

THE STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

O R D E R

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51(A)(7), the Supreme Court of New Hampshire adopts the following amendments to court rules.

Superior Court – Alternative Dispute Resolution

(These amendments clarify that ADR reports must be filed after the conclusion of an ADR proceeding other than binding arbitration, and authorize the imposition of sanctions if the ADR report is not timely filed.)

1. Amend Superior Court Rule 170, regarding alternative dispute resolution, on a temporary basis, as set forth in Appendix A.
2. Amend Superior Court Rule 51, regarding settlements, on a temporary basis, as set forth in Appendix B.
3. Amend Superior Court Rule 62(I)(D), regarding pretrial procedures, on a temporary basis, as set forth in Appendix C.
4. Amend Superior Court Rule 62(III), regarding pretrial procedures, on a temporary basis, as set forth in Appendix D.

Effective Date

These amendments shall take effect August 1, 2009, and shall be referred to the Advisory Committee on Rules for its recommendation as to whether they should be adopted on a permanent basis.

Date: July 21, 2009

ATTEST: _____
Eileen Fox , Clerk of Court
Supreme Court of New Hampshire

APPENDIX A

Amend Superior Court Rule 170, on a temporary basis, with the following (additions are in **[bold and brackets]**; deletions are in ~~strike~~ thru format):

170. ALTERNATIVE DISPUTE RESOLUTION (ADR)

(A) Cases for Alternative Dispute Resolution.

(1) All writs of summons, transfers of actions from the district court, and such equity cases as the court may deem or the parties may agree are suitable, shall be assigned to ADR, with the exception of those exempted in paragraph (2).

(2) The following categories of civil and equity actions are exempt from the requirements of this rule.

(a) Actions by or against or appeals taken from decisions of the state, counties, or municipalities (including their subdivisions, departments, agencies, boards, and agents), except where the action contains a claim for personal injury or monetary damages, unless the parties agree to ADR and the court approves.

(b) Actions where the parties represent by joint motion that they have engaged in formal ADR before a neutral third party prior to suit being filed.

(c) Actions exempted by the court on motion and for good cause, but only when said motion is filed within 180 days of the return date.

(B) Election of Specific Alternative Dispute Resolution Procedure and Selection of a Neutral.

(1) Unless the context of the rule indicates otherwise, the term "neutral" shall include any mediator, arbitrator or neutral evaluator who is selected from the court's lists of approved neutrals, and any mediator, arbitrator or neutral evaluator who is not on the court's approved lists but who is agreed upon by the parties.

(2) Promptly after the filing of an answer or appearance in the superior court or upon removal from the district court, the parties shall

confer and select an ADR process (that is, mediation, neutral evaluation, or arbitration) and a neutral third party to conduct the process. If the parties cannot agree on the ADR process, they will be required to submit to mediation.

(3) The parties shall select a neutral third party to conduct the dispute resolution process from the court lists of approved neutrals. Prior to making such a selection, the parties shall determine whether they wish to select a neutral from the list of approved volunteer neutrals, or from the list of approved paid neutrals.

(a) If the parties choose a neutral from the list of approved paid neutrals, the parties shall notify the neutral and request that the neutral provide the parties with a schedule of fees and expenses.

(b) Unless the court orders or the parties otherwise agree, the neutral's fees and expenses shall be apportioned and paid in equal shares by each party, and shall be due and payable according to fee arrangements agreed to directly by the parties and the neutral. Fees and expenses paid to the neutral shall be allowed and taxed as costs in accordance with Superior Court Rule 87(a).

(c) If the parties choose a neutral from the list of approved volunteer neutrals, the parties shall be subject to a one-time administrative fee of \$50.00 per party, which shall be paid to the court at the time the Stipulation for ADR is filed with the court. This is an administrative fee which will be designated for use by the Office of Mediation and Arbitration and is not refundable. Parties who are indigent may petition the court for waiver of the \$50.00 administrative fee.

