

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE**

**ORDER AMENDING RULE 16  
OF THE COURT OF COMMON PLEAS  
RULES OF CIVIL PROCEDURE**

This 21<sup>st</sup> day of May 2009, it is ORDERED THAT:

- 1) Court of Common Pleas Civil Rule 16 is amended by including the material underlined, as follows:

**Rule 16. Pretrial procedure; formulating issues.**

(a) In any action, the Court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference to consider:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a Commissioner for findings to be used as evidence at trial;
- (6) Such other matters as may aid in the disposition of the action.

The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

(b) *Scheduling and planning.* Except in categories of actions identified in this rule or any specific action exempted by the Court,

(1) The Court may under the provisions of this Rule enter a Pre-Trial Scheduling Order, that either establishes or limits the following time schedules;

(i) To join other parties or to amend the pleadings.

(ii) To file and hear motions.

(iii) To complete discovery.

(iv) To engage in compulsory alternative dispute resolution (“ADR”), the format of which is to be agreed upon by the parties. Such ADR may include, but shall not be limited to, nonbinding or, if agreed to by the parties, binding arbitration, mediation or neutral case assessment. If the parties cannot agree on the format of ADR, the default format shall be mediation unless otherwise ordered by the Court.

(v) In the event the parties cannot agree on an ADR Practitioner, they may file a joint motion with the Court within thirty (30) days of issuance of the scheduling order requesting that the Court appoint an ADR Practitioner for the parties. The Court may impose sanctions upon a party or both parties if it determines that the parties have not attempted to agree upon an ADR Practitioner in good faith.

(2) In the event the Court elects to not enter a Scheduling or Planning Order, the parties, of any case not exempted under this rule, shall select an ADR practitioner within thirty (30) calendar days of the last responsive pleading and comply with the balance of the provisions of this Rule. Within sixty (60) days of the filing of the last responsive pleading, the parties shall file a joint ADR Statement and Certification specifying the method of ADR, the name of the ADR practitioner and the status of ADR.

(i) In the event the parties cannot agree on an ADR Practitioner, they shall file a joint Motion with the Court within seventy (70) days of the last responsive pleading requesting that the Court upon motion appoint an ADR Practitioner for the parties. The Court may impose sanctions upon a party or both parties if it determines that the parties have not attempted to agree upon an ADR Practitioner in good faith.

(3) The parties shall select an eligible ADR Practitioner who may serve under this Rule. Each ADR Practitioner shall have been a practicing member of the Delaware Bar for at least five (5) years and be in good standing.

(4) The parties shall pay the ADR Practitioner in accordance with the allocation and amount of fees established by the ADR Practitioner and agreed to by the parties or ordered by the Court. The ADR Practitioner may apply to the Court for sanctions against

any party who fails to comply with the terms of engagement established by the ADR Practitioner and agreed to by the parties including, but not limited to, dismissal of the action or default judgment.

(5) The compulsory ADR provisions set forth in this Civil Rule shall not apply to cases unless all parties are represented by counsel; appeals *de novo* filed pursuant to 10 *Del. C.* §9570 *et seq.* from Magistrate's Court; confirmation of arbitration awards, all consumer debt cases, statutory penalty cases, *in forma pauperis* cases, or any other civil cases within the discretion of the Court which the Court deems exempt.

(6) The ADR Practitioner may not be called as a witness in any aspect of the litigation or in any proceeding relating to the litigation in which the ADR Practitioner served. In addition, all ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another. Each ADR Practitioner shall remain bound by any confidentiality agreement signed by the parties and the ADR Practitioner as part of the ADR.

(7) The following definitions apply to this rule:

(a) "Arbitration" is a process by which a neutral arbitrator hears both sides of a controversy and renders a fair decision based on the facts and the law. If the parties stipulate in writing the decision shall be binding, in which instance the case is removed from the Court's docket.

(b) "Mediation" is a process by which a mediator facilitates the parties in reaching a mutually acceptable resolution of a controversy. It includes all contacts between the mediator and any party or parties until a resolution is agreed to, the parties discharge the mediator, or the mediator determines that the parties cannot agree.

(c) "Neutral case assessment" is a process by which an experienced neutral assessor gives a non-binding, reasoned oral or written evaluation of a controversy, on its merits, to the parties. The neutral assessor may use mediation and/or arbitration techniques to aid the parties in reaching a settlement.

(d) "ADR Practitioner" shall include the arbitrator, mediator, neutral case assessor or any other Practitioner engaged by the parties to facilitate ADR.

(8) Any other deadlines or protocols appropriate in the circumstances of the case may be imposed by this Court including, but not limited to, appropriate sanctions for failure to meet the deadlines and requirements established by the Scheduling Order or Pretrial Worksheet/Case Management Worksheet detailed below to include, in the Court's discretion, dismissal of the action or a default judgment entered by this Court.

(9) Either party may appeal the Arbitrator's decision by filing a notice of appeal to the Civil Clerk within 15 calendar days of the Arbitrator's decision.

(10) The Pretrial Scheduling Order, if entered by the Court, in paragraph 16(b)(1) may also include:

(i) The date, or dates for conferences before trial, a final pretrial conference, and trial;

(ii) Any other matters the Court deems appropriate in the circumstances of each case.

(11) Mandatory Case Management Worksheet/Order or Pre-Trial Worksheet. Following the selection of the ADR Practitioner by the parties and within twenty (20) calendar days the parties shall file a Case Management Worksheet/Order, or Pre-Trial Worksheet with the Civil Clerk who shall present the same to the Court for consideration. This Order shall encompass the deadlines set forth in (b)(1) Scheduling and Planning of this Rule. Failure to comply with this deadline may result in sanctions being imposed by the Court, including but not limited to dismissal of the case or other appropriate sanction.

(i) In the event the parties fail to comply with paragraph (11) of this rule, the Civil Clerk shall prepare and forward to the parties a Civil Rule 41(e) dismissal notice and schedule the matter for a hearing on the civil motion calendar. The Civil Rule 41(e) hearing shall be withdrawn if the parties comply with paragraph (11) of this rule.

2) The effective date of this rule amendment shall be July 6, 2009.

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Chief Judge Alex J. Smalls

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Judge William C. Bradley, Jr.

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Judge John K. Welch

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Judge Rosemary Betts Beauregard

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Judge Kenneth S. Clark, Jr.

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Judge Charles W. Welch, III

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Judge Joseph F. Flickinger, III

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Judge Andrea L. Rocanelli

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Judge Anne Hartnett Reigle