

RULE 16B. ALTERNATIVE DISPUTE RESOLUTION

This rule is applicable to cases filed in the Superior Court and cases removed to the Superior Court from the District Court,

(a) **Applicability.** All parties to any civil action filed in or removed to the Superior Court, except actions exempt in accordance with subsection (b) of this rule, shall, within 60 days of the date of the Rule 16(a) scheduling order, schedule an alternative dispute resolution conference which conference shall be held and completed within 120 days of the date of the Rule 16(a) scheduling order. By agreement of all parties, reported to the court in writing within 120 days of the date of the Rule 16(a) scheduling order, the time for the completion of the alternative dispute resolution conference shall be extended for a period not to exceed 180 days from the date of the Rule 16(a) scheduling order.

(b) **Exemptions.** The following categories of cases are exempt from the requirements of this rule:

- (1) Actions under Rule 80D, 80L, and Chapter XIII;
- (2) Appeals under Rule 80B or Rule 80C;
- (3) Appeals under 36 M.R.S.A. § 151;
- (4) Actions for recovery of personal injury damages where the plaintiff requests exemption and certifies that the likely recovery of damages will not exceed \$30,000.
- (5) Actions where the parties have participated in statutory prelitigation screening or dispute resolution processes including medical malpractice and Maine Human Rights Act cases;
- (6) Actions where the parties certify that they have engaged in formal alternative dispute resolution before a neutral third party. The certification shall state the name of the neutral and the date(s) on which formal alternative dispute resolution conferences occurred;
- (7) Actions for nonpayment of notes in mortgage foreclosures and other secured transactions;
- (8) Actions by or against prisoners in state, federal or local facilities; and
- (9) Actions exempted by the court on motion by a party and for good cause shown but only where the motion seeking exemption is filed within 30 days of the date of the Rule 16(a) scheduling order.

(c) Motions and Discovery. Motions and discovery practice shall proceed in accordance with these rules while an alternative dispute resolution process is being scheduled and held.

(d) Neutral Selection and Conference Scheduling.

(1) Promptly after the filing of an answer in the Superior Court or removal from the District Court, the parties shall confer and select an alternate dispute resolution process (that is, mediation, early neutral evaluation, or nonbinding arbitration) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they shall proceed to mediation. If the parties cannot agree on the selection of a neutral, they shall notify the court, which shall designate a neutral third party, with experience appropriate to the nature of the case, from the appropriate roster of court neutrals developed by CADRES;

(2) Unless the court orders or the parties otherwise agree, fees and expenses for the neutral shall be apportioned and paid in equal shares by each party, due and payable according to fee arrangements worked out directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in accordance with Rule 54(f). If any party is unable to pay its share of the fees and expenses of the neutral, that party may apply for in forma pauperis status pursuant to Rule 91. If granted, the court may allocate the fee among those parties who are not in forma pauperis or ask the selected neutral to undertake the conference on a reduced fee basis. Failing the consent of the selected neutral to the reduced fee, the court will designate an alternate neutral from the roster developed by CADRES who will agree to undertake the assignment on a reduced fee basis or pro bono.

(3) Once the neutral is selected or designated, the parties shall agree with the neutral on a time and place for the conference. The plaintiff shall notify the court of the name of the neutral and the time and place for the conference no later than 60 days after the date of the Rule 16(a) scheduling order. The conference must be held and completed no later than 120 days after the date of the Rule 16(a) scheduling order.

(e) Conference Issues. At the alternative dispute resolution conference, the only required function is to conduct the ADR process selected by the parties. If at the conclusion of that process and, after a serious effort by the parties, agreement is not reached on all issues, then the neutral may proceed to a case management discussion with the parties to try to reach agreement on the following:

(i) identification, clarification and limitation of remaining issues; (ii) stipulations; and (iii) discovery-related issues;

The neutral should not address case management issues in cases that are specially assigned or subject to single judge management, except with the approval of the assigned judge. When case management issues are addressed, the neutral may not extend deadlines or otherwise modify directives in the scheduling order set pursuant to M.R. Civ. P. 16(a). An ADR conference need not be reconvened if, after an initial session, the only remaining issues are case management issues.

(f) Conference Attendees.

