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Court-Connected Alternative Dispute Resolution in Maine

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COURT-CONNECTED ALTERNATIVE DISPUTE RESOLUTION IN MAINE

Honorable Howard H. Dana, Jr.

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COURT-CONNECTED ALTERNATIVE DISPUTE RESOLUTION IN MAINE

Honorable Howard H. Dana, Jr.*

In the 21st Century, Maine's courts will offer citizens access to a variety of means for resolving their disputes, as well as assistance in identifying the dispute resolution methods most appropriate to their cases.1

I. INTRODUCTION

With these words of prophecy the Commission to Study the Future of Maine's Courts launched its discussion of alternative dispute resolution (ADR). Although conceding that "the adversary process . . . has served the people of the state well" and acknowledging that "the state must continue to provide a forum for forceful advocacy that produces a definite and binding judicial decision" the Commission asked the Maine judicial and legislative branches to embrace ADR.2

For the last dozen years, the Author has been the Supreme Judicial Court's (SJC's) liaison to its ADR Planning and Implementation Committee and Chair of the Court's Advisory Committee to the Court ADR Service (CADRES).3 In this Article, he summarizes the arguments for and against court-connected ADR, describes and assesses the State's various experiments with ADR, with special emphasis on the State's recent implementation of mandatory ADR in the Superior Court, and concludes with some recommendations for the future.

A. What is ADR?

ADR in its broadest sense may be an alternative to a trial or an aid to settlement. Because of the public's constitutional right to a jury trial, most court-con-

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1. COMM'N TO STUDY THE FUTURE OF MAINE'S COURTS, NEW DIMENSIONS FOR JUSTICE 38 (1993) [hereinafter COMMISSION].
2. Id. at 39.
3. Formerly known as the Court Mediation Service.
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nected ADR is usually less the former and more the latter. 4 Although the various types of ADR are probably infinite, the most well-known processes are the following: mediation, 5 early neutral evaluation, 6 arbitration, 7 advisory arbitration, 8 summary jury trial, 9 mini-trial, 10 and the judicial settlement conference. 11

B. What Are the Pros and Cons of Court-Connected ADR?

The Commission to Study the Future of Maine's Courts listed a few of the advantages and none of the disadvantages claimed for court-connected ADR. It suggested that Maine's forty-nine active trial judges cannot expeditiously process the quantity of litigation being filed nor are the courts equipped to deal effectively with the complexity of the public and social policy disputes that increasingly find their way into court. 12 The Commission stressed the results of their 1992 public opinion poll "that more than 80% of Mainers support the greater use of processes such as mediation and arbitration as alternatives to the traditional trial process." 13 The Commission believed that by diverting some cases to ADR it would increase "access to traditional adjudication" 14 and that a "high quality of justice" can be achieved "by providing mechanisms that will allow individuals and groups to find their own solutions to problems." 15 In sum, the Commission saw ADR as a panacea for the Maine Court system and the citizens who use it.

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5. A process in which a neutral person (mediator) "seeks, by providing information and suggestions, to guide the parties to a solution acceptable to both of them." See JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 596 (4th ed. 1998).

6. A process in which an experienced trial attorney or other expert hears summaries of the parties' positions and advises them about the strengths and weaknesses of claims and defenses and the probable outcome of a trial.

7. Privately selected neutral person (or persons) hears evidence and parties' arguments and issues an award that can be entered as an enforceable judgment.

8. A process in which a neutral arbitrator hears the parties' evidence and arguments and issues a non-binding decision.

9. A trial before a judge and jury in which the lawyers summarize the evidence and then argue their case to the jury and the judge instructs the jury on the law. The jury deliberates and then their non-binding verdict is read to the parties.

10. Like the summary jury trial except there is no judge and no jury. A neutral arbitrator keeps order and each advocate explains his view of the law and the facts to the representatives of both (or all) parties. Each lawyer is subject to questioning and rebuttal evidence can be offered. The representatives then discuss a possible resolution.

11. Settlement conference before a judge or other judicial officer usually with parties and counsel present, where counsel present their case and know that the opposing party is hearing the presentation. The judge or judicial officer may try to force a settlement rather than facilitate a mutually acceptable resolution.

12. COMMISSION, supra note 1, at 39. To the same effect the California Business & Professional Code, in the purposes clause to its mediation statute, lists complexity of litigation as one of the reasons for court-connected mediation. CAL. BUS. & PROF. CODE § 465 (1990).

13. COMMISSION, supra note 1, at 39.


15. COMMISSION, supra note 1, at 39.
By increasing access to dispute resolution, the court system will save significant intangible costs arising from unresolved problems among neighbors, families, schools and children, businesses and public agencies. The system will also save the very tangible costs resulting from unnecessary demands on the courts, lost productivity and the need for social services, and law enforcement.16

As an unabashed advocate for court-connected ADR, the Commission can be forgiven for only extolling the perceived advantages of its recommendations. Others have provided a more balanced critique.

Advocates of court-connected ADR describe it as often cheaper, quicker, and better than the adjudicatory trial.17 Such claims, however, are not universally endorsed. What follows is a review of the claimed benefits of and problems with court-connected ADR, for the parties, the courts, and society at large.

1. Benefits for Parties

Those touting ADR claim that it benefits the parties to a dispute by: reducing

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16. Id. at 39-40.

17. KAKALIK I, supra note 4, at 10; Kim Dayton, The Myth of Alternative Dispute Resolution in the Federal Courts, 76 IOWA L. REV. 889, 914 (1991) ("The former director of the Federal Judicial Center [Leo Levin] has stated that ADR's goals include avoiding trial (by increasing settlement ratios), reducing the 'elapsed time to termination of the law suit,' reducing the cost of litigation, and decreasing the expenditure of judicial resources.") (citations omitted); see Developments in the Law—The Paths of Civil Litigation: VI. ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives, 113 HARV. L. REV. 1851, 1853 (2000) [hereinafter Developments in the Law].
costs;\textsuperscript{18} speeding up the pace of case resolutions;\textsuperscript{19} shortening the time to final


\textsuperscript{19} See Brazil, supra note 18, at 68-69; Winston, supra note 18, at 190; Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 673 (1986); Steelman et al., supra note 18, at 8 (reporting that there were more cases disposed of in the same period that were exposed to ADR than those in the pre-ADR sample; 87.9\% vs. 77.5\% (a statistically significant change)); Craig A. McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 Me. L. Rev. 237, 238 (1981); E. Allan Lind & John E. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts 93 (Federal Judicial Center rev. ed. 1983) ("It is clear that in two of the three pilot districts the arbitration rules have expedited the disposition of cases . . ."); Krieger, supra note 18, at 243; Senft & Savage, supra note 18, at 327-32; McAdoo & Hinshaw, supra note 18, at 525; Trantina, supra note 18, at 8.
resolution; increasing the likelihood of settlement; improving the quality (rationality) of the thinking that informs each side’s decision about how to proceed and on what terms to resolve the matter; providing increased party participation and satisfaction; improving communication across party lines; reducing distrust between parties; helping to forge better relations between parties; im-

20. Cole et al., supra note 4, § 2.3 ("late settlement increases costs of discovery and motion practice"); Brazil, supra note 18, at 68-69; Clarke et al., supra note 18, at vi; Winston, supra note 18, at 190 ("The imminence of mediation, much like the imminence of trial, can serve as a ‘settlement event’ that induces parties and attorneys to focus on the case and to enter into serious negotiations.").

21. Winston, supra note 18, at 192 (noting that mandatory mediation is an effective means of obtaining out-of-court settlements, and “overcomes the sign of weakness that is often associated with mediation.”); Cole et al., supra note 4, § 2.2 ("High rates of settlement of civil and divorce cases are widely known. Research evidence suggest that, at most, mediation provides only marginal gains to overall settlement rates, but may do much to change the character and timing of settlement."); id. at § 2.3 n.2 (referencing the National Standards for Court-Connected Mediation Programs, Standard 4.1 which aims for case selection including “promoting effective settlement and avoiding harm to nonparties, promoting continuing relationships, and avoiding continued court involvement”); Rex R. Perschbacher & Debra Lyn Bassett, The End of Law, 84 B.U. L. Rev. 1, at 16 (2004) (recognizing settlement as one of the purposes of court-mandated ADR); Phillips, supra note 18, at 148.

22. Brazil, supra note 18, at 68-69; see also Steelman et al., supra note 18, at 13; Dan Kagan et al., Alternative Dispute Resolution: So, What Does the Court Say About It?, 16 Me. B.U. L. Rev. 1, at 16 (2004) (recognizing settlement as one of the purposes of court-mandated ADR); Phillips, supra note 18, at 148.

23. Brazil, supra note 18, at 68; McEwen & Maiman, supra note 19, at 238 ("Heightened participation by disputants in resolving their own dispute should leave them more satisfied with both the process and the outcome than if they had had their case adjudicated."); Cole et al., supra note 4, § 2.3 n.1 (referencing “participation of parties” as a reason for requiring mediation); Francis E. McGovern, Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary), Dispute Resolution Magazine, Summer 1997, at 12 ("People like the ability to participate in the resolution of their dispute, the opportunity to appear in a judicial-like setting, and the receipt of individual attention. Some litigants prefer the privacy of ADR, the less confrontational style, the ‘free’ discovery, or the bargaining methodology over the procedural litigation process."); Krieger, supra note 18, at 243; Senft & Savage, supra note 18, at 328 (referring to “consistently high satisfaction rates by participants”); Developments in the Law, supra note 17, at 1861 (noting that ADR “has the potential to provide a variety of benefits, including greater satisfaction of the parties”).

24. Brazil, supra note 18, 69; Winston, supra note 18, at 191 (“Even when parties fail to reach a settlement, the enhanced mutual understanding resulting from the mediation process greatly improves the prospects for a later agreement.” (citing CPR INSTITUTE FOR DISPUTE RESOLUTION, CPR MODEL ADR PROCEDURES AND PRACTICES: MEDIATION 1-22 (1994))); McEwen & Maiman, supra note 19, at 256 (noting that mediation is more likely to cause parties to understand the other side’s point of view); Cole et al., supra note 4, § 2.3 (“Preservation and improvement of continuing relationships between parties is often articulated as a goal for mediation.”); McAdoo & Hinshaw, supra note 18, at 526 (stating that mediation encourages the parties to communicate directly).

25. Brazil, supra note 18, at 68-69; McGovern, supra note 23, at 13; McEwen & Maiman, supra note 19, at 256 (mediation helps leach out the anger).
proving communication between the lawyer and client; improving communication between the parties and the court and reducing party-alienation from the process by increasing understanding of procedural and substantive matters, reducing formalities and procedural rigidities, and affording the parties more power than is available in formal adjudication; enhancing the parties' capacity to protect privacy interests; creating opportunities for a wider range of outcomes by injecting more creativity into the design of possible solutions; providing a more flexible process for resolving disputes; providing solutions with which the parties are more likely to comply; and providing access to ADR, which outside the court

27. Brazil, supra note 18, at 68-69.
28. Id.; McGovern, supra note 23, at 13; McEwen & Maiman, supra note 19, at 237-39 (citing Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 8 BAYLOR L. REV. 1 (1956)) (ADR decreases the alienation of citizens when it is made an adjunct to the formal judicial process. The charge of alienation was first identified by Roscoe Pound in his 1906 critique of American Justice when he found that citizens too often view courts as intimidating, unfair, and incapable of yielding equitable outcomes.); McEwen & Maiman, supra note 19, at 255 (stating that ADR allows parties more time to explain their side of the dispute); id. at 256 (noting that the greater informality and privacy of mediation made it less intimidating and easier to understand than court process); Clarke et al., supra note 18, at 4 ("[T]he parties themselves can best fashion a solution to their dispute."); Winston, supra note 18, at 191 (citing Craig A. McEwen & Thomas W. Milburn, Explaining a Paradox of Mediation, 9 NEGOTIATION J. 23, 23 (1993) ("[P]arties often benefit from mediation despite the fact that their participation in the mediation is a result of a court order."); id. ("[R]eluctant parties often use mediation effectively and evaluate their mediation experiences positively."); Cal. Bus. & Prof. Code § 465 (1990) (listing less threatening procedures as a reason for requiring mediation); Cole et al., supra note 4, § 2:4; Deborah R. Hensler, Suppose It's Not True: Challenging Mediating Ideology, 2002 J. Disp. Resol. 81, 93 (2002) (stating that individuals prefer procedures where they can voice their opinions); Earler, supra note 18, at 224 (mediation lets the parties test their cases, understand each other, and tell their stories free from the structures of the legal process).
29. Brazil, supra note 18, at 68-69.
30. Id.; McEwen & Maiman, supra note 19, at 239 (noting that mediation provides superior means of resolving disputes because its procedural flexibility permits consideration of a broader range of issues); Cole et al., supra note 4, § 2:3 n.2 (referencing the National Standards for Court-Connected Mediation Programs, Standard 4.1 aims for case selection include "promoting effective settlement and avoiding harm to non-parties, promoting continuing relationships, and avoiding continued court involvement"); Senft & Savage, supra note 19, at 346-47 (stating that mediation allows parties to "decide for themselves their own outcome that is uniquely responsive to their situation."); Developments in the Law, supra note 17, at 1851, 1861, 1871; Crec, supra note 14, at 1021, 1071 (stating that equitable and non-economic remedies are more likely in mediation); McAdoo & Hinshaw, supra note 18, at 530; 4 Am. JUR. 2d Alternative Dispute Resolution § 1 (2004); Trantina, supra note 18, at 7.
31. See Commission, supra note 1, at 39 ("Flexibility" was one of the attributes of ADR referred to by the Commission); Cole et al., supra note 4, § 2:7 (discussing the fact that mediation depends upon both procedural and substantive flexibility); McEwen & Maiman, supra note 19, at 239 (mediation's "procedural flexibility permits consideration of a broader range of issues, including underlying problems that may prove to be more important to the parties than the concerns raised in their claim or complaint."); Senft & Savage, supra note 28, at 327-28; Developments in the Law, supra note 17, at 1871.
32. Clarke et al., supra note 18, at 4 ("[A] voluntary resolution is more likely to be complied with than a court-imposed judgment."); McEwen & Maiman, supra note 19, at 239 (explaining that participants are more likely to honor obligations contained in the agreements that they make); id. at 261-64 (mediation more likely to cause compliance with judgments than adjudications); id. at 241 ("[T]here is emerging evidence that divorce and custody mediation results more often in compliance with settlements and less often in further litigation than does adjudication of similar cases."); Senft & Savage, supra note 18, at 328 (stating that after successful mediation, there is less likelihood of future litigation); id. at 339; Krieger, supra note 18, at 244.
system is generally available only to those who can afford it.33

2. Benefits for the Court System

Proponents believe that ADR benefits the court system by: reducing costs;34 reducing backlog of older cases;35 expediting particular categories of cases;36 preserving the court's reservoir of authority;37 enhancing the system's legitimacy;38 increasing the level of access for those cases requiring adjudication by relieving the adjudicatory system of those cases that can be resolved through ADR;39 and increasing the level of access for those cases employing ADR by providing an opportunity for ADR.40

3. Benefits for Society

Advocates of ADR claim that ADR changes the "zero sum" game culture to

33. See McGovern, supra note 23, at 13; Perschbacher & Bassett, supra note 21, at 240-41; Senft & Savage, supra note 18, at 333.

34. See Brazil, supra note 18, at 68-69; Winston, supra note 18, at 191-92; id. at 188 (finding that ADR relieved overburdened and inefficient court system); Steelman, et al., supra note 18, at 2 (Comparing ADR project sample with a random pre-project sample indicated that higher court costs (as reflected by the number of events per case) were incurred in the earlier stages of ADR sample cases than in the earlier stages of pre-ADR sample cases. However, cases in the pre-ADR sample had much higher court costs associated with events that occurred later in the pendency of such cases.); McEwen & Maiman, supra note 19, at 238 ("unclog backed-up court dockets"); Cole et al., supra note 4, § 2:3 n.1; id. at § 2:3; Proceedings of the Forty-Sixth Judicial Conference of the District of Columbia Circuit, 111 F.R.D. 91, 195 (1985)

And, finally, with court resources being as scarce as they are, it is to everyone's advantage to save as much of those resources as we can. Many alternative programs save as much as 50 percent of trials—of judge time devoted to trial. That's a terribly important thing, not only for those cases going through the alternative mechanism, but for all the other litigants waiting in line to have their cases heard.); Senft & Savage, supra note 18, at 332; Hensler, supra note 14, at 175-77, 185 (explaining that one of the aims of settlement efforts is saving the court and the parties' money).

35. See Brazil, supra note 18, at 68; McEwen & Maiman, supra note 19, at 238 (discussing impact on "caseload"); Lederman, supra note 18, at 262 (easing docket congestion a plausible explanation for court encouragement of settlement).

36. Ostermeyer & Keilitz, supra note 18, at 16.

37. McGovern, supra note 23, at 13 (Any resolution that does not require judges to decide preserves the court's "sparse reservoir of authority residing in our judges.").

38. See, e.g., McEwen & Maiman, supra note 19, at 238-39; McGovern, supra note 23, at 13 (Arguing that excessive adversarial sentiment may produce a backlash against the entire system similar to the backlash against pretrial discovery. Injecting more cooperation into the process may be seen as restoring a "healthy balance of cooperation and adversarialness that is essential to the maintenance of our current litigation system."); Cole et al., supra note 4, § 2:4; Senft & Savage, supra note 18, at 328.

39. Improving access was also listed by the Commission; Cal. Bus. & Prof. Code § 465 (listing access as a reason for requiring mediation); Cole et al., supra note 4, § 2:3 n.1 (referencing "court caseload" as a reason for requiring mediation); Creo, supra note 14, at 1020 (reducing caseload enhances access to justice); Hensler, supra note 14, at 194.

40. Cole et al., supra note 4, § 2:5.
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the “win/win” culture and generates more trust and cooperation thereby creating a more civil society. On the other hand, detractors and a few supporters have identified a series of problems associated with court-connected ADR.

4. Problems for Parties

Some believe that engrafting ADR onto the litigation process creates problems for litigants. These problems include the following: it increases (or at least does not decrease) the cost of litigation; yields no significant reduction in the time to resolution; has little or no impact on settlement rates; sacrifices fairness because of pressures to settle; delays a final resolution in some cases; and generates more trust and cooperation thereby creating a more civil society.

41. Steelman, et al., supra note 18, at 26; McGovern, supra note 23, at 12-13 (finding that ADR allows “win-win” solutions to predominate over “zero sum game” solutions); McEwen & Maiman, supra note 19, at 253 (quoting Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 Harv. L. Rev. 637 (1976)) ("[A] process like . . . mediation has a 'graduated or accommodative character,' whereas adjudication generally has a binary character; that is, mediated outcomes can range along a continuum from all to nothing while adjudicative outcomes tend to be either all or nothing."); Creo, supra note 14, at 1029 (finding that mediation encourages “cooperative and non-combative behavior.”) (citation omitted).

