

SUPERIOR COURT RULE 170 ADR
HELPFUL HINTS FOR NEUTRALS AND/OR SUPPORT STAFF AND INFORMATION
FOR USERS OF THE PROCESS

I. Scheduling

The OMA has received feedback about scheduling concerns under the new Rule 170 model. If you are a Rule 170 neutral, below are some helpful hints to make scheduling easier for you and/or your staff. If you are a user of the process, then you may find the information helpful as well:

For Volunteers:

1. It would be most helpful to take your calendar for 2009 and decide which days you are going to make yourself available for your work as a Rule 170 volunteer in 2009. If you are a *volunteer only* neutral, you should decide *how many days (or how few days)* you are willing to donate to this cause, by designating your Rule 170 volunteer days on your own office calendar. As you are contacted by counsel or parties you can simply schedule cases on the days you have designated on your calendar. Since you are in control of the length of time you designate for each case, you can either schedule a full day for one case, or you can schedule more than one case on your ADR days. Once those days get scheduled fully, then you/your office staff can indicate to parties or counsel when they contact you, that your scheduled ADR time for that month, quarter etc., is filled and then direct the parties/counsel to contact their second choice of neutral.

You do not have to add additional days or split up days to accommodate the scheduling. Once you have reached your limit of volunteer days, you simply contact the OMA at Ltroy@courts.state.nh.us and we will remove your name from the list of volunteer mediators until the next year's listing.

For Paid Neutrals:

2. **If you are a *paid neutral*, then volunteering for a minimum two days of ADR time is outlined in the rule.** Consequently, the same tenet for scheduling your volunteer time can be used as outlined above, except that once you have scheduled your two volunteer days, then please e-mail or call the OMA and we will remove you from the volunteer list and leave you on the paid list only. You should continue to schedule your paid cases just as you did prior to the change in the Rule.

3. ***You do not have to accept a case unless you want to.*** If you are getting calls to work as a volunteer in cases that are more appropriate for working as a paid neutral, you may, of course, turn down their request to work as a volunteer. Although it is not explicit in the rule at the moment, but the program will work best, if the smaller simpler cases with a lower damage award potential are handled by volunteer neutrals, while the larger, more complex—higher damage potential cases, are handled by market-rate neutrals. Therefore, please do not hesitate to inform either the parties or counsel in a complex high damage potential case, that you would be happy to do it as a paid neutral, but that you will not do the case as a volunteer. (Unless of course you want to volunteer). The parties or counsel can then move to their second or third choices for neutrals.

For Volunteers and Paid Neutrals:

4. *If you are on the list as both a volunteer and a paid neutral, please remember that you are completely in control of how much time you choose to devote to ADR in the Rule 170 program.* Again, it may be helpful to block out a specific number of days for taking volunteer cases. If you insert those days on your calendar as volunteer ADR days, they will get filled in over the normal course of time as parties or counsel contact you. Once you have filled those days, please contact OMA (603-271-6418 ext 303- Lynda Troy) and we will take you off the volunteer list. You do not have to continue to add days to your schedule to accommodate additional requests unless you want to. When scheduling your paid cases, in addition to the volunteer cases, you should continue to handle those the same way did before Rule 170 changed.

5. The new Rule allows for mediations to take place at the courthouse or at your private office location. This is to provide you, and the parties/counsel, with maximum flexibility. *However, if the consensus is that mediation would be best at the court house, please be sure to contact the court house or have the parties or counsel check with the court staff* to determine whether or not the court house will be available on the day you plan the ADR session to take place. If the courthouse is not available, please feel free to contact the OMA and we will try to assist you to find another suitable location.

II. Rule 170 Procedures:

1. The OMA has received feedback that the processes for getting neutrals assigned to cases were not clear or were not working well under the new Rule. The amendments to the Rule, adopted on July 1, 2008 were intended to address this problem by clarifying how the process is supposed to work.

Below is the relevant text of the amended temporary rule. I have underlined and italicized the sections that have to do with how the process of choosing a neutral for a case is intended to work.

(B) Election of Specific Alternative Dispute Resolution Procedure and Selection of a Neutral.

(1) Promptly after the filing of an answer or appearance in the superior court or upon removal from the district court, the parties shall confer and select an ADR process (that is, mediation, neutral evaluation, or arbitration) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they will be required to submit to mediation.

(2) The parties shall select a neutral third party to conduct the dispute resolution process from the court lists of approved neutrals. Prior to making such a selection, the parties shall determine whether they wish to select a neutral from the list of approved volunteer neutrals, or from the list of approved paid neutrals.