(1) Conference attendees shall include:

- (i) Individual parties;
- (ii) A management employee or officer of a corporate party, with appropriate settlement authority, whose interests are not entirely represented by an insurance company;
- (iii) A designated representative of a government agency party whose interests are not entirely represented by an insurance company;
- (iv) An adjuster for any insurance company providing coverage potentially applicable to the case, provided that the adjuster participate in the conference with appropriate settlement authority;
- (v) Counsel for all parties; and
- (vi) Nonparties whose participation is essential to settlement discussions—including lienholders—may be requested to attend the conference.

(2) The court may impose appropriate sanctions on any party or representative required and notified to appear at a conference who fails to attend.

(3) Attendance shall be in person, or in the discretion of the neutral, for good cause shown, by telephone or video conference.

(g) Conference Documents. If requested by the neutral, five days prior to the conference, the plaintiff shall provide to the neutral:

- The complaint;
- The answer or other responsive pleading;
- Any pretrial scheduling statement;

- Any pretrial order that may have issued; and
- Any dispositive motions and memoranda that have been filed in connection with those motions.

(h) Conference Report and Order.

(1) *Settlement*. If the conference results in a settlement, the parties shall, within 10 days after the conference, report that fact to the court and include a proposed order concerning the settlement. The court shall order the appropriate entry to be made on the docket.

(2) *Neutral Report*. If the conference does not result in a settlement, the neutral shall, within 10 days after the conference, file with the court a report and, if appropriate, a proposed order which indicates any agreements of the parties on matters such as stipulations, identification and limitation of issues to be tried, discovery matters and further alternative dispute resolution efforts. If there are no agreements of the parties, the report shall so indicate. If the neutral does not file the report, the parties shall prepare and file the report indicating their points of agreement and disagreement. The parties shall be equally responsible for assuring that the neutral's report is filed in a timely manner and may be subject to appropriate sanctions if filing of the report is filed later than 130 days after the date of the Rule 16(a) scheduling order.

(i) *Jury Fee*. For cases required to have an alternative dispute resolution conference in accordance with this rule, payment of the civil jury fee required by Rule 38(b) or Rule 76C, shall be deferred until 210 days after the date of the Rule 16(a) scheduling order. Cases required to have an alternative dispute resolution conference in accordance with this rule but subsequently exempted from this rule by court order pursuant to Rule 16B(b) shall pay the jury fee: (A) when exemption is being requested pursuant to M.R. Civ. P. 16B(b)(4), or (B) within 14 days of exemption being ordered by the court pursuant to Rule 16B(b)(9) or any other provision of these rules. If the jury fee is not paid within the time required, any right to jury trial shall be deemed waived and the case shall be scheduled on the nonjury list for trial.

(j) *Standards for Alternative Dispute Resolution*. No agreement or order to enter into alternative dispute resolution pursuant to this rule may be entered or issued without consideration being given to the needs of indigent or unrepresented parties or parties in situations where there is a potential for violence, abuse, or intimidation.

(k) Confidentiality. A neutral who conducts an alternative dispute resolution conference pursuant to this rule, or an alternative dispute resolution process pursuant to subsection (b)(6), shall not, without the informed written consent of the parties, disclose the outcome or disclose any conduct, statements, or other information acquired at or in connection with the ADR conference. A neutral does not breach confidentiality by making such a disclosure if the disclosure is: (i) necessary in the course of conducting the dispute resolution conference and reporting its result to the Court as required in (h)(2); (ii) information concerning the abuse or neglect of any protected person; (iii) information concerning the intention of one of the parties to commit a crime, or the information necessary to prevent the crime or to avoid subjecting others to the risk of imminent physical harm; or (iv) as otherwise required by statute or court order.

(l) Sanctions. If a party or a party's lawyer fails without good cause to appear at a dispute resolution conference scheduled pursuant to this rule, or fails to comply with any other requirement of this rule or any order made thereunder, the court may, upon motion of a party or its own motion, order the parties to submit to alternative dispute resolution, dismiss the action or any part of the action, render a decision or judgment by default, or impose any other sanction that is just and appropriate in the circumstances. In lieu of or in addition to any other sanction, the court shall require the party or lawyer, or both, to pay the reasonable expenses, including attorney fees, of the opposing party, and any fees and expenses of a neutral, incurred by reason of the nonappearance, unless the judge finds an award would be unjust in the circumstances.