42. See, e.g., McGovern, supra note 23, at 13; Cole et al., supra note 4, § 2:3, n.1 (referencing the “economic and social consequences of unresolved disputes” as a reason for requiring mediation); Brazil, supra note 18, at 56 (“One of organized society’s most fundamental responsibilities is to provide means by which people can resolve disputes without violence. In other words, providing effective dispute resolution processes is an essential public responsibility.”); see also Hensler, supra note 14, at 188 (indicating that evidence demonstrates that mediation produces little time or cost savings); Hensler, supra note 28, at 81 (arguing that there is no empirical evidence to support the claim that mediation saves time and money).

43. Winston, supra note 18, at 190 (“unsuccessful mediation followed by litigation . . . adds to the cost of the litigation process.”); Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. Legal Stud. 1, 18-19 (1995); Lucy V. Katz, Enforcing an ADR Clause—Are Good Intentions All You Have?, 26 Am. Bus. L.J. 575, 583 (advancing that mandatory mediation is an exercise in futility if one of the parties enters the mediation determined not to settle); Cole et al., supra note 4, § 2:5 (imposing fees for mandatory mediation on low-income parties makes this especially critical because there is a barrier created to access); Kakalik I, supra note 4, at 10 (“We have no strong statistical evidence that lawyer work hours are significantly affected by mediation or neutral evaluation in any of the six programs studied.”); Hensler, supra note 14, at 188 (noting that evidence indicates that mediation produces little time or cost savings.); Kakalik I, supra note 28, at 81 (claiming that there is no empirical evidence to support the claim that mediation saves time and money); Erler & Kagan, supra note 18, at 223.

44. Kakalik I, supra note 4, at 11 (“We have no strong statistical evidence that time to disposition is significantly affected by mediation or neutral evaluation in any of the six programs studied.”); Dayton, supra note 17, at 896 (“These comparisons conclusively show that ADR has not resulted in speedier resolution of federal civil cases, has not reduced backlogs, and has not affected the incidence of civil trials.”); Erler & Kagan, supra note 18, at 223.

45. Clarke et al., supra note 18, at viii; Cole et al., supra note 4, § 2:2 (“Research evidence suggests that, at most, mediation provides only marginal gains to overall settlement rates, but may do much to change the character and timing of settlement.”).


47. Susan C. Kuhn, Comment, Mandatory Mediation: California Civil Code Section 4607, 33 Emory L.J. 733, 758 (1984) (arguing that mandatory mediation creates another legal obstacle for the parties to overcome on their way to litigation).
makes the process more cumbersome and neutrals more scarce because of government regulation; produces "unfair" results for weaker parties because of the procedural and substantive flexibility of mediation; produces "unfair" settlements because of imbalances of power; creates a second class of justice for the poor, either because they can only afford ADR or because they cannot; causes judges to become less involved in cases prior to the ADR effort; and diminishes the effectiveness of ADR because of inappropriate timing.

5. Problems for the Court System

Detractors also claim that mandatory court-connected ADR: increases court

48. Winston, supra note 18, at 193. Winston notes that one problem with mandatory mediation is "defining the level of participation that constitutes compliance with the statute." Id. This uncertainty generates additional unproductive litigation and a loss of confidentiality. The solution may be to merely require attendance by a party (or representative with settlement authority) and an exchange of position papers on disputed issues. See also COLE ET AL., supra note 4, § 2:04 (noting that efforts to promote high quality mediation through qualifications for mediators, ethical codes and systems for assigning cases can reduce completion and drive up costs). Id. at § 2:8.


50. Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1076 (1984). See COLE ET AL., supra note 4, § 2:2; Developments in the Law, supra note 17, at 1873 ("When private neutrals are paid directly by disputants, they may prove more beholden to the repeat players in commercial disputes than to their adversaries."); Krieger, supra note 18, at 237; Peterson, supra note 49, at 8; Coates, supra note 18, at 6; A.B.A. Commission on Domestic Violence, Policy 00A109B.

51. STEELMAN ET AL., supra note 18, at 16 (Suggesting that ADR causes "some judges to remove themselves from involvement in the pretrial stages of the cases. As a result, said one interviewee, they may be less inclined to 'squeeze' counsel or parties to move cases to resolution."); Brazil, supra note 20, at 90 ("Once an ADR program is institutionalized for certain kinds of cases, judges might be tempted to shift their energy and attention away from those cases and toward other matters.").

52. STEELMAN ET AL., supra note 18, at 16-17 (noting sometimes ADR is held too soon—"before attorneys have completed enough initial discovery to feel that they have a good enough understanding of their cases to participate effectively in ADR sessions."); KAKALIK I, supra note 4, at xxxiv (In the six ADR programs studied as part of the federal experiment pursuant to the Civil Justice Reform Act (CJRA) of 1990, [t]he problem cited most often by lawyers and ADR providers was that the parties were not ready to settle. The timing of the ADR session could be a major factor in this lack of "readiness." . . . Substantial numbers of lawyers in some districts felt that the sessions were held too early to be useful.); Erler & Kagan, supra note 18, at 223.

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costs; and yields no reduction in court workload. They also question the authority of a court to force parties to participate in and pay for a service with the principal purpose of causing a settlement, especially if the provider of the service is an individual or a profit-making institution earning more than a \textit{de minimis} fee, and question the propriety of a court channeling money-making work to any individual or private institution in competition with others.

6. Problems for Society

Detractors also believe that ADR conceals problems that would otherwise have come to the attention of the public and be solved by political forces and highjacks a private dispute resolution process and makes it subservient to the court system. ADR is often blamed for the vanishing trial, especially the jury trial; some have argued that courts seem to place too high a premium on avoiding trials, and trials are harder to get.

54. Steelman et al., \textit{supra} note 18, at 17 (especially costing clerk's offices in low volume counties); \textit{id.} at 24 (noting that in larger counties, ADR requires a significant portion of at least one person's time in the clerk's office); Cole et al., \textit{supra} note 4, § 2:3 ("evidence ... suggests that savings of money and time for parties may be more likely than savings of money or time for courts."). Such findings make sense when one understands that courts typically have sufficient work that a decline in one area simply means expanded time to handle work in other areas); Kakalik I, \textit{supra} note 4, at xxxi (In the six ADR programs studied as part of the federal experiment pursuant to the Civil Justice Reform Act (CJRA) of 1990 the court administrative cost per case ranged from $130 to $490. "The total start-up cost to district courts ranged from $10,000 to $69,000.").

55. Clarke et al., \textit{supra} note 18, at vii.


57. Brazil, \textit{supra} note 18, at 86.

58. Tom R. Tyler, \textit{The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities}, 66 \textit{DENV. U. L. REV.} 419, 433 (1989); Goldberg et al., \textit{supra} note 51, at 15; Cole et al., \textit{supra} note 4, § 2:2 ("Commentators claim that it is unjust to permit private settlements because enforcement agencies are denied information to ascertain patterns of misbehavior and to address them."); Fiss, \textit{supra} note 50, at 1078-79; \textit{id.} at 1085-88 (by settling, justice is not necessarily done, force is not given to values embodied in the Constitution or statutes, and no authoritative interpretation of law is given); Perschbacher & Bassett, \textit{supra} note 1, at 14-15 (By taking this narrow "dispute resolution" approach, other considerations within the wider realm of "law"—including providing norms, social control, affording a public forum, providing future guidance for others similarly situated, creating precedent, and building a body of decisions for sue both directly and by analogy—are disregarded and discarded without apparent thought.); Lederman, \textit{Precedent Lost}, 221, 258-59; \textit{Developments in the Law}, 1851, 1854; Creo, \textit{supra} note 14, at 1031; Krieger, \textit{supra} note 18, at 240-41, 249-51 (stating that court mediation reprivatizes family law and is a setback for victims of domestic violence); Patricia Lee Refo, \textit{Opening Statement: The Vanishing Trial}, 30 \textit{A.B.A. J. SEC. LITIG.} 2, 4 (2004) (observing that the results of ADR are shielded from public view).

59. Clarke et al., \textit{supra} note 18, at 3 ("Some see attorney involvement in mediation and other forms of alternative dispute resolution as part of an 'institutionalization and legalization of ADR' in which lawyers have captured or co-opted innovative ways of resolving disputes and returned them to the adversarial system."); Creo, \textit{supra} note 14, at 1045 (listing negative impacts of institutionalization of mediation); Sentf & Savage, \textit{supra} note 18, at 336; Hensler, \textit{supra} note 14, at 192 (stating that court mediation often resembles traditional judicial settlement conferences).

60. See, e.g., Peter L. Murray, \textit{The Disappearing Massachusetts Civil Jury Trial}, \textit{M. L. REV.} (Spring, 2005).
With these arguments in mind, should the court system offer parties an opportunity to engage in court-connected ADR? Based on the Maine experience, this Author believes the answer is an unqualified “yes.” A slightly closer question is whether the court-system should require that participation.

C. Should Court-Connected ADR be Mandatory or Voluntary?

It has been suggested that all of the benefits of court-connected ADR are retained and most of the problems are mitigated if ADR is voluntary (i.e., the court system makes ADR options available to the parties but does not require their use). This suggestion is seductive. Lawyers are honorable people and will do what is in their clients’ best interests. Lawyers know best whether and when to engage in settlement efforts. Forcing all litigants to engage in ADR at the same time and in a particular way is subject to the “one size fits all” criticism that is often directed at the adjudicatory system.

Wayne D. Brazil,61 a leading proponent of court-connected ADR makes the case against voluntary programs. Arguing that “little participation is likely in purely ‘volunteer’ ADR programs,” he explains that

[t]o “volunteer” a case into a program, usually all parties must agree, and when one party/lawyer suggests participation in an ADR program, the other parties/lawyers are likely to be suspicious that some ulterior motive inspires the suggestion, e.g., that the party making the suggestion is doing so because it expects to gain some advantage over the others through the ADR process that has been suggested. Some attorneys and many clients, even now, are unaware of ADR.62

Mr. Brazil has further argued that some have become accustomed to doing things in certain ways and find those ways comfortable; they resist trying something new because it takes more energy.

Attorneys are overworked and practice in a largely reactive mode, putting out the hottest fires first (trials and imminent trials are the hottest fires); they often feel they have little time for longer range planning or to step back from the day-to-day, immediate needs of their practice to look thoughtfully at alternative ways of proceeding or to develop big-picture strategies for meeting efficiently the needs of individual cases.63

Some attorneys fear the unknown—they fear things untried or new—they fear loss of control over and loss of predictability in the process . . . [s]ome attorneys’ fear loss of control over inputs (about the litigation) to their own client, or out-

61. Judge Brazil is a Magistrate Judge in the United States District Court for the Northern Division of California and recognized authority in court-connected ADR. Brazil, supra note 18.

62. Id. at 122. This observation was recently echoed by the authors of a study by Rand’s Institute for Civil Justice evaluating some of the pilot projects in the federal courts pursuant to The Civil Justice Reform Act (CJRA) of 1990. James S. Kakalik et al., Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act, 49 ALA. L. REV. 17, 35 (1997) [hereinafter Kakalik II]. It has also been noted that “[n]either lawyers nor judges have used any type of ADR extensively when its use is voluntary.” Id. See also Meierhoefer, supra note 51, at 11 (“Voluntary alternative programs in other jurisdictions have been notably unsuccessful in attracting cases. Programs that do not attract cases are unlikely to have any overall effect on the cost of litigation or court burden.”); Senft & Savage, supra note 18, at 329-30.

63. Brazil, supra note 18, at 122-23.
puts (communications) from their client to the opposition. Some attorneys fear that by suggesting ADR they will appear (to their own clients and/or to their opponents) as something less than a completely aggressive "gladiator." Some attorneys fear that making an election, a choice/decision, that appears so fundamental (which procedure to use) needlessly creates something for which they can be second-guessed, criticized, and sued by their own client.\footnote{Id. at 123.}

Finally, some attorneys are "reluctant to give up the fee-generating potential of the traditional litigation process and to move into an alternative that might generate appreciably less income for counsel."\footnote{Id.}

\section*{D. If Mandatory, Should the Timing be Left to the Parties and Their Lawyers?}

This is not a subject that has received much critical attention. Lawyers can be expected to say—if we must do this (i.e., ADR), at least let us pick the time. All the reasons marshaled for having a voluntary program, can be marshaled for giving the lawyers control over timing. It is also true that at least some of the arguments for a mandatory program augur for the court being involved in setting the time of the ADR.\footnote{Id.} Additionally, for the cases that settle early, it is probable that discovery and trial preparation costs have been saved. It also may be argued that for those cases that do not settle and require involvement of the court to resolve the matter, requiring the parties to engage in ADR has increased their costs. Finally the Author has had a working hypothesis that the sooner the parties and their lawyers begin to discuss the possibility of settlement, the more likely they will reach a settlement. As we will see from the Maine experience with ADR, especially in the Superior Court, there is some evidence to support this hypothesis.

\section*{E. A Caution}

In determining whether a court should adopt either voluntary or mandatory court-connected ADR or involve the court in setting the time of ADR, we would do well to reflect on the advice of Richard A. Posner:

\begin{quote}
[T]he success or failure of [a proposed alternative to the conventional methods of resolving legal disputes] must be verifiable by accepted methods of (social) scientific hypothesis testing. I am unconvinced by anecdotes, glowing testimonials, confident assertions, appeals to intuition. Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing. Judicial opinions and law review articles alike are full of assertions—about the effects of a comparative negligence standard, jurors’ comprehension of instructions, . . . the social utility of pretrial discovery, the virtues of adversarial compared to inquisitorial techniques, and hundreds of other matters—that have no demonstrable factual basis. . . . If we are to experiment with alternatives to trials, let us really experiment; let us propose testable hypotheses, and test them.\footnote{Monahan & Walker, supra note 5, at 596 (emphasis omitted) (quoting Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366, 367 (1986)).}\
\end{quote}
II. THE MAINE EXPERIENCE—EARLY DEVELOPMENT OF COURT-CONNECTED ADR

It is probable that various extrajudicial methods for resolving disputes have been employed in Maine for hundreds of years. It is also probable that judicially sponsored settlement conferences have been a part of the legal landscape for as long as we have had judges. Other than these judicially sanctioned settlement conferences, formal court-connected ADR has been employed in Maine only for about twenty-five years.

A. Small Claim Mediation in Maine

"Sponsored by the Cumberland County Bar Association and originally funded by the Maine Council for the Humanities and Public Policy," court-connected small claim mediation in Maine began as a pilot project in the fall of 1977. After expanding to Biddeford, Brunswick, Augusta, and Lewiston, the program received state funding in 1979 and legislative authorization in 1980. Today, every District Court that handles small claims has a mediation component.

In 1981, Craig A. McEwen and Richard J. Maiman provided an empirical assessment of the small claims pilot project. They found that early judicial skepticism had been replaced with the view that small claims mediation was "useful," that it served to "remove inappropriate cases from the docket," and that it "allow[ed] judges more time for the cases remaining on their calendars." Attorneys reportedly found it a "superb device... to coax an unreasonable client into a reasonable settlement." The principal findings from their comprehensive study were that:

1. Two-thirds of the mediations ended in agreement.
2. Relatively complicated cases proved the hardest to resolve through mediation.
3. Mediation worked equally well for well-acquainted and unacquainted persons.
4. Defendants were far more likely to obtain judgment if they tried mediation and failed (i.e., 39%) than if they went directly to an adjudication (i.e., 17%).
5. A mediated settlement was equally likely in those cases in which mediation was mandatory and those in which it was voluntary.
6. Mediators (65%) were far more likely than judges (24%) to make arrangements for payment.

68. In 1784, when Maine was part of Massachusetts, the practice of resolving disputes by dueling was outlawed. 1784 Mass. Acts 193. Until recently it was still illegal. Me. Rev. Stat. Ann. tit. 17, § 1351 (1983). The Maine Legislature has recently repealed this provision. 1997 Me. Laws 623. Presumably, the motivation for this repeal was not to reintroduce that ADR option into Maine.
69. McEwen & Maiman, supra note 19, at 241-42.
70. Id. at 242.
71. Id. at 241-42.
73. McEwen & Maiman, supra note 19, at 241.
74. Id. at 242.
75. Id.
76. Id. at 249-50.
77. Id. at 250.
78. Id. at 251.
79. Id.
80. Id. at 252.
81. Id.

7. In virtually every case that settled through mediation (92.4%), plaintiffs obtained a positive award, while plaintiffs in 17.2% of adjudications received a defendant’s verdict.82

8. On the other hand, almost half the plaintiffs that went to trial (i.e., 48.5%) obtained a judgment greater than 90% of their demand. This compares to only 16.9% of plaintiffs trying mediation who settled for over 90% of their demand.83

9. On the average, small claim mediation lasted longer (i.e., 25.7 minutes) than trials (i.e., 14.4 minutes).84

10. Participants in mediations were more likely (i.e., 93.6%) to feel that they had sufficient time to fully explain their side of the case than in adjudications (i.e., 80.5%).85

11. Participants were far more likely to understand “everything that was going on” in mediations (i.e., 78.6%) than in adjudications (i.e., 64.8%).86

12. Participants were twice as likely to increase their understanding of the other party’s point of view in mediation (i.e., 30%) as in an adjudication (i.e., 14%).87

13. Participants were somewhat more likely to be completely or mostly satisfied with mediation (i.e., 66.6%) than they were with an adjudication (i.e., 54%).88

14. Plaintiffs who recovered nothing were far more likely to view their mediation as fair (i.e., 53.8%) than were plaintiffs who recovered nothing from their adjudication (i.e., 8%). Correspondingly, defendants who ended up agreeing to pay over 90% of the plaintiffs’ claims were almost twice as likely to view the mediation as fair (i.e., 66.7%) as their counterparts who ended up with such a judgment following adjudication (i.e., 37.1%).89

15. Settlements requiring the payment of money were far more frequently paid in full (70.6%) than were adjudicated judgments (33.8%). Correspondingly, no payments were made in 45.1% of the adjudicated judgments and only 12.8% of the mediated judgments.90

While mediation of small claims disputes in Maine began as a voluntary experiment in the Portland District Court, today, financed by a $5 surcharge on the small claim filing fee, a small claims mediator is available to assist the parties in reaching their own settlement whenever a small claims docket is held throughout Maine.91

B. Child Custody Disputes in Maine

In 1977, Maine established a court-sponsored voluntary mediation service for domestic relations cases. In a 1982 report to the Chief Justice, the status of domes-

82. Id. at 253.
83. Id.
84. Id. at 255.
85. Id.
86. Id. at 256.
87. Id.
88. Id. at 256-57.
89. Id. at 258.
90. Id. at 261.
91. Interview with Diane Kenty, Director, Office of Court Alternative Dispute Resolution (July 1, 2004).
tic relations mediation was described: For Fiscal Year 1981: 130 domestic relations mediation cases; average time—2 hours, 45 minutes (range: 10 minutes to 8 hrs.); 68 resolved by mediator, 36 referred to judge, 26 continued. For Fiscal Year 1982: 83 domestic relations mediation cases; average time—2 hours, 15 minutes (range: 20 minutes to 7 hours); 47 resolved by mediator, 19 referred to judge, 17 continued.

