

THE CLASS OF 1964 POLICY RESEARCH SHOP

CRIMINAL MEDIATION IN NEW HAMPSHIRE



PRESENTED TO CHIEF JUSTICE TINA NADEAU, NEW HAMPSHIRE SUPERIOR COURT

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PREPARED BY:

Dara Casey
John Keating
Zoe McGuirk



NELSON A. ROCKEFELLER CENTER FOR PUBLIC POLICY AND THE SOCIAL SCIENCES

Contact:

Nelson A. Rockefeller Center, 6082 Rockefeller Hall, Dartmouth College, Hanover, NH 03755
<http://rockefeller.dartmouth.edu/shop/> • Email: Ronald.G.Shaiko@Dartmouth.edu

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EXECUTIVE SUMMARY

The goal of this report is to evaluate the effectiveness of criminal mediation processes in the New Hampshire judicial system.¹ Criminal mediation is a form of Alternative Dispute Resolution (ADR), an alternative to the traditional trial process. Although ADR is not yet broadly employed across the United States, New Hampshire has an established Felony Settlement Conferences (FSC) program and has begun to expand criminal mediation processes in response to the COVID-19 pandemic. To evaluate mediative practices in New Hampshire, we employ qualitative interviews with county court clerks, judges, prosecutors, public defenders, and other relevant actors, in combination with quantitative data extracted from court recording systems. Across the interviews, we identify nine major findings on the efficacy of criminal mediation, five common criticisms, and propose five recommendations to improve the process. The interviews revealed an overall satisfaction with the process as an alternative to traditional trial practices, with opportunities for improvement.

1 INTRODUCTION

Alternative Dispute Resolution (ADR) can take the form of mediation without a trial, neutral case evaluation, or arbitration. ADR is a type of restorative justice, which is “an approach to justice that seeks to repair harm by providing an opportunity for those harmed and those who take responsibility for the harm to communicate about and address their needs in the aftermath of a crime.”²

The New Hampshire Superior Court has long employed mediative measures for civil court cases, and now for criminal cases as well. The formal ADR procedures are called Felony Settlement Conferences (FSC), although additional criminal mediation practices have been extended to a greater variety of criminal cases considering the effects of the COVID-19 pandemic on case backlog.³

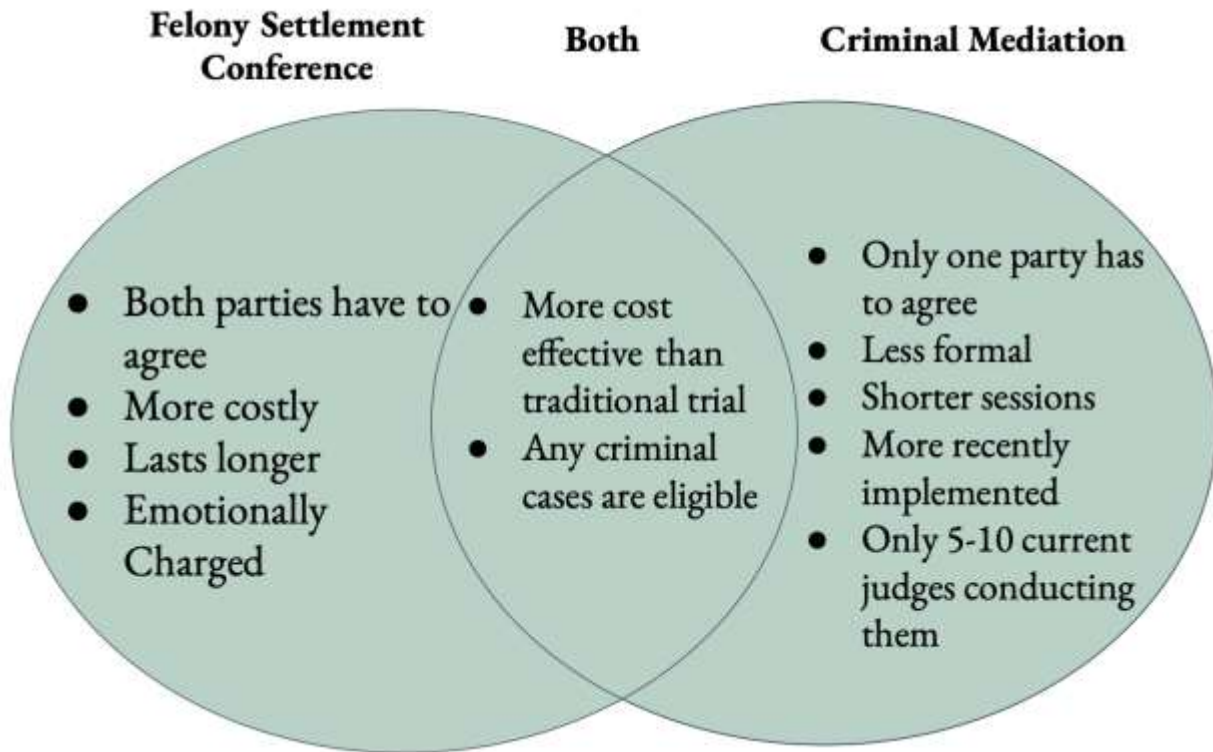
The mediation process exists to provide cathartic, informal, and confidential spaces for both parties to a criminal case to evaluate the case and communicate about options for resolution. Two decades ago, New Hampshire courts began holding dispositional conferences with the presiding judge within five weeks of arraignment—an initiative meant to hasten the court process and relieve case backlog. However, since these conferences are usually quite short—ten minutes long—there is rarely enough time to delve deeply into the facts of the case. Acknowledging this constraint, criminal mediation was an option added to the list of possible outcomes that may be requested at the dispositional conference. Roughly forty percent of cases are resolved within those five weeks, depending on their simplicity and the Early Case Resolution (ECR) capabilities of each county. Today, if the status conference does not produce a negotiated resolution and the case might benefit from continued discussions, criminal mediation may be recommended to or requested by case parties.

