RULE 16. PRETRIAL PROCEDURE IN THE SUPERIOR COURT

(a) Case Management.

(1) Standard Scheduling Order. Unless otherwise ordered by the court, after the filing of the answer in any civil action in the Superior Court other than proceedings pursuant to Rule 80, 80B or 80C, the court shall enter a standard scheduling order setting deadlines for a conference of counsel concerning discovery, the joinder of additional parties, the exchange of expert witness designations and reports, the scheduling and completion of an alternative dispute resolution conference when required by Rule 16B, the completion of discovery, the filing of motions, and the placement of the action on the trial list. The standard scheduling order shall not be modified except in accordance with Rule 16(a)(2) or on motion for good cause shown. The joinder of additional parties after the standard scheduling order has issued shall not require a modification of the scheduling order except on motion for good cause shown.

(2) Modified Scheduling Order. On motion by a party filed within 30 days of the entry of the standard scheduling order, or at any time on the court's own initiative, the standard scheduling order may be modified or supplemented to address the requirements of a case not addressed by the standard scheduling order. The court, after conferring with the parties and considering the nature of the case, may in the modified or specialized scheduling order establish deadlines, schedules, and other orders for the efficient preparation of the case for trial. Once entered, the modified scheduling order shall not be further modified except for good cause shown.

(b) Pretrial Order and Trial Management Conference. Unless the court has ordered otherwise when the action is placed on the trial list, the court shall enter a pretrial order setting deadlines for final pretrial filings and settlement discussions. The pretrial order shall be issued not later than 30 days prior to the commencement of the trial session and shall not be modified except on motion for good cause shown. On motion of a party or on its own motion, the court may defer the pretrial order and order the parties to file pretrial memoranda, briefs or such other filings as the court may direct. The court may conduct a trial management conference. Unless excused for good cause, each party shall be represented at the trial management conference by the attorney who is to conduct the trial and who shall be prepared to represent the party’s position on settlement and on all matters involved in the conduct of the trial. At the trial management conference, the parties shall be prepared and authorized to discuss settlement in good faith. The

court may conduct a settlement conference and may direct the parties, their insurers, and their authorized representatives to appear at the settlement conference and to participate in good faith.

(c) Reserved.

(d) Sanctions. If a party fails to comply with the requirements of this rule or any order made hereunder, the court may impose upon the party or the party's attorney, or both, such sanctions as the circumstances warrant, which may include the dismissal of the action or any part thereof with or without prejudice, the default of a party, the exclusion of evidence at the trial, and the imposition of costs including attorney fees and travel. The court may expressly order that the costs of sanctions be borne by counsel and not paid by counsel's client.

Advisory Committee Note
July 2008

Rule 16 is amended with corresponding amendments to Rules 26, 33, 34 and 37 to address the need for specific treatment of the discovery of electronically stored information. These amendments are taken largely from the 2006 amendments of the Federal Rules of Civil Procedure, which comprehensively address the discovery of electronically stored information. Guidance in the interpretation of the Maine rules may be obtained from the federal amendments, their Advisory Committee's Notes, and cases applying the federal rules. "Electronically stored information" is intended to have the same broad meaning found in Rule 34 (a), which permits discovery of electronically stored information regardless of the medium in which the information is stored or the method by which it is retrieved. Given the amount of information that exists only in electronic form, the discovery rules need to address the preservation and production of this information.

The fact that Rule 16 encourages the parties to address electronic information if a discovery conference is requested and that the discovery rules provide for the production of such information does not suggest that discovery of electronically stored information is appropriate in every case. As in every case, the parties are expected to engage in discovery in a reasonable manner. The court has broad powers at under Rules 26 and 37 to regulate discovery.

Rule 16(a)(1) is amended to require a scheduling order to include "a conference with counsel concerning discovery" early in the case. The form

scheduling order recommended by the Advisory Committee requires a conference to be held "if requested by any party." The purpose of the conference with counsel concerning discovery is twofold. First, it is desirable for a counsel to discuss their plans for discovery early in the case. Frequently, such discussions can lead to narrowing the scope of discovery and setting the stage for more efficient use of resources in preparing the case. Second, cases now more frequently involve the production of electronically stored information. In those cases in which the discovery of electronically stored information is contemplated, it is important for counsel to discuss early in the case preservation of that information, which might otherwise be altered or deleted in the ordinary course of business, and to discuss the form in which such information can be preserved and produced. The intent of the rule is that this discussion take place early in the case to ensure that discovery proceeds efficiently and to require the parties to document an agreement concerning the preservation and production of information in order to prevent disputes later in the case.

The form scheduling order should be amended in part as follows:

SCHEDULING ORDER

Pursuant to M.R.Civ.P. 16(a), the court orders as follows:

1. Discovery Conference. If requested by any party, a conference of counsel shall be held to discuss a plan for discovery, including in appropriate cases a plan for the production and preservation of electronically stored information. Agreements by the parties, including an agreement that no such provisions need be made, shall not be filed with the court but shall be documented by written communication to all counsel. In the absence of agreement, disputes shall be resolved under Rule 26 (g).

[renumber remaining paragraphs accordingly]

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The draft scheduling order amendment submitted by the Advisory Committee with the amendment to Rule 16(a)(1) contains a new paragraph 1 to require a discovery conference "if requested by any party." The purpose of the conference is to encourage counsel "to discuss a plan for discovery, including in appropriate cases a plan for the production and preservation of electronically stored information." The parties may decide not to have such a conference. If the

conference is requested and held, however, the parties may make agreements as to discovery generally and electronically stored information specifically or, alternatively, they may agree that no provisions need be made. In either case, the parties must document the agreements they reach in a written communication. That communication "shall not be filed with the court," but it must be in the form in which it can be presented to the court in the event that there is a dispute later in the case. The provision for a discovery conference is motivated by two considerations. First, the scheduling order encourages the parties to address the issue of discovery, including electronically stored information where appropriate, and to document what they have decided to do. It obviously would be simple to require such a conference, but the Advisory Committee believes that parties should be free to decide for themselves whether a conference need be held. Second, if the parties do address these issues and reach some agreement on how the issues are to be handled, it is the objective of this process to reduce the likelihood of disputes later in the case, including claims of spoliation of evidence. For example, if the parties agree that a particular type of information should be produced or preserved or agree that no such information need be preserved, those agreements as documented in the written communication required by the order should enable the court to address a spoliation claim in a more focused way than if no agreements were reached. In other jurisdictions, spoliation claims, particularly as to electronic information, have resulted in substantial sanctions. Maine lawyers now have the tools to reduce that exposure. Similarly, the conference is a good opportunity for the parties to address whether electronically stored information is "reasonably accessible" within the meaning of Rule 26(b)(6).