(a) If the parties choose a neutral from the list of approved paid neutrals, the parties shall notify the neutral and request that the neutral provide the parties with a schedule of fees and expenses.

(b) Unless the court orders or the parties otherwise agree, the neutral's fees and expenses shall be apportioned and paid in equal shares by each party, and shall be due and payable according to fee arrangements agreed to directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in accordance with Superior Court Rule 87(a).

(c) If the parties choose a neutral from the list of approved volunteer neutrals, the parties shall be subject to a one-time administrative fee of \$50.00 per party, which shall be paid to the court at the time the Stipulation for ADR is filed with the court. This is an administrative fee which will be designated for use by the Office of Mediation and Arbitration and is not refundable. Parties who are indigent may petition the court for waiver of the \$50.00 administrative fee.

(d) Parties may select a neutral who is not on the court's lists of approved neutrals if the parties agree on the choice of the neutral.

(3) If the parties cannot agree on the selection of a neutral, they shall so indicate in their Stipulation. The court shall designate a neutral at the structuring conference. If the parties have not selected an ADR method and neutrals by the time the structuring conference occurs, the court shall, at the structuring conference, set a date certain by which ADR shall have occurred.

(C) *Stipulation and Court Order for Alternative Dispute Resolution.*¹

(1) No later than ten days prior to the initial structuring conference provided for in Rule 62(I), the parties must file with the court a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, containing:

(a) An agreement to seek resolution of the issues involved in the action by designating one or more of the following alternative dispute resolution methods to be carried out as provided in this rule:

- i. Mediation;
- ii. Neutral Evaluation;
- iii. Binding Arbitration; or
- iv. Any other method of dispute resolution agreed upon by the parties.

(b) The designation of a Rule 170 neutral, to serve in the agreed-upon process, or an agreement to accept a neutral chosen by the court from a list provided by the clerk. However, prior to the designation of a Rule 170 neutral to serve in the agreed upon process, the parties or counsel (if parties are represented) shall contact each other in the first instance and agree upon a neutral and two alternates. They shall appoint one person to contact the neutral, or if need be, the alternates, to determine if the neutral is willing and able to serve and whether it will be on a volunteer or a paid basis.

(c) A schedule for the completion of the agreed-upon ADR process including the

¹ Remember, the easy to use stipulation form for this purpose can be found at www.nh.gov/judiciary/adrp/forms/index.htm. It is form NHJB 2489-S. It is for use by attorneys or pro se's. Other forms related to the process are also available on line at the address noted above.

filing of case statements and the completion of any necessary discovery, or including the agreement to accept the assistance of the neutral designated under subparagraph (C)(1)(b) in setting a schedule for completion of the process. The schedule must provide for completion of the process within the shortest possible time after filing of the Stipulation, consistent with completion of the minimum amount of discovery necessary to make the process meaningful, but in any event not more than eight months after the date of the Stipulation.

(d) The location of the session and a date by which the session shall have occurred.

(2) The court may waive the initial structuring conference if, prior to the structuring conference, the court has received a completed and signed Rule 170 stipulation and a completed and signed Structuring Conference Order. If the court has not received either or both of these documents, then at the initial structuring conference, after consultation with counsel, or with parties if unrepresented, the court shall issue an order stating: (a) the specific ADR procedure to be used; (b) the identity of, and contact information for, the neutral; (c) the date by which the ADR procedure must be completed; (d) whether the ADR shall be at the court house or off-site; and (e) the anticipated time needed for the ADR method chosen. If the court chooses a neutral from the volunteer list, the court shall order the parties to pay a one-time administrative fee of \$50.00 per party.

The court has discretion to waive this fee if the parties are indigent. At the request of the parties for good cause, the court may also permit an individual \$50.00 fee to apply to multiple plaintiffs or defendants, if under the circumstances of the case, the court determines that the per party fee would cause undue hardship if it were applied to individual parties, or if one fee for multiple parties on the same side is deemed equitable by the court.

If the neutral is chosen at the structuring conference either by the parties and counsel or by the court, the parties and counsel shall, within 10 days after the date of the structuring conference, contact the neutral or the alternates, if necessary, and schedule the ADR session with their choice of neutral.

Except for the date by which the ADR procedure must be completed, the structuring conference order regarding ADR may thereafter be amended by agreement of the parties by filing an amended Stipulation with the court. The court may permit an extension of the date by which the ADR procedure must be completed on the motion of either party for good cause shown.