Advisory Notes

June 2008

Rule 16B(b)(1), addressing exemptions from the Rule 16B ADR processes is amended to recognize that Rule 80 is abrogated [effective January 1, 2009] and to cite to Chapter XIII of these Rules that now governs most Family Division and domestic relations actions.

Advisory Committee Note

December 2007

M.R. Civ. P. 16B(f)(3) is amended to permit the neutral to approve participation by telephone or video conference but only where good cause is shown

for not participating in person. Mediation works best when the parties and persons with appropriate settlement authority are present and actively engaged in the process and, therefore, remote participation should be discouraged.

Advisory Committee Note
April 2, 2007

Rule 16B is amended in an effort to make alternative dispute resolution more flexible. Much experience has been gained since the Supreme Judicial Court first promulgated Rule 16B in 2002. On the whole, the program has been very successful in creating settlements in cases that otherwise might have persisted in the process before ultimately settling, as the large majority of cases do. However, many cases may not be ready for ADR when first filed. More time may be required to gather the information the parties need to evaluate their cases. The amendments are intended to provide more flexibility in scheduling mediations.

On occasion, parties agree that a case is not ready for productive ADR and may need additional time to prepare the case. Rule 16B(a) is amended to permit the parties to agree to an automatic extension of the ADR process not to exceed an additional 60 days. To obtain the extension, the parties notify the court by letter or by a filing recording their agreement to the extension. To assist the ADR process and to control costs, subdivision (i) and the form scheduling order are amended to provide that the time for paying the jury fee is extended to 210 days in all cases.

Advisory Notes
2004

Rule 16B is amended to state the court's or a neutral's discretion to order parties to appear by video and telephone conferencing options.

Advisory Committee's Note
May 16, 2001

The first sentence of Rule 16B is added to clarify the effective date of the court-connected ADR rule to indicate that it applies only to cases in the Superior Court when the original date for filing the complaint is on or after January 1, 2002. Accordingly, the rule would not apply to cases filed in the District Court before January 1, 2002 but removed to the Superior Court after that date, and it would not apply to cases already pending in Superior Court on January 1, 2002. The original

filing date, whether in District Court or Superior Court, becomes the critical date for determining applicability of the rule to a particular case.

Rule 16B, subdivision (i), is amended, because under current practice, a party demanding a jury trial pursuant to Rule 38 or removing a case for jury trial pursuant to Rule 76C must pay the jury fee promptly. Cases which proceed through the court-connected ADR process are exempt from the jury fee payment requirement until 150 days after the date of the Rule 16(a) scheduling order. Those cases which are authorized to automatically request and receive exemption from the ADR requirements by Rule 16B(b)(4) or which receive a court order exempting them from the ADR requirements pursuant to Rule 16B(b)(9) or any other provision of these rules, become subject to the normal jury fee payment requirements. The jury fee must be paid with the filing of the automatic exemption request pursuant to Rule 16(b)(4). For other cases receiving exemptions, the jury fee must be paid within 14 days of the exemption being ordered by the court. If the jury fee is not paid as required, the parties shall be deemed to have waived their right to jury trial. A case removed from District Court pursuant to Rule 76C which then waives its jury trial right by default in the required payment of the jury fee would be remanded to the District Court for further proceedings.

Advisory Committee's Notes
February 8, 2001

Subsection 2 amends the rules to adopt a new Rule 16B generally covering the ADR processes.

Subsection (a) directs all parties to civil actions either filed in the Superior Court or removed from the District Court to the Superior Court, except exempt actions, (i) to schedule an ADR conference within either 60 days of the date of the Rule 16(a) scheduling order; and (ii) to hold that ADR conference within 120 days of the same date.

The time limits in Rule 16B(a) are subject to M.R. Civ. P. 6(b) which allows the court to enlarge a time limit "for cause shown." *See also* M.R. Civ. P. 16(a) (allowing scheduling order modification "for good cause shown").