Criminal mediation is another alternative to traditional trials. This process, unlike FSCs, requires that only one party to a case request mediation with a retired or sitting judge not presiding over the case, where there is no need for agreement. The purpose of mediation in criminal cases is to resolve

a case that the requesting party believes could be resolved but has not been yet for some reason. This process is not intended to be a substitute for cases more appropriate for traditional trials, ECR, or FSC, but instead as a supplementary form of alternative resolution.⁴

FIGURE 1.1

Differences between Felony Settlement Conferences and Criminal Mediation



Source: Tina Nadeau⁵

2 PROBLEM STATEMENT

Criminal mediation is a contemporary form of restorative justice just beginning to establish itself within the American judicial system. New Hampshire itself is a pioneer in criminal mediation; first in its implementation of FSCs and now in its adoption of criminal mediation. Pioneering modern judicial practices is not without caveats, though. In developing a robust restorative justice process, New Hampshire has few guidelines to follow nor other states to model its programs after. Restorative justice is uncharted territory, and we do not yet have all the answers or understand best practices.

This report seeks to evaluate the effectiveness, efficiency, and success of New Hampshire’s criminal mediation process. This undertaking requires determining measures of success and applying them to criminal mediation structures currently in place. Where are the effects of mediation reflected in the judicial system and society at large? Are victims and defendants more

satisfied, or experience a greater sense of justice after participating in mediation? Are court backlogs relieved of cases unnecessarily awaiting trial? Is the criminal justice system working more efficiently and effectively? These are just several possible measures of success. A holistic review of criminal mediation will be necessary to assess its implementational success.

3 METHODOLOGY

Our team evaluated criminal mediation practices in New Hampshire through qualitative interviews with key participants in the criminal justice system. Quantitative data collected from interviewees and court clerks when available supplemented the analysis of the interviews. Individual experiences, insights, and evaluations of criminal mediation help illuminate the nuances inherent to a deeply personal form of alternative justice.

3.1 MEASURES OF SUCCESS

The New Hampshire judicial system implemented criminal mediation in response to the Covid-19 pandemic, and the hefty case backlog that plagued the New Hampshire courts during this tumultuous time. One key measure of success will include evaluating whether mediation has alleviated case backlog across the state. Similarly, mediation can be deemed successful if it has expedited court processes and increased or upheld resolution rates. Finally, perceived procedural fairness and justice remain crucial measures of success as we evaluate this emerging form of alternative justice.

3.2 INTERVIEWS

We interviewed key players in the criminal mediation process between January and April 2023, to gather their views on the strengths, weaknesses, and areas of improvement within criminal mediation processes across the state. Specifically, we interviewed judges, prosecutors, public defenders, criminal defense attorneys, and county clerks who had direct experience with criminal mediation. Abiding by the Dartmouth Committee for the Protection of Human Subjects (CPHS) guidelines, we were unable to directly interview victims and defendants. However, lawyers, as proxies for their clients, offered and suggested general experiences with criminal mediation. Interested parties can find example interview questions in Appendix A. The interviews followed a set of standard questions which varied depending on the position of the interviewee. We aimed to ask the same questions of each category of participant, but also allowed the interviewees to direct the conversation if they felt that the questions did not address a critical aspect of mediation.

3.3 DATA ANALYSIS

The data primarily comprises qualitative accounts from key legal actors involved with mediation in New Hampshire. Through twenty interviews with judges, lawyers, and clerks who have participated in mediation, we evaluated the strengths and weaknesses of mediation and its impacts on the legal system and those involved with it. We asked a set of similar questions of each interviewee, with some role-specific questions depending on occupation. In total, we held interviews with three mediating judges, seven court clerks, three county attorneys, six public defense attorneys, and one criminal defense attorney. These testimonies allowed us to understand

the impact of mediation on the New Hampshire court system, gauge attitudes and perspectives on mediation, understand common criticisms, and identify areas for improvement.

We requested data management reports from court clerks when they had them readily available, and from a few reports we supplemented some of our qualitative data. Due to the new and evolving nature of mediation as well as sometimes rudimentary court scheduling and data recording systems, we could not produce concrete data from each county nor identify information that may allow us to identify mediation's micro-effects on individual participants.