(3) Upon receipt of notice of appointment in a case, the neutral shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

2. In theory, if parties and/or counsel follow the protocol set forth in the Rule, the neutral should be contacted by one of the attorneys or parties BEFORE the neutral is entered by the parties either on the stipulation form or on the structuring conference order form. The process works best when the parties or counsel contact each other after the complaint and answer have been filed. They can then decide which neutral to contact, whether it should be a volunteer or paid case, how for how long it should be scheduled. **(REMEMBER THERE IS NO LONGER A REQUIREMENT THAT THESE MATTERS ADHERE TO A TWO HOUR TIME FRAME...THE PROCESS CAN TAKE AS MUCH TIME AS THE NEUTRAL, THE PARTIES AND COUNSEL DETERMINE WILL BE REQUIRED TO ADDRESS THE ISSUES IN THE CASE.) THIS IS TRUE FOR BOTH VOLUNTEER AND PAID CASES.**

If Neutrals have provided the OMA with Biographical information, it can be found on-line at the OMA link on the Judicial Branch home page at www.courts.state.nh.us, or internally for the court staff on the “JIBB” or in hard copy at each courthouse.

3) Once attorney or parties contact the neutral and everyone is in agreement as to whether this is a volunteer or paid case, the location for the session, and the type of ADR they are requesting, and then parties/counsel should complete the stipulation form (number NHJB-2489-S) and file it with the structuring conference form. (Number NHJB 2384-S). These forms are available on-line along with other forms that are there for use by the neutrals during the process at www.courts.state.nh.us/adrp/forms/index.htm.

III Rescheduling ADR

In part, the revisions to the Rule were intended to cut down on the red tape for the users of the programs and the courts. This is currently not working as intended. The idea was that when parties and counsel stipulated to the ADR process terms, parties or counsel only needed to include a date certain by which ADR would take place before the date scheduled for trial.

In the event that an ADR session needs to be rescheduled, then that is done by the parties, counsel, and the neutral. The process is intended to be efficient since the neutral, counsel and the parties would be able address rescheduling issues without the need for court assistance. The hope is that direct communication between the neutral, parties and counsel will eliminate the need for motions to continue ADR so long as any rescheduled ADR session takes place by the date specified on the Structuring Conference Form.

Please note: if dates for previously scheduled sessions need to change parties and counsel should contact each other first and determine available dates, and then a designee from that group should contact the neutral to be sure that he or she will be available on the rescheduled date.

IV. Wrapping Up after the ADR Process Has Been Completed

1. The temporary Rule provides that: **(4) Within 15 days after the conclusion of an ADR proceeding, other than binding arbitration, the neutral must report the results of the process to the court in writing.** The report may not disclose the neutral’s assessment of any aspect of the case or substantive matters discussed during the session or sessions except as is required to report the information required by this paragraph. The report must contain the following items:

(a) The date on which the session or sessions were held including the starting and finishing times;

(b) **The names and addresses of all persons attending, showing their role in the session and specifically identifying the representative of each party who had decision-making authority;**

(c) **A summary of any substitute arrangement made regarding attendance at the session;**

(d) **The results of the session, stating whether full or partial settlement was reached and appending any agreement of the parties...**

The ADR Report form is available on-line at: www.nh.gov/judiciary/adrp/forms/index.htm It is form number NHJB 2488-S.

2. In reviewing feedback from a participating Rule 170 Attorney-Neutral the OMA understands that the new rule poses a problem in cases where the parties do not wish to make their agreement public and they specifically include a confidentiality provision in their agreement. Parties can, of course, choose to keep confidential their agreement, in which case, filing the mediation report with a cover letter explaining that along with the docket markings indicating that the parties have agreed to keep the terms of their settlement confidential should suffice to comply with the rule.²

3. PLEASE NOTE: The most important document that the neutral is responsible for filing is the **ADR Report**. (see above). The court has no other way of tracking whether a case has settled prior to trial. **It is critical for the court's docket management and for the OMA to track be able to track settlement rates, that neutrals file the mediation report as noted in the rule above.** Your cooperation in making sure this happens is very much appreciated.

If you have concerns or comments (pro or con) about the Rule 170 program, please feel free to call the Office of Mediation and Arbitration at 603-271-6418 Ext. 315, Karen J. Borgstrom, Esq., Director, or Lynda Troy, Administrative Assistant at Ext 303, during business hours. You may also e-mail either of us, at kborgstrom@courts.state.nh.us, or ltroy@courts.state.nh.us any time.

Thank you for your participation in the Superior Court's Rule 170 ADR program.

² The OMA is making every effort to keep a record of comments about the new process pro and con, so that with help from the users of the program and from the program staff, we will be able ensure that the rule is amended properly to address these concerns prior to its next review.