Since the scheduling order is entered shortly after the answer is filed, the defendant may not have all of the information required to enter into definitive agreements on some of the discovery issues. In that case, the parties may agree -- and document their agreement -- to address these issues at a future time. If the parties are unable to agree on an issue during the discovery conference, the dispute "shall be resolved under Rule 26 (g)," as the proposed scheduling order requires.

Since the discovery schedule is relatively short, in cases in which a large volume of electronically stored information is produced, parties may find out later that information that is privileged or subject to the work product qualified immunity has been inadvertently produced. Proposed Rule 26(b)(5)(B) specifically addresses this issue and prescribes the procedure for handling the information once the claim of privilege is raised. In this context, and under amended Rule 26(b)(5)(B), the term "privilege" is intended to mean confidential

information protected from discovery on any ground, whether by statutory provision, privilege created by law or rule, or otherwise.

Advisory Committee Note
April 2, 2007

This amendment is designed to provide parties and the court with a choice for differentiated case management. Once the parties have appeared, the Superior Court enters a form scheduling order that sets deadlines for the case. The amendment to Rule 16(a) establishes a subdivision (a)(1), which is directed to the form scheduling order, now called the "standard" scheduling order in the amendment. A "standard" scheduling order will issue unless, in a few cases, the court has previously issued a specialized scheduling order governing the particular proceeding. The deadlines in the "standard" scheduling order may not be modified under the rule unless "good cause" can be shown. Although the standard scheduling order should govern the great majority of cases, there are cases in which the form order may not serve the requirements of an individual case.

The adoption of Rule 16(a)(2) permits the court, on its own or on a motion, filed within 30 days of the scheduling order, to modify the order without having to meet the exacting "good cause" standard. A Rule 16(a)(2) modification of the scheduling order should be the exception, rather than the routine. The new subdivision (a)(2) purposely does not specify the kinds of cases in which a departure from the form order is warranted, but obvious examples include complex or multi-jurisdictional cases, cases with many parties and counsel, and extremely simple cases that do not require the full standard treatment. A motion for modification to the standard scheduling order should specify why the standard order does not meet the requirements of the case and should proffer an alternative order, preferably with the agreement of all counsel. The court is intended to have broad discretion to decide whether to depart from the standard order and, if so, on the schedules and orders made to address the particular requirements of the case.

Advisory Committee's Notes
July 1, 2001

The amendment makes changes in Rule 16(b) to recognize present practice. The scheduling order issued under Rule 16(a) now controls subsequent pretrial proceedings, so the provisions presently in Rule 16(c) are superfluous. The amendments to Rule 16(b) reflect the current more flexible practices. The amendments also address settlement and permits the court to compel the

attendance of parties including insurers. Although many judges believe that the court now has the inherent power to compel such attendance, the grant of express authority dispels any possible argument that under the present rule the court may not have the power to compel the attendance of an insurer who is not a party. The sanctions provisions presently in place are sufficient to cover the settlement conference.

Advisory Committee's Notes
February 8, 2001

Subsection 1 amends Rule 16(a) to add an ADR scheduling component to the scheduling order which the court now issues under Rule 16(a). The scheduling order specifies the time within which the ADR conference has to be scheduled and completed. As with other aspects of the 16(a) scheduling order, the dates for scheduling and completion of the ADR conference may be adjusted by the court for good cause shown. The scheduling order would reference Rule 16B for implementation procedures.

Advisory Committee's Notes
May 1, 1999

Rule 16 has been completely replaced in a continuing effort to improve pretrial procedure. The objective of the new rule is to implement reforms to the discovery process and to bring the rule itself into line with a simplified pretrial process. The new pretrial procedure under Rule 16 applies only to the Superior Court and does not apply to proceedings filed under Rules 80, 80B or 80C.

In 1980, a new Rule 16 was adopted to strengthen the pretrial memorandum/conference process, which was nearly the exclusive means by which cases were made ready for trial. In 1988, however, the court adopted a new procedure by which cases were "tracked" either to the expedited pretrial list or the regular pretrial list. Conforming amendments were made to Rule 16 to recognize that cases on the expedited pretrial list would be called for trial without formal pretrial memoranda or conferences. Assignment to the regular pretrial list required parties to file detailed pretrial memoranda and to address at a pretrial conference the many issues required by the 1980 amendment. In all cases, amendments to Rule 16 also required the parties to confer within 15 days of the service of the answer in order to prepare and file a pretrial scheduling statement that specified whether the case would be tried to a jury, the time required for trial and discovery, and the possibility of settlement.

As the practice developed, however, the overwhelming majority of cases were placed on the expedited pretrial list, rendering the detailed pretrial memorandum/conference requirements inapplicable. The process of preparing the pretrial scheduling statement became little more than a pro forma filling out of a form, frequently performed without personal contact among counsel. The process also imposed a burden on the clerk to initiate and police the filing of the statement. Most importantly, the process did not deliver the intended substantive exchange between the parties at an early point in the case.

The present amendments to Rule 16 recognize that for the large majority of cases, it is most efficient for the court to send out a scheduling order automatically, setting deadlines for joinder of parties and amendment of pleadings, expert witness designations, discovery deadlines, jury demand, trial time estimates, exchange of witness lists, and deadlines for filing motions. The scheduling order also requires an automatic disclosure of expert witness information required by M.R. Civ. P. 26(b)(4)(A)(i) by the plaintiff with a corresponding disclosure by the defendant thereafter. A similar process has been used with success in the federal court for the District of Maine.