In fiscal year 1981 court-sponsored domestic relations mediation was occurring in only seven District Courts (out of 32) and two Superior Courts (out of 16). In his cover letter to the Chief Justice enclosing his report, Lincoln Clark, the Director of the Court Mediation Service, stated that:

[O]ur experience has demonstrated [in domestic relations cases] that mediation is generally a better solution than litigation.

Where adversarial trials tend to exacerbate differences, mediation works to lead the parties to a common ground. Because the mediator has more time to listen than our over-burdened trial judges, the underlying causes of disputes are more likely to be aired; and because a mutually acceptable mediated solution more often than not leaves the parties on speaking terms, compliance with the resulting court order is facilitated, which is critically important when the custody of children is involved. In intra-family disputes, mediation makes a unique contribution both to the judicial system and to the welfare of the parties.

On March 17, 1983, the Chief Justice of the Supreme Judicial Court issued the following order designed to encourage, but not require, mediation in domestic relations cases:

- Attorneys to inform clients of the availability of court-sponsored mediation, and to discuss the possibility of mediation with a client and opposing counsel.
- Judges to inquire about efforts to settle, and to recommend mediation where appropriate.
- Courts to give scheduling priorities to cases where parties have attempted to mediate.

With the Court’s urging, between May and December of 1983 an average of 50 divorce cases per month were mediated.

In 1983, the Maine Legislature established the Commission to Study the Matter of Child Custody in Domestic Relations. In its 1984 Report the following year, the Commission recommended:

Institutional changes that emphasize conciliation and agreement should be made in the present system for handling matters of child custody in domestic relations cases.

The current trial-focused system for addressing child custody disputes is inherently antagonistic to the goals of providing stability for children, meaningful parent-child relationships, sufficient living arrangements and support, and responsible communication between adults. Divorce proceedings should be re-

92. COURT MEDIATION SERVICE, JUDICIAL DEPARTMENT, STATE OF MAINE, MEDIATION IN MAINE: FIVE YEARS OF PROGRESS 21, 23 (November 1982) (finding that Mediation Service at the time operated in the areas of small claims, landlord/tenant, disclosure, and domestic).
93. Id. at 26, 28.
94. Id. (Letter from Lincoln Clark, Court Mediation Service, to Hon. Vincent McKusick, Judicial Department, State of Maine (Nov. 16, 1982)).
96. Id. at n.47.
moved from the adversary process and placed in a forum where discussion, compromise, and communication will be fostered in the best interest of the parties and children involved.\footnote{Id. at ii-iii.}

The Commission did not favor mandatory mediation because of a fear it could increase the time and cost of the divorce process. Nevertheless, in 1983, the Maine Legislature rejected the Commission's recommendation and mandated mediation before any contested domestic relations hearing involving children.\footnote{P.L. 1983, ch. 813, § 3.} Mediation was to occur before someone other than the Court because, as the Commission concluded,

The judge cannot sit down with the parties around a table and engage in an extensive discussion, focusing first on the best interest of the children, and only second on the parties' interest and their economic disputes. A judge who becomes too involved in attempting to promote settlements may be viewed as compromising judicial objectivity if the matter ultimately must go to trial and decision.\footnote{Report—Child Custody, supra note 95, at 15 (citing Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 426-35 (1982)).}

In 1995, the State Justice Institute (SJI) awarded Maine a grant to study the effectiveness of domestic relations mediation in Maine. Participants (attorneys, parties, and mediators) in domestic relations mediations at eight court sites were asked to complete evaluation forms following mediation sessions. Questionnaires from 2695 people were tabulated and the results were released in a report entitled "'Trapping the Data': Mediation Programs in Maine." The principal findings of the Report are as follows:

1. Satisfaction. 4 out of 5 mediators (81%), 3 out of 4 mothers (75%) and fathers (73%) were satisfied with the outcome.\footnote{MARKET DECISIONS, INC., "TRAPPING THE DATA": MEDIATION PROGRAMS IN MAINE 4 (Aug. 1997).}

2. Costs. More than half (56%) of the attorneys surveyed believed that mediation had reduced their client's costs, 19% believed there was no change, and only 16% believed that mediation increased client costs.\footnote{Id. at 5.} The parties had a different perspective. Only 10% of the mothers and 11% of the fathers indicated that mediation had decreased their costs.\footnote{Id.} This divergence between counsel and

<table>
<thead>
<tr>
<th>Impact on Costs</th>
<th>Attorneys</th>
<th>Mothers</th>
<th>Fathers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increases Costs</td>
<td>16%</td>
<td>27%</td>
<td>32%</td>
</tr>
<tr>
<td>No change</td>
<td>19%</td>
<td>33%</td>
<td>32%</td>
</tr>
<tr>
<td>Decreases Cost</td>
<td>56%</td>
<td>10%</td>
<td>11%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>9%</td>
<td>29%</td>
<td>25%</td>
</tr>
</tbody>
</table>

\footnote{Id.}
clients is perhaps not surprising. From a client's perspective everything increases costs. The attorneys have the benefit of experience and are in a better position to assess whether a particular expenditure of time reduces anticipated total costs.

3. Time. Most attorneys (62%), but relatively few mothers (16%) and fathers (20%), indicated that mediation reduced the time that both attorneys and clients otherwise would have spent. The same observation about the reason for the attorney/client divergence on the cost of mediation can also be made about their relative assessments of the impact on time to resolution.

4. Family Relationships. Twenty-eight percent of the mothers and 30% of the fathers indicated they thought that the mediation improved their dealings with the other parent, while 9% of both felt the relationship worsened as a result of the mediation.

103. *Id.* at 5-6.

### Table B

*Impact on Time to Resolution*

<table>
<thead>
<tr>
<th></th>
<th>Attorneys</th>
<th>Mothers</th>
<th>Fathers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Increases Time</td>
<td>17%</td>
<td>31%</td>
<td>28%</td>
</tr>
<tr>
<td>No change</td>
<td>21%</td>
<td>29%</td>
<td>30%</td>
</tr>
<tr>
<td>Decreases Time</td>
<td>62%</td>
<td>16%</td>
<td>20%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>0%</td>
<td>24%</td>
<td>22%</td>
</tr>
</tbody>
</table>

104. *Id.* at 6.

### Table C

*Impact on Relationship with Spouse*

<table>
<thead>
<tr>
<th></th>
<th>Mothers</th>
<th>Fathers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improved Relations</td>
<td>28%</td>
<td>30%</td>
</tr>
<tr>
<td>No change</td>
<td>41%</td>
<td>43%</td>
</tr>
<tr>
<td>Made Relations Worse</td>
<td>9%</td>
<td>9%</td>
</tr>
<tr>
<td>Don't Know</td>
<td>22%</td>
<td>18%</td>
</tr>
</tbody>
</table>

*Id.*
5. Understanding. Fifty-eight percent of the mothers and 63% of the fathers indicated that the mediation had the effect of improving at least somewhat their understanding of the other person's perspective.105

6. Outcome. Forty-two percent of the mediation sessions resulted in total settlement; 29% reported settlement of some, but not all, issues; 15% reported no settlement; and 14% reported the scheduling of a follow-up mediation session.106

In the future, the court system should compare the levels of satisfaction following mediated settlements with that following trials. One Virginia study found that "mothers in litigation reported significantly greater satisfaction with the outcome of the court contact. Specifically, mothers in litigation felt that they had won more and lost less in comparison with mothers in mediation."107 In a follow-up study, the authors reported that

[M]ediation was found to keep a substantial number of families out of court and to produce agreements in less than half the time it took to litigate settlements. No differences were found in the content of the mediated and litigated agreements in either study, with the exception that joint legal custody was a more frequent outcome of mediation.108

In Maine today, by court rule, the judicial department requires parties in virtually all contested family or domestic relations cases (i.e., with or without children) to engage in mediation.109 The volume of this mediation is growing.

105. Id.

Table D

<table>
<thead>
<tr>
<th>Impact on Understanding of Other's Perspective</th>
<th>Mothers</th>
<th>Fathers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improved to a Great Extent</td>
<td>12%</td>
<td>12%</td>
</tr>
<tr>
<td>Improved Somewhat</td>
<td>46%</td>
<td>51%</td>
</tr>
<tr>
<td>No Improvement</td>
<td>42%</td>
<td>37%</td>
</tr>
</tbody>
</table>

106. Id. at 10.
109. See ME. R. FAM. CT. III.B(2), C(2), D.
C. The 1988-1990 Superior Court Pilot Project

For eighteen months in 1988-1990 approximately 15% of the non-domestic civil filings in the Superior Court in Knox and York Counties experienced an “ADR Conference” soon after the filing of the answer. Litigants who either volunteered for or were assigned to the ADR track paid a total fee of $250. Experienced trial lawyers, after three hours of training, served as ADR neutrals for a fixed fee of $250. Although called “mediators,” most acted as “early neutral evaluators” and saw their function as settling the case. During the 18-month period, 170 cases were randomly assigned to ADR, 156 to the regular pre-trial track, and 87 cases voluntarily entered the ADR experiment. As of November 1, 1991, 38 months after the project began and 20 months after the start of the last case when approximately 89% of the 413 cases had been resolved, Professor Craig A. McEwen’s analysis of the results disclosed the following:

Overall Settlement Patterns. Although cases voluntarily signing up for ADR experienced a significantly higher level of settlements (79%), the settlement rates of the cases assigned to ADR (69%) and to the control group (65%) were comparable.

The Speed of Settlement. On the average, cases experiencing ADR settled sooner than cases not experiencing ADR. Voluntary ADR cases settled on average in about 67% of the time (268 days) that it took the control cases to settle (400 days) and the assigned ADR cases took about 85% of the time (340 days) it took the control cases to settle. Cases that experienced ADR and did not settle, however, averaged 468 days to disposition—19% longer than the average for the entire control group (i.e., 400 days) to reach disposition. The ADR experience accelerated the resolution time for those cases that did settle and lengthened the resolution time for those cases that did not.

Discovery. Perhaps because discovery was suspended prior to the ADR conference, discovery requests were substantially fewer in the cases experiencing ADR. The control group averaged 4.7 requests for discovery; the assigned group 3.1 requests; and the voluntary group 2.6 requests. Mediators, however, listed the absence of formal discovery as the primary reason for non-settlement in 29% of the conferences in which no settlement was achieved.

Motions and Court Hearings. The level of formal court involvement in ADR cases was significantly lower than in the control group. In 54% of the cases in the control group there was a court hearing compared with only 35% of the assigned ADR group cases and 30% of the voluntary ADR cases.

110. CRAIG A. McEWEN, AN EVALUATION OF THE ADR PILOT PROJECT: FINAL REPORT (Bowdoin College 1992) i, iii.
111. See supra notes 4-11 and accompanying text.
112. See KAKALIK I supra note 4.
113. McEWEN, supra note 110, at iii.
114. See McEWEN, supra note 110.
115. Id. at 6.
116. Id. at 7-9.
117. Id.
118. Id.
119. Id. at 9.
120. Id. at 9-11.
121. Id. at 11-12.
Impact on the Courts. In both York County and Knox County, the ADR pilot project produced more and earlier settlements. Its impact, however, on the two dockets was negligible. Although "average days from filing to final disposition" fell in both counties, it also fell statewide. Part of the reason for this negligible impact may be the fact that only 15% of civil filings in the two counties experienced ADR.

Costs and Problems of Implementing the Pilot Project. In addition to the problem of imposing a mediation fee of $250 on the litigants, because the income went into the State's General Fund and the Legislature did not increase the system's appropriation accordingly, the Court system was required to absorb the full cost of the $250 payment to each mediator. Additionally, the Court system fully absorbed the substantial hidden administrative costs of the project. These administrative costs were absorbed almost entirely by the clerks' offices in the two counties.

The ADR Process.

Ambiguity and vagueness in the court order establishing the Pilot Project and the very limited training of mediators left unclear precisely what the "ADR mediators" were expected to do as neutrals. Because of these ambiguities in the "mediator" role, it is not at all clear what the 74 different ADR "mediators" actually did during their ADR conferences.

The average length of each conference was 2.6 hours. Sometimes the "mediators" withheld judgment (37%), or expressed views on the legal merits (38%), on case value (24%), or on a likely court outcome (25%). Settlements were reported to be far less likely (21%) if the mediator's view on the legal merits, case value, or likely case outcome was withheld than if one or more of these views were revealed to the parties.

Settlement was, however, far more likely in cases where the "mediator" encouraged the parties to do most of the talking (71%) as compared to those instances when the parties only did some of the talking (41%) or none of it (28%).

D. The 1995-1997 Superior Court Pilot Project

The Pilot Project.

On July 1, 1995, in response to the report of the Commission on the Future of Maine's Courts, the Supreme Judicial Court commenced a two-year pilot project in the Superior Court in Kennebec, Aroostook, Sagadahoc, and Androscoggin Counties in which most newly filed cases were to experience a dispute resolution con-
ference conducted by a volunteer neutral attorney (the Volunteer Neutral Conference or VNC). In two of the counties (Kennebec and Sagadahoc), the VNC was to be held before discovery and in the other two counties (Androscoggin and Aroostook), the VNC was to be held halfway through discovery. Each pair of counties included a county with a large population (Kennebec and Androscoggin) and a county with a relatively small population (Sagadahoc and Aroostook). As originally envisioned, the neutral attorney’s task was to listen to each party’s description of the dispute, explore the possibilities of immediate settlement, and advise about ADR processes that might be suitable for resolving the dispute. If a settlement was not achieved at the VNC, the Neutral was to work with the parties and their counsel to reach an agreement on the best process for resolving the controversy, either by first utilizing a compensated ADR process (the Compensated Neutral Conference or CNC) or going directly to a trial. If the parties could not agree on how to proceed, the Volunteer Neutral was to determine the process that the Neutral believed was most appropriate and draft a proposed order directing the parties to undertake that process. After a review and approval by a judge, the order would govern the future course of proceedings. As developed by the Court’s ADR Planning and Implementation Committee, on which the Author sat as the Court’s liaison, the pilot project was designed to promote more extensive use of ADR services, to evaluate the effectiveness of those services, and to assess, in particular, when during the litigation process the services were most effective.

In announcing the project, Chief Justice Daniel E. Wathen described the hopes and aspirations of the Court: “We hope that this project will be beneficial for everyone involved. . . . It may prove to be at least part of the answer to crowded courts, delays in hearing cases and litigation costs that are just too high.”

The Chief Justice continued:

An important feature of the pilot project is that clients will be required to be involved early in the discussion of alternative dispute resolution methods along with their respective attorneys and a neutral, volunteer attorney. . . . Whether or not this experiment is successful will depend on these volunteer lawyers . . . . I believe we are entering a new era where increasing attention will be focused on the role of lawyers as problem solvers.

Cushman Anthony, a Portland lawyer, mediator, and the Chair of the ADR Planning and Implementation Committee, opined that the primary goals of the

134. Id.
135. Id.
136. Id. at 4.
137. See id. at 5.
138. Id.
140. Maiman et al., supra note, 133, at 4.
142. Id.
two-year experiment were to make the resolution of civil disputes faster and less expensive and to achieve settlements that yield greater citizen satisfaction.\textsuperscript{143}

With funds from a $120,000 grant from the State Justice Institute, the Court retained the services of the Muskie Institute of Public Affairs of the University of Southern Maine to study the experiment and evaluate it by comparing the results obtained in the four selected counties with those in the two “control counties” (Penobscot and Oxford), including settlement rates, client satisfaction, and the impact on cost for the parties and the court.\textsuperscript{144} Over ninety attorneys participated in a two-day training course in preparation for their role as Neutrals, and most also participated in a third day of follow-up training.\textsuperscript{145}

The Evaluation.

The evaluation of the two-year project proceeded on several fronts. This Author analyzed the docket sheets of a random sample of the cases filed in the experimental and control counties during the nine months commencing July 1, 1992 (i.e., before implementation) and all the cases filed in those six counties during the first nine months of the project period (1995-97).

At the conclusion of each conference, a questionnaire was distributed for completion by the parties, the lawyers, and the Neutral and mailed to the Muskie Institute for analysis. This article has benefited from the Author’s access to the conclusions revealed by the Muskie Institute in a series of interim and then its final report on the “Dispute Resolution Conference Pilot Project.”\textsuperscript{146}

This Author sent a second questionnaire to over 700 lawyers who participated in the pilot project and analyzed over 300 responses to this questionnaire.

The Muskie Institute extensively interviewed many of the “architects” and administrators of the project, and a sample of the lawyers and Neutrals involved in the project and polled all of the Neutrals for their views. These necessarily subjective evaluations were supplemented by testimony from many of the Neutrals at a meeting scheduled to seek their views and thank them for their service.

Summary of Findings.

What did we learn about court-connected ADR from the 1995-97 Pilot Project?

The project was a fair test of both an early and a midpoint case management conference involving the parties, their lawyers, and a professional (not a judge) who (sometimes) employed techniques associated with mediation, early neutral evaluation, or a judicial settlement conference. It appears to have generated a burst of early settlements and an overall increase in the number of settlements.\textsuperscript{147}

The project was not a fair test of the value of a Compensated Neutral Conference. Less than 10\% of the eligible cases experienced a Compensated Neutral

\textsuperscript{143} Id.
\textsuperscript{144} MAIMAN ET AL., supra note 133, at 1.
\textsuperscript{145} Hon. Howard H. Dana, Jr., Court-Connected Alternative Dispute Resolution in Maine 32 (1998) (unpublished masters thesis, Muskie School of Public Service) (on file with Author) [hereinafter Dana Thesis].
\textsuperscript{146} MAIMAN ET AL., supra note 133; MUSKIE INSTITUTE OF PUBLIC AFFAIRS OF THE UNIVERSITY OF SOUTHERN MAINE, INTERIM REPORTS ON THE DISPUTE RESOLUTION CONFERENCE PILOT PROJECT (Aug. 26, 1998, and Nov. 4, 1996; Nov. 21, 1996; Jan. 14, 1997; March 17, 1997; March 21, 1997; and June 16, 1997) [hereinafter MUSKIE INTERIM REPORTS].
\textsuperscript{147} The recent RAND study of the CJRA pilot projects confirmed this finding. See Kakalik II, supra note 62, at 36.
Conference. Apparently, the Neutrals at the VNCs rarely proposed that the court order the parties to pay for an ADR experience if they were not otherwise willing.

Although the timing of the early VNC was sometimes criticized as being "too early," the objective data does not support that criticism. The unhappiness of attorneys and Neutrals with the timing of the early conference was reflected in the Muskie Institute interviews. Surprisingly, however, the lawyers experiencing the early conference preferred the timing of the conference by a substantial margin (52.5% to 34.4%).