Subsection (b) exempts from the ADR requirements:

1. Divorce, Forcible Entry and Detainer, [Civil Violations,] and Small Claims Actions.

2. 80B and 80C appeals.
3. State tax assessors appeals. Even though these actions are “de novo,” 36 M.R.S.A. § 151, in fact they have been through an extensive discussion process. Further, most of these matters that do get to Superior Court are resolved on stipulations or cross-motions for summary judgment. Considering that the Superior Court often does not get these actions until they have been in the administrative process for three or four years, an additional ADR component would not appear to be productive.
4. Actions for recovery of personal injury damages where the plaintiff requests exemption and certifies that the likely recovery will not exceed \$30,000. This exemption addresses the concern of many trial lawyers that adding an ADR process may unacceptably increase the cost of prosecuting cases where relatively small damages and fees may be recovered. The exemption must be initiated by the plaintiff who thus could choose ADR by not seeking exemption. The choice is limited to the plaintiff, as it is the plaintiff’s potential recovery and any resulting contingent fee that may be most impacted by ADR related cost increases.

The certification should be a good faith estimate by the plaintiff at the time it is filed that likely recovery will not exceed \$30,000. However, this estimate does not preclude a plaintiff, at trial or in any other forum where plaintiff’s claim is addressed, from seeking and recovering more than \$30,000.

5. Actions where parties have already participated in statutorily required ADR or prelitigation screening processes such as medical malpractice and Maine Human Rights Acts cases. Cases where parties exempt themselves from the prelitigation screening process in medical malpractice cases or proceed based on a right to sue letter, without the dispute resolution processes of the Maine Human Rights Act, would be subject to the normal ADR processes.
6. Actions where the parties certify that, prior to the time for answer or removal, they already engaged in a formal ADR process before a neutral third party. The certificate would be required to state the

name of the neutral and the date(s) on which the formal ADR process occurred.

7. Actions for non-payment of notes in mortgage foreclosures and other secured transactions.
8. Actions by or against incarcerated persons.
9. Actions where a party demonstrates good cause to gain an exemption from or a deferral of the ADR process. This reflects the choice that such exemptions should not be automatic if the parties agree but only subject to court approval based on “good cause.” For instance, the parties may persuade a court that “no ADR process is likely to deliver benefits to the parties sufficient to justify the resources consumed by its use.” ADR Local Rule 3-2 of the Northern District of California. Compare the experience with mediation in small claims actions. If ADR is an economic hardship to one of the parties and a pro bono neutral cannot be obtained, the Court should relieve the parties of this requirement. ADR, although highly desirable, should not be a barrier to court access. The rule requires that any such exemption motion be filed within 30 days of the date of the Rule 16(a) scheduling order to assure that such exemptions are seriously considered and don’t become a dilatory tactic for people that are late in getting around to selecting a neutral and scheduling an ADR conference.

An exemption under 16B(b) is to be distinguished from a time limit extension which may be sought pursuant to M.R. Civ. P. 6(b) or 16(a).

Subsection (c) indicates that discovery and motion practice will proceed unaffected by the ADR process. Presumably, if the parties agree, scheduling adjustments can be made as contemplated in M.R. Civ. P. 6(b) and 16(a).

Subsection (d)(1) requires the parties to confer promptly after answer or removal to select an ADR process and a neutral to conduct the process. If the parties cannot agree on the process, mediation will be the process. If the parties cannot agree on a neutral, the court will select a neutral with experience appropriate to the nature of the case from the appropriate roster developed by CADRES.

Subsection (d)(2) provides that costs for the neutral will, initially, be shared equally by the parties—e.g., if there is one plaintiff and two defendants, each party will pay one-third. The neutral will be required to be paid in accordance with fee arrangements worked out directly between the neutral and the parties. Ultimately, these costs would be assessed in accordance with Rule 54(f). The court can order a different cost payment arrangement if, for instance, one of the parties sought in forma pauperis status pursuant to Rule 91. If the designated neutral does not consent to the revised fee arrangement, the court will designate an alternative neutral from the CADRES roster.

Subsection (d)(3) relates to the parties agreeing with the neutral on the timing of the conference with responsibility then placed upon the plaintiff to notify the court of the name of the neutral and the time and place for the conference—this notification to occur no later than 60 days after the date of the Rule 16(a) scheduling order, with the conference to be held and completed no later than 120 days of the same date.