The scheduling order, set forth below, is automatically entered by the court when issue is joined in the case. It is contemplated that all actions will be governed by the form scheduling order unless a party moves to amend or alter the order within 10 days of its issuance, a deadline set by the order itself. Departure from the schedule should be allowed only where it is shown that the circumstances of the case make imposition of the order's deadlines unfair or impractical. In the absence of a motion, the order sets the discovery deadline, which triggers important obligations for the parties. Not later than 15 days after the discovery deadline, the parties must exchange a witness list and must have conferred and filed with the court an estimated number of days required for the trial. Within 60 days of the discovery deadline, all motions except motions in limine must be filed.

When the case is set for trial, the court will issue a form pretrial order, set forth below, specifying the date for trial and deadlines for pretrial preparation. The order is issued once, although the case may appear on more than one trial list if not reached. The parties are required by the order to exchange settlement positions and lists of exhibits and witnesses. In advance of the trial date, the parties are also required to edit depositions to be offered at trial. One day prior to the commencement of the trial session, each party is required by the order to submit a trial brief consisting of a short statement of legal and factual issues. The trial brief

should have attached a witness and exhibit list and any requested voir dire, jury instructions or special verdict form. It is the intent of the rule and the orders implementing the rule that pretrial preparation be conducted in good faith and on schedule.

The automatic process contemplated by Rule 16(a) and (b), implemented by the scheduling and pretrial orders, may not be appropriate for cases complicated by the issues, the number of parties or the need for special management. In these cases, on motion of a party or on the court own motion, the court may order the parties to file pretrial memoranda and to attend a pretrial conference under Rule 16(c). The intent of the new provisions for the pretrial memorandum and pretrial conference is to simplify the process and to give the court maximum flexibility in the management of the preparation for trial. The language of Rule 16(c) is taken from Local Rule 16.4(b) of the United States District Court for the District of Maine. The purpose of the rule is to require the parties to file brief memoranda flushing out the issues and identifying witnesses and exhibits, to hold a conference among counsel and the court, and to provide for the entry of a customized pretrial order that will "control the subsequent course of the action." Since pretrial memoranda and a conference will be required only in those cases requiring special management, the intent of the procedure is to provide a means for case specific simplification of the issues and management of the trial.

As in the former Rule 16, Rule 16(d) expressly empowers the court to impose a variety of sanctions upon a party or upon counsel alone for failure to comply with the requirements of the rule or with the orders issued on authority of the rule. The purpose is to provide the court with the tools to require adherence to its processes and to encourage the court to use those tools where appropriate. As the pretrial order specifically states, agreements among counsel to waive requirements or to extend deadlines will not be recognized. The requirements of Rule 16 are neither onerous nor pointless.

Advisory Committee's Note
February 1, 1983

Rule 16(c)(1) is amended to delete the requirement for a pretrial conference under Rule 16 in divorce actions unless one of the parties has requested a conference in his pretrial memorandum. Past experience has indicated that in the vast majority of divorce actions, a pre-trial conference has not served the functions set forth in Rule 16 for other actions. A conference will not be held therefore

unless a specific request is made by a party. Absent such a request by either party the clerk will place the action on the trial list.

Advisory Committee's Note
September 1, 1980

I. General.

The abrogation of the existing Rule 16 and its replacement with a new Rule relating to pretrial procedure is the most significant modification of the Maine Rules of Civil Procedure in recent years. It results from a two-year study of pretrial procedure undertaken by the Advisory Committee at the direct mandate of the Supreme Judicial Court. The new Rule 16 is intended to remedy substantial defects in the existing scheme of pretrial procedure and to give more explicit, rigorous and detailed directions for pretrial procedure for the benefit of both the Bench and the Bar.

The new procedure represents a response to a perceived need for greater structure to and stricter enforcement of pre-trial processes and requirements. Of significance is the issuance by the Supreme Judicial Court of an Administrative Order to the Bench and the Regional Administrators and Clerks detailing the expectations of the Supreme Judicial Court relative to compliance with the requirements of the new Rule and urging the Bench to achieve "vigorous enforcement" after "a brief period of adjustment." The purposes of this reform of pretrial procedure are to reduce delay and costs to litigants; to insure a just result of litigation; to meet some genuine concerns of the litigating bar; and to increase the efficient utilization of judicial resources. The Supreme Judicial Court sets forth in the Administrative Order, its expectations in respect to future conduct of pretrial procedures. It states:

> First, we expect acceptance by justices and by counsel of the principle that pretrial procedures can be beneficial to all concerned by focusing productively on the genuine issues and expediting trials where necessary, settlements where possible.
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> Second, we expect that, after a brief period of adjustment, the requirements of Rule 16 will be vigorously as well as fairly enforced, by sanctions whenever appropriate.

Third, we expect the pretrial justice to address the often complex issues at pretrial conference and to produce a useful pretrial order in every case.

Fourth, we expect trial counsel to fulfill his professional responsibility, in simple cases, not to burden our limited judicial resources with cumbersome procedures and, in complex cases, to assist the pretrial justice in the preparation of the necessary pretrial order.

Fifth, we except the decisions by the administrative staff, and the Regional Presiding Justices to adhere to the directives and the purposes expressed herein.

Sixth, we expect that the Regional Presiding Justices will institute the following procedures and see that they are adhered to:

A. The first six items on each pretrial memo will be examined by the civil calendar clerk to assist in the performance of scheduling duties.

B. When directed by the Regional Presiding Justice, pretrial conferences will be scheduled as conveniently as possible (not less than one-half hour apart) and not less than three weeks in advance of the conference.

C. Time will be scheduled approximately one week prior to pretrial conference for the pretrial justice to examine the files, determine whether pre-trial conference is in order, or may be dispensed with upon the entry of a pretrial order under Rule 16(b).

D. When appropriate in the opinion of the pre-trial justice, he shall designate cases to be specially assigned to a date certain. He shall not determine the date, which shall be done by the clerk and/or the Regional Court Administrator.