Reviewing some of the alleged pros and cons of court-connected ADR discussed at the outset of this paper, it would appear that the Volunteer Neutral Conferences:

a. **Reduced party costs.** For those litigants who settled quickly the early emphasis on substantive settlement discussions unquestionably reduced party costs. For the additional 5 to 11% who settled ultimately and thereby avoided the cost of a trial or a dispositive motion, we can only speculate as to their savings. More lawyers believed that the VNC increased costs than believed that it decreased costs. Among the lawyers who felt the impact of the VNC was substantial, however, more lawyers felt the VNC decreased rather than increased costs. Those who estimated the "cost" of the VNC (presumably counsel fees to prepare for and attend the conference) quantified the average to be in the $500 to $700 range, while those who estimated the cost savings from the conference (presumably counsel fees saved in achieving a settlement earlier than anticipated) quantified the average as between $3,500 and $4,000. Responses to both questions were relatively few and are not considered a reliable sample of the whole. It should be noted that the RAND study of mediation and early neutral evaluation programs in the federal courts revealed no strong statistical evidence that those programs impacted litigation costs.

b. **Shortened the time to final resolution.** Subjectively, most Neutrals and one-half of the lawyers interviewed believed that the VNCs hastened resolutions "sometimes." After twenty-nine months, the average time from filing to resolution decreased in all four project counties relative to the same counties three

148. Interestingly, the authors of the recent RAND study of ADR in the federal courts reported a similar observation. *Id.* at 38 ("Substantial numbers of lawyers in some districts felt that the sessions were held too early to be useful.").

149. The Muskie Institute Project Director, David Karraker, conducted interviews with three members of the judiciary, sixteen conference neutrals, ten participating lawyers (three of whom were also conference neutrals), and three participating insurance adjusters. Mr. Karraker had previously reported on March 21, 1997 that nearly every respondent was of the view that the midpoint conference was preferable to the early conference because of a need for some discovery prior to the conference. Many urged greater flexibility as to the timing of the conference. *MUSKIE INTERIM REPORTS*, *supra* note 146, at 11.

150. Surprisingly, of the lawyers responding to this Author's questionnaire who had experienced the early conference (i.e., before discovery), the percentage of lawyers believing the conference was too early was only 34.4%, and 52.2% were of the view that the conference was appropriately timed. *See* Dana Thesis, *supra* note 145, at 65-67.

151. *Id.* at 59, table 22.

152. *Id.* at 62-64.


years earlier: Androscoggin (-3 weeks), Aroostook (-18.5 weeks), Kennebec (-2 weeks), Sagadahoc (-8.5 weeks). Similar reductions, however, were also observed in the control counties of Oxford (-15 weeks) and Penobscot (-3 weeks). Because the control counties also share in this reduction, it could be concluded that factors such as the decline in pending cases or the filling of judicial vacancies had a greater effect on this apparent statewide improvement in resolution time than did the pilot project. The pilot project may have contributed, however, by freeing limited judicial resources for other cases. The RAND study also was unable to detect any "strong statistical evidence" that mediation and early neutral evaluation in the federal court affected "time to disposition." 

c. Increased the Likelihood of Settlement. After 29 months all four counties in the pilot project experienced percentage increases in settlement rates over the same counties three years earlier—Androscoggin (+13.3%), Aroostook (+10.6%), Kennebec (+9.5%), and Sagadahoc (+23.5%). Additionally with only 89% of the cases resolved, three out of four pilot project counties experienced higher settlement rates than the same counties experienced after 100% of the cases were resolved during the historical period. By contrast, the settlement rate in the control County of Oxford was almost unchanged over the rate achieved in the same county three years earlier. The settlement rate in Penobscot, the other control County, was the lowest of the six during the project period, but because of its dismal performance in the historical period, it registered a significant improvement during the project period. It was projected that 60 months after the pilot project began, settlement rates in the pilot project counties improved over the historical period from 8% to 16%, a performance 10% to 13% better than the control counties.

d. Increased Party Participation and Satisfaction. In the typical court case, settlement discussions take place out of the presence of the parties, either between lawyers or between lawyers and the court. The pilot project brought the parties directly into the process. The Muskie Institute questionnaire results suggest that the parties viewed their involvement favorably.

e. Increased Administrative Costs in the Larger Counties but a Substantial Reduction in the Number of Cases Requiring the Application of Judicial Resources for Ultimate Resolution. Although clerks in Androscoggin and Kennebec Counties found that the pilot project substantially increased their workload, the clerks in the two smaller Counties, Aroostook and Sagadahoc, did not share this view. After 29 months comparing the project period with the historical period the reduction in the percentage of cases requiring resolution by a court was substantial in all four pilot project counties—Androscoggin (-31.6%), Aroostook (-47.7%), Kennebec (-21.5%), and Sagadahoc (-33.5%). These reductions compare to a reduction of 29.3% in Oxford County and an increase of 42.1% in judicial resolutions in Penobscot County.

155. Id. at 48.
156. Id. at 44.
157. Id. at 38 n. 119 and accompanying text.
158. Id. at 46, 49-52, 55.
159. Kakalik II, supra note 62, at 36.
161. MUSKIE INTERIM REPORTS, supra note 146, at 4-7 (Jan. 14, 1997).
f. **Preserved the Court's Reservoir of Authority.** As McGovern observed, any resolution that does not require judges to decide preserves the Court's "sparse reservoir of authority residing in our judges."\(^{162}\) Indeed, percentage reductions from 20% to 50% in the number of judge-decided cases is a substantial conservation of this resource. This is especially true if the Court is not directly involved in urging the parties to settle. Importantly, none of the participants in the VNCs reported being pressured into a settlement.

Based upon the results of the Pilot Project, the Author concluded that Maine litigants and the court system would benefit from an ADR experience with the following characteristics:

(a) a generally mandatory\(^{163}\)
(b) settlement, scheduling,\(^{164}\) and mediation conference
(c) held typically, soon after discovery commences\(^{165}\)
(d) at which both substantive and procedural issues would be discussed
(e) with the parties and their lawyers and
(f) a neutral, other than a judge\(^{166}\)
(g) who would be selected,\(^{167}\) trained\(^{168}\) and compensated\(^{169}\) by the court system

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163. Dana Thesis, *supra* note 145, at 82. Exemptions would be available for all the reasons permitted under the pilot project, including a failed previous attempt at ADR and a willingness to engage in private ADR within the same time frame.
164. *Id.* Under close supervision of the judiciary, the Neutral would have the power to propose orders for court review dealing with discovery, scheduling, and pretrial matters.
165. *Id.* Within certain parameters set by the judiciary, the timing of the conference would be left to the Neutral and the parties. The parameters might include a bias for holding the conference as soon as the judiciary determines that constructive settlement discussions might be fruitful.
166. *Id.* Two separate rationales exist for consciously excluding the judiciary from this function. The first is that by national standards Maine's front-line judiciary is overworked. For example, it was recently reported that:

> [f]or courts of general jurisdiction comparable to Maine's Superior Court, Maine ranks 47th in judges per 100,000 population: 1.3 compared to the average of 3.6 per 100,000 for all states . . . [and] Maine has the fewest number of judges in courts of general jurisdiction (16) of any of the 49 states surveyed . . . [and] when compared to other states, Maine ranked 5th in clearance rates for civil cases and 12th for criminal cases.

**REPORT OF THE JUDICIAL COMPENSATION COMMISSION i, 2 (Me. 1996)** (citing statistics provided by the National Center for State Courts in 1995 and 1996).

The second rationale is to avoid the appearance of impropriety—a judge urging parties to settle to avoid a trial or other expenditure of the court's time.

167. Dana Thesis, *supra* note 145, at 83. Selecting the Neutral for the parties was designed to protect the growing profession of private mediators and dispute resolution professionals. Since it was not anticipated that the system would be able to afford market rates, selecting the Neutral at random from a list maintained by the court would encourage the parties who could afford to select their own mediator at market rates.
168. *Id.* at 83. It was contemplated that each county would have relatively few trained neutrals.
169. *Id.* at 83. Compensation should be sufficient to attract seasoned litigators and ADR professionals to devote a significant amount of time to an undertaking that is, nevertheless, a moderately paid public service.
(h) to be financed by a legislative appropriation or, alternatively, a diversion of the $300 civil jury trial fee.

III. MANDATORY ADR IN THE SUPERIOR COURT

Following the 1995-97 Superior Court Pilot Project and the evaluations by this Author and the Muskie Institute, and an unsuccessful attempt to interest the Maine Legislature in providing funding for the cost of mediators, a divided Supreme Judicial Court adopted Rule 16B of the Maine Rules of Civil Procedure to take effect on January 1, 2002.

The rule provides that in all non-exempt cases filed after January 1, 2002 the parties (or their lawyers) shall schedule an ADR conference with a neutral of their choice to be held within 120 days of the issuance of the scheduling order (which issues typically a few days after the answer is filed). In most cases, the neutral's fee is established by the neutral and then apportioned or paid equally by the parties. At the parties' election, the process may be mediation, early neutral evaluation or non-binding arbitration. Although the court, for good cause shown, may extend the time of the ADR conference past the 120-day deadline, it was contemplated that conferences would be typically held approximately half way through the normal discovery period.

When the Supreme Judicial Court adopted Rule 16B, it pledged to study its effectiveness after a suitable period. As the Chair of the Court's ADR Committee with the able assistance of my administrative assistant, Amber Davis, the Director of the Court ADR Service (CADRES), Diane Kenty, and two interns, the Author has been studying the effectiveness of Rule 16B, by comparing the progress of the civil cases commenced during the first half of 2000 (before Rule 16B) with the cases filed in the first half of 2002 (under Rule 16B) and the cases filed in the first two months of 2003 (after the bench and bar had become more accustomed to

170. Id. at 83. Good ADR is not inexpensive. Additionally, overseeing the process can be costly. While the system envisioned here would not have all of the record keeping aspects of the pilot project, it would have some. Additional staff support in the larger counties would be required. Excluding cases arising under the Uniform Reciprocal Enforcement Support Act, Rule 80B and 80C, appeals from the District Court and real estate foreclosure actions, Superior Court filings in FY '97 were 3,301. Superior Court-Civil Filings and Dispositions by Type of Case (Table SC-5). If current civil filings in the Superior Court were to remain steady and approximately two-thirds of the cases require a Neutral conference, the annual cost for the Neutrals (at $300 per conference) would be $660,000 (3,300 x 2/3 x $300). If the parties so desire, they would be able to retain at their own expense the neutral for subsequent sessions at the neutral's market rate. Id. at 83 n.187.

171. See Dana Thesis, supra note 145.

172. See MAIMAN ET AL., supra note 133.

173. ME. R. CIV. P. 16(B). See Appendix A & B for a copy of the Rule and the Court's statements of support and non-concurrence.

174. Id. Rule 16B(b) provides that the following cases are exempt from ADR: actions for divorce (Rule 80), Forcible Entry and Detainer (Rule 80D), Small Claims Appeals (Rule 80L), Review of Governmental Actions (Rule 80B), Review of Final Agency Actions (Rule 80C), State Tax Assessor Appeals (ME. REV. STAT. ANN. tit. 36, § 1151), actions in which parties have already participated in ADR, actions for mortgage foreclosure or other secured transactions, actions by prisoners, and small personal injury actions (i.e., $30,000 or less) if the plaintiff requests the exemption, and in all other cases in which a party established good cause. Id.

175. J.T. Cooke of the University of Vermont Law School and Shane Wright of the University of Maine School of Law.
Rule 16B). The Author also polled the lawyers and clients in a random sample (10%) of the cases filed during the first half of 2002.

A. Introduction and Summary

The central findings of this study are that under Rule 16B, significantly more cases are being resolved without the involvement of the courts (i.e., more settlements), reducing in half the numbers of cases requiring judicial involvement for their resolution. Cases exposed to Rule 16B are also resolving faster than their pre-Rule 16B counterparts and the pace of those resolutions is picking up as the bench and bar gain experience with Rule 16B. The support for these findings follows.

In the sixteen counties, there were 1497 civil filings during the first half of 2002. Of those, 477 (32%) were exempt under the rule, leaving 1020, of which 246 did not have a scheduling order. This left 774 cases apparently ADR eligible; however, 207 (27%) of those cases were resolved before an ADR conference was less than a month in the future. This left 567 cases still ADR eligible. Of that number, fifteen (3%) still had not experienced an ADR conference twenty-four to thirty months after filing. This left 552 cases that experienced an ADR conference or settled within thirty days of such a conference or settled within thirty days of a judicial sanction for failing to conduct such a conference. Of these cases, 254 (46%) cases settled immediately (defined as a resolution with docket entries within thirty days of a scheduled ADR conference or an order to submit to one). The balance of 298 (54%) did not settle immediately, but 213 (39%) have since settled. Thus, 85% of the 552 cases exposed to an ADR conference had settled as of July 1, 2004.

Although, as defined above, 552 cases experienced an ADR conference or settled within thirty days of such a conference or settled within thirty days of a judicial sanction for failing to conduct such a conference, only 509 actual conferences occurred. If we remove the cases that settled in the wake of a court order to conduct a conference (twenty-three) and those cases that settled on the eve of a scheduled conference (twenty), we can study just the impact of the conferences rather than the operation of Rule 16B. Of the 509 actual conferences, 211 (41%) immediately settled (i.e., within thirty days of the conference) and those cases that settled on the eve of a scheduled conference (twenty), we can study just the impact of the conferences rather than the operation of Rule 16B. Of the 509 actual conferences, 211 (41%) immediately settled (i.e., within thirty days of the conference) and those cases that settled on the eve of a scheduled conference (twenty), we can study just the impact of the conferences rather than the operation of Rule 16B. Of the 509 actual conferences, 211 (41%) immediately settled (i.e., within thirty days of the conference) and, as of July 1, 2004, another 213 (42%) have since settled. Thus, as of July 1, 2004, 83% of the cases that experienced a Rule 16B conference have settled. The county-by-county numbers are set out in Table I.

176. In New Hampshire, where they have had mandatory ADR in the Superior Court for about twelve years, they count as ADR-induced settlements cases that settle within 30 days before or after a scheduled conference. Maine has expanded that definition to include as ADR-induced settlements, those cases that settle within 30 days of an order to conduct ADR or a judicially imposed sanction for not doing so. As of July 1, 2004, twenty-three of the settlements had been judicially induced and 20 occurred within thirty days of a scheduled conference.
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**Notes:**
- The table provides a breakdown of civil cases filed in each county for the years 2002 and 2003.
- Data includes cases resolved, cases still in ADR, and cases with ADR conflict held.

**Table Continued on Next Page**
Table I continued

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*Court pressure indicates those cases that settled shortly after a Court order to participate in an ADR conference.

**Conference pressure indicates those cases that settled on the eve of a scheduled settlement conference.
As of July 1, 2004, of the 552 cases experiencing an ADR conference, 177 (85%) had settled; thirty-two (6%) had resolved by a dispositive motion or bench trial; twenty-three (4%) had resolved by a jury trial; and thirty-one (5%) remain unresolved. Combining these 552 cases and the 207 cases that resolved before a conference and the fifteen eligible and open cases that had not had a conference generates Table II, a progress report on all the ADR eligible cases as of July 1, 2004.
<table>
<thead>
<tr>
<th>Cases Closed Before ADR</th>
<th>Cases Exposed \no{to ADR} Conf.</th>
<th>Percentage</th>
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<tr>
<td>Settlements</td>
<td>170</td>
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<td>Dispositive Motions</td>
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<td>552</td>
<td>100%</td>
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For the comparable period in 2000 there were 783 cases with a scheduling order that would not have been exempt under Rule 16B. Without the benefit of Rule 16B as of July 1, 2004 (i.e., after forty-eight to fifty-four months) 596 (76%) had settled; 134 (17%) had resolved by a dispositive court order or bench trial; forty-six (6%) required a jury trial; and seven (1%) remain unresolved.

In Table III we compare the data for 2000 and 2002.

TABLE III

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<tr>
<th></th>
<th>2000</th>
<th>2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled</td>
<td>596 (76%)</td>
<td>636 (84%)</td>
</tr>
<tr>
<td>Dispositive Motions</td>
<td>134 (17%)</td>
<td>52 (7%)</td>
</tr>
<tr>
<td>Jury Trials</td>
<td>46 (6%)</td>
<td>25 (3%)</td>
</tr>
<tr>
<td>Unresolved</td>
<td>7 (1%)</td>
<td>46 (6%)</td>
</tr>
<tr>
<td>Cases ADR Eligible with a Scheduling Order</td>
<td>783 (100%)</td>
<td>759 (100%)</td>
</tr>
</tbody>
</table>

Until recently, one could not be certain whether the increase in the number of early settlements meant that cases that were always going to settle were just settling sooner. In the 1995-97 pilot project, the increase in the number of early settlements did proceed a significant increase in the percentage of cases that ultimately settled, e.g., in the early control period roughly 75% of the cases settled, but 85% of the cases settled in the pilot project. This proportionately modest increase in settlements, however, produced a 40% decrease in the percentage of cases requiring judicial involvement in their resolution, e.g., from 25% to 15%.

We can now say that Rule 16B is replicating that earlier finding. If none of the unresolved 2002 cases settle, Rule 16B has made a significant contribution to the work of the Superior Court. If only half the remaining cases settle, Rule 16B has almost cut in half the percentage of cases requiring court involvement in their resolution, i.e., from 23% to 14%. Because most of its costs are fixed, the impact of such a contribution does not produce any financial savings to the court system. The real savings for the system are in freeing up scarce judicial and clerical resources for tackling other work within the system. The savings for the litigants, while real, are difficult to quantify.

178. This figure excludes seven bankruptcies, five defaults, five Rule 41(b) dismissals, four miscellaneous dismissals, and two changes of venue.

179. Indeed, as of March 22, 2005, of the forty-six cases pending on July 1, 2005, twelve more had settled, nine had resolved in a bench trial or dispositive motion, one resolved by jury trial, and twenty-four remained pending. Thus, as of March 22, 2005, 649 (85.5%) had settled, sixty (8%) had resolved by bench trial or dispositive motion, twenty-six (3.4%) had resolved in a jury trial, and twenty-four (3.2%) remained undecided.
The reader may ask, however, is it altogether fair to evaluate a change just as the change is being implemented? In order to test whether the bench and bar's collective experience with Rule 16B is evolving, we have also been following the progress of the cases filed during the first two months of 2003.

Between January 2, 2003 and February 28, 2003, there were five hundred case filings in the Superior Court. 149 were exempt under the Rule, and an additional sixty-four lacked a scheduling order. This left 287 ADR-eligible cases, but sixty-nine cases resolved before a conference and fourteen cases are still waiting for their conference. Therefore, as of July 1, 2004, 204 cases experienced an ADR conference. Of those 204, one hundred (49%) settled immediately,\textsuperscript{180} a slight improvement from the 2002 settlement percentage of 46%. Of the remaining 104 cases that did not settle immediately, as of July 1, 2004, fifty-nine have settled, ten have resolved by a dispositive motion, seven resolved in a jury trial, and twenty-eight were unresolved. Thus, as of July 1, 2004, 78% of the 2003 cases that experienced a Rule 16B conference had settled. The county-by-county numbers are set forth in Table IV.