Subsection (e) indicates that the primary function of the conference is to conduct the selected ADR process. The first priority is on efforts at settlement and means of exploring settlement. If settlement does not happen then case management issues may be discussed. There are three limitations on the neutral's address of case management issues. First, the neutral will not address management issues in cases that are specially assigned or subject to single judge management. Second, the neutral cannot extend deadlines or otherwise modify directives in scheduling orders issued pursuant to M.R. Civ. P. 16(a). Third, a conference which adjourns after substantive claims in the case are addressed—as where one or both parties want some time to consider an offer or a proposed resolution—need not be reconvened if the only remaining issues to be addressed are case management issues. This avoids the delay and expense that would otherwise be required to reschedule, prepare for and attend a reconvened meeting.

Subsection (f) addresses conference attendees. It follows recommendation of the ADR Planning and Implementation Committee with the addition of a new subparagraph (iii) addressing participation by a designated representative of a government agency. For many government agencies, no particular individual may have settlement authority. *See State v. Town of Franklin*, 489 A.2d 525 (Me. 1985).

Subsection (f)(2) is a sanction section emphasizing that failure to attend may subject a party to sanctions.

Subsection (f)(3) provides that in the discretion of the neutral required attendees may participate by telephone. Some cases may not support requiring every attendee to be personally present or justify the expense of fully face to face conferences.

Subsection (g) requires the plaintiff to provide copies of the listed documents to the neutral, but only if requested by the neutral.

Subsection (h)(1) is very similar to practice under the pilot project, with the only change being the requirement that the parties submit to the court a proposed order concerning the settlement. The order may simply state that the parties have agreed to a dismissal of the action with (or without) prejudice.

Subsection (h)(2) directs that, if there is no settlement, the neutral is to file a report within 10 days. In most cases it is anticipated that the report would be prepared at the end of the conference and filed shortly thereafter. Along with the report would be, if appropriate, a proposed order to implement the report. The report would indicate any matters on which the parties had reached agreement such as stipulations, identification and limitation of issues to be tried, discovery matters and any further alternative dispute resolution efforts. The report would also indicate if there were no agreements. The subparagraph also includes a sentence placing upon the parties, equally, the responsibility for assuring that the report is filed in a timely manner and subjecting them to appropriate sanctions if the report is unduly delayed. If the neutral does not file the report, or does not do so in a timely manner, the parties are to prepare and file a report indicating their points of agreement and disagreement. Although the report is due 10 days after the conference, the court will consider it delinquent 130 days after the date of the Rule 16(a) scheduling order.

Subsection (i) defers payment of the jury fee for those cases to experience the ADR conference until 150 days after the date of the Rule 16(a) scheduling order. If the fee is not paid, the right to a jury trial is waived. Note that the rule does not include a specific rule reference for the jury fee.

Subsection (j) is included to remind the court and neutrals that during ADR proceedings they must be alert to the particular needs of the poor, the unrepresented and those subject to violence, abuse or intimidation.

Subsection (k) imposes a duty of confidentiality upon all neutrals who act pursuant to the rule. Like the analogous provision of the Maine Code of Professional Responsibility, the rule prohibits, with certain exceptions, disclosure in any private or public context. *Cf.* M. Bar R. 3.6(h). The purpose of the rule is to encourage candid and complete discussions that will enable neutrals to achieve the goals of the process in which they are involved. The permitted disclosures are those necessary to the process itself, for project research, or for compliance with law, or that a neutral may make to disclose evidence of abuse or neglect of any protected person or to prevent future criminal conduct. It is anticipated that Rule 16(B)(k)(iv), authorizing a disclosure pursuant to court order, will be utilized only after the court finds that the need for disclosure substantially outweighs the importance of the state's policy favoring the protection of confidentiality of settlement discussions such as the ADR conference.

Subsection (l) provides a variety of sanctions that the court may impose on parties or counsel who fail to comply with the express terms of the rule and orders issued thereunder. Specifically, the rule focuses on appearance at the dispute resolution conference. Other matters subject to sanction are requirements of the rule pertaining to filings and other deadlines. There is no sanction for failure to participate appropriately in a conference or proceeding. Standards for determination of the appropriate level of participation would be difficult to articulate and apply, and enforcement would raise serious problems of confidentiality. The range of sanctions available under the rule is intended to give the court flexible power both to penalize noncompliance and to serve the interests of other parties and the court in bringing an action to a fair and just resolution. The rule expressly provides that payment of costs incurred may be awarded as a sanction, in addition to whatever procedural remedies may be appropriate.