E. When all parties agree, and sufficient justification is presented to the Regional Presiding Justice, the Regional

Presiding Justice may recommend the special assignment of an individual justice by the Chief Justice.

F. When requested by the pretrial justice, the clerk shall type a pretrial order on the basis of the Justice's notes. When the justice has directed counsel to prepare a pretrial order, the clerk shall see that the order has been entered before the case is placed on the trial calendar.

G. Every pretrial order shall address the matters enumerated in Rule 16(c)(2).

H. Attached hereto is a recommended form entitled "Report of Pretrial Conference and Order" for use by justices and counsel.

I. Every pretrial order when signed by the justice shall be entered on the docket and copies thereof forwarded to all counsel.

J. When necessary, counsel may obtain an amendment of a pretrial order on motion which may be heard by a justice other than the pretrial justice if he is not available.

K. No case shall be moved forward to the trial calendar without a pretrial order that complies with Rule 16.

Clearly the Court intends this revision of the Rule to result in meaningful and effective management of cases at the pretrial stage. It is to be expected that the full resources of the Bench and the Administrative Office will be brought to bear to secure very strict compliance with the requirements of the Rule. Vigorous enforcement by use of appropriate sanctions is to be anticipated.

II. Comments on the Rule.

1. *Filing of Pretrial Memoranda*. All parties are required to file a pretrial memorandum addressing the matters set forth in Paragraph (a)(3) of the Rule. No such memorandum. may be filed until the last responsive pleading has been served or the time therefore has elapsed without its filing. The memoranda *must* be filed in every case unless the party is specifically excused by the court

from such filing. It is anticipated that such excuses will be rarely ordered. A party excused from filing a pretrial memorandum *must* file a demand for jury trial under Rule 38 if he wishes to preserve his right to jury trial.

No case may be scheduled for trial until the memoranda have been filed, unless otherwise ordered by the court. Counsel should be at pains to notice that sanctions, including dismissal of the action and entry of default, may be imposed for failure to file pretrial memorandum in a timely manner.

2. *Pretrial List and Advancement of Cases to Trial*. All cases are to be placed upon the Pretrial List on filing of a pretrial memorandum. Cases on the list will be scheduled for pretrial conference in accordance with Paragraph (c)(1) of the Rule. The pendency of discovery in the case will not delay assignment for pretrial conference.

A case may be placed upon the Trial List *only* if a Pretrial Conference is held under Paragraph (c) of the Rule or if the court dispenses with the need for such conference under Paragraph (b) of the Rule. It is expected that this requirement will result in Pretrial Conferences being held in all but very simple cases and in cases in which counsel have met and filed, by agreement, a satisfactory proposed Pretrial Order for the consideration of the pretrial justice.

3. *Contents of Pretrial Memoranda.* Paragraphs (a)(3) and (a)(4) of the Rule set forth in detail the subjects to be addressed by the respective parties in their pretrial memoranda. Some subjects are newly added to the Rule and are of great importance. It is imperative that all the listed subjects be addressed by each party in a meaningful way unless a party adopts the statement of another party on the subject in question. Any party desiring a pretrial conference must request it in the pretrial memorandum. It should he noted that even if all parties seek to dispense with the pretrial conference, the court may, nevertheless, order that it be held. Counsel should attempt to be candid and accurate in estimating the time required for pretrial conference and for trial.

Paragraph (a)(3)(F) requires all pending motions to be identified in the memorandum. This provision is intended to aid the court in performing its duty under Paragraph (c)(2)(A) in disposing all pending motions. The need for strict compliance is obvious.

Paragraph (a)(3)(G) requires a statement of the nature of the case. This should be as concise as possible but should be detailed enough to give the court an

understanding of the factual circumstances in which the legal issues of the case are raised. "Boiler plate" or "pro-forma" descriptions of the case, as have often been used in the past, will no longer be acceptable.

Paragraph (a)(3)(H) requires a "precise statement" of the legal issues. General or conclusory statements of the issues will not be acceptable. Failure to list a legal issue in the pretrial memorandum will probably result in a waiver of that issue at trial unless it is preserved in the pretrial order. It is expected that the court will enforce such waivers unless counsel has a valid excuse for failure to identify an issue in the memorandum or at pretrial conference. Paragraph (a)(3)(I) requires identification of unusual legal issues and sanctions may be imposed if the trial process is delayed or unduly complicated where such an issue has not been identified by counsel in the pretrial process. In such case the court may treat the issue as waived.

Paragraph (a)(3)(J) requires that the court be fully apprised of the status of pretrial discovery in the memoranda. Counsel are to provide candid and factual information to the court, in the memoranda on this point. The court at pretrial conference will consider this matter and establish a deadline for completion of further discovery. Hence, it is in the interest of counsel to state clearly and at length those further discovery needs he intends to satisfy.

Paragraph (a)(3)(M) requires provision of a list of exhibits to be offered at trial. Failure to list exhibits in the memoranda may well result in exclusion of the omitted exhibits at trial, for that reason. Counsel are to treat this requirement most seriously. This places on counsel the need and obligation for detailed trial preparation in advance of the filing of the memoranda if this risk is to be avoided.

Paragraph (a)(3)(P) requires a detailed itemization of all damages claimed. The emphasis here is on the word "detailed." This provision is intended to require counsel to break down his party's claim for damages into specific, legally cognizable categories of damage and to prove a specific and complete listing and quantification of damages claimed under each such category of damage.

Paragraph (a)(3)(S) requires a concise description of the settlement posture of the case. The contents of the pretrial memoranda are not to include reference to specific figures involved in prior discussions or negotiations. Counsel is, however, to indicate in this section of the pretrial memorandum. whether or not settlement discussions have been had and, in a general manner, to describe for the court the present posture of those negotiations. It is important that this information be

provided in as much detail and with as much accuracy as possible as the court now has, under this Rule, a more significant role with respect to settlement discussions than has previously been the case. See: Paragraph (c)(5) of the Rule.