\textsuperscript{180} See supra note 177.
## TABLE IV

**County-by-County Data for 2003 as of July 1, 2004**

<table>
<thead>
<tr>
<th></th>
<th></th>
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</tr>
</thead>
<tbody>
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<td><strong>No. of Civil Filings 1/2/03-6/30/03</strong></td>
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<td>500</td>
</tr>
<tr>
<td>Less Exempt Cases</td>
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<td>5</td>
<td>41</td>
<td>4</td>
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<td>13</td>
<td>2</td>
<td>4</td>
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<td>4</td>
<td>6</td>
<td>1</td>
<td>16</td>
<td>149</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>27</td>
<td>17</td>
<td>98</td>
<td>5</td>
<td>18</td>
<td>32</td>
<td>11</td>
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<td>6</td>
<td>5</td>
<td>6</td>
<td>8</td>
<td>11</td>
<td>57</td>
<td>351</td>
</tr>
<tr>
<td>Less Cases without Scheduling Order</td>
<td>5</td>
<td>1</td>
<td>16</td>
<td>1</td>
<td>4</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td>6</td>
<td>2</td>
<td>10</td>
<td>64</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td><strong>ADR Eligible Cases</strong></td>
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<td>16</td>
<td>82</td>
<td>4</td>
<td>14</td>
<td>26</td>
<td>8</td>
<td>2</td>
<td>8</td>
<td>24</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>11</td>
<td>47</td>
<td>287</td>
</tr>
<tr>
<td>Less Cases Closed Before ADR</td>
<td>4</td>
<td>2</td>
<td>26</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>8</td>
<td>69</td>
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<tr>
<td><strong>Still ADR Eligible Cases</strong></td>
<td>18</td>
<td>14</td>
<td>56</td>
<td>3</td>
<td>10</td>
<td>21</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>19</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
<td>39</td>
<td>218</td>
</tr>
<tr>
<td>Less Cases without ADR Yet</td>
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<td>1</td>
<td>3</td>
<td>2</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td><strong>Cases with ADR Conf. Held</strong></td>
<td>18</td>
<td>14</td>
<td>53</td>
<td>2</td>
<td>7</td>
<td>19</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>17</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
<td>36</td>
<td>204</td>
</tr>
</tbody>
</table>

Table IV continued on next page
### Table IV continued

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cases Resolved</strong></td>
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<td>10</td>
<td>21</td>
<td>2</td>
<td>5</td>
<td>9</td>
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<td>2</td>
<td>3</td>
<td>19</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td><strong>Cases Unresolved</strong></td>
<td>8</td>
<td>4</td>
<td>32</td>
<td>2</td>
<td>10</td>
<td>3</td>
<td>1</td>
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<td>3</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>17</td>
<td>104</td>
<td></td>
</tr>
<tr>
<td><strong>Cases Subsequently Settled</strong></td>
<td>5</td>
<td>23</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>8</td>
<td>59</td>
<td></td>
<td></td>
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<tr>
<td>SJ/Disp. Mot./Bench Trial</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
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<td>1</td>
<td>1</td>
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<td>10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jury Trial</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Still Unresolved</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>1</td>
<td>5</td>
<td>2</td>
<td>2</td>
<td>9</td>
<td>28</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
As of July 1, 2004, if we combine the 2003 cases exposed to an ADR conference (204), the cases resolved before a conference (65), and the eligible and open cases that have not had a conference (14), we generate Table V.

### TABLE V

<table>
<thead>
<tr>
<th></th>
<th>Cases Closed Before ADR</th>
<th>Cases without a Conf.</th>
<th>Cases Exposed to ADR Conf.</th>
<th>Total</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlements</td>
<td>57</td>
<td>159</td>
<td>216</td>
<td>76%</td>
<td></td>
</tr>
<tr>
<td>Dispositive Motions Court Trials</td>
<td>8</td>
<td>10</td>
<td>18</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td>Jury Trials</td>
<td></td>
<td>7</td>
<td>7</td>
<td>2%</td>
<td></td>
</tr>
<tr>
<td>Still Open</td>
<td></td>
<td>14</td>
<td>28</td>
<td>42</td>
<td>15%</td>
</tr>
<tr>
<td>Subtotal</td>
<td>65</td>
<td>14</td>
<td>204</td>
<td>283</td>
<td>100%</td>
</tr>
<tr>
<td>Less Misc. Disp.</td>
<td>4*</td>
<td></td>
<td></td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>69</td>
<td>14</td>
<td>204</td>
<td>287</td>
<td></td>
</tr>
</tbody>
</table>

*This figure excludes four miscellaneous dispositions, including: one default and two dismissals for failure to file an ADR report and one for want of prosecution.*
Table VI compares the data for 2000 (after four years) with the data for 2002 (after two years) and the data for 2003 (after one year).

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resolved by Motion or</td>
<td>596</td>
<td>636</td>
<td>216</td>
</tr>
<tr>
<td>Bench Trial</td>
<td>(76%)</td>
<td>(84%)</td>
<td>(76%)</td>
</tr>
<tr>
<td>Resolved by Jury Trial</td>
<td>134</td>
<td>52</td>
<td>18</td>
</tr>
<tr>
<td>(17%)</td>
<td></td>
<td>(7%)</td>
<td>(6%)</td>
</tr>
<tr>
<td>Unresolved</td>
<td>46</td>
<td>25</td>
<td>7</td>
</tr>
<tr>
<td>(6%)</td>
<td></td>
<td>(3%)</td>
<td>(2%)</td>
</tr>
<tr>
<td>Cases ADR Eligible with a</td>
<td>7</td>
<td>46</td>
<td>42</td>
</tr>
<tr>
<td>Scheduling Order</td>
<td>(1%)</td>
<td>(6%)</td>
<td>(15%)</td>
</tr>
<tr>
<td></td>
<td>783</td>
<td>759</td>
<td>283</td>
</tr>
<tr>
<td>(100%)</td>
<td></td>
<td>(100%)</td>
<td>(100%)</td>
</tr>
</tbody>
</table>

https://digitalcommons.mainelaw.maine.edu/mlr/vol57/iss2/4
Note that with 15% of the 2003 cases still unresolved, the percentage of 2003 cases settled as of July 1, 2004, equals the percentage of 2000 cases settled as of July 1, 2004. If the remaining 15% resolve in anything approaching a historical pattern, the ultimate settlement percentage of the 2003 cases we are following will equal, if not exceed, the settlement percentage of the 2002 cases. It is therefore evident that Rule 16B has caused a significant and permanent change in the resolution patterns of the Superior Court.

**B. Does It Seem To Matter When the Conferences Are Held?**

The data from the cases filed during the first six months of 2002 provides modest support for those who argue that the later in the process the conference is held, the more likely there will be a settlement. The 2003 data, however, undermines that support.

Pursuant to Rule 16B, in the absence of a court-ordered delay, the conferences are supposed to occur within 120 days of the scheduling order, which issues shortly after the answer is filed. Looking first at the cases filed in 2002, as set forth in Table VII below, if one looks at the results of only the conferences (ignoring the impact of settlements on the eve of a conference or settlements immediately following a court order to have a conference), 269 (53%) of the conferences were held within 120 days of the scheduling order. Of those 104 (39%) resulted in an immediate settlement. Of the 241 conferences held after 120 days from the scheduling order, 106 (44%) resulted in an immediate settlement. Of the 154 conferences held after 150 days following the scheduling order, 74 (48%) resulted in an immediate settlement. Of the ninety-eight conferences held after 180 days following the scheduling order forty-nine (50%) resulted in an immediate settlement. Of the sixty-six cases held after 210 days following the scheduling order thirty-six (55%) resulted in an immediate settlement. Of the twenty-six conferences held after 240 days following the scheduling order, twenty-six (53%) resulted in an immediate settlement. Of the thirty-seven conferences held after 270 days following the scheduling order nineteen (51%) resulted in an immediate settlement. Of the twenty-six conferences held after 300 days following the scheduling order, thirteen (50%) resulted in a settlement.

If we factor in the settlements brought about (we believe) by the prospect of a settlement conference (twenty-four) and by a court order to hold a conference (eighteen), the early percentages improve. Note, however, that the conferences held after seven months of discovery tend to settle about 57% of the time, while those conferences held within the first seven months of discovery settle about 44% of the time. This data provides some support for those who suggest that conferences held after full discovery will more likely result in immediate settlements.

181. Indeed, as of March 22, 2005, of the forty-two cases pending on July 1, 2004, seventeen had settled, seven had resolved in a bench trial or dispositive motion, five had resolved by a jury trial, and thirteen were still pending. Thus, as of March 22, 2005, of the 283 eligible cases filed during the first two months of 2003, 233 (82%) had settled, twenty-five (9%) had resolved by dispositive motion or bench trial, twelve (4%) had resolved as a result of a jury trial, and thirteen (5%) remained undecided.

182. ME. R. CIV. P. 16B(a).
### TABLE VII

<table>
<thead>
<tr>
<th>Days from Filing of Case</th>
<th>Settled*</th>
<th>Unresolved</th>
<th>Cumulative Settlement Percentage—Without Parenthetical Figures</th>
<th>Cumulative Settlement Percentage—With Parenthetical Figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within 60</td>
<td>7</td>
<td>11</td>
<td>39%</td>
<td>39%</td>
</tr>
<tr>
<td>61-90</td>
<td>26 (6)</td>
<td>40</td>
<td>39%</td>
<td>43%</td>
</tr>
<tr>
<td>91-120</td>
<td>71 (11)</td>
<td>114</td>
<td>38%</td>
<td>42%</td>
</tr>
<tr>
<td>121-150</td>
<td>32 (15)</td>
<td>54</td>
<td>38%</td>
<td>43%</td>
</tr>
<tr>
<td>151-180</td>
<td>25 (3)</td>
<td>32</td>
<td>39%</td>
<td>44%</td>
</tr>
<tr>
<td>181-210</td>
<td>13 (4)</td>
<td>19</td>
<td>39%</td>
<td>44%</td>
</tr>
<tr>
<td>211-240</td>
<td>10</td>
<td>7</td>
<td>40%</td>
<td>45%</td>
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<tr>
<td>241-270</td>
<td>7 (2)</td>
<td>5</td>
<td>40%</td>
<td>45%</td>
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<tr>
<td>271-300</td>
<td>6</td>
<td>5</td>
<td>40%</td>
<td>45%</td>
</tr>
<tr>
<td>301-330</td>
<td>3</td>
<td>4</td>
<td>40%</td>
<td>45%</td>
</tr>
<tr>
<td>331-360</td>
<td>4</td>
<td>3</td>
<td>41%</td>
<td>46%</td>
</tr>
<tr>
<td>361-390</td>
<td>1</td>
<td>3</td>
<td>41%</td>
<td>45%</td>
</tr>
<tr>
<td>391-420</td>
<td></td>
<td></td>
<td>41%</td>
<td>45%</td>
</tr>
<tr>
<td>421-450</td>
<td>2</td>
<td></td>
<td>41%</td>
<td>46%</td>
</tr>
<tr>
<td>451 and up</td>
<td>3 (1)</td>
<td>3</td>
<td>41%</td>
<td>46%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>210 (42)</td>
<td>300</td>
<td>41%</td>
<td>46%</td>
</tr>
</tbody>
</table>

*Settlements brought about by the prospect of a settlement conference and settlements resulting from court-ordered conferences are indicated in parentheses.
But if we fast forward to the cases filed in the first two months of 2003, that slight support for delaying all conferences disappears. In Table VIII below we see that the settlement percentage is very stable. The immediate settlement percentage is about 43% without regard to when the conferences are held and the percentage jumps to 49% when we factor in the settlements that occur on the eve of the conference or following a court order to hold a conference. Note, also, that the conferences held after seven months of discovery tend to settle about 35% of the time, while those conferences held within the first seven months of discovery settle about 45% of the time. The detail appears in Table VIII.
### TABLE VIII

<table>
<thead>
<tr>
<th>Days from Filing of Case</th>
<th>Settled*</th>
<th>Unresolved</th>
<th>Cumulative Settlement Percentage—Without Parenthetical Figures</th>
<th>Cumulative Settlement Percentage—With Parenthetical Figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within 60</td>
<td>4</td>
<td>4</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>61-90</td>
<td>7 (3)</td>
<td>10</td>
<td>44%</td>
<td>50%</td>
</tr>
<tr>
<td>91-120</td>
<td>28 (5)</td>
<td>32</td>
<td>46%</td>
<td>51%</td>
</tr>
<tr>
<td>121-150</td>
<td>17 (5)</td>
<td>22</td>
<td>45%</td>
<td>50%</td>
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<tr>
<td>151-180</td>
<td>8 (3)</td>
<td>9</td>
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<td>51%</td>
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<tr>
<td>181-210</td>
<td>4</td>
<td>7</td>
<td>45%</td>
<td>50%</td>
</tr>
<tr>
<td>211-240</td>
<td>1</td>
<td>3</td>
<td>44%</td>
<td>49%</td>
</tr>
<tr>
<td>241-270</td>
<td>3 (2)</td>
<td>4</td>
<td>44%</td>
<td>50%</td>
</tr>
<tr>
<td>271-300</td>
<td>2</td>
<td>7</td>
<td>43%</td>
<td>48%</td>
</tr>
<tr>
<td>301-330</td>
<td>0 (1)</td>
<td>3</td>
<td>42%</td>
<td>48%</td>
</tr>
<tr>
<td>331-360</td>
<td>2 (1)</td>
<td>1</td>
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<td>49%</td>
</tr>
<tr>
<td>361-390</td>
<td>1</td>
<td>43%</td>
<td>49%</td>
<td>49%</td>
</tr>
<tr>
<td>391-420</td>
<td>1</td>
<td></td>
<td>43%</td>
<td>49%</td>
</tr>
<tr>
<td>421 and up</td>
<td>2</td>
<td>2</td>
<td>43%</td>
<td>49%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>79 (20)</td>
<td>104</td>
<td></td>
<td></td>
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</tbody>
</table>

*Settlements brought about by the prospect of a settlement conference and settlements resulting from court-ordered conferences are indicated in parentheses.
The 2003 cases provide little support for the view that later is better. Eighty-five (46%) of the conferences were held within 120 days of the scheduling order which is down from the 53% for the 2002 cases. Otherwise the settlement rate (if any trend can be discerned) seems to decline over time. The data from both 2002 and 2003 may provide support for the current approach: presumptively scheduling the conference early but authorizing postponement for good cause.

If, however, for each period one were to add to the percentage of cases that settle immediately (collectively 46%) the percentage of cases that subsequently settle (collectively an additional 38% as of July 1, 2004) and then smooth out, the monthly fluctuations by using a three month moving average for the 2002 cases would produce Table IX.
<table>
<thead>
<tr>
<th>Days from Filing Filing of Case</th>
<th>A: Total Conferences</th>
<th>B: Immediate Settlements</th>
<th>C: Subsequent Settlements</th>
<th>(\frac{(B+C) \times 100}{A})</th>
<th>Three Month Moving Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-60</td>
<td>18</td>
<td>7</td>
<td>6</td>
<td>72%</td>
<td>82%</td>
</tr>
<tr>
<td>61-90</td>
<td>72</td>
<td>32</td>
<td>29</td>
<td>85%</td>
<td>82%</td>
</tr>
<tr>
<td>91-120</td>
<td>196</td>
<td>82</td>
<td>78</td>
<td>82%</td>
<td>84%</td>
</tr>
<tr>
<td>121-150</td>
<td>101</td>
<td>47</td>
<td>43</td>
<td>89%</td>
<td>83%</td>
</tr>
<tr>
<td>151-180</td>
<td>60</td>
<td>28</td>
<td>20</td>
<td>80%</td>
<td>81%</td>
</tr>
<tr>
<td>181-210</td>
<td>36</td>
<td>17</td>
<td>14</td>
<td>86%</td>
<td>83%</td>
</tr>
<tr>
<td>211-240</td>
<td>17</td>
<td>10</td>
<td>5</td>
<td>88%</td>
<td>88%</td>
</tr>
<tr>
<td>241-270</td>
<td>14</td>
<td>9</td>
<td>4</td>
<td>93%</td>
<td>93%</td>
</tr>
<tr>
<td>271-300</td>
<td>11</td>
<td>6</td>
<td>5</td>
<td>100%</td>
<td>94%</td>
</tr>
<tr>
<td>301-330</td>
<td>7</td>
<td>3</td>
<td>3</td>
<td>86%</td>
<td>88%</td>
</tr>
<tr>
<td>331-360</td>
<td>7</td>
<td>4</td>
<td>1</td>
<td>71%</td>
<td>83%</td>
</tr>
<tr>
<td>361-390</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>100%</td>
<td>82%</td>
</tr>
<tr>
<td>391-420</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100%</td>
</tr>
<tr>
<td>421-450</td>
<td>2</td>
<td>2</td>
<td></td>
<td>100%</td>
<td>78%</td>
</tr>
<tr>
<td>451 and up</td>
<td>7</td>
<td>4</td>
<td>1</td>
<td>71%</td>
<td>78%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>552</td>
<td>252</td>
<td>212</td>
<td>84%</td>
<td>84%</td>
</tr>
<tr>
<td>Percentage</td>
<td>100%</td>
<td>46%</td>
<td>38%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table IX again provides some support for the view that it is possible to hold the mediation too soon and that by doing so it may reduce the chance of ultimately settling. Cases that conference in the first four months following the scheduling order settle one or two percentage points below the mean. Conversely, those cases that conference eight and twelve months following the scheduling order appear to settle on the average a few percentage points above the mean.

Again, this pattern is not observable in the cases filed in early 2003. See Table X.
TABLE X
Cumulative Settlements Based on Time of Conference
Cases Filed Jan. & Feb. 2003

<table>
<thead>
<tr>
<th>Days from Filing Filing of Case</th>
<th>Total Conferences</th>
<th>Immediate Settlements</th>
<th>Subsequent Settlements</th>
<th>( \frac{(B+C) \times 100}{A} )</th>
<th>Three Month Moving Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-60</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>75%</td>
<td>86%</td>
</tr>
<tr>
<td>61-90</td>
<td>20</td>
<td>10</td>
<td>8</td>
<td>90%</td>
<td>81%</td>
</tr>
<tr>
<td>91-120</td>
<td>65</td>
<td>33</td>
<td>18</td>
<td>78%</td>
<td>78%</td>
</tr>
<tr>
<td>121-150</td>
<td>44</td>
<td>22</td>
<td>10</td>
<td>73%</td>
<td>77%</td>
</tr>
<tr>
<td>151-180</td>
<td>20</td>
<td>11</td>
<td>5</td>
<td>80%</td>
<td>75%</td>
</tr>
<tr>
<td>181-210</td>
<td>11</td>
<td>4</td>
<td>4</td>
<td>73%</td>
<td>77%</td>
</tr>
<tr>
<td>211-240</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>75%</td>
<td>83%</td>
</tr>
<tr>
<td>241-270</td>
<td>9</td>
<td>5</td>
<td>4</td>
<td>100%</td>
<td>80%</td>
</tr>
<tr>
<td>271-300</td>
<td>9</td>
<td>2</td>
<td>5</td>
<td>78%</td>
<td>82%</td>
</tr>
<tr>
<td>301-330</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>50%</td>
<td>75%</td>
</tr>
<tr>
<td>331-360</td>
<td>3</td>
<td>3</td>
<td></td>
<td>100%</td>
<td>75%</td>
</tr>
<tr>
<td>361-390</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>391-420</td>
<td>1</td>
<td>1</td>
<td></td>
<td>100%</td>
<td>67%</td>
</tr>
<tr>
<td>421-450</td>
<td>4</td>
<td>2</td>
<td></td>
<td>50%</td>
<td>60%</td>
</tr>
<tr>
<td>451 and up</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>203</td>
<td>99</td>
<td>58</td>
<td>77%</td>
<td>77%</td>
</tr>
<tr>
<td>Percentage</td>
<td>100%</td>
<td>49%</td>
<td>29%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
C. Do the Settlement Rates Vary Depending Upon The Type of Case?

