

2023-003

# The State of New Hampshire Judicial Branch

Office of Mediation & Arbitration  
Supreme Court  
Superior Court  
Circuit Court



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January 25, 2023

Hon. Patrick E. Donovan, Chair  
Advisory Committee on Rules  
New Hampshire Supreme Court  
One Charles Doe Drive  
Concord, NH 03301

RE: Proposed Revisions to Supreme Court Rule 48-B

Dear Justice Donovan and Members of the Rules Committee,

The proposed revisions to Supreme Court Rule 48-B in Attachment A serve two purposes: (1) to increase the mediation fee for divorce/parenting mediation from \$300 to \$450 for four hours of mediation service and one hour of administrative work, and modify the sliding scale used to determine mediation beyond four hours; and (2) to clarify that the requirement to repay the mediation fee for cases involving dependent children is controlled by the statutory language in RSA 461-A:7.

**(1) Increasing the divorce/parenting mediation fee.**

With the implementation of Supreme Court Rule 48-B in 2003, the divorce/parenting mediation fee was set as \$300 per case when both parties to the case were indigent, and \$60 per hour in cases that did not qualify as indigent.<sup>1</sup> The divorce/parenting mediation fee was comparable to the indigent defense counsel rate at the time, which was also \$60 per hour.<sup>2</sup> On October 1, 2022, the indigent defense counsel fee was increased to \$125 per hour for major crime cases and Supreme Court appeals, and \$90 per hour for all other cases.<sup>3</sup> In conjunction, the guardian *ad litem* fee was also increased to \$90 per hour.<sup>4</sup> In the interest of consistent and equitable pay for services to parties in court cases, the proposed revisions to Supreme Court Rule 48-B would increase the mediation fee to \$450 for four hours of mediation service and one hour of administrative work (which amounts to \$90 per hour). Accordingly, the amendment would also modify the sliding scale used to determine the hourly rate for mediation beyond four hours. This would mirror indigent defense counsel and guardian *ad litem* fees. RSA 461-A:7, X states that the mediation fee "shall be set annually by supreme court rule." It has been twenty (20) years since the divorce/parenting mediation fee was set. In that time, the dollar has had an average inflation rate of 2.55% per year, producing a cumulative price increase

<sup>1</sup> See N.H. Sup. Ct. R. 48-B (eff. July 1, 2003).  
<sup>2</sup> See N.H. Sup. Ct. R. 47 (eff. October 11, 2002).  
<sup>3</sup> See N.H. Sup. Ct. R. 47 (eff. October 1, 2022).  
<sup>4</sup> See N.H. Sup. Ct. R. 48-A (eff. October 1, 2022).

of 61.31%.<sup>5</sup> The cost of providing mediation services (staff, rent, overhead, acquisition of new technology) has increased in that time, but the fee has not. The proposed amendment to Supreme Court 48-B would ameliorate this discrepancy and align Rule 48-B with the increases in indigent defense counsel and guardian *ad litem* fees that were implemented in 2022.

## **(2) Making the repayment requirement contingent upon RSA 461-A:7.**

There are three sources of financial assistance offered to parties who cannot afford to pay their portion of the divorce/parenting mediation fee. First, the Department of Health and Human Services Access and Visitation Grant received by the ADR Office pays the mediation fee for parties who receive public assistance and where child support is at issue. Second, parties without a minor child in common can qualify under Supreme Court Rule 48-B to have their mediation fee paid for by the ADR fund, established by RSA 490-E:4. Third, pursuant to RSA 461-A:7, parties with a minor child in common can also qualify to have their mediation fee paid for by the ADR fund established by RSA 490-E:4; they are then required to repay the fee to the Office of Cost Containment.<sup>6</sup> Of the sources of financial assistance available, only indigent parties who have a minor child in common are required to repay the mediation fee. This has resulted in inequity between similarly situated parties and unnecessary administrative burden for court staff who need to correctly distinguish between financial assistance that requires repayment, and financial assistance that does not. Moreover, in no other case type is a party to a mediation managed by the Office of Mediation and Arbitration required to repay their mediation fee.

As such, the Office of Mediation and Arbitration and the New Hampshire Circuit Court have proposed amendments to RSA 461-A:7 and RSA 461-A:18 to remove the repayment requirement altogether.

Because the trajectory of the proposed legislative amendment remains unclear, the proposed amendment to Supreme Court Rule 48-B will ensure that the fate of the repayment requirement is dependent upon the language in the statute. Thus, if the legislative amendment becomes law, an additional request to change the Supreme Court rule to match RSA 461-A:7 will not be necessary.

Attached, please find the proposed changes to Supreme Court Rule 48-B.

Thank you,



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<sup>5</sup> Calculated using [CIP Inflation Calculator](https://www.bls.gov/data/inflation_calculator.htm) US Bureau of Labor Statistics. U.S. Bureau of Labor Statistics. Available at: [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (Accessed January 24, 2023).

<sup>6</sup> See RSA 461-A:7, X (discussing payment of mediator fees for mediation of cases involving children); see also RSA 461-A:18 (outlining repayment).

Sup. Ct. Rules, Rule 48-B  
RULE 48-B. FAMILY MEDIATOR FEES

**(1) Scope.** The provisions of this rule shall apply to proceedings in which the parties participate in court-connected mediation under RSA 461-A:7 and RSA 458:15-c, including reopened cases under either statute.

**(2) Purpose.** This rule outlines how and when parties engaged in mediation pay their mediation fee. This rule also provides guidance for mediators in collecting fees.