The concluding sentence of Paragraph (a)(3) provides that counsel may submit with the pretrial memorandum a proposed Pretrial Order. It is anticipated that under the new pre-trial procedure, counsel will be required, with greater frequency than in the past, to prepare the Pretrial Order for approval by the court as the result of discussions had at pretrial conference. This provision of the rule is intended to facilitate counsel's cooperation in the preparation of the Pretrial Order by permitting it to be done in advance of the pretrial conference so that the actual text of the proposed Pretrial Order may be available at the conference for discussion with the court. It is suggested that really effective pretrial procedure, especially in serious and complex cases, would dictate that counsel meet in advance of the filing of pretrial memoranda and attempt to agree upon a proposed Pretrial Order for submission with the memoranda. Where this can be done it will greatly facilitate the subsequent preparation of the Order as a result of discussions had at the pretrial conference.

4. *Actions Set for Trial Without Pretrial Conference*. Under the new pretrial procedure the pretrial justice is to be provided in advance of the actual conference with the time required to review the pretrial memoranda in each case and other pertinent documents in the court's file. Subdivision (b) of the Rule provides an opportunity for the court and counsel to dispense with the pretrial conference in an appropriate situation. If counsel believes that a conference is not required, this may be indicated in the pretrial memorandum under Paragraph (a)(3)(A) of the Rule. In such event, counsel *must* file with the pretrial memoranda a proposed joint Pre-trial Order for review by the court. The preparation of the proposed joint Pretrial Order will require the agreement of counsel. Its drafting will, in almost all cases, require very detailed discussions about the case among counsel. The Order must respond to all the subjects listed in Paragraph (c)(2) of the Rule and should follow the format of the "Report of Pretrial Conference and Order" recommended by the Supreme Judicial Court as an appendix to its Administrative Order.

If such submission is made, it is for the pretrial justice to determine, after review of the Pretrial Memoranda and the proposed joint Pretrial Order, if Pretrial Conference may be dispensed with. If the justice finds that the proposed Pretrial Order is unacceptable, he will order that a Pretrial Conference be held. If the justice finds that the proposed Pretrial Order adequately covers the subjects listed

in Paragraph (c)(2) of the Rule *and that there is no further action necessary to prepare the case for trial*, he may sign the proposed joint Pretrial Order and cause it to be docketed. The case will then go on the appropriate trial list in accordance with his instructions in the Pretrial Order.

Counsel should be aware that the mechanism provided by subdivision (b) of the Rule is not intended to be a source of easy escape from the requirement of a meaningful pretrial conference. In order for the pretrial conference to be dispensed with, the justice must be completely satisified that all the requirements of Rule 16 have been fully complied with and that there remains nothing further to be done in order to place the case in a trial posture in compliance with the Rules. This is not an "automatic" or "routine" procedure. Counsel can expect that the justice will make a discrete judgment as to whether the case is fully prepared for trial. The burden of satisfying the court on this particular rests fully *with counsel*. Hence, full preparation of the case, detailed compliance with the Rule's requirements and complete cooperation among counsel will be required if counsel expects to achieve the goal of having the pretrial conference dispensed with by the pretrial justice.

5. *Scheduling of Pretrial Conference.* One purpose of the revision accomplished by this Rule is to expedite the assignment of cases for pretrial conference and trial as soon as any party files pretrial memorandum. On filing of such a memorandum by any party, other parties are required to file a responsive pretrial memorandum within twenty days. Under Section. (c)(1) the clerk is to assign the case at the earliest possible opportunity after the expiration of a thirty day period following the period following the first filing of a pretrial memorandum.

6. *Matters to Be Considered at Pretrial Conference*. Section (c)(2) of the Rule sets forth a rather detailed listing of seventeen subject matters to be discussed at the pretrial conference. It is imperative that counsel come to every pretrial conference prepared to put forth his party's position with respect to each of these subject matters. The court is, under the Rule, entitled to expect counsel to be fully prepared to discuss all of these subjects at pretrial conference in a definitive and meaningful manner. Failure to be prepared for such discussions may result in the imposition of sanctions. Finally, at the conclusion of the pretrial conference, the court may direct counsel to prepare and submit to the court for approval a proposed Pretrial Order. It is anticipated that the preparation of a proposed Pretrial Order will, in most cases, require the full collaboration of all counsel in the case, in the interest of promptly submitting an appropriate proposed Pretrial Order which is satisfactory to the court. The filing of the Pretrial Order is to be entered on the

docket. The Supreme Judicial Court's recommended form for the "Report of Pretrial Conference and Order" specifically directs the appropriate docket entry to be made. Such a direction, appropriate to circumstances of the case, should be set forth in every Pretrial Order.

7. *Effect of Pretrial Order*. One of the most significant changes in pretrial procedure under the revised Rule is that accomplished by Section (c)(3) which provides that the Pretrial Order, once entered, ". . . [C]ontrols the subsequent course of the action unless modified at the trial to prevent manifest injustice." It is intended that this provision will be interpreted by the court to make the Pretrial Order the definitive document in determining the future course of the case at trial, unless modified for good cause. *Counsel should understand that the Pretrial Order will supersede the pleadings for purposes of definition of issues and recording the contentions of the respective parties*. Counsel should appreciate that failure to include any significant matter in the Pretrial Order may well result in the waiver at trial of significant issues. It is important that counsel review the Pretrial Order when it is entered by the court since it becomes final unless counsel files objections to the contents of the Order within ten days of the date on which the Pretrial Order is mailed to counsel.

8. *Attendance of Trial Counsel at Pretrial Conference*. Section (c)(4) of the Rule is intended to secure the attendance at pretrial conference of the counsel who will actually try the case, wherever that is reasonably possible. Counsel are required to be fully prepared for purposes of pretrial conference to discuss all aspects of. the case. Where there is good reason why trial counsel cannot be present at pretrial conference, application may be submitted to the court for substitute counsel to appear at pretrial conference. The application must, however, contain an *express* representation that such substitute counsel will be thoroughly familiar with the rule and the case to be pretried and that he will be fully authorized to act at pretrial conference in all respects. It is anticipated that the court will no longer tolerate the situation where substitute counsel appears at pretrial conference without sufficient knowledge of the case and without authorization to act at pretrial conference.