From Table XI, it would appear that some types of actions are more likely than others to benefit from mandatory mid-discovery ADR. Based upon plaintiff counsel’s characterization of the nature of the complaint, the Author has compared settlement conference rates depending upon the type of case. In order to maximize the size of the sample the 2002 and 2003 cases have been combined. The sample sizes for many types of cases are large enough to conclude that auto negligence (52%), contract (45%), other negligence (43%), other personal injury torts (46%), other statutory actions (59%), and property negligence (53%) all appear to be reasonable prospects for Rule 16B.
### TABLE XI

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Settled</th>
<th>Not Settled</th>
<th>Percent Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault</td>
<td>5</td>
<td>6</td>
<td>45%</td>
</tr>
<tr>
<td>Auto Negligence</td>
<td>150</td>
<td>138</td>
<td>52%</td>
</tr>
<tr>
<td>Boundaries</td>
<td>4</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Constitutional/Civil Rights</td>
<td>1</td>
<td>8</td>
<td>11%</td>
</tr>
<tr>
<td>Contract</td>
<td>48</td>
<td>59</td>
<td>45%</td>
</tr>
<tr>
<td>Damages</td>
<td>1</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>Declaratory Judgment</td>
<td>11</td>
<td>16</td>
<td>41%</td>
</tr>
<tr>
<td>Easements</td>
<td>2</td>
<td>4</td>
<td>33%</td>
</tr>
<tr>
<td>Equitable Relief</td>
<td>3</td>
<td>1</td>
<td>75%</td>
</tr>
<tr>
<td>Equitable Remedies</td>
<td>2</td>
<td>8</td>
<td>20%</td>
</tr>
<tr>
<td>Gen. Injunctive Relief</td>
<td>2</td>
<td>3</td>
<td>40%</td>
</tr>
<tr>
<td>Libel/Defamation</td>
<td>2</td>
<td>3</td>
<td>40%</td>
</tr>
<tr>
<td>Mechanics Lien</td>
<td>3</td>
<td>6</td>
<td>33%</td>
</tr>
<tr>
<td>Nuisance</td>
<td>1</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>Other Civil</td>
<td>7</td>
<td>16</td>
<td>30%</td>
</tr>
<tr>
<td>Other Equitable Relief</td>
<td>3</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Other Negligence</td>
<td>21</td>
<td>28</td>
<td>43%</td>
</tr>
<tr>
<td>Other Non Personal Injury Tort</td>
<td>5</td>
<td>7</td>
<td>42%</td>
</tr>
<tr>
<td>Other Personal Injury Tort</td>
<td>19</td>
<td>22</td>
<td>46%</td>
</tr>
<tr>
<td>Other Real Estate</td>
<td>1</td>
<td>4</td>
<td>20%</td>
</tr>
<tr>
<td>Other Statutory Actions</td>
<td>10</td>
<td>7</td>
<td>59%</td>
</tr>
<tr>
<td>Partition</td>
<td>3</td>
<td>1</td>
<td>75%</td>
</tr>
<tr>
<td>Personal Injury</td>
<td>1</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>Products Liability</td>
<td>2</td>
<td>5</td>
<td>29%</td>
</tr>
<tr>
<td>Property Negligence</td>
<td>36</td>
<td>32</td>
<td>53%</td>
</tr>
<tr>
<td>Quiet Title</td>
<td>2</td>
<td>8</td>
<td>20%</td>
</tr>
<tr>
<td>Trespass</td>
<td>6</td>
<td>6</td>
<td>50%</td>
</tr>
<tr>
<td>Unfair Trade Practices</td>
<td>7</td>
<td>7</td>
<td>50%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>351</td>
<td>404</td>
<td>46%</td>
</tr>
</tbody>
</table>

By consolidating the types of cases under the broad headings listed below, it is evident that: statutory actions (55%), torts (50%), and contract disputes (42%) are excellent prospects for mandatory mid-discovery ADR, while other types of cases appear less amenable to the process.
### TABLE XII

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Settled</th>
<th>Not Settled</th>
<th>Percent Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Injury/Property Damage/Tort</td>
<td>240</td>
<td>238</td>
<td>50%</td>
</tr>
<tr>
<td>Libel/Defamation</td>
<td>2</td>
<td>3</td>
<td>40%</td>
</tr>
<tr>
<td>Contract/Declaratory Judgment/Gen. Injunctive Relief/Equitable Relief</td>
<td>66</td>
<td>90</td>
<td>42%</td>
</tr>
<tr>
<td>Constitutional/Civil Rights</td>
<td>1</td>
<td>8</td>
<td>11%</td>
</tr>
<tr>
<td>Statutory Actions</td>
<td>17</td>
<td>14</td>
<td>55%</td>
</tr>
<tr>
<td>Misc. Civil Cases</td>
<td>7</td>
<td>16</td>
<td>30%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>18</td>
<td>35</td>
<td>34%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>351</td>
<td>404</td>
<td>46%</td>
</tr>
</tbody>
</table>

**D. What Process was Selected?**

Of the cases filed in the first half of 2002, 509 cases actually had a conference. For those conferences, mediation was selected 490 times, early neutral evaluation was selected thirteen times and arbitration was selected only six times. Mediation resulted in an immediate settlement 41% of the time, early neutral evaluation resulted in an immediate settlement 15% of the time, and non-binding arbitration resulted in settlements 67% of the time.

Of the cases filed in the first two months of 2003, 182 had a conference as of July 1, 2004. All but one were mediations—the other was an early neutral evaluation.183

**E. What Do We Know About the Neutrals Selected?**

Pursuant to Rule 16B(d)(1), promptly after the answer is filed, “the parties shall confer and select . . . a neutral third party to conduct the [ADR] process.” As virtually all parties were represented by counsel, it is perhaps not surprising that lawyers were selected as neutrals 96% of the time.184 Although 13% of the neutrals selected were women, women were selected as neutrals only 5% of the time.185 Although the court system maintains rosters of neutrals that satisfy certain educational and experiential qualifications, non-rostered lawyers were selected almost 27% of the time.

For 509 of the conferences, the parties selected ninety-one different neutrals. The rostered neutrals and the non-rostered neutrals each settled 41% of the cases they handled. Three of the most active non-rostered neutrals settled 55% of their cases. The remaining thirty-seven non-rostered neutrals settled only 27% of their cases.

183. In two other cases the parties selected arbitration, but in one case a bankruptcy precluded arbitration and in the other the parties settled before the scheduled arbitration.
184. For the cases filed in the first two months of 2003, lawyers were selected 98% of the time.
185. For the cases filed in the first two months of 2003, 11% of the neutrals selected were women; women were selected 5% of the time.
Twenty of the ninety-one neutrals conducted ADR in four or more cases. Collectively, those twenty conducted ADR in 409 (81%) of the cases. The busiest four conducted 230 (45%) ADR sessions. The next busiest four conducted ninety-two (18%). As a group, the most active twenty had a settlement rate of 47%. Those who handled three or less had a combined settlement rate of 25%. Averages, however, can be misleading. Even among the busiest eight, settlement ratios ranged from a low of 33% to a high of 71%. Among the busiest twenty, settlement rates went from a low of 0% to a high of 83%. Overall, the settlement rates varied from 0% (forty-five) to 100% (sixteen). There is no evidence that neutrals are being selected because they are both inexpensive and ineffective.

Looking at immediate settlement rates can be misleading. Most cases ultimately settle. Indeed, 76% of the 2000 cases settled without the assistance of Rule 16B. The pilot project demonstrated that early or mid-discovery mandatory mediation can boost this ultimate percentage by 12% to 14%.

Table I reveals that as of July 1, 2004, 84% of the 2002 cases exposed to mid-discovery ADR had settled, and that percentage is likely to climb as the thirty-one open cases (5.6%) resolve. The Author has been tracking both the immediate and the subsequent settlement rates by mediator. Table XIII below sets forth the immediate and current settlement rates (as of July 1, 2004) for the ten busiest neutrals for the cases filed during the first half of 2002. The data indicates that immediate settlement rates are not a very good predictor of ultimate settlement rates, or, put another way, a mediation before a competent mediator may be only the beginning of a process that ultimately leads to settlement.

<table>
<thead>
<tr>
<th>Roster</th>
<th>Number of Cases</th>
<th>Mediator</th>
<th>Immediate Settlement Percentage</th>
<th>7/1/04 Settlement Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>✔</td>
<td>79</td>
<td>A</td>
<td>37%</td>
<td>92%</td>
</tr>
<tr>
<td>✔</td>
<td>69</td>
<td>B</td>
<td>43%</td>
<td>87%</td>
</tr>
<tr>
<td>✔</td>
<td>42</td>
<td>C</td>
<td>69%</td>
<td>93%</td>
</tr>
<tr>
<td>✔</td>
<td>40</td>
<td>D</td>
<td>40%</td>
<td>95%</td>
</tr>
<tr>
<td>✔</td>
<td>30</td>
<td>E</td>
<td>43%</td>
<td>67%</td>
</tr>
<tr>
<td>✔</td>
<td>23</td>
<td>F</td>
<td>57%</td>
<td>87%</td>
</tr>
<tr>
<td>✔</td>
<td>21</td>
<td>G</td>
<td>71%</td>
<td>86%</td>
</tr>
<tr>
<td>✔</td>
<td>18</td>
<td>H</td>
<td>33%</td>
<td>83%</td>
</tr>
<tr>
<td>✔</td>
<td>14</td>
<td>I</td>
<td>43%</td>
<td>93%</td>
</tr>
<tr>
<td>✔</td>
<td>12</td>
<td>J</td>
<td>83%</td>
<td>92%</td>
</tr>
</tbody>
</table>

For the cases filed during the first two months of 2003, as of July 1, 2004, fifty-seven neutrals held 183 ADR sessions (all but one being a mediation). The busiest four (not the same four as in 2002) accounted for 39% of the sessions.

186. Between July 1, 2004, and March 22, 2004, seventeen of the thirty-one cases pending on July 1, 2004, resolved: nine as a result of a bench trial or dispositive judgment, seven as a result of a settlement, and one jury trial. Thus, as of March 22, 2005, 474 (86%) of the 552 cases exposed to a 16B conference had settled, 40 (7%) had resolved by a bench trial or dispositive motion, 24 (4%) had resolved as a result of a jury trial, and 14 (2.5%) remained unresolved.
down from 45% for 2002. The next busiest four (again, not the same four) accounted for 17% of the sessions, down slightly from the 18% in 2002. The busiest twenty in 2003 handled 76% of the ADR sessions, down from 81% from the twenty busiest neutrals (not the same twenty) in 2002. While the twenty busiest neutrals in 2002 conducted ADR sessions in 81% of the cases, the twenty busiest neutrals in 2003 held ADR sessions in only 67% of the cases, indicating that the work is spreading out. The twenty busiest neutrals in 2002 had a combined immediate settlement rate of 47% (from 0% to 83%). The twenty busiest neutrals in 2003 had a combined immediate settlement rate of 51%. Six of the busiest twenty in 2003 were not among the busiest in 2002. Overall, immediate settlement rates for the 2003 cases ranged from a low of 0% (twenty-nine) to a high of 100% (seven).

F. What Has Been the Impact on Resolution and Settlement Rates?

There have been two prior experiments with ADR in the superior court. For eighteen months in 1988-90 approximately 15% of the non-domestic civil filings in the superior court in Knox and York counties had an ADR conference soon after the filing of the answer.¹⁸⁷ For two years commencing on July 1, 1995, qualifying cases filed in four counties experienced a mandatory ADR conference either before discovery (Androscoggin and Aroostook) or halfway through discovery (Kennebec and Sagadahoc).¹⁸⁸ In the 1995-97 experiment, county settlement and resolution rates were compared with settlement and resolution rates for those same counties two years earlier and contemporaneously with two “control” counties (Oxford and Penobscot). Because Rule 16B is now operating statewide, there is no contemporaneous control available. There are, however, court records of cases filed during the first half of 2000 that the Author has used as a control for the performance of Rule 16B.

Both the settlement rate (percentage of cases settling) over time and the resolution rate (percentage of cases resolving by whatever means) over time were compared for the non-exempt cases with a scheduling order filed within the first six months of 2000 and 2002 and the first two months of 2003. Set out below are computer-generated graphs portraying this information for Maine’s six largest counties (Androscoggin, Aroostook, Cumberland, Kennebec, Penobscot, and York), and because there were not enough cases filed in the other ten counties during January and February of 2003, the combined data for three regional groupings:

1. Oxford, Franklin, Somerset, and Piscataquis counties;
2. Sagadahoc, Lincoln, Knox, and Waldo counties; and
3. Hancock and Washington counties.

On the vertical axis, the percentage of cases settling or resolving was plotted against the horizontal axis, the number of months from the date of the scheduling order. The denominator of the fraction that generates each line is the sum of all non-exempt cases with a scheduling order filed during the two six-month periods and the one two-month period under study (2000, 2002, and 2003; 783, 744, and 287, respectively). The numerator for the settlements fraction includes all the cases that settled by the end of that month. The numerator for the resolutions fraction is

¹⁸⁷. For a more comprehensive explanation of the pilot project, *see supra* Part II.C.
¹⁸⁸. *See supra* Part II.D.
all the cases that were closed for whatever reason by the end of that month. At the base of each settlement chart the timing of the settlements is indicated in the following way: before a conference (C); at a conference or within thirty days of a scheduled conference or a court order to attend a conference (R); more than thirty days after an “unsuccessful” conference (U/C); or a partially successful conference (P/C).

189. Note that in order to compare cases that were filed throughout each period under study, all the cases were analyzed as though they received their scheduling order on the first day (as represented by the origin of the graph).
Resolutions of Non-Exempt Cases After a Scheduling Order
Aroostook County

2003 = 12 out of 16 cases
2002 = 33 out of 36 cases
2000 = 48 out of 48 cases
7/1/04

Settlements of Non-Exempt Cases After a Scheduling Order
Aroostook County

2003 = 12 out of 16 cases (R = 10, C = 2)
2002 = 29 out of 36 cases (R = 19, U/C = 4, P/C = 1, C = 5)
2000 = 33 out of 48 cases
7/1/04

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Resolutions of Non-Exempt Cases After a Scheduling Order
Cumberland County

- 2003 = 74 out of 82 cases
- 2002 = 182 out of 189 cases
- 2000 = 167 out of 167 cases

7/1/04

Settlements of Non-Exempt Cases After a Scheduling Order
Cumberland County

- 2003 = 64 out of 82 cases (R = 21, U/C = 20, P/C = 21)
- 2002 = 161 out of 189 cases (R = 58, U/C = 56, P/C = 42)
- 2000 = 124 out of 167 cases

7/1/04
ALTERNATIVE DISPUTE RESOLUTION IN MAINE

Resolutions of Non-Exempt Cases After a Scheduling Order
Hancock & Washington Counties

2003 = 22 out of 25 cases
2002 = 42 out of 42 cases
2000 = 49 out of 50 cases

Settlements of Non-Exempt Cases After a Scheduling Order
Hancock & Washington Counties

2003 = 16 out of 25 cases (R = 8, U/C = 3, C = 5)
2002 = 33 out of 42 cases (R = 6, U/C = 8, C = 19)
2000 = 31 out of 50 cases

Resolutions of Non-Exempt Cases After a Scheduling Order
Kennebec County

2003 = 20 out of 26 cases
2002 = 61 out of 69 cases
2000 = 77 out of 77 cases

Settlements of Non-Exempt Cases After a Scheduling Order
Kennebec County

2003 = 19 out of 26 cases (R = 9, U/C = 5, C = 5)
2002 = 51 out of 69 cases (R = 17, U/C = 15, P/C = 1, C = 19)
2000 = 53 out of 77 cases
Resolutions of Non-Exempt Cases After a Scheduling Order
Oxford, Franklin, Somerset & Piscataquis Counties

- 2003 = 23 out of 24 cases
- 2002 = 75 out of 77 cases
- 2000 = 78 out of 79 cases

Settlements of Non-Exempt Cases After a Scheduling Order
Oxford, Franklin, Somerset & Piscataquis Counties

- 2003 = 20 out of 24 cases (R = 9, U/C = 5, C = 6)
- 2002 = 63 out of 77 cases (R = 25, U/C = 21, P/IC = 4, C = 13)
- 2000 = 61 out of 79 cases
Resolutions of Non-Exempt Cases After a Scheduling Order
Penobscot County

2003 = 22 out of 24 cases
2002 = 73 out of 78 cases
2000 = 86 out of 90 cases
7/1/04

Settlements of Non-Exempt Cases After a Scheduling Order
Penobscot County

2003 = 16 out of 24 cases (R = 7, U/C = 5, C = 5)
2002 = 64 out of 78 cases (R = 29, U/C = 12, PIC = 1, C = 22)
2000 = 65 out of 90 cases
Resolutions of Non-Exempt Cases After a Scheduling Order
Sagadahoc, Lincoln, Knox & Waldo Counties

- 2003: 18 out of 21 cases
- 2002: 68 out of 79 cases
- 2000: 73 out of 73 cases

Settlements of Non-Exempt Cases After a Scheduling Order
Sagadahoc, Lincoln, Knox & Waldo Counties

- 2003: 16 out of 21 cases (R = 7, U/C = 7, C = 2)
- 2002: 63 out of 79 cases (R = 30, U/C = 16, P/C = 1, C = 16)
- 2000: 55 out of 73 cases
As an illustration, study the two graphs for Androscoggin County. The settlement graph reveals that it took thirty-six months to settle approximately 80% of the 2000 cases, but only nineteen months to settle the same percentage of 2002 cases, and only sixteen months to settle 80% of the 2003 cases. Looking at the same graph, one can see that after sixteen months 54% of the 2000 cases had settled, 62% of the 2002 cases had settled, and 81% of the 2003 cases had settled.

The Androscoggin resolution graph reveals that all of the 2000 cases had resolved after forty-six months but all of the 2002 cases were resolved after just twenty-nine months. It took seventeen months for the 2003 cases to reach a resolution rate of 91%, three months ahead of the pace set by the 2002 cases and seven months ahead of the pace of the 2000 cases.

Generally speaking, the cases filed in 2003 are settling and resolving faster than the cases filed in 2002, and the cases filed in 2002 are settling and resolving faster than the cases filed in 2000.

