

# A More Civil Dispute

With long lines at the courthouse, people are turning to a quicker alternative

By John Robinson

Suppose you had your choice: you could wait in line behind tens of other litigants waiting to get their day in court — a wait that could last a year or more — or you could hire a private arbitrator and get yourself some speedy, private justice.

Which way would you go?

The field of “alternative dispute resolution” — ADR — is growing in New Hampshire for at least two reasons. The first, practitioners say, is the ability to settle civil cases rapidly and inexpensively, and obtain a better result than a court might provide. The other is the long line on the courthouse steps.

“The Constitution requires that the courts provide speedy, free access to civil disputes, but the system has been unable to do that because of the financial constraints put on it by the Legislature,” notes attorney Tom Richards, executive director of the aptly named ADR firm Resolution Now in Concord.

According to the New Hampshire Supreme Court’s website, the

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state courts will lose at least six days this year due to closures needed to meet budget cuts. Those closings, and the involuntary furlough of court employees on those days, results from a reduction of \$3,100,000 in the judicial system’s budget during the two-year cycle that began in 2009.

“The courts are underfunded and overstressed, and where people would normally be able to get into court within a year, that isn’t happening, so where do you go to get it done?” Richards asks.

Firms like his provide one answer. It draws on a pool of retired Superior Court judges who can hear a case on a less-formal basis than a trial environment would require, and render decisions promptly. “If I got a call from a lawyer tomorrow, I could probably set

up a hearing within 48 hours or less, and guarantee a written decision within 10 days” says Richards.

This kind of quick justice comes at a cost, but whether that’s more or less than the cost of a trial depends on the particular case. Says Richards, “Our charges are \$1,500 per party per day, of \$800 for a half day or less. That’s probably less than (litigants are) paying their own lawyers at \$200 to \$400 per hour. And a three to four day hearing with us could take eight to 10 days in the courts.”

Where Resolution Now provides arbitration in which a neutral third party listens to the litigants and issues a decision that the parties are obliged to accept, other New Hampshire attorneys

## moreinfo

The Office of Mediation and Arbitration (OMA) has overall responsibility for managing, developing and overseeing all of the court system’s alternative dispute resolution (ADR) programs. [www.courts.state.nh.us/adrp/index.htm](http://www.courts.state.nh.us/adrp/index.htm), (603) 271-6418

New Hampshire Conflict Resolution Association: [www.nhcra.org](http://www.nhcra.org), (603) 230-9903



focus on mediation. That's a process in which the parties try to reach their own solution, with the support and occasional prodding by an impartial intermediary. In either case, the result is approved by a court and then has the same force as a decision made by the court itself.

Ora Schwartzberg specializes in family and divorce mediation from offices in Concord and Piermont. "Going to court on family issues can be very destructive emotionally and financially, and people don't necessarily get anything better for all their money and aggravation," Schwartzberg says. "In mediation, where people design their own agreements and act with integrity, they can come out being the good person they wanted to be as opposed to doing things out of the pressure of the litigation process."

Attorney Terry Shumaker with Bernstein Shur in Manchester says ADR is also effective in what he calls "fence

cases." He observes, "It generally isn't really about the boundary, but the junk cars in the front yard or the loud music on Saturday nights. A good mediator can be incredibly effective by listening and grinding out why the parties are really in court, and can include things in the settlement that a court would have no power to order."

Shumaker calls himself "a true believer in ADR" because of the speed and relative ease of resolution that it can provide, especially in cases that just can't wait to get before a judge. "With the faster pace of life and business, the Internet and the speed of commerce, a lot of people don't have four years to wait around and be in the courts," he says. "In business, one side or the other may not even be around in two to four years."

He also notes that most cases are ultimately resolved outside of the courtroom anyway. "The Bar Association says 98.4 percent of cases filed settle

before trial or appeal," Schumaker says, "so if a case is going to settle anyway, why not get on with mediation?"

But Schwartzberg says that depends on the mediator doing the job well — something that's not always certain, especially for litigants who can't afford their own attorney or choose not to hire one. "There are a lot of mediators contracting with the courts who are not experienced or not familiar with the law, and who are providing a disservice to the pro se litigants who come to the court and think they are getting professional help because it is being provided by the court system."

The reason, again, is money. "The court pays (mediators) \$60 per hour with no preparation time and no travel time, although people are required to go to the courthouse," says Schwartzberg. "But it costs more than \$60 per hour to run a law office, so the really good mediators work for the courts very infrequently,

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and the courts have less choice of who they can hire.”

The lack of affordable expertise means outcomes can vary in quality, something a judge might miss while reviewing the agreement. “I’ve had clients six months after a divorce having all kinds of problems because the initial parenting plan was not adequate,” says Schwartzberg.

When that happens there’s not much a lawyer can do. “There’s a right of appeal to the Supreme Court, but it’s limited to an absolute error of law, prejudice or misconduct,” Richards says. “It has to be a fairly egregious thing as opposed to the wide parameters in an ordinary court proceeding.”

Yet the difficulty in undoing an unfavorable outcome does not seem likely to slow litigants from engaging in ADR — especially since New Hampshire courts require at least an attempt at out-of-court negotiations in all but a very few situations. And although ADR may help ease the backlog being exasperated by cost cutting in the courts, Richards notes that it’s not the solution for every situation.

“The lack of funding is doing a lot of harm particularly in areas where people need emergency orders and decisions,” he says. “More attention needs to be brought to the problem, and the Legislature needs to step up and say this is not acceptable.” **NH**



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