Under this section of the rule the court is entitled to presume that the counsel who appears at pretrial conference will be present as trial counsel at the time of the trial. If, in the period following pretrial conference, pretrial counsel discovers that it is necessary for other counsel to act as trial counsel, that fact should be brought promptly to the attention of the court and the approval of the court obtained.

9. *Settlement*. Section (c)(4) requires that counsel come to pretrial conference fully authorized with respect to settlement. Section (c)(5) imposes upon the court the duty to explore settlement negotiations to the date of the conference between the parties and to attempt to assist the parties in reaching a fair disposition of the case by settlement. Counsel is required, on the other hand, to be in a position to make a representation at pretrial conference that he has made a recommendation to his client in respect to settlement and that the client has acted on such recommendation.

This requirement makes it mandatory that counsel evaluate cases prior to attendance at pretrial conference. Delaying the evaluation process until the eve of trial is no longer possible. Counsel can expect that if it is not in a position to make the representation required by this section of the rule, sanctions will be imposed, absent good cause for such failure. It is the intention of this provision to assure that, in most cases, meaningful and substantial discussions on the subject of settlement of the case take place at pretrial conference and immediately thereafter. Counsel, under the rule, has the obligation to discuss settlement in good faith and in a constructive manner. This requirement is not to be taken lightly.

10. *Sanctions*. Subdivision (d) is intended to make explicit the authority of the pretrial justice to impose sanctions upon any party or attorney where the requirements of this Rule have not been adequately observed. The content of the Administrative Order in respect to pretrial procedures makes it clear that the Supreme Judicial Court is prepared to stand behind the actions of the pretrial justice in imposing such sanctions where such action is appropriate. Counsel should anticipate that sanctions will be used liberally "after a brief period of adjustment" to bring about full and meaningful compliance with the requirements of this Rule in respect to pretrial procedures. Of special significance is that provision of subdivision (d) which gives the court discretionary authority to impose sanctions directly upon counsel and to prohibit the counsel from passing such sanctions on to the client. The purpose of this provision is to promote the responsibility of counsel with respect to pretrial requirements by requiring counsel to bear the burden of an appropriate sanction where failure to comply with pretrial requirements is caused solely by the conduct of counsel.

It is to be anticipated that, with the passage of time, the court will develop a full panoply of sanctions appropriate to discourage particular types of noncompliance with this Rule. Counsel should bear in mind that sanctions, as contemplated by the rule do not consist entirely of imposition of monetary sanctions. The court may in appropriate circumstances, impose sanctions which

substantially affect the interests and positions of noncomplying parties in the specific litigation in question. As previously pointed out, these include the enforcement of waivers of important matters at trial, the exclusion of evidence, the entry of judgment by default and the involuntary dismissal of the action. Hence, failure to comply with pretrial requirements has the potential to substantially affect the rights of litigants in a specific case.

Advisory Committee's Note
February 2, 1976

Rule 16 is amended to require the pre-trial memoranda to state the intention of a party to offer a learned treatise as substantive evidence. The amendment was recommended by the Evidence Advisory Committee. Evidence Rule 803 (18) provides as an exception to the hearsay rule for the use of statements of learned treatises to the extent they are called to the attention of an expert witness upon cross-examination. If a treatise is established as authoritative, it may then be admitted as substantive evidence. For the purpose of preventing the expert from being unfairly surprised, this amendment calls for the identification of the treatise and the part thereof to be offered and specification of the matter intended to be proved.

Advisory Committee's Note
May 15, 1974

These amendments implement the simultaneous amendment of Rule 38, requiring that a party wishing trial by jury make demand therefor in his pre-trial memorandum. See Advisory Committee's Notes to that rule and to Rule 39. A warning of the necessity of filing a jury demand even when a pre-trial memorandum is excused is specifically added to subdivision (a)(1). When the party is filing a pre-trial memorandum, the check-list of subdivision (a)(3)(xii) reminds him of the necessity of making a jury demand.

Advisory Committee's Note
September 1, 1973

The substantial amendments of Rule 16, while preserving the substance of the pre-trial memoranda and the pre-trial conference make extensive changes in the scheduling and other mechanics of pre-trial procedure. The shortcomings of the existing Rule 16 and pre-trial practice under it, which have become increasingly apparent, were emphasized in an article written by Justice Thomas E. Delahanty in

the January 1973, issue of the *Maine Bar Bulletin*. Suggesting that "it may now be time to reappraise pre-trial practice," he made specific proposals for reform.

Rule 16 as originally promulgated in 1959 made the holding of a pre-trial conference entirely discretionary with the court and in brief terms specified the matters to be considered at the pre-trial conference and the nature of the pre-trial order resulting therefrom, *if a pre-trial conference was held*. After a minor amendment in 1962 there was a total revision of the rule effective December 31, 1967. *See* "History of Rule", Field, McKusick & Wroth, 1 *Maine Civil Practice* 312-13 (1970). Enough experience has accumulated in the intervening five and a half years to call for substantial revision.

There is much that remains unchanged in revised Rule 16. The contents of pre-trial memoranda previously set forth in Rule 16(a) are substantially unchanged in the revised Rule 16(a)(3), (4). The itemization of the matters to be considered at the pre-trial conference is in revised Rule 16(c)(2) preserved in the same form in which it was originally adapted in 1959 from Federal Rule 16. Also the requirements for representation by counsel and for the contents of the pre-trial order, as well as the provision of sanctions, are retained substantially unchanged.

The principal changes worked in Rule 16 by this revision are the following:

1. The time for filing pre-trial memoranda and the scheduling of pre-trial conferences, which were previously tied in with terms of court, no longer will have any direct relation-ship to court terms. By virtue of a 1969 amendment of 4 M.R.S.A. § 110 the times for holding civil terms of the Superior Court in each county are established by the Chief Justice of the Supreme Judicial Court. It has been demonstrated in practice that to tie the timing of pre-trial procedure to the time of holding court sessions produces an undesirable inflexibility.