Table XIV displays the settlement and resolution percentages for the 2000, 2002, and 2003 cases after each group has been pending for seventeen or eighteen months.
TABLE XIV
Settlement & Resolution Percentages

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Androscoggin</td>
<td>18</td>
<td>54%</td>
<td>62%</td>
<td>82%</td>
<td>68%</td>
<td>72%</td>
<td>91%</td>
</tr>
<tr>
<td>Aroostook</td>
<td>18</td>
<td>41%</td>
<td>75%</td>
<td>75%</td>
<td>44%</td>
<td>80%</td>
<td>75%</td>
</tr>
<tr>
<td>Cumberland</td>
<td>18</td>
<td>63%</td>
<td>72%</td>
<td>78%</td>
<td>79%</td>
<td>78%</td>
<td>90%</td>
</tr>
<tr>
<td>Kennebec</td>
<td>18</td>
<td>40%</td>
<td>64%</td>
<td>69%</td>
<td>55%</td>
<td>72%</td>
<td>72%</td>
</tr>
<tr>
<td>Penobscot</td>
<td>17</td>
<td>41%</td>
<td>68%</td>
<td>68%</td>
<td>49%</td>
<td>73%</td>
<td>92%</td>
</tr>
<tr>
<td>York</td>
<td>18</td>
<td>47%</td>
<td>69%</td>
<td>73%</td>
<td>49%</td>
<td>72%</td>
<td>73%</td>
</tr>
<tr>
<td>Northwest</td>
<td>17</td>
<td>47%</td>
<td>65%</td>
<td>79%</td>
<td>53%</td>
<td>73%</td>
<td>92%</td>
</tr>
<tr>
<td>(Oxford, Franklin,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Somerset,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Piscataquis)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northeast</td>
<td>18</td>
<td>24%</td>
<td>60%</td>
<td>64%</td>
<td>28%</td>
<td>72%</td>
<td>84%</td>
</tr>
<tr>
<td>(Hancock,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washington)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mid-Coast</td>
<td>18</td>
<td>53%</td>
<td>60%</td>
<td>71%</td>
<td>64%</td>
<td>68%</td>
<td>77%</td>
</tr>
<tr>
<td>(Sagadahoc,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lincoln, Knox,</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waldo)</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>AVERAGE</strong></td>
<td></td>
<td>46%</td>
<td>66%</td>
<td>73%</td>
<td>54%</td>
<td>73%</td>
<td>83%</td>
</tr>
</tbody>
</table>

It is evident that not only is Rule 16B helping to resolve cases, but as the bench and bar becomes acclimated to its operation, it also seems to be doing so sooner. Because the last few cases to resolve tend to inflate the average, it is difficult to compare average case durations until virtually all the cases have been resolved. One can compare, however, the average length in days of the 2000 and 2002 cases for those counties in which the cases have entirely (or all but entirely) resolved. By doing so, it is possible to get a measure of the average reduction in case duration for the Rule 16B cases compared with those cases commenced in 2000. As of July 1, 2004, all the 2000 and 2002 cases being followed had been resolved in six counties and all but 3% to 5% resolved in two more. From this data one can conclude that, on average, the time from scheduling order to resolution has been reduced from 402 days to 263 days, a reduction of 139 days, or better than four-and-a-half months. This represents an average reduction of 35%. Table XV displays the individual county data:
G. What Has Been the Impact on the Superior Court’s Civil Docket?

When lawyers and judges lament on the decline in the number of civil jury trials, ADR generally, and Rule 16B in particular, are often blamed or given credit. Although this decline has been observable in court records for eighty years, it is also possible that Rule 16B and judicial settlement conferences (on the eve of trial) are contributing to this decline in the number of jury trials.

Between fiscal years 1988 and 1998, Maine court records indicate that the number of civil jury trials fluctuated from a high of 256 (fiscal year 1988) to a low of 123 (fiscal year 1992). In fiscal year 1998 (the last year for which the Court has accurate statistics) the number was 177.

Up to this point in our study of Superior Court cases, the Author has been focusing only on the half of the total filings that are or were eligible under Rule 16B. Because historic jury trial numbers are for the Superior Court as a whole, it is necessary to expand the focus from the Rule 16B eligible cases to the entire Superior Court civil docket. Of the 1497 civil cases filed in the Superior Court between January 1, 2002 and June 30, 2002, 477 were exempt and an additional 246 non-exempt cases did not receive a scheduling order. Of those 723 cases, after excluding defaults (forty-five), cases filed to authorize a foreign deposition (forty-two), to approve a minor settlement (sixty-three), those dismissed for insufficient service (twenty-one), removed to the United States District Court (thirty-six), transferred to another venue (three), opened in error (seven), and consolidated into another case (one), 505 remained. Of those 505, as of July 1, 2004, 275 had settled, 152 were resolved by a bench trial or a dispositive motion (including sixty-nine foreclosures), five were resolved by a jury trial and seventy-three remain open. If these numbers are added to the comparable numbers from Table II, the reader can get a snapshot of the progress of all the cases filed in the Superior Court during the first half of 2002. This exercise is set forth in Table XVI.

190. Murray, supra note 60.
### TABLE XVI

Status of the Cases Filed in the Superior Court in the First Half of 2002

<table>
<thead>
<tr>
<th></th>
<th>Exempt and/or No Scheduling Order</th>
<th>ADR Eligible</th>
<th>Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled</td>
<td>275 (54%)</td>
<td>636 (84%)</td>
<td>911 (72%)</td>
</tr>
<tr>
<td>Resolved—Disp Mo. or Bench Trial</td>
<td>152 (30%)</td>
<td>52 (7%)</td>
<td>204 (16%)</td>
</tr>
<tr>
<td>Resolved—Jury Trial</td>
<td>5 (1%)</td>
<td>25 (3%)</td>
<td>30 (2.4%)</td>
</tr>
<tr>
<td>Still Open</td>
<td>73 (15%)</td>
<td>46 (6%)</td>
<td>119 (9.4%)</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td>505 (100%)</td>
<td>759 (100%)</td>
<td>1264 (100%)</td>
</tr>
<tr>
<td>Default</td>
<td>45</td>
<td>7</td>
<td>52</td>
</tr>
<tr>
<td>Foreign Deposition</td>
<td>42</td>
<td></td>
<td>42</td>
</tr>
<tr>
<td>Minor Settlement</td>
<td>63</td>
<td></td>
<td>63</td>
</tr>
<tr>
<td>Insufficient Service</td>
<td>21</td>
<td>4</td>
<td>25</td>
</tr>
<tr>
<td>Removed to USDC</td>
<td>36</td>
<td>1</td>
<td>37</td>
</tr>
<tr>
<td>Change of Venue</td>
<td>3</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Opened in Error</td>
<td>7</td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>Consolidated</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>723</td>
<td>774</td>
<td>1497</td>
</tr>
</tbody>
</table>

Although after two to two-and-a-half years the cases from this six-month period have only generated thirty jury trials, there are still 119 cases (9%) yet to be resolved. If none of the 119 end in a jury trial, then Maine would be experiencing civil jury trials at the rate of sixty per year. If the number of jury trials gener-

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191. The Judicial Branch has recently adopted case completion standards. For jury and non-jury civil actions the standards are as follows:

- 50% to be resolved within twelve months of filing;
- 75% to be resolved within eighteen months of filing; and
- 99% to be resolved within twenty-four months of filing.

*See* Maine Judicial Branch Quarterly Report Trial Court Efficiency, 4 (November 1, 2004).

Of the 1497 civil cases filed during the first half of 2002, as of July 1, 2004, (i.e., after twenty-four to thirty months from the filing) 7.5% (119 cases) of the 1497 cases filed during the period under study were still pending. By December 31, 2004, the number of pending cases had been reduced to seventy-four. Of those, nineteen were stayed due to a pending bankruptcy, four were stayed by agreement of the parties and no service has been made in one case. This left fifty active cases pending, or 3.3% of the 1497 cases that were filed at least thirty months and perhaps as long as thirty-six months earlier. It is evident that, notwithstanding the impact of Rule 16B and judicial settlement conferences, the Superior Court is not meeting its civil case completion standards. Interestingly, almost 40% of the fifty pending cases from the first half of 2002 are medical malpractice cases which are required by law to experience prelitigation screening and mediation panels before they can proceed in Superior Court. *See* ME. REV. STAT. ANN. tit. 24 § 2851 (West 2004) *et seq.*
ated out of the remaining 119 cases is proportionally four times greater than the number generated from the 1149 cases that had resolved as of July 1, 2004, then the cases from the first half of 2002 will be generating jury trials at an annual rate of eighty-four per year—50% fewer than the previous low of 123 (1993) and approximately half the civil jury trials held in fiscal year 1998. Although all the juries are not in, it does appear that Rule 16B and judicial settlement conferences on the eve of trial are significantly reducing the number of civil jury trials in the Superior Court.

Rule 16B appears to be impacting the work of the Maine Supreme Judicial Court (Law Court) as well. During the first half of 2002 when the Superior Court was getting used to Rule 16B, the Law Court was deciding appeals from decisions of the Superior Court with respect to cases that had been commenced in an earlier time. During that six-month period, however, the Law Court decided forty-seven civil appeals from the Superior Court that would have been Rule 16B eligible had those cases been commenced in 2002. Two years later, in the first half of 2004, the Law Court decided just twenty-seven cases that were Rule 16B eligible. This 43% drop in Rule 16B eligible appeals is exactly what one would expect. After reducing the number of cases requiring court involvement in their resolution by half, one would expect a similar reduction in the number of appeals.

H. To What Extent Have Judicial Settlement Conferences Contributed to the Increase in Settlements?

Of the 1497 civil cases filed in the Superior Court in the first half of 2002, approximately half were not exempt and received a scheduling order. As of July 1, 2004, of the 774 cases eligible for a Rule 16B settlement conference, a total of 636 had settled. Of those, 170 settled before a conference, 254 settled at the conference, and 212 settled after the conference.

Of the 298 cases that did not settle immediately, as of July 1, 2004, thirty-seven cases also experienced a judicial settlement conference. Of those thirty-seven cases, twenty-three immediately settled (i.e., within thirty days of the conference), and six more subsequently settled. Of the remaining eight, there have been two jury trials, one bench trial, and five cases were still pending as of July 1, 2004. Thus, of the 212 cases settling after the Rule 16B conference, the judicial settlement conference was directly or indirectly responsible for twenty-nine (14%) of those settlements.

Of the 636 settlements experienced as of July 1, 2004, including seven settlements brought about by judicial settlement conferences held before a Rule 16B conference, the thirty-six direct and indirect settlements amount to approximately 5.7% of the total settlements. Any analysis of the impact of Rule 16B on the work

192. Note that as of March 22, 2005, of the 119 cases pending on July 1, 2004: thirty had settled; twenty-two had resolved by bench trial or dispositive motion; and only one had resolved by a jury trial.
193. See supra Tables III and VI and accompanying text.
194. See supra Tables I and II and accompanying text.
of the Superior Court must acknowledge the impact on settlement rates brought about by the judicial conferences on the eve of trial.195

I. What Has Been the Reaction of Lawyers, Clients, and Neutrals to Rule 16B?

In order to assess the attitudes of the participants towards mandatory ADR in the Superior Court, the Author randomly selected\(^{196}\) sixty-six of the 2002 cases that experienced a Rule 16B ADR conference (or settled on the eve of one) and sent a letter and questionnaire\(^{197}\) to the 153 lawyers involved in those cases. More than half (eighty-six lawyers) responded.\(^{198}\) Accompanying the lawyer letter was a letter from the Author to the client\(^ {200}\) and a questionnaire\(^{199}\) for the client to answer. Each lawyer was asked to forward the letter and questionnaire on to the client. The Author also sent a letter\(^ {201}\) to the ten busiest neutrals who collectively participated in over 68% of the 2002 conferences.

1. Lawyer Reaction

Better than 75% of the lawyers responding were generally favorable towards Rule 16B, although about the same percentage wanted more lawyer control over the timing of the conference and wanted the Court to impose a good faith requirement by rule.

Although 60% thought the ADR conferences were sometimes held too soon and 13% found the process sometimes too expensive, the overwhelming majority (74%) found that Rule 16B forces early evaluation, early settlement discussions, and/or early resolutions. Most lawyers (71%) thought the benefits of Rule 16B justified the expense. A more comprehensive summary of the lawyer responses is set forth in Appendix E.

195. Of the non-exempt cases filed during the first half of 2002, as of March 22, 2005, there have been thirty-seven Judicial Settlement Conferences of cases that had previously experienced a Rule 16B conference. Of those thirty-seven, twenty-three settled immediately and nine more have since settled, two cases were resolved by a jury trial, two were resolved in a bench trial, and one remains open.

As of March 22, 2005, there have also been eight Judicial Settlement Conferences of non-exempt cases filed in the first half of 2002 that had not experienced a Rule 16B conference. Of those, six settled immediately, one subsequently settled, and one resolved at a bench trial.

196. We first selected every tenth case on the docket, but when a case selected had not experienced an ADR conference, we selected the next case on the docket that did experience a conference (or settled on the eve of one). The sample produced an over-representation of cases that resolved as a result of the conference (i.e., 53% of sample compared to 46% for the population). The sample also over-represented certain mediators and the number of cases that resolved on the eve of the conference. We therefore removed ten cases from the sample that reduced the percentage of settled cases to 46% of the sample, selecting for removal cases where mediators relative involvement had been overrepresented. A more comprehensive summary of lawyer responses is set out at Appendix E.

197. See infra Appendix C and D.
198. See infra Appendix E.
199. See infra Appendix F.
200. See infra Appendix G.
201. See infra Appendix I.
2. Client Reaction

How many of the lawyers forwarded the letter and questionnaire to their clients is unknown. Forty-one clients responded: twenty-two plaintiffs, fifteen defendants, and four other clients (three of the four were the same insurance adjuster).

Collectively, they reported twenty-two settlements as a result of the Rule 16B conferences (all were mediations). Twelve clients (seven plaintiffs, four defendants, and one third-party) thought the conference was held too soon, twenty-three clients (twelve plaintiffs, nine defendants and two third-parties) thought it was timed just right, and four clients (three plaintiffs and one defendant) thought the mediation was too late. Nineteen of the twenty-seven clients that thought that the mediation was timed either appropriately or was too late, settled. Nine of the twelve clients who thought the mediation was too early did not settle. The fifteen clients (seven plaintiffs, seven defendants, and one third-party) who found the benefit of the ADR conference worth the cost, settled. Thirteen clients (eight plaintiffs, three defendants, and two third-parties) of the fifteen (ten plaintiffs, three defendants, and two third-parties) who found the benefit of the ADR conference not worth the cost, did not settle. Six of the eleven clients (five plaintiffs, five defendants and one third-party) who were not sure, settled. Twenty-eight of the clients (sixteen plaintiffs, eleven defendants, and one third-party) were generally favorable to Rule 16B (eighteen of the twenty-eight settled); eleven clients (six plaintiffs, three defendants, and two third-parties) were not generally favorable to Rule 16B (5 of whom settled). Twenty-nine of the clients (seventeen plaintiffs, nine defendants, and three third-parties) would leave the timing of the ADR conference up to the lawyers (fifteen of the twenty-nine). Nine of the clients (four plaintiffs, four defendants, and one third-party) would let the Court set the time (seven of the nine settled). The clients had many other suggestions for improving Rule 16B.

3. Neutral Reaction

Although ninety-one different neutrals were selected by the parties to mediate the 2002 cases being followed, ten individuals mediated over 68% of them. They were sent the letter that appears in Appendix I. As of July 1, 2004, seven of the ten had responded. The neutrals' responses were as follows:

Is the Timing of the Conference Appropriate? One respondent would leave the rule alone, one would hold the conference before the last two months of dis-

202. Twenty-three settlements out of forty-one responses, seems high. All things being equal we would have expected fifteen settlements (i.e., 46%). Perhaps happier clients are more likely to respond to surveys. Perhaps the responses include some settlements that occurred more than thirty days after the conference that the client believed was caused by the Rule 16B conference.

203. Although it is perhaps understandable that lawyers would want to be in control of the timing of the conference, it is less clear why twenty-four out of thirty-two clients who expressed an opinion on this subject (fourteen of whom settled) would also want their lawyers in charge of the timing. It may be that these clients have confidence in their lawyers and opposing counsel to select the appropriate time by agreement; it may also reflect a belief that their lawyers did select the proper time because of the ease with which attorneys are able to obtain extensions from the court.

204. See infra Appendix H.
covery, one would hold the conference after three depositions and a document exchange, two would hold the conference prior to thirty days after discovery ends, one would permit counsel to defer the conference by agreement until just prior to the trial management conference, and one would leave it up to the mediator to decide when the mediation should occur. Two of the mediators would permit the lawyers to opt out of the ADR conference by agreement.

Should the Court System Adopt a Good Faith Standard? Four respondents oppose adding a good faith requirement to Rule 16B, two (one of whom always puts such a provision in his contract) believe it should be put in the rule. One expressed no view on the issue. Three of the seven volunteered that the rule should require insurance adjusters to attend the conference in person (two) or, at least, by phone (one).

J. What are the Major Conclusions to be Drawn?

The foregoing data supports the conclusions set out below. Mandatory, mid-discovery mediation:

1. Speeds up the pace of resolutions. In addition to lawyer perceptions, Table XII reveals that 50% more cases resolved in the first year and a half under Rule 16B as had resolved in a year and a half during the pre-Rule 16B period (2000).
2. Shortens the time to final resolution. The evidence indicates that Rule 16B has reduced the duration of the average case by four-and-a-half months or 35%.205
3. Increases the likelihood of settlement. Lawyers correctly report that most cases settle. Based on their experience and memories, many lawyers will provide the listener with a number (i.e., “four out of five cases settle”; “95% of cases settle;” etc.). In Maine during 1992 (before the Pilot Project) and during 2000 (before Rule 16B) only three out of four cases settled (e.g., during 2000, 76% settled and 24% required a decision by a court or a jury for a final resolution). With 6% of the 2002 cases still unresolved, under Rule 16B the settlement percentage has already passed 83%. If the final settlement percentage approaches 86%, that will equate to a 13% increase over the pre-Rule 16B settlement percentage. During the Pilot Project, volunteer neutrals increased the settlement percentages in four counties from 10% to 13%.
4. Reduces court involvement. A 13% increase in settlements equates to a 40% reduction in the cases requiring judicial involvement in their resolution. In addition to the ability to redirect scarce judicial resources, this also preserves the court’s reservoir of authority.206
5. May reduce party costs. In addition to the reasonable supposition that cases that resolve quickly do not cost the parties as much as cases that linger, the only evidence supporting this conclusion is that most of the lawyers responding to the Author’s questionnaire believed that Rule 16B saved resources.

K. Recommendations for the Future

Based upon our study of the pros and cons of ADR, the ADR pilot project, and the operation of Rule 16B for two and a half years, the Author would approach any change in Rule 16B with caution.

205. See Table XIV, supra Part III.F.
206. See supra note 37 and accompanying text.
1. Do Not Convert to a Voluntary Program. There is no evidence supporting a wholesale repeal of Rule 16B or converting Rule 16B into a voluntary program. Rule 16B has been a constructive improvement in the processing of civil disputes in the Superior Court.