4 METHODOLOGICAL LIMITATIONS

While the enumerated methodology should produce insightful, accurate, and reliable analysis, some methodological limitations do certainly exist, and the report would remain incomplete without addressing these flaws. However, these limitations should not unduly bias the results of this analysis for the reasons described below.

4.1 SELECTION EFFECTS

It remains impossible to rule out the possibility that selection effects have biased our analysis, but we have reasons to believe that the selection effects should not have altered our conclusions. The potential selection effects stem from our inability to randomly select participants from the New Hampshire bar to interview; we could only interview those who responded to our inquiries and were willing to be interviewed. Hence, it remains possible that something about the group willing to be interviewed could bias our results. For example, the participants in our study may have offered their insights particularly because they favor mediation. However, due to the relatively small size of the New Hampshire Bar we feel confident that our sample should be at least relatively representative of experiences with criminal mediation.

4.2 INABILITY TO SPEAK DIRECTLY WITH DEFENDANTS AND VICTIMS

Due to the confidential nature of mediation and the need for lawyers and judges to maintain the anonymity of their clients, we were obviously unable to speak directly with the individuals most affected by mediation, namely the victim and defendant. Rather we relied on the insights of the defense attorneys and prosecutors as a gauge of clientele satisfaction with the process. While attorneys obviously have an incentive to overstate their clientele satisfaction given the centrality of effective representation to mediation's success, lawyers have less incentive to overstate their client's satisfaction with a system that does not necessarily benefit them. While we cannot rule out the possibility that both prosecutors and defenders have inaccurate understandings of their client's satisfaction with mediation, we feel confident that their gauge proves somewhat accurate and that they would not willingly misrepresent it.

4.3 INABILITY TO ACCESS COMPLETE DATA RELATED TO MEDIATION

We set out at the outset of this study with much broader goals. We hoped to use county-by-county data to investigate a variety of factors related to mediation, including if mediation reduced recidivism rates, if it reduced costs for clients, and other valuable insights. However, because counties do not record this kind of information, and because many do not specifically record mediations at all, we were unable to conduct a thorough statistical analysis in New Hampshire.

4.4 INTERVIEWEE POOL MAY SKEW TOWARDS DEFENSE ATTORNEYS

As we could not directly control who we spoke to, and instead had to rely on scheduling gaps and willingness of the interviewee to participate, our sample population tended to skew slightly towards defense attorneys. This means that our analysis may overstate the perspective of defense attorneys as compared to prosecutors. However, we are not particularly worried about this possibility because each prosecutor that we did interview who had experience with mediation answered relatively consistently to the same questions, increasing our confidence that so long as we balanced prosecutor and defense attorney responses in our analysis, the results should prove sound.

5 PRIMARY FINDINGS

We found that lawyers, judges, and clerks throughout New Hampshire seem generally satisfied with the process of mediation and see it as an effective mechanism to case settlement in New Hampshire. While mediation does not technically serve as a substitute to traditional trial practices, as the right to jury trial always remains, it does allow defendants and victims a faster, oftentimes more satisfactory alternative to a traditional trial. We discuss the major findings and consistent pieces of analysis here before documenting areas for growth and recommendations.

5.1 PROSECUTORIAL ATTITUDES PROVE CRITICAL TO MEDIATION'S EFFICACY

A common theme that emerged throughout the interviews concerned the willingness of prosecuting attorneys to participate meaningfully in mediation processes. Although some individuals recognized the potential mediation has for alleviating the heavy caseloads of prosecutors, they also said the process can be underused among prosecutors and even discouraged in some instances. Some interviewees attributed these attitudes to unreasonable expectations among prosecutors, pressure from office superiors to pursue trial, and age—regarding both less experienced young attorneys and older attorneys attached to traditional methods of trial.

While conducting interviews, our team heard from at least twelve individuals that prosecutors inhibited wider adoption of criminal mediation processes in New Hampshire. Many of these interviewees pointed to general procedural disagreement or a lack of commitment towards mediation among prosecuting attorneys.

One public defender suggested prosecutors have such large caseloads that they cannot afford the time to treat cases more individually, even if mediation can expedite the resolution of some cases. A separate public defender suggested that some prosecutors are simply not engaged in the mediation process, so if or when they are made to participate in mediation, they enter the process without any intentions of giving up ground to the defense. Also, according to the public defender, some prosecutors may try to maintain a sense of executive power or authority in mediated cases, which explains why they may not be open to negotiation or compromise. Another public defender told us that he has seen prosecutors agreeing to mediation recently out of obligation, saying “they have to,” but then entering the process without any real sense of commitment, as they believe the case will have to go to trial in any event.

Yet another public defender spoke to the difficulties these attitudes pose to engaging meaningfully with cases and reaching a resolution. He explained that when the prosecution and defense are not on the same page, everybody’s time is wasted, and mediation fails to function as efficiently and effectively as intended. One public defender corroborated this sentiment and mentioned that she rarely sees the State requesting mediation. In instances in which prosecutors do not participate meaningfully, the defense will give full sentencing arguments only for nothing to come of such efforts. This same attorney said that in certain counties, mediation has not contributed to better outcomes because the State refuses to engage meaningfully with the process. Other actors also raise the issue of prosecutorial engagement. One prosecutor described the divides and barriers to connection between prosecutors and defenders as inhibiting the abilities of both parties to pursue justice, and that enhanced communication is key to a functioning criminal justice system.