It is still left to the parties to initiate the pre-trial procedure. One or other of them presumably will have incentive to do so, since as declared in Rule 16(a)(1) the filing of the pre-trial memoranda is the only way (other than by court order) to cause an action to be moved forward to be in order for trial. The time period leading up to the pre-trial conference runs from the filing of a pre-trial memorandum by either party. Within 14 days after the first party files a pre-trial memorandum the opposing party must file a responding pre-trial memorandum. Under Rule 16(c)(1) the clerk shall under the court's direction schedule the pre-trial conference (whether or not the responding memorandum is filed) as soon as

possible after a period of 21 days following the filing of the first pre-trial memorandum has expired.

2. In revised Rule 16(a)(2), and in a simultaneous amendment of Rule 40(a), simple clear-cut procedures are prescribed for the clerks in all sixteen counties to follow in maintaining a Pre-Trial List and two Trial Lists, one for jury cases and the other for non-jury cases. These lists are maintained under the court's direction in all respects. The clerk will automatically enter upon the Pre-Trial List any action at the time any party files a pre-trial memorandum therein. At the same time the clerk will make a notation on the Pre-Trial List of the date when the first pre-trial memorandum was filed. Thus in every county there will always be available a constantly maintained list from which the Superior Court Justice who schedules pre-trial conferences can readily determine which cases will be in order to be pre-tried on the date when a judge is available to hold pre-trial conferences. In other words, if that date comes more than 21 days after an action went on the Pre-Trial List that action can be scheduled for a pre-trial conference.

3. Although no pre-trial memorandum may be filed (and therefore the pre-trial procedure may not be commenced) until the last responsive pleading has been served or the time therefor has elapsed, the present revision eliminates the following sentence inserted in 1967: "No conference shall be held, except by agreement or unless otherwise ordered, while there are pending any discovery proceedings notice of which has been filed with the clerk." Justice Delahanty reports the mischief produced by the all-too-common practice of not answering interrogatories or pursuing other discovery until the notice of the pre-trial conference stirs counsel into action. *Maine Bar Bulletin*, January, 1973, pp. 25-26. Obviously such delays cannot be eliminated by any rules amendment; only firm action by the judges holding pre-trial conferences can dissuade counsel from using those tactics. However, the elimination of the above-quoted sentence does put the burden of persuasion on any attorney seeking continuance of the pre-trial conference in order to permit additional discovery.

4. References in the 1967 rule to joint pre-trial memoranda have been eliminated. In practice such memoranda are very rare. If the parties still wish to file a joint pre-trial memoranda they clearly may do so and by stipulation they may waive the 21-day waiting period for the pre-trial conference and request a more prompt conference from the court.

5. Complete control of the transfer of cases from the Pre-Trial List to the appropriate Trial List maintained under Rule 40(a) is vested in the Superior Court

Justices. See revised Rule 16(b) and 16(c)(4). Although the clerk automatically puts the case on the Pre-Trial List when a pre-trial memorandum is filed, every step thereafter is taken only at the specific direction of a judge. That includes the scheduling of pre-trial conferences on the basis of the information shown on the Pre-Trial List, and the transfer of cases from the Pre-Trial List to either the Jury or the Nonjury Trial List.

6. Present Rule 16(d) provides for "excepted actions" in which a pre-trial conference would not be required. Such actions included those where both parties waived pre-trial, as well as a number of actions in which the pre-trial procedure was deemed unnecessary. The "excepted action" provision has been eliminated, Pre-trial memoranda will be required in all cases (see revised Rule 16(a)(1)) and, except in those cases where the court concludes that the pre-trial memoranda will suffice for the efficient conduct of the trial, a pre-trial conference will also be held in all cases. Of course while the rule no longer expressly permits the waiver of pre-trial conference by the parties, it will be open to them to move the court to dispense with the pre-trial conference on the basis of the pre-trial memoranda. This substantial revision of Rule 16 is made in recognition of the great benefits that result from pre-trial memoranda and conferences wherever both court and counsel work at realizing those benefits.

Advisory Committee's Note
October 1, 1970

In a continuing attempt to make pre-trial conferences an effective device, two amendments are made to Rule 16. First, Rule 16(b) is amended to permit either party to require the holding of a pre-trial conference, even though the court believes that the pre-trial memoranda will suffice for the efficient conduct of the trial and also even though the action is one excepted by Rule 16(d) from. the pretrial requirement.

In the second place, Rule 16(e) is amended to make clear that it is within the power of the court to impose penalties and sanctions upon the attorney of a party who fails to comply with the requirements of the pre-trial rule or any order made thereunder. Although it would appear that the existing rule could have been interpreted to permit the imposition of costs upon the delinquent attorney, the courts have uniformly been reluctant to take action against the attorney, and at the same time have in many cases believed that the party should not suffer because of the delinquency of his attorney.

Advisory Committee's Note
(Dec. 31, 1967)

Rule 16 has been completely revised in order to resolve many of the problems which have arisen with regard to the pre-trial conference since promulgation of the rules in 1959. Although the original rule spoke in the discretionary language of Federal Rule 16, and the draftsmen apparently intended a flexible practice (see Field and McKusick, Maine Civil Practice, Reporter's Note to Rule 16; § 16.1), the justices of the Superior Court in a policy statement dated December 1, 1959, made the pre-trial conference mandatory in virtually every case. Dissatisfaction on the part of both bench and bar in the last two years has resulted in a number of suggestions for improvement from the bar and considerable experimentation by individual justices. In drafting the new rule the Committee has had the benefit of the report of a committee of the Maine State Bar Association presented at the annual meeting in August 1966 (55 Rep.Maine Bar Assn. 115–123 (1966)), and of experience with the various experimental procedures developed by the justices. An earlier draft, substantially similar to the new rule, was approved by the Conference of Superior Court Justices at a meeting on February 11, 1967.