(d) Parties may select a neutral who is not on the court's lists of approved neutrals if the parties agree on the choice of the neutral.

(4) If the parties cannot agree on the selection of a neutral, they shall so indicate in their Stipulation. The court shall designate a neutral at the structuring conference. If the parties have not selected an ADR method and neutrals by the time the structuring conference occurs, the court shall, at the structuring conference, set a date certain by which ADR shall have occurred.

(C) Stipulation and Court Order for Alternative Dispute Resolution.

(1) No later than ten days prior to the initial structuring conference provided for in Rule 62(I), the parties must file with the court a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, containing:

(a) An agreement to seek resolution of the issues involved in the action by designating one or more of the following alternative dispute resolution methods to be carried out as provided in this rule:

- i. Mediation;
- ii. Neutral Evaluation;
- iii. Binding Arbitration; or
- iv. Any other method of dispute resolution agreed upon by the parties.

(b) The designation of a Rule 170 neutral, to serve in the agreed-upon process, or an agreement to accept a neutral chosen by the court from a list provided by the clerk. However, prior to the designation of a Rule 170 neutral to serve in the agreed upon process, the parties or counsel (if parties are represented) shall contact each other in the first instance and agree upon a neutral and two alternates. They shall appoint one person to contact the neutral, or if need be, the alternates, to determine if the neutral is willing and able to serve and whether it will be on a volunteer or a paid basis.

(c) A schedule for the completion of the agreed-upon ADR process including the filing of case statements and the completion of any necessary discovery, or including the agreement to accept the assistance of the neutral designated under subparagraph (C)(1)(b) in setting a schedule for completion of the process. The schedule must provide for completion of the process within the shortest possible time after filing of the Stipulation, consistent with completion of the minimum amount of discovery necessary to make the process meaningful, but in any event not more than eight months after the date of the Stipulation.

(d) The location of the session and a date by which the session shall have occurred.

(2) The court may waive the initial structuring conference if, prior to the structuring conference, the court has received a completed and signed Rule 170 stipulation and a completed and signed Structuring Conference Order. If the court has not received either or both of these documents, then at the initial structuring conference, after consultation with counsel, or with parties if unrepresented, the court shall issue an order stating: (a) the specific ADR procedure to be used; (b) the identity of, and contact information for, the neutral; (c) the date by which the ADR procedure must be completed; (d) whether the ADR shall be at the courthouse or off-site; and (e) the anticipated time needed for the ADR

method chosen. If the court chooses a neutral from the volunteer list, the court shall order the parties to pay a one-time administrative fee of \$50.00 per party.

The court has discretion to waive this fee if the parties are indigent. At the request of the parties for good cause, the court may also permit an individual \$50.00 fee to apply to multiple plaintiffs or defendants, if under the circumstances of the case, the court determines that the per party fee would cause undue hardship if it were applied to individual parties, or if one fee for multiple parties on the same side is deemed equitable by the court.

If the neutral is chosen at the structuring conference either by the parties and counsel or by the court, the parties and counsel shall, within 10 days after the date of the structuring conference, contact the neutral or the alternates, if necessary, and schedule the ADR session with their choice of neutral.

Except for the date by which the ADR procedure must be completed, the structuring conference order regarding ADR may thereafter be amended by agreement of the parties by filing an amended Stipulation with the court. The court may permit an extension of the date by which the ADR procedure must be completed on the motion of either party for good cause shown.

(3) Upon receipt of notice of appointment in a case, the neutral shall disclose any circumstances likely to create a conflict of interest, the appearance of a conflict of interest, a reasonable inference of bias, or prevent the process from proceeding as scheduled. If the neutral withdraws, has a conflict of interest, or is otherwise unavailable, another shall be agreed to by the parties or appointed by the court.

(D) Alternative Dispute Resolution Proceeding.