Some attributed the State to instilling such unwillingness in prosecutors to engage in mediation. One clerk we spoke to provided the following narrative,

Prior to last year, the county attorney was opposed to engaging in this process. However, the court forced a case to mediation over the State’s objection last summer, where it resulted in a resolution of the case. Since then, we have held four other cases in mediation with the agreement of the two sides in each case, and all of them resulted in resolutions to the cases. We now have two more scheduled to occur in the near future, and it appears the State is willing to engage in this process whenever requested. The State has even requested such proceedings themselves on two occasions.

5.1.1 INSTITUTIONAL INERTIA

Such testimony suggests that this issue is more institutional than individual. One of the public defenders we spoke with anecdotally described a situation in which a prosecutor said, “can’t do that because the boss [district attorney] is calling the shots on the case,” in response to a suggestion that the attorneys request mediation. Such reluctance among the State to pursue mediation seems to have had worse results than it should have within a process which requires only one party to request for its practice. A public defender described instances in which the judge presiding over the case has failed to order mediation or has canceled it altogether following the State’s refusal or reluctance to participate. A separate public defender shared such experiences, saying that, anecdotally, if the State is not on board, the judge decides mediation is not worth its trouble, and does not schedule sessions.

Willingness among prosecutors to engage in mediation has seemed to change over time. Several interviewees suggested that both younger and older prosecutors pose difficulties to wide-spread adoption of criminal mediation. This problem, however, is not static; interviewees expressed hope for increased acceptance of mediation as more and more cases are mediated now through the future. One of the clerks we spoke to said that some prosecutors simply do not believe in the potential impact of mediation. But, once people do participate in mediation or hear of good experiences from their colleagues, they typically grow its value. This phenomenon can be especially prolific among younger, less experienced prosecutors who have a more textbook vision of legal practices, as well as among older, more experienced prosecutors who adhere to the traditional legal practices they have engaged with for decades. Among both populations, prosecutors may have a more fixed idea of what they believe a case to be worth, contributing to their unwillingness to mediate and risk agreeing less to than they believe the case to be worth.

5.1.2 PARTICIPATION IN MEDIATION INCREASES APPRECIATION FOR THE PROCESS

On the other hand, a criminal defense lawyer suggested that prosecutors—especially younger ones—disinterested in mediation have not developed understandings of what certain cases are worth. A prosecutor shared a similar idea, that an increasingly younger Bar with frequent turnover across the state has made it difficult to determine the value of cases. Regardless, each of the interviewees who described the phenomena above suggested that more experiences with mediation and judges’ input towards the value of cases can positively influence prosecutors regarding attitudes toward mediation.

As already alluded to, increased rates of mediation have expanded the willingness of prosecutors to engage in later mediation. The legal actors we spoke to identified mediation as influencing prosecutors by forcing necessary conversations, enhancing perspective, and resulting in positive outcomes for both parties. All the individuals who described problems with prosecutors engaging in mediation also testified to opportunities for conversations in mediation that would not have been possible otherwise, and which have helped to soften prosecutors’ attitudes. Mediation has also been cited by these participants as offering a chance for fresh eyes—the judge—to review a case and level with the lawyers about its worth. Such conversations and neutral perspectives have been helpful in instances where clients or lawyers on either side have unreasonable expectations about the case. Such qualities have enhanced the perceived humanity of the people involved in the case, which has ultimately led to more favorable outcomes. One prosecutor spoke to mediation as allowing for both parties to see the “humanity” of the other.

5.2 UNREALISTIC EXPECTATIONS

Courts utilize mediation for several reasons, but many actors mentioned that mediation can serve as a “reality check” when prosecutors, defense attorneys, defendants or victims have unrealistic expectations about a case. Sometimes defense attorneys have defendants who might expect much lower sentences than they will feasibly receive, or they themselves overestimate their ability to win a case. Having a neutral judge who has no prior involvement with the case may provide the

defendant, defense attorney, prosecutor, and victim with an objective valuation of the case that helps alleviate misunderstandings.

Prosecutors might also want an unrealistically high sentence, especially in instances where a newer prosecutor does not understand what a case is worth. Having an experienced superior court judge tell the prosecutor that the case is not worth what is being asked for often leads to loosening the sentence recommendation. Otherwise, a prosecutor might have a supervisor with unrealistic expectations. After the mediation, a prosecutor can tell his or her supervisor that a superior court judge thinks a sentence is too strict. The same applies to defense attorneys who, both private and public, have unrealistic expectations regarding what they believe their defendant should receive in a specific case.

Lastly, a victim who has far less familiarity with what a case is worth can see that they have unrealistic expectations when a superior court judge tells them so. Many actors also mentioned that judges used to give input on a case during dispositional conferences. This practice stopped around 2017. However, criminal mediation has served as a beneficial replacement for this practice. Implementing criminal mediation allowed beneficial, restorative, and educational conversations to resume.

