹⁸

- Articulate the specific purpose(s) of the evaluation research;

¹⁷ *National Standards*, Sections 16.1-16.3.

¹⁸ Craig A. McEwen, “Evaluating ADR Programs,” in Sander, *Emerging ADR Issues*, pp. 204-226. This list of the principles is based on the summary of Professor McEwen’s article in *ADR Program Design*, at pp. 106-108.

- Establish evaluative standards and clear criteria that the program has to meet in order to be judged successful;
- Describe the ADR process or program used, understanding that the nomenclature of ADR has yet to be established;
- Understand the role and limits of empirical research;
- Based on needs and available resources, decide whether evaluation research is to be undertaken by an outside organization, internally, or through a mix of internal and outside resources;
- Understand that evaluation research works best in assessing patterns among large numbers of cases, and that it works less well on rare or exceptional events;
- Define the size, scope and duration of the evaluation to meet specific local needs, even if the research may not constitute a 'scientifically valid' project according to social science criteria; and
- If possible, design ADR programs as true experiments.¹⁹

The evaluation information recommended here for the ADR programs in the Family Division Pilot Project reflects the most common program assessment data for divorce mediation programs.²⁰ Information on party satisfaction with ADR processes has been added to that list as a reflection of the emphasis on the legislation creating the Family Division Pilot Project that the program be "user friendly."²¹

***Recommendation No. 10.** Independent of the outcome of the Family Division Pilot Project, and unless the outcome of any evaluation of Family Division ADR programs conclusively demonstrates their unsuitability for New Hampshire, the court system should be prepared (a) to provide broad education and information about the nature and value of ADR for family matters; (b) to promote broader referral of marital cases to certified mediators; and (c) to promote more use of referrals to parent-child mediation in juvenile cases.*

Whatever are the results of the Family Division Pilot Project, there appears to be broad support in New Hampshire for greater use of ADR as a means to resolve family

¹⁹ See Appendix C in Volume Two for further discussion of true experimental designs in evaluation research.

²⁰ See Susan Myers, Geoff Gallas, Roger Hanson and Susan Keilitz, "Divorce Mediation in the States: Institutionalization, Use, and Assessment," *12 State Court Journal* (No. 4, Fall 1988) 17, at 24.

disputes that is perceived to be less formal, more “user friendly,” and less costly for parties. There is ample research on programs in other jurisdictions to support the expectation that ADR programs employed in the Family Division Pilot Project will be found by evaluators to possess these attributes. (See Finding No. 8 and related discussion in the second chapter of Volume Two.). Education and information efforts are critical to ensure that ADR programs are understood and used; and New Hampshire already has existing resources in the form of certified marital mediators and parent-child mediators that appear now to be relatively underutilized by the courts.

ADR in Probate Court and District Court. The final aspect of the undertaking by the NCSC staff members for this project was to consider the suitability of ADR in the Probate Court and the District Court. Based on its findings as presented in the third chapter of Volume Two, the National Center team offers two recommendations with regard to those courts.

***Recommendation No. 11.** The Probate Court should actively pursue the development of an ADR program for referral of probate cases to volunteer mediators in the court’s discretion or on agreement of the parties. Appropriate attention should be given to the selection, qualification and training of mediators, as well as to the monitoring and evaluation of the program and the quality of service by individual mediators.*

The Administrative Justice for the New Hampshire Probate Court has recently prepared a draft protocol for the use of mediators in probate cases, and in interviews for this study by NCSC staff members, there was general agreement that contested wills and other contested probate matters are often suitable cases for referral to ADR. (See Finding No. 9 and related discussion in Chapter III of Volume Two.) The use of ADR in probate

²¹ This is also a major issue in the research literature. See Jessica Pearson, “Family Mediation,” in S. Keilitz, *National Symposium*, pp. 63-66.

matters has been supported by the Commission on National Probate Court Standards.²²

The growth of the elderly population may make the use of mediation or other ADR techniques particularly valuable in adult guardianships and other cases involving elderly parties. To ensure quality of service to parties, it is important that the development of an ADR program in the Probate Court include serious attention to the qualifications of ADR neutrals and the monitoring and evaluation of program and individual neutral performance.

***Recommendation No. 12.** In locations where it will aid the management of the court's workload, save judge-time and enhance service to citizens, the District Court should pursue the development of opportunities to refer small claims and other civil cases on party agreement the day of trial to volunteer mediators. The court should also make active use of opportunities to refer juvenile matters to parent-child mediation. As with the Probate Court, the District Court should give appropriate attention to the selection, qualification and training of mediators, as well as to the monitoring and evaluation of programs and the quality of services provided by individual mediators.*

During interviews for this study, many people indicated that ADR would be no less valuable for civil matters in District Court than it is for civil matters in Superior Court under Rule 170. The most significant objections raised to the use of ADR techniques in District Court were (a) that they should not slow down what is already a relatively expeditious case process; and (b) that judges in small court locations often are able to dispose of cases as expeditiously as ADR neutrals. Yet volunteer mediators have apparently been helpful in both the Concord and Goffstown District Courts, and there are parent-child mediators available for juvenile matters (especially CHINS cases) in every county.

²² Commission on National Probate Court Standards, *National Probate Court Standards* (Williamsburg, VA: National Center for State Courts, 1993), Standards 2.5.1 and 2.5.2.

Referrals to ADR would be most appropriate in court locations where they would serve the objectives of assisting court management of its workload, save judge-time and provide an opportunity for citizens to pursue mutually-satisfactory dispute resolution. The District Court would be able to use ADR to pursue valuable court goals while recognizing the concerns expressed by those with reservations about ADR at this level. Focusing on the qualifications of ADR neutrals and on means to monitor and evaluate both program and individual neutral performance is no less important for the District Court than for the Probate Court.