(1) Upon receipt of the structuring conference order, the parties or their counsel shall confirm the date, time and location for the ADR to take place and the neutral shall advise the parties in writing of the schedule for submission and exchange of summaries. Unless the neutral advises otherwise, each party shall exchange a summary, not to exceed five pages, of the significant aspects of their case. The parties may also attach to the summary copies of pertinent documents. Upon receipt of a party's submission, any party may send additional information responding to that submission. Unless the neutral advises otherwise, all submissions shall be exchanged with opposing counsel and shall contain a statement of compliance with the exchange requirement.

(2) Thirty days before the date of the first scheduled ADR session,

each party must certify to the neutral that party's readiness to proceed on the scheduled date or request that the neutral reschedule the ADR session. At any time, upon written request of a party for good cause shown, the neutral may reschedule the ADR session for a date prior to the date set forth in the structuring conference order for completion of the ADR proceeding.

(3) All parties and their counsel must attend a scheduled ADR session, unless the court, for good cause, excuses an individual from participation or authorizes an individual to participate by speaker telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action, must each be represented by a person, other than outside counsel, who has settlement authority and authority to enter into stipulations. With the agreement of all parties and the neutral, any person having an interest that may be materially affected by the outcome of the proceeding may be invited to attend the session in person or by counsel.

(4) Within 15 days after the conclusion of an ADR proceeding, other than binding arbitration, the ~~neutral~~ **[plaintiff(s) or plaintiff(s)' counsel (unless otherwise agreed)]** must report the results of the process to the court in writing. The report may not disclose the neutral's assessment of any aspect of the case or substantive matters discussed during the session or sessions except as is required to report the information required by this paragraph. The report (form no. NHJB-2488-S) contains the following items:

(a) The date on which the session or sessions were held including the starting and finishing times;

(b) The names and addresses of all persons attending, showing their role in the session and specifically identifying the representative of each party who had decision-making authority;

(c) A summary of any substitute arrangement made regarding attendance at the session;

(d) The results of the session, stating whether full or partial settlement was reached and appending any agreement of the parties.

Comment

Form no. NHJB-2488-S is available on-line at www.courts.state.nh.us/forms/nhjb-2488-s.pdf

(5) In any action in which ADR does not result in a settlement, the

action will proceed in accordance with any agreement reached in the ADR process, or in the absence of an agreement, as ordered by the court.

(6) ADR proceedings shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, or conferences nor the requirements and time deadlines of New Hampshire Superior Court Rules 62 and 63. However, regardless of whether the neutral was selected from the court's approved lists or not, **[a copy of] the ADR report must be filed [by the plaintiff(s) or plaintiff(s)' counsel (unless otherwise agreed): (1) within 15 days of the ADR session; (2) as an exhibit to the final pre-trial statement if the case did not resolve through ADR; or (3) as an exhibit to the docket markings.]** ~~no later than the date of the final pre-trial.~~ If the ADR report is not timely filed, the **[court may schedule a show-cause hearing to determine the status of the ADR process and to impose sanctions appropriate to the circumstances, if necessary.]** ~~parties and/or counsel will face sanctions, which may include fines or other sanctions appropriate to the circumstances.~~

(E) Inadmissibility of Alternative Dispute Resolution Proceedings.

(1) ADR proceedings and information relating to those proceedings shall be confidential. Information, evidence, or the admission of any party or the valuation placed on the case by any neutral shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All non-binding ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding, the fact that there was an ADR proceeding or any other matter concerning the conduct of the ADR proceedings except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct.

(2) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in an ADR proceeding.

(F) Sanctions.

If a party or a party's counsel fails without good cause to appear at an ADR session scheduled pursuant to this rule, or fails to comply with any order made hereunder, the court may, on its own or upon motion of a party, impose any sanction that is just under the circumstances.

(G) Qualifications of and Approval Process for Neutrals.

(1) Qualifications of Neutrals

(a) Good standing. All neutrals (neutral evaluators, mediators, arbitrators) must be attorneys admitted to practice in New Hampshire who are in good standing.

(b) Moral character. Neutrals must be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court.