5.3 CASES BEST SUITED FOR MEDIATION

Upon introduction to this project and criminal mediation itself, certain literature suggested that certain cases—particularly physical or sexually violence cases—were ill-suited for mediation practices. Legal actors who have engaged with mediation as an alternative means of resolving cases of such nature told a different story, however. Interviewees spoke to the flexibility of mediation in terms of which cases are most eligible as one of the many assets of the process.

5.3.1 LOGISTICAL QUALITIES OF CASES

Various legal actors suggested that the type and severity of cases prove less important for the suitability of mediation than their logistical qualities. Defense attorneys, prosecuting attorneys, judges, and court clerks mentioned a wide array of cases they witnessed undergo successful mediation, ranging from first and second-degree assault, to molestation and domestic violence, to burglary and manslaughter, and even homicide. The individuals we interviewed spoke more about the potential to bridge connections between parties as a key determinant of eligibility for mediation. Even for cases without a traditional victim involved, like drug cases, defense attorneys in particular described mediation as a means of providing restorative justice. Although concrete data concerning the resolution rates of certain cases categories remains impossible to obtain, interviewees anecdotally claimed that cases have resolved at high rates indiscriminately.

The most prominent discerning difference between criminal mediation and Felony Settlement Conferences (FSCs) that appeared through our interviews concerned factual disputes. Public defenders and prosecutors especially emphasized beliefs that mediations are most successful when the facts of a case are not disputed between parties. If the two sides cannot agree on the basic facts of the case, there is little hope that they will be able to reach an agreement through mediation. Factually contested and more emotionally charged cases are often deemed better suited for FSCs

or for a traditional trial. A jury may be required to determine the validity of each side's case when the facts are unclear.

5.3.2 HIGH RESOLUTION RATE

While perfect data still does not exist, nearly every interviewee mentioned that almost all of their mediations typically resolve at the mediation stage or do not go on to trial. Many respondents mentioned that their mediations typically settle at a rate of approximately 80 to 90 percent, emblematic of the success of the process, its ability to reduce the number of lengthy trials, and to create satisfactory settlements for both the victims and the defendant.

5.4 A (SOMEWHAT) EMOTIONALLY RESORATIVE PROCESS

Mediation offers a less adversarial form of conflict resolution that encourages discourse and connection. Victims and defendants have a greater degree of agency, and they feel less constrained by the process due to mediation's confidentiality. Prosecutors, public defenders, and defense attorney's all commented that mediation allowed their clients to feel "heard" by the criminal justice system, and that anecdotally at least they rarely felt dissatisfied with mediation after it occurred. Mediation is particularly helpful in that it allows for the facilitation of difficult discussions between parties, which is beneficial even if the case does go to trial. Multiple mediating justices mentioned that even in incredibly traumatic situations, mediation allowed the defendant to apologize, explain, and come to some form of emotional understanding with the victim. Of course, FSCs accomplish this objective more substantively, and many parties did mention that they primarily see mediation as a strategic tool rather than a true form of restorative justice.

5.5 SMALL EFFECT ON COURT BACKLOG

Given the lack of standardized data available to analytically evaluate criminal mediation's effect on backlog across New Hampshire, the county clerks interviewed provided important insights. Most of the clerks *did not* believe that the criminal mediation process had significantly impacted on the court backlog. Often, mediation was a step taken towards the end of a case's life cycle. One public defender mentioned that they might request mediation closer to trial anyways, often as a "last ditch effort" if they felt that the prosecutor continued to be unreasonable. One prosecutor mentioned that because mediations still only constitute a relatively small proportion of cases, and they often occur in cases that might end in a plea agreement anyways, mediations really do not have much of an appreciable difference on facilitating a reduction in cases (some counties only used mediation a few times over the last year, as described below). However, mediations do offer a much lower time commitment than both a traditional trial and settlement conference since they typically last approximately one-to-two hours.

Instead of solving court backlog outright, meditation seemingly offers a useful, more restorative alternative to a traditional trial and plea process that may prove less emotionally taxing for both parties. Of course, if mediation does continue to grow in popularity, then the effects on court backlog may prove more substantial.

5.6 DISPARITIES BETWEEN COUNTIES

While likely a result of the novelty of mediation as a criminal justice procedure, our interviews revealed a relative disparity in terms of experience and familiarity with mediations across each state in two ways. First, some counties clearly utilized the tool of mediation at a greater rate than others. Second, location had a clear effect on the mediation process due to the important role of individual justices and prosecutors who operated in the local area.

In the first instance, one prosecutor even mentioned that he had only participated in FSCs and was not familiar with the intricacies of mediation (or had even heard of them). Generally, our analysis bore out this finding, with the data (anecdotally at least) supporting the finding that some counties utilize mediation far more than others. Obviously, we can attribute this finding in part to the fact that certain counties simply have greater populations and hence greater, such as concentrated in Hillsborough North. However, comparison of proportions demonstrates that the likelihood to use mediation varies significantly across similar counties. For example, Carrol and Belknap counties have relatively similar populations. However, since early 2022, Belknap has conducted 13 mediations, while Carroll County conducted only six. On the other hand, Rockingham County, nearly six times the size of both Carrol and Belknap Counties, conducted only eight. Yet Hillsborough County conducted nearly 94 mediations in 2022. Clearly, the likelihood of undergoing mediation as either a criminal defendant or as a victim varies across counties and does not necessarily depend on county population size. Clearly, criminal mediations result not from an optimal case or scenario or even from victims/defendants requesting them (if they did, we might expect to see roughly equal proportions), but rather likely because certain judges, prosecutors, and defense attorneys who tend to operate in specific regions are more likely than others to pursue it or authorize it.