**(3) Services.** Mediators shall be paid according to this rule for conducting mediation sessions, drafting mediated agreements, and performing necessary administrative tasks. Administrative tasks may include reviewing the file, screening for domestic violence, scheduling and rescheduling sessions, and communicating before and after mediation with the parties and, if applicable, counsel.

Except as provided below, mediators shall not be paid for travel time; see section (7) below for mileage reimbursement.

**(4) Disclosure of Fees.** Before mediation begins, the mediator shall provide the parties a written mediation agreement disclosing both the set fee of \$450 300, which includes the first four hours of mediation services and up to one hour of administrative work related to the mediation, *and the sliding scale fee schedule for any additional mediation that exceeds the total five hours and the hourly fee for any time that exceeds the five hours.* This disclosure of both fees shall be prominently displayed. Before mediation may begin, the mediation agreement shall be signed by the parties, the mediator, and if present, counsel.

**(5) Fees.**

**(a) First Four Hours of Mediation.** For court-connected mediation permissible under RSA 461-A:7 and RSA 458:15-c, the fee is \$450 300, and includes the first four hours of mediation services and up to one hour of administrative work related to the mediation. The court may allocate responsibility for the fee between the parties as the court determines.

(i) For a case mediated under RSA 461-A:7, if a party is indigent as defined by administrative order of the Circuit Court, the party qualifies to have the party's mediation fee paid to the mediator from the Fund established by RSA 490-E:4 (the Fund). *Any requirement to repay the fee to the Office of Cost Containment is governed by RSA 461-A:7 If the party chooses to accept such assistance, pursuant to RSA 461-A:18, the party is required to repay the fee to the Office of Cost Containment (OCC) after the mediation occurs.*

(ii) For a case mediated pursuant to RSA 458:15-c, if a party is indigent, as defined by administrative order of the Circuit Court, the party qualifies to have that party's mediation fee paid to the mediator from the Fund established by RSA 490-E:4.

(iii) If a party is not indigent, or has not completed the necessary steps to receive a determination of indigence from the court, the party is required to pay the mediation fee directly to the mediator.

1. If, after communication between the mediator and a party about a fee owed, the party fails to pay the mediator, the mediator may decline further mediation services.

2. If the mediator does not receive payment after providing services, the mediator may submit to the court a Notice to Court of Nonpayment of Mediator Fee. The court may raise the issue of non-payment at the next hearing with the party.

(b) *Additional Mediation Beyond Four Hours.*

(i) If the mediator believes mediation beyond four hours will benefit the parties, the mediator may propose additional mediation to the parties after three hours of mediation. The mediator shall share the sliding scale with the parties at that time.

If both parties want to continue mediation beyond four hours, and at least one party is indigent, the mediator shall contact the Office of Mediation and Arbitration to receive approval. The Office of Mediation and Arbitration will notify the mediator within seven (7) days if another four hours has been approved. If both parties want to continue mediation beyond four hours and neither party is indigent, the mediator has discretion to proceed.

(ii) If additional hours are agreed upon, each party's fee will be determined by the party's individual gross annual income *using the sliding scale below*. Each party shall pay the mediator at the hourly rate listed below, unless the court orders one party to pay all or a portion of the other's fees or payments from an asset, as justice requires.

**INDIVIDUAL ANNUAL GROSS INCOME**

\$ 10,000 and under
\$ 45 25 hour
\$ 10,001--\$ 15,000
\$ 20 30 hour
\$ 15,001--\$ 20,000
\$ 25 40 hour
\$ 20,001--\$ 30,000
\$ 35 55 hour
\$ 30,001--\$ 35,000
\$ 45 70 hour
\$ 35,001--\$ 40,000
\$ 55 85 hour
\$ 40,001--\$ 50,000
\$ 65 100 hour
\$ 50,001--\$100,000
\$ 75 120 hour
\$ 100,001 and above
\$ 100 150 hour

(iii) If a party is indigent, a party may pay the mediator directly or may qualify to have that party's mediation fee paid to the mediator from the Fund established by RSA 490-E:4. ~~The party would then repay the fee to the OCC after mediation occurs.~~ Mediators shall advise parties who are indigent of both options for payment.

(iv) If a party is not indigent, or has not completed the necessary steps to receive a determination of indigence from the Court, the party is required to pay the mediation fee directly to the mediator.



**(6) Rescheduling, Cancellation, Non-Appearance.**

(a) *Rescheduling.* If a party wishes to reschedule a mediation session, the party must:

1. contact the other side to obtain consent to reschedule from the other party;
2. notify the mediator at least 2 business days before the session; and
3. provide the mediator with dates and times both parties are available.

(b) *Cancellation.* If a party wishes to cancel mediation and not reschedule, the party must contact the mediator at least 2 business days before the session. If the cancellation occurs before the first mediation session, the parties must file a motion with the court requesting to be excused from mediation. If the cancellation occurs after the first session, the mediator shall indicate "Case did not settle," without further comment.

(c) *Non-appearance.* If a party receives notice but does not appear for a scheduled mediation session, or cancels or reschedules the mediation session less than 2 business days before the session, the case may be scheduled for the next court event. The non-appearing party shall pay the mediator a failure-to-appear fee of ~~\$180~~ ~~\$120~~. If neither party appears, each party shall pay the mediator a failure-to-appear fee of ~~\$90~~ ~~\$60~~. The mediator has discretion to waive failure-to-appear fees.

**(7) Mileage.** For the first mediation session, the mediator shall be reimbursed at the current IRS mileage reimbursement rate. No additional mediation sessions are eligible for mileage reimbursement. To receive reimbursement, the mediator shall, within 45 days of accrual, submit to the Office of Mediation and Arbitration a completed mileage form.