(c) Disclosures. Applicants must disclose criminal convictions or findings of professional misconduct, which have not been annulled. The Administrative Council may refuse to approve an applicant who has been convicted of a criminal offense or has been found to have committed professional misconduct. Failure to disclose complete and accurate information may constitute grounds for decertification.

(d) Specific Requirements.

(i) Mediators -- All Rule 170 mediators must have at least 20 hours of training in civil mediation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in mediating case(s) with an approved Rule 170 mediator/mentor. The 20-hour training requirement may be satisfied by way of training provided by the Office of Mediation and Arbitration for a fee, or the mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval. A mediator/mentor must be approved as a mediator/mentor by the Administrative Council before serving as a mentor.

New Rule 170 mediators shall be subject to the 20-hour training requirement. All mediators who were on the court's approved list of Rule 170 mediators prior to January 1, 2008, will not be subject to the 20-hour training requirement; they will, however, be subject to a biennial 8-hour refresher-training requirement. The 8-hour refresher training must be completed by January 1, 2009. The refresher training requirement may be satisfied by way of court-sponsored training, which shall be provided without charge to mediators, or a mediator may provide to the Office of Mediation and Arbitration documentation of equivalent training, subject to its approval.

(ii) Neutral Evaluators -- Neutral evaluators must be attorneys who have a minimum of 10 years experience in litigation in the subject matter areas to which they may be assigned as neutral evaluators. All neutral evaluators must have at least 20 hours of

training in ADR and an additional 4 hours of training in neutral evaluation. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in neutral evaluation of case(s) with an approved Rule 170 neutral evaluator/mentor. The neutral evaluator/mentor must be approved by the Administrative Council before serving as a neutral evaluator/mentor.

(iii) Arbitrators -- Arbitrators must be attorneys who have a minimum of 10 years of experience in litigation in the subject matter areas which they may be assigned as arbitrators. All arbitrators must have a minimum of 20 hours of training in ADR and an additional 8 hours of training in arbitration under this rule. The 20-hour training shall consist of at least 14 hours of course material, either sponsored by, or approved by, the Office of Mediation and Arbitration, along with at least 6 hours of mentoring time in actual arbitration of case(s) with an approved Rule 170 arbitrator/mentor. The arbitrator/mentor must be approved by the Administrative Council before serving as an arbitrator/mentor. Arbitrators shall adhere to all codes of conduct generally applicable to both commercial and private arbitrations.

(2) Application and Approval Process

(a) In order to serve as a neutral, an attorney must apply and be approved by the Administrative Council. In approving neutrals, the Administrative Council may consider the applicant's alternative dispute resolution experience or other relevant factors, such as length of practice or trial experience.

(b) Neutrals may choose to be listed on the volunteer list, the paid list, or both. Neutrals shall pay an annual rostering fee pursuant to a fee schedule established by supreme court order. The amount of the fee may vary depending upon which list the neutral chooses to be included. The fee will be used to support the Office of Mediation and Arbitration. The neutral may provide biographical information for inclusion on the list, as well a description of those areas of the law in which the neutral has enhanced knowledge. All neutrals, regardless of whether they are on the paid or volunteer list, shall agree to act as a volunteer neutral for a minimum of at least two days but not more than four days annually. Neutrals in these volunteer cases must also agree to travel to the courthouse in which the case is located if the parties and counsel have chosen to have the ADR proceeding there.

(c) Neutrals shall apply for inclusion on the court's lists by submitting an application, the applicable rostering fee, and three letters of reference as set forth in this rule to the Office of Mediation/Arbitration. Inclusion on the court's list of approved neutrals

remains valid for a one year period from July 1 through June 30 of each year. To request continued inclusion on the court's list or lists, a neutral, prior to June 1 of each year, shall:

(i) File a statement that there have been no material changes in his or her initial application for inclusion, or if there have been material changes, list and explain them.

(ii) File documentation that the neutral has completed required refresher training in the field of alternative dispute resolution in accordance with section (G)(1)(c).