In the second instance, the effectiveness of mediation also depends on location as evidenced by our interviews. Multiple defense attorneys and public defenders relayed stories of prosecutors simply refusing to participate in the mediation process, or at least not coming to the table in good faith. One attorney even mentioned that they have had judges not authorize mediations if the prosecutor did not appear to be on board with the process. However, we should note here that the judges may have simply denied the request because the attorney requested a settlement conference, which requires both sides consent. This report emphasizes the importance of this confusion in section 6.8. Further, many attorneys mentioned that most of the mediations they conducted typically occurred with the same mediating justice. Hence, if most attorneys pointed out the centrality of the mediating justice to the effectiveness of the mediation, as emphasized in 6.7, then variability across counties will also greatly alter the effectiveness of criminal mediation. Further, some justices emphasized the importance of pre-existing relationships with practicing attorneys as central to an effective mediation, while every party emphasized the importance of experience and knowledge of mediation procedures. Because these facets fluctuate across counties, so, too does the effectiveness of mediation.

5.7 MEDIATING JUSTICES CRITICAL TO MEDIATION EFFICACY

Nearly every interviewee consistently emphasized the importance of the mediating justices to the success of the mediation. The pre-existing relationships that attorneys had with the mediating justices seemed critical to the informal environment so necessary for the success of mediation.

One respondent even went so far as to say that they could not extricate their evaluation of mediation from the performance of the mediating justice; they had only done mediations with one justice and were unsure if the entire system of mediation worked or if the justice was simply terrific at facilitating them. However, on the other hand, mediation criticisms most often targeted justices as well. For example, some attorneys expressed frustration at specific instances where the judge, rather than providing the unreasonable opposition with a “reality check” with an assertive evaluation of what the case was worth, instead chose to remain a relatively aloof facilitator, providing some input and analysis but not much else.

Clearly, the effectiveness of mediations depends highly on the quality of the judge. Many interviewees expressed concerns with the number of judges mediating cases specifically because they worried that repetitive judges offered repetitive judgments. One public defender mentioned that he has only ever conducted mediations with one judge and worries that the mediation outcomes have become *too* predictable and hence less useful. We note the importance here of some degree of predictability, but not enough to render the actual process of mediation useless.

5.8 DISTINCTION BETWEEN MEDIATIONS AND FSCs OFTEN BLURRED

Notably, practitioners and members of the New Hampshire bar often see little functional difference between Felony Settlement Conferences (FSCs) and criminal mediations. Of course, most understood the fundamental differences as enumerated in the background information section of this report. However, one prosecutor mentioned that he often enters mediations that turn into FSCs and enters FSCs that turn into criminal mediations. The same prosecutor even believed that FSCs did not require the consent of both sides and explained instances in which he had been forced to participate in them. For many interviewees, the distinction seemed unimportant, as they consistently drifted in between describing their experiences with FSCs and mediations. When asked to provide examples of particularly illuminating mediation sessions, one judge offered an example of an FSC as the most emblematic example of the efficacy of the process. Generally, it often appeared as though many practitioners conceived of criminal mediations and FSCs as almost interchangeable, with only small details differentiating them.

Of course, they do serve certain purposes. One public defender expressed preference for mediation over FSCs, in part because of the value of alternative dispute mechanisms stemming from the opportunity to see what a judge thinks a case is worth. However, interviewees also indicated that FSCs typically are reserved for cases where there may be a dispute over the facts or a large misunderstanding between the victim and the defendant. In cases where both sides clearly accept the basic facts and premises of the case, the distinction between mediations and FSCs appears to break down for most practitioners. One prosecutor even appeared to believe that FSCs also did not require the consent of both parties, also describing instances in which his team felt frustrated that they had been dragged to a settlement conference in which they did not want to participate.

6 BARRIERS TO SUCCESS

In tandem with several recommendations for enhancing criminal mediation in New Hampshire, we have identified four areas that impede larger implementation of criminal mediation.

6.1 FRUSTRATION WITH NON-MUTUAL CONSENT MEDIATIONS

Both defense attorneys and prosecutors often expressed frustration with the ability for the other side to request mediation without the consent of the other party. While they recognized that mediation is not binding and should not have a direct influence on the trial if it were to continue, they felt that the process did not make sense if one side already expressed a hesitancy to participate. The success of mediation, both as a tool to elucidate what a case is worth for prosecutors and judges and as an opportunity for victims and defendants to discuss in a non-combative arena, depends on the proactive and enthusiastic engagement of representatives from both sides of the cases. One prosecutor even said, “we love FSCs and mediations so long as we aren’t being dragged to them.” Some respondents felt that if the other side did not plan on engaging wholeheartedly in the mediation from the outset it would prove a waste of time for both sides. And although the judge and mediation process can certainly help to get either the hesitant client or hesitant attorney to participate, its shorter time frame may restrict this capacity. While we do not recommend later that mediations operate only when both sides agree to them, it seems necessary to point out that multiple parties have felt that mediation had little efficacy unless both sides actively wished to participate.