The new rule contains two basic departures from previous practice: (1) Unless the court otherwise orders, any case in which the parties agree to waive pre-trial, or which is one of a list of specified actions, may be set for trial on request of a party without a pre-trial conference; and (2) in any other action, to move the case to trial the parties must file either separate pre-trial memoranda or a joint memorandum, on the basis of which the trial judge may either dispense with a conference or order the parties to appear for a conference. These changes are intended to make the pre-trial conference more effective in what the Committee conceives to be its primary role in Maine practice—simplifying and guiding preparation for trial and trial itself.

Subdivision (a) establishes the basic requirement of the memorandum. A party who wishes to move to trial an action not excepted by waiver or otherwise under subdivision (d) must either file a pre-trial memorandum 21 days prior to the start of the term at which he wishes trial or obtain the agreement of the opposing party to file a joint memorandum 10 days before the term begins. The 21-day period is necessary in the case of a separate memorandum to provide time for the opposing party to file a responsive memorandum, which he must do at least 10 days prior to the start of the term.

The contents of the memorandum are itemized in the rule. The items are in general those which have been required in experiments carried out in the last two years by individual justices. They also include most of the requirements of local Rule 17(b) of the United States District Court for the District of Maine. In filing his responsive memorandum, the opposing party may adopt all or part of the original memorandum, but must set forth in detail any new matter which he presents.

The memoranda have a twofold purpose: (1) They will simplify the conference by insuring preparation in advance and by advising parties and the court of the principal matters to be raised; and (2) they will give the court a basis for determining under subdivision (b) that no purpose would be served by a conference.

Subdivision (b) provides that the court, on reviewing the memoranda or joint memorandum, may dispense with the conference if the memoranda will serve "for the efficient con-duct of the trial." The court has the further discretion to order that the memoranda or joint memorandum shall control the course of the litigation as a pre-trial order under subdivision (c). Presumably, this latter discretion will be exercised only in a case where the memoranda are in accord as to the issues and such other elements of an order on which agreement is necessary. Even where the memoranda do not have the force of an order, however, they should serve informally to assist court and counsel to shape the trial. Several of the Superior Court justices have experimented with the practice of review embodied in subdivision (b) and have found that it could be conducted effectively in the 24 hours prior to the start of the term. In view of the reduced number of cases subject to pre-trial, it should be possible in all counties to adjust the schedule so that the justice who is to hold a trial term may review the memoranda either on the first day of the term or at some time prior thereto.

Under subdivision (c), if the court has not dispensed with pre-trial, it is to order the parties to appear for a conference. As a practical matter, the clerks, after the 10-day deadline for filing has passed, should follow present practice and schedule conferences in all cases where memoranda have been filed. In a case in which the court dispenses with the conference under subdivision (b), the clerk should immediately notify counsel by the most expeditious means that the scheduled conference is cancelled as unnecessary.

The items to be considered at the conference are those contained in present Rule 16 with several provisions added. Provisions of local Federal Rule 17(c), requiring

that, unless excused, trial counsel attend the conference and be prepared on the case and fully authorized with respect to settlement, have been adopted verbatim. The new rule also provides that no conference shall be held while discovery proceedings are pending unless the parties agree or the court so orders. The court's power to order a conference despite the pendency of discovery should prevent abuse of a provision which seems necessary for the most fruitful results of the conference. Finally, the rule permits the court even after the conference to use the memoranda as the basis of its order; otherwise the form and effect of the order are as under present Rule 16.

Subdivision (d) lists the actions excepted from the requirement of a pre-trial memorandum and conference. Collection cases, property damage cases, and condemnation proceedings have been excepted because the issues in such actions are ordinarily of such a routine nature that no formal conference procedure is necessary to guide the course of the trial. A study of the files of the Superior Court for Cumberland County for the period, January 1, 1965, to June 30, 1966, bears out this conclusion. In property damage cases during the period, pre-trial orders were issued in only 34.5% of the cases in which conferences were held, while in collection cases the percentage was only 37%. By contrast, the percentage for personal injury cases was 61.2% and for ordinary contract damage cases, 47%, suggesting the much greater utility of the conference in the latter two types of cases. (The number of condemnation cases during the period was insignificant.) The same study indicates that elimination of these three classes of cases will effect a 25% reduction in the present pre-trial conference load. Nonjury cases have also been excepted on the theory that in the more flexible circumstances of a court trial, the court can arrange whatever preliminary discussions are necessary without the formality of a conference. Eliminating all jury-waived cases would lead to an additional 20% reduction in the pre-trial calendar according to the foregoing survey. Finally, to provide ultimate flexibility, the parties may waive the entire pre-trial procedure by agreement.

It is obvious that in some of the arbitrarily excepted actions there will be issues which should properly he pre-tried. Subdivision (d) provides that the court may order a pre-trial in such an action if "unusual factual or legal issues are involved." Thus, if either party objects to the elimination of pre-trial in an action, or if the court finds that the case is not as simple as the parties have represented, the court has discretionary power to order memoranda and set a conference, modifying the rule's time periods and other requirements as circumstances dictate. This practice should be followed only in an exceptional case, in order not to defeat the basic salutary purpose of subdivision (d).

Subdivision (e), providing sanctions for noncompliance with any provision of the rule or orders made under it, is based on local Rule 17(f) of the United States District Court for the District of Maine. It is much stronger than the sanctions added to the rule in 1962, applying only to nonappearance.

Explanation of Amendment
November 1, 1962

The purpose of this amendment was to make clear the court's inherent authority to dismiss or default a case for failure to obey an order to appear for pre-trial. The court is expressly given the powers of dismissal and default under Rules 41(b) (2) and 55(b), but only on the written motion or application of opposing counsel. The amendment avoids putting opposing counsel to the possible embarrassment of making such a motion or application.

Such dismissal is with prejudice unless otherwise stated in the order. See Rule 41(b) (3). The only relief available to a party in such circumstances is that provided by Rule 60(b).

Reporter's Notes
December 1, 1959

This rule is substantially the same as Federal Rule 16. Use of the pre-trial conference is made discretionary, and it is to be expected that there would be experimentation in its use, with the practice varying from county to county.