(iii) Pay the rostering fee set for inclusion on the court's list of approved neutrals.

(d) All neutrals agree that as a condition of inclusion on the Court's list of approved neutrals, they may be required to provide at least two days but no more than four days of volunteer ADR sessions each year.

(H) *Immunity for Rule 170 Neutral.*

A "Neutral" (defined as a Neutral Evaluator, Mediator or Arbitrator) selected to serve and serving under Superior Court Rule 170 or Rule 170-A shall have immunity consistent with RSA 490-E:5.

APPENDIX B

Amend Superior Court Rule 51, on a temporary basis, with the following (additions are in **[bold and brackets]**; deletions are in ~~strike-thru~~ format):

51. Whenever an attorney states orally or in writing to the clerk that a particular case has been settled and that agreements **[and/or docket markings, and the ADR report]** will be filed, the clerk shall forthwith notify by mail the parties of record or their attorneys of such statement[.] ~~, and, if~~ **[If]** the agreements **[and/or docket markings, and the ADR report]** are not filed within thirty days after the mailing of such notice, the court shall take such action as justice may require **[including scheduling a show-cause hearing and imposing sanctions appropriate to the circumstances, if necessary]**.

APPENDIX C

Amend Superior Court Rule 62(I)(D), on a temporary basis, with the following (additions are in **[bold and brackets]**; deletions are in ~~strike-thru~~ format):

(D) Ten days prior to the Structuring Conference the parties shall file a comprehensive written stipulation, signed by all counsel, or by parties if unrepresented, addressing all of the foregoing matters on which agreement was reached. If the parties have been unable to reach agreement on one or more issues, each party shall submit a proposed order on those matters as to which agreement has not been reached with the exception of ADR. If the parties are unable to reach an agreement on ADR, the specifics of the ADR process shall be determined in accordance with Rule 170(B). At the same ~~time~~, **[time]** all parties shall file summary statements necessary to support their respective claims, defenses or counterclaims. This summary statement shall be comprehensive and made in good faith, but shall not be admissible at trial. The purpose of the summary statement is to apprise the court of the nature of the claims, defenses, and legal issues likely to arise.

APPENDIX D

Amend Superior Court Rule 62(III), on a temporary basis, with the following (additions are in **[bold and brackets]**; deletions are in ~~strike-thru~~ format):

(III) **Pretrial Statements**

If a pretrial statement is ordered it shall include, by numbered paragraphs, a detailed, comprehensive, and good faith statement, setting forth, if applicable:

1. Uncontested issues of fact.
2. Contested issues of fact.
3. Applicable law.
4. Disputed issues of law.
5. Specific claims of liability by the party making the claim.
6. Defendant's specific defenses.
7. Itemized special damages.
8. Specification of injuries with a statement as to which, if any, are claimed to be permanent.
9. The status of settlement negotiations.
10. A list of all exhibits to be offered in the direct case of each party. The parties, or their counsel, shall bring exhibits, or exact copies of them, to the clerk's office on the day of the trial management conference for examination by opposing parties or their counsel.
11. A list of all depositions to be read into evidence.
12. A waiver of claims or defenses, if any.
13. A list of the names and addresses of all witnesses who may be called.

14. Whether there will be a request for a view and, if so, who shall pay the cost in the first instance.

15. The names and addresses of the trial attorneys.

Except for good cause shown, only witnesses listed in the pretrial statement will be allowed to testify and only exhibits, so listed, will be received in evidence.

[Superior Court Rule 170 requires that a copy of the ADR report be filed by the plaintiff(s) or plaintiff(s)' counsel (unless otherwise agreed): (1) within 15 days of the ADR session; (2) as an exhibit to the final pre-trial statement if the case did not resolve through ADR; or (3) as an exhibit to the docket markings. If the ADR report is not timely filed the court may schedule a show-cause hearing to determine the status of the ADR process and to impose sanctions appropriate to the circumstances, if necessary.]