6.2 INABILITY FOR CLIENTS TO DISCUSS DIRECTLY WITH JUDGE

As mentioned in the themes, both prosecutors and defense attorneys consistently mentioned that they appreciate mediation because it “humanized” their clients. Prosecutors felt that it allowed victims to feel like the justice system listened to them and defense attorneys argued that it helped provide context on their client to the prosecutor, potentially making the prosecutor more lenient. Critical to this endeavor remains the confidentiality of mediation and the ability for defendants and victims to talk freely without the concern of how the jury might perceive them. However, one defense attorney brought up the concern that they still worry about how the prosecutor perceives their client in the mediation. They had multiple experiences in which their client desperately wanted to speak to the judge alone to explain their circumstances and the facts of the case without potentially biasing the prosecutor.

6.3 JUDGES NOT ORDERING MEDIATION

While surprising, some defense attorneys mentioned experiences in which the presiding judge over their trial refused to authorize mediation if the prosecutor did not express interest in participating. This is concerning given that mediation is supposed to occur if one side requests them. Of course, this frustration may be linked back to the general confusion on the difference between mediations and FSCs; it may be that the attorney requested an FSC and simply equated it with a mediation. However, some defense attorneys clearly feel that presiding judges tend to be biased towards prosecutors and the state, potentially because of the separation of powers and authority vested in the executive when it comes to charging. Clarification for the New Hampshire Bar on the mediation and FSC processes may help alleviate these concerns if they result from misunderstandings.

6.4 TOO FEW MEDIATING JUSTICES

Interviewees consistently advocated for a greater pool of interviewing judges to match increased demand for mediation throughout New Hampshire. Some attorneys, as mentioned previously, had only conducted mediations with a singular justice. And while they appreciated the justice's experiences and insights, they felt that their analysis of a case had grown predictable; mediation no longer served as a tool to provide a reality check to the opposing side because they both knew how the judge would likely respond. A small pool of judges is critical for the sake of maintaining the relationships so crucial to effective mediations. However, if that pool is so small that mediation no longer serves their purpose, then the pool must increase. As mediation grows in popularity, so will the pool of mediating justices need to.

7 RECOMMENDATIONS

While most people expressed generally positive sentiments about criminal mediation, we offer a brief series of recommendations to improve the process based on the previously enunciated criticisms. The fact that we offer recommendations does not imply that mediation does not work, but rather that like any process it can be improved upon.

7.1 STANDARDIZE PREPARATORY EXPECTATION

Several interviewees noted the success of mediation cases in which one or both parties came prepared with memoranda submitted to the judge prior to the mediation session. One public defender mentioned that when mediating judges receive memoranda and information beforehand, they approach mediation with a greater degree of certainty, engagement, and confidence. Instituting standards for counsel to mediated cases including, although perhaps not limited to, requiring memoranda to be submitted prior to mediation could assuredly improve criminal mediation practices in New Hampshire. It may also force prosecutors and defense attorneys who might otherwise have decided to not participate in the mediation to prepare and adopt a new perspective on its usefulness.

7.2 RECORD KEEPING

Given the relative novelty of criminal mediation, many counties have not begun rigorous data collection efforts. Initially, some counties had no label for criminal mediation in hearing management reports, so they were labeled as "felony settlement conferences" or under "other". Better record keeping regarding mediation would allow for a more complete analysis of their efficacy, specifically in answering the questions that this report hoped to in its methodology. Additionally, courts should try to collect data on the recidivism rates of defendants in mediation. This would help determine if sentences in mediations are as effective as a traditional trial.

7.3 INCREASE THE NUMBER OF MEDIATING JUSTICES

New Hampshire should increase the number of judges available to participate in criminal mediation to meet increased demand and reduce predictability in rulings but must also balance competing priorities. Given the identified importance of established relationships, experience, and trust to a successful mediation, New Hampshire ought not increase the number of mediating

justices so much that it dilutes the pool of experienced, effective judges and drastically increases the variability of rulings. A marginally increased pool of mediating justices would provide new perspectives and meet heightened demand for mediations.

7.4 OFFER CLIENTS PRIVATE COUNSEL WITH MEDIATING JUDGE

This simple procedural change, allowing both victims and defendants to speak privately with the presiding judge in mediations, as happens in FSCs, would be beneficial for multiple reasons. First, it would increase feelings of fairness, satisfaction, and a sense of feeling “heard” by the criminal justice system. Second, it may encourage defendants to fully engage in the process if they fear that their answers might be used against them in a trial later one. Third, presuming the second claim proves true, it could provide the mediating justice with a greater degree of context, hence leading to more accurate and beneficial evaluations of a case’s value. Fourth, it might encourage prosecutors to arrive particularly prepared for mediations with previously submitted memoranda to ensure that the defense cannot manipulate the facts of the case in a private session.

7.5 CLARIFY THE DIFFERENCES BETWEEN FSCs AND MEDIATIONS

A relatively easy and quick step that the New Hampshire bar should take to increase the efficacy of mediation should be to clarify the primary differences between criminal mediation and FSCs. Given that the research revealed confusion about criminal mediations and frequently that practitioners think about them interchangeably, revamped resources from the New Hampshire Bar Association or the Superior Court Justices which could include guidance on how to choose which process to follow. A clearer understanding of the goals and procedures of criminal mediation would undoubtedly lead to more effective mediation and a greater degree of satisfaction with the process.

8 CONCLUSION

This report assesses criminal mediation procedures in New Hampshire. Through interviews with a variety of key actors in the criminal justice system—judges, prosecutors, defense attorneys, and court clerks—our team compiled qualitative data regarding the experiences with and perceptions of criminal mediation across the state. We interviewed twenty court practitioners, drawing from each of the aforementioned roles. We spoke to individuals from every county except Merrimack, including both Hillsborough districts.

Some interviewees, court clerks, in particular, were able to supplement our qualitative records with quantitative data. Systematic data proved to be a rarity however, considering under-reporting and misreporting of mediations as they continue to grow in our legal system. Also, by nature of who responded to our interview requests and the types of contacts provided for our research, our data skewed towards defense attorneys. We do not believe these limitations have hindered our analytical abilities or findings unduly, however.

The perspectives shared in these interviews highlighted several prominent themes: mediation is, overall, viewed highly positively. Mediation enhances feelings of justice and humanizes participants. However, reluctance and even negative attitudes among prosecutors presents barriers

to a wider adoption of criminal mediation. On that note, unrealistic expectations held by parties and legal counsels to cases can complicate negotiations and stall mediation. Interviews also revealed a preference for mediated cases to be factually undisputed, but the category and severity of cases do not otherwise matter in determining appropriateness for mediation.

In response to findings from interviews, supplemented by quantitative data, we have identified a series of recommendations for improving the already established and popular practice of criminal mediations in New Hampshire. We suggest requiring standard preparation in the form of memoranda from both legal counsels to better inform the mediating judge of the nature of the case. We also suggest reforming the county court recording systems to keep track of a wider array of data and more sustainably evaluate mediation in the future. Additionally, slightly increasing the pool of mediating judges, if possible, could be beneficial. Greater discourse between parties and the mediating judge can also enhance the process through a few avenues. Finally, we suggest greater education on mediation, particularly in discerning it from FSCs and in alerting lawyers and judges to its possibility as an alternative form of justice.

New Hampshire is the pioneer of an innovative method of criminal justice that could become a national model. Its early successes and potential for even greater success illuminate an exciting path forward.

APPENDIX A: EXAMPLE INTERVIEW QUESTIONS

Of each interviewee, we also inquired into the biographical information, including their job title, years spent in their role, other experience in the legal system if applicable, and then general experiences with and perceptions of criminal mediation.

Mediating Judges:

- Do you think criminal mediation is an effective way of resolving disputes?
- Do you think criminal mediation has reduced the case backlog of your county?
- Which types of cases do best with criminal mediation?
- Are there any types of cases that you believe should not be encouraged to go through criminal mediation?
- Do you think criminal mediation has reduced the case backlog?

Prosecutors:

- Do you think criminal mediation is an effective way of resolving disputes?
- What impact has mediation had on case resolution rates and expedience?
- Victims are treated fairly and with respect throughout the mediation process.
- Which types of cases do best with criminal mediation?
- Are there any types of cases that you believe should not be encouraged to go through criminal mediation?
- Do you think criminal mediation has reduced the case backlog of your county?
- If there is a victim involved in a case, typically how satisfied are they with the outcome of the case?

Court Clerks:

- Approximately how many trials for criminal cases has your county held in the past year?
- Approximately how many criminal cases in your county have opted to enter the criminal mediation process in the past year?
- Approximately how many criminal cases in your county have opted to enter the felony settlement process in the past year?
- If the following information is available, for the cases that went to criminal mediation:
 - Approximately how many of these cases were settled?
 - Approximately how many of these cases settled some issues?
 - Approximately how many of these cases did not settle?
- Do you think criminal mediation has reduced the case backlog of your county?

Defense Attorneys/Public Defenders:⁶

- What type of cases have you had to go through criminal mediation?
- What impact has mediation had on case resolution rates and expedience?
- How satisfied is your client with the outcome typically?
- Which types of cases do best with criminal mediation?
- Are there any types of cases that you believe should not be encouraged to go through criminal mediation?
- Do you think criminal mediation has reduced the case backlog of your county?

9 REFERENCES

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² *Restorative Justice*, <https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html>

³ *Felony Settlement Conferences*, <https://www.courts.nh.gov/resources/mediation/superior-court-adr/felony-settlement-conferences>

⁴ *Criminal Mediation*,

<https://docs.google.com/document/d/1Ca5i2UCG9s61jIBqBATYNLF0hQCjR984XumsQ4jGGfQ/edit?usp=sharing>

⁵ Tina Nadeau, Interviewed October 24, 2022

⁶ *Mediation Questionnaire*, <https://www.surveymonkey.com/r/NHMediation>