2. Adjust the Timing of the Conference. Approximately 70% of the lawyers and clients responding to the survey would leave the timing of the conference to the lawyers, although about the same percentage of clients thought their conference was timed either appropriately or was too late. Most of the mediators responding to the survey would give the lawyers greater flexibility in delaying the timing of the conference, although one feared that such flexibility would make timing a subject of bargaining to the ultimate detriment of the weakest participant. The objective evidence does not point to the need for greater flexibility in the timing of the conference. If the Superior Court, however, is routinely granting modest requests for extensions, perhaps the rule should be amended to authorize the parties to obtain an automatic extension of up to sixty days by filing a request signed by all counsel.

3. Revisit the Exemptions. Because only one of nine cases involving constitutional or civil rights settled in mediation, it might be argued that this type of case deserves an exemption. Perhaps for the same reason, appeals of governmental actions (Rule 80B and Rule 80C cases) should retain their exemptions. The Author suspects, however, that if a school board member, a planning board member, or a member of the Board of Environmental Protection were required to attend a mediation in cases in which their decisions were being appealed to the Superior Court a significant number of those cases would settle. Perhaps the Law Court should authorize a pilot project to test this thesis.

4. Reject a Good Faith Requirement. Because neutrals can and do provide in their contracts that the parties agree to participate in good faith, the Author would not recommend adding such a requirement to the Rule.

5. Cautiously Expand into the District Court. Many cases filed in the District Court currently either require (i.e., family) or make available (i.e., small claims) non-binding mediation. Because of power imbalances many other District Court cases may not lend themselves to mandatory mediation. The Law Court, however, should consider authorizing some pilot projects to assess whether Rule 16B should be expanded to the general civil docket, especially when neither party is or both parties are represented by counsel.

6. Expand ADR into the Probate Court. The Probate Court should consider a pilot project to test the efficiency of Rule 16B on all or a portion of its docket.

7. Overall. After twenty-seven years of experimenting, implementing, and evaluating, Maine is well on its way to fulfilling the promise of the Commission to Study the Future of Maine’s Courts to “offer citizens access to a variety of means for resolving their disputes . . . .” Although the traditional method of resolving disputes with or without a jury and with the right to appeal must always be available, the citizens of Maine deserve and are getting alternatives.

207. Only one of the eight cases, however, required the court’s involvement for a resolution. The other seven all settled after the conference and before trial.

208. COMMISSION, supra note 1, at 38.
1. Rule 16(a) of the Maine Rules of Civil Procedure is amended as follows:

**RULE 16. PRETRIAL PROCEDURE IN THE SUPERIOR COURT**

(a) **Scheduling Order.** 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 scheduling order setting deadlines for 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 scheduling order shall not be modified except on motion for good cause shown. The joinder of additional parties after the scheduling order has issued shall not require a modification of the scheduling order except on motion for good cause shown.

2. Rule 16B of the Maine Rules of Civil Procedure is adopted as follows:

**RULE 16B. ALTERNATIVE DISPUTE RESOLUTION**

(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.

(b) **Exemptions.** The following categories of cases are exempt from the requirements of this rule:
(1) Actions under Rule 80, 80D, and 80L;
(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) identifi-
cation, 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 spe-
cially 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 Me. 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 ap-
propriate settlement authority, whose interests are not entirely repre-
sented 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 poten-
tially 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 discus-
sions—including lienholders—may be requested to attend the confer-
ence.

(2) The court may impose appropriate sanctions on any party or representa-
tive 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, by
telephone.

(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;
(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), shall be deferred until 150 days after the date of the Rule 16(a) scheduling order. 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.
(1) 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.

Dated: February 8, 2001

/s/DEW
Daniel E. Wathen
Chief Justice

/s/PLR
Paul L. Rudman

/s/HHD
Howard H. Dana, Jr.

/s/LIS
Leigh L. Saufley

/s/DGA
Donald G. Alexander

/s/SC
Susan Calkins
Associate Justices*

* Justice Robert W. Clifford does not concur.
1. 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.

2. 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 that may be sought pursuant to Me. 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 Me. 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 Me. 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. Me. 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 (1) 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.
APPENDIX B

STATEMENT

As the Court adopts a rule to encourage the use of Alternative Dispute Resolution in civil cases in the Superior Court, it is useful to recall the genesis of this effort and the benefits that can be realized through court-connected ADR.

In 1993, the Commission to Study the Future of Maine’s Courts issued a comprehensive report making many recommendations to improve our system of justice. One overriding concern of the Futures Commission, shared by this Court, was the need to improve the delivery of court services to our customers—litigants, attorneys, and the public. A court-connected ADR program was recommended, in part, to improve our service to the public by enhancing citizen litigants’ sense of participation in, and understanding of, court processes directly affecting their lives.

This goal of improving court service to the public was necessarily not the focus of our discussions as we examined the appropriate scope of an ADR rule, but it was, and remains, the motivation for adopting this rule. We now have the benefit of several studies which address litigant and public benefits of ADR. These studies point to four important benefits from participation in an ADR program.

First, individuals in litigation believe that through ADR their voices are being heard and that they have more of a say in decisions affecting their lives than in court trial processes where decisions are perceived to be controlled largely by attorneys and judges;

Second, through ADR, parties gain a greater understanding of their own case, its strengths and weaknesses, and improved understanding of the other side’s point of view;

Third, parties having participated in ADR are more willing to accept the ultimate result and perceive it as fair, even if the result is against them; and

Fourth, because of greater party participation, there are fewer problems enforcing payment obligations and greater compliance with other terms of judgments in cases that have been subject to ADR processes.

Some of these studies also suggest that views about the value of ADR participation are shared to a lesser extent by attorney participants than by party participants. But if our focus is on the goals established by the Futures Commission, including improved customer service, greater party participation in decisions affecting their lives, and better public understanding of the justice system, the court-connected ADR program we adopt—with many accommodations to the concerns of the Bar and others—is an appropriate step to take.


We are not unmindful that mandatory ADR imposes costs on attorneys and litigants. Although in many cases, the cost of ADR will be offset by savings in legal expense and delay, we have designed the rule to insure that it does not become an economic barrier to court access. The measures that temper the expense of ADR include the following:

1. A number of types of litigation are exempt from ADR and the court has authority to exempt other actions for good cause shown.
2. The court is encouraged to waive the ADR requirement if the expense of ADR would present an economic hardship to any party.
3. The parties are free to select their own neutral on their own terms.
4. Provision is made for reduced fee and pro bono services from a neutral when necessary.
5. The requirement to pay a jury fee is deferred until the parties have engaged in ADR.
6. Because the rule does not become effective for approximately one year, all parties and attorneys will have ample time to establish acceptable and economical arrangements for compliance.

*STATEMENT OF JUSTICE CLIFFORD IN NONCONCURRENCE*

I decline to join in the promulgation of these changes to the Rules of Civil Procedure making the use of alternative dispute resolution mandatory in the Superior Court.

I encourage the use of ADR. I am not convinced, however, that its use should be mandatory. ADR is increasingly being used by litigants and attorneys on a voluntary basis as an effective way to resolve civil disputes. The Superior Court is having fewer trials as more cases are being resolved without the necessity of trial. Superior Court Justices are becoming increasingly effective in helping to settle cases prior to trial. Accordingly, I fail to see the need for mandatory ADR.

Aside from the questionable need for mandatory ADR, there are several additional reasons why I decline to support its imposition at this time. As a result of the recent legislative changes implementing the recommendations of the Court Unification Task Force, see P.L. 1999, ch. 731, part ZZZ, the workload of the District Court is likely to increase. I fear that some litigants may be encouraged to file cases in the District Court for the purpose of avoiding mandatory ADR. Moreover, the most appropriate time to resolve cases is unique to each case. Attorneys, litigants, and Justices of the Superior Court, especially those Justices assigned to cases under the single justice assignment system, are in the best position to evaluate when that time is. Unfortunately, mandatory ADR predetermines that time for all cases.

Most importantly, mandatory ADR imposes an additional cost on civil litigants. In addition to paying substantial attorney fees, civil litigants pay service of process fees, fees for filing cases in our courts, jury fees, and fees to appeal. Although some litigants may be excused from payment, and some may not feel the burden, the substantial costs of mandatory ADR will be an additional and unwelcome burden on most of those seeking to access our justice system.
APPENDIX C

LAWYER LETTER

As you know, the Court adopted Maine Rule of Civil Procedure 16B effective January 1, 2002, mandating an ADR conference within four months of the scheduling order. We are studying the impact of this change on the courts, the lawyers and the litigants.

Of the civil cases filed in the Superior Court during the first half of 2002, approximately 600 cases to date have experienced such a conference.

At random, we have selected approximately 10% of those cases in which to seek lawyer and client reaction to this process. The above case was one of those selected.

This case may be ongoing, may have settled as a result of the conference or without regard to the conference, or may have been decided after trial or a dispositive motion. We ask that you answer the enclosed lawyer survey yourself and return it to me in one of the enclosed envelopes. We also ask that you forward the client survey along with my cover memo to the client and urge your client to respond. We have enclosed another self-addressed stamped envelope for their convenience.

We thank you in advance for your cooperation and appreciate your participation in this study.

Sincerely,

Howard H. Dana, Jr.
Associate Justice
Chair, Court Alternative
Dispute Resolution
Service (CADRES)

HHD/ald
Enclosures
APPENDIX D

LAWYER SURVEY

Please circle the most appropriate answer to the following questions:

1. Did you represent a plaintiff, defendant or another party in the lawsuit referenced in Justice Dana’s cover letter?
   P   D   Other_______

2. Do you generally favor the Court requiring counsel and the parties to participate in an ADR conference during discovery (i.e., 16B)?
   Y   N   Unsure

3. Many lawyers have said that 16B would be fine if only the lawyers could decide when to hold the conference. Would you favor this approach?
   Y   N   Unsure

4. Should there be a good faith requirement for the participating attorneys?
   Y   N   Unsure

5. Should the exemptions from Rule 16B be expanded or reduced?
   E   R   Unsure

   Which categories of cases should be included or excluded from Rule 16B?

6. Should 16B apply to the same category of cases in District Court as in Superior Court?
   Y   N   Unsure

7. What do you see as the strengths and weaknesses of 16B as presently configured?
   Strengths:
   Weaknesses:

8. As it worked in the case identified in the cover letter,
   a. Was the client satisfied with the process?
   b. Were you satisfied?
   c. Do you think the benefits achieved justified the expense?
   d. Over a third, but less than half, of the cases experiencing a
conference settled within 30 days of the conference. Without regard to whether your case settled, do you feel the process justified, in your case, the cost incurred by all parties?

9. Other comments or suggestions?
APPENDIX E

LAWYER

Q1. Did you represent a plaintiff, defendant or another party in the lawsuit referenced in Justice Dana’s cover letter?

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<tr>
<th></th>
<th>P</th>
<th>D</th>
<th>Other</th>
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<tbody>
<tr>
<td>Number</td>
<td>45</td>
<td>39</td>
<td>2</td>
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Q2. Do you generally favor the Court requiring counsel and the parties to participate in an ADR conference during discovery (i.e., 16B)?

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<th>Other</th>
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<tr>
<td>Yes</td>
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<tr>
<td>Unsure</td>
<td>7</td>
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N.B.: Attorneys representing plaintiffs “generally” favor 16B: better than 9 to 1, while defense attorneys “generally” favor 16B almost 3 to 1.

Q3. Many lawyers have said that 16B would be fine if only the lawyers could decide when to hold the conference. Would you favor this approach?

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<th>T</th>
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<th>Other</th>
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<td>Yes</td>
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<tr>
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N.B.: Defense attorneys favor lawyers setting the time: better than 8 to 1. Plaintiffs’ attorneys favor lawyers setting the time: better than 2 to 1.

Q4. Should there be a good faith requirement for the participating attorneys?

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<th>Other</th>
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<tr>
<td>Yes</td>
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<td>1</td>
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</table>

N.B.: Lawyers overwhelmingly support adding a good faith requirement to 16B.

Q5. Should the exemptions from Rule 16B be expanded or reduced?

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<thead>
<tr>
<th></th>
<th>E</th>
<th>R</th>
<th>Unsure</th>
<th>As Is</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>23</td>
<td>8</td>
<td>44</td>
<td>8</td>
</tr>
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</table>
Which categories of cases should be included or excluded from Rule 16B?

**Require mandatory ADR (16B) in the following cases**

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>All personal injury cases, regardless of dollar amount in controversy or prior attempts at ADR</td>
<td>2</td>
</tr>
<tr>
<td>Quite title actions</td>
<td>1</td>
</tr>
</tbody>
</table>

**Exempt the following cases from 16B**

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large cases requiring more discovery</td>
<td>4</td>
</tr>
<tr>
<td>When all counsel agree that it would be a waste of time</td>
<td>4</td>
</tr>
<tr>
<td>Coverage cases</td>
<td>4</td>
</tr>
<tr>
<td>Personal injury cases in which the parties know the involved insurance company will not participate in good faith – Allstate, State Farm, etc.</td>
<td>3</td>
</tr>
<tr>
<td>Cases where one or both of the parties are pro se</td>
<td>2</td>
</tr>
<tr>
<td>Actions to enforce foreign judgments&lt;</td>
<td>1</td>
</tr>
<tr>
<td>Set a higher dollar threshold to trigger ADR</td>
<td>2</td>
</tr>
<tr>
<td>When liability is unclear until after discovery</td>
<td>1</td>
</tr>
<tr>
<td>Quite title actions</td>
<td>1</td>
</tr>
<tr>
<td>Cases between $30,000 and $50,000</td>
<td>1</td>
</tr>
<tr>
<td>Personal injury exemption of under “$30,000” should be changed to “special damages” under $2,500&lt;TB&gt;</td>
<td>1</td>
</tr>
<tr>
<td>Option to choose binding arbitration</td>
<td>1</td>
</tr>
<tr>
<td>Foreclosures</td>
<td>1</td>
</tr>
</tbody>
</table>

Q6. Should 16B apply to the same category of cases in District Court as in Superior Court?

<table>
<thead>
<tr>
<th>T</th>
<th>P</th>
<th>D</th>
<th>Other</th>
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<tbody>
<tr>
<td>Yes</td>
<td>44</td>
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</tr>
<tr>
<td>No</td>
<td>17</td>
<td>9</td>
<td>7</td>
</tr>
<tr>
<td>Unsure</td>
<td>22</td>
<td>11</td>
<td>10</td>
</tr>
</tbody>
</table>

**N.B.** Setting aside the 27% of all attorneys who are unsure, of the balance: plaintiffs' attorneys favored extending 16B to the District Court: better than 2 to and defense attorneys favor it: 3 to 1.

Q7. What do you see as the strengths and weaknesses of 16B as presently configured?
### Strengths

<table>
<thead>
<tr>
<th>Strength</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Forces (insurance carrier) (parties) (lawyers) to seriously evaluate the case and brings everyone together early</td>
<td>36</td>
</tr>
<tr>
<td>2. It resolves cases (early)</td>
<td>17</td>
</tr>
<tr>
<td>3. Clients (and lawyers) appreciate having a 2nd pair of eyes(without passion and emotion)</td>
<td>9</td>
</tr>
<tr>
<td>4. Forces settlement discussions early</td>
<td>11</td>
</tr>
<tr>
<td>5. Saves money</td>
<td>3</td>
</tr>
<tr>
<td>6. It’s mandatory in most cases</td>
<td>2</td>
</tr>
<tr>
<td>7. Quality of the mediators</td>
<td>2</td>
</tr>
<tr>
<td>8. Gives clients more control of the process</td>
<td>1</td>
</tr>
<tr>
<td>9. Clients get to talk about case which leads to settlement</td>
<td>3</td>
</tr>
<tr>
<td>10. Reduces extended posturing</td>
<td>1</td>
</tr>
<tr>
<td>11. Introduces Bar to benefits of ADR</td>
<td>1</td>
</tr>
<tr>
<td>12. Judges liberally grant continuances</td>
<td>1</td>
</tr>
<tr>
<td>13. Sometimes helps with client control</td>
<td>1</td>
</tr>
<tr>
<td>14. Can select type of ADR</td>
<td>1</td>
</tr>
<tr>
<td>15. Promotes preparation from the outset</td>
<td>1</td>
</tr>
<tr>
<td>16. Helps avoid personal conflicts</td>
<td>1</td>
</tr>
<tr>
<td>17. Practically speaking, the ADR conference serves to narrow and otherwise delineate the real issues presented in the case</td>
<td>1</td>
</tr>
<tr>
<td>18. Judicial economy</td>
<td>1</td>
</tr>
</tbody>
</table>

### Weaknesses

<table>
<thead>
<tr>
<th>Weakness</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Sometimes too early (especially in big cases or when liability is disputed)</td>
<td>51</td>
</tr>
<tr>
<td>2. Cost is excessive in (some) (small) cases</td>
<td>11</td>
</tr>
<tr>
<td>3. Too many bad mediators out there</td>
<td>3</td>
</tr>
<tr>
<td>4. Wastes resources when settlement very unlikely</td>
<td>3</td>
</tr>
<tr>
<td>5. Needs a sanction for failing to participate in good faith</td>
<td>2</td>
</tr>
<tr>
<td>6. Does not require the adjuster to negotiate in good faith</td>
<td>1</td>
</tr>
<tr>
<td>7. Sometimes too much pressure to settle</td>
<td>1</td>
</tr>
<tr>
<td>8. Doesn’t provide an incentive to settle early</td>
<td>1</td>
</tr>
<tr>
<td>9. Process denies me trial experience</td>
<td>1</td>
</tr>
<tr>
<td>10. Need more exemptions from ADR</td>
<td>1</td>
</tr>
<tr>
<td>11. Permits some attorneys to file very weak cases knowing that settlement discussions will be held soon</td>
<td>1</td>
</tr>
<tr>
<td>12. Too many lawyers use it simply as a discovery vehicle</td>
<td>1</td>
</tr>
<tr>
<td>13. No downside for failing to effectively participate</td>
<td>1</td>
</tr>
<tr>
<td>14. Insurance companies not serious about putting their best offer forward for fear of being &quot;squeezed&quot; at trial</td>
<td>1</td>
</tr>
<tr>
<td>15. Clients of insurance carriers should be required to attend(some parties have a limited role)</td>
<td>2</td>
</tr>
<tr>
<td>16. There should not be an additional four months of discovery after the ADR conference. For the most cases we can follow the federal court five month discovery plan and keep the ADR at four months</td>
<td>1</td>
</tr>
</tbody>
</table>
17. Useless when the Allstates and State Farms dig in their heels and don’t mediate in good faith 2
18. There needs to be penalties for lawyers who do not follow through with a mediation agreement or refuse to sign the final paperwork 1
19. The insurance industry uses ADR to intimidate poor people 1
20. If there are discovery disputes, or if discovery is complex, counsel is repeatedly required to file motions to continue 1
21. Clerks at the Cumberland County Courthouse are entirely too quick to impose sanctions, a courtesy call should be made first 1
22. Insurance company adjusters from out of state should not be required on routine cases 1

Q8. As it worked in the case identified in the cover letter,

a. Was the client satisfied with the process?

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<th>Other</th>
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<tbody>
<tr>
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<tr>
<td>No</td>
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<td>16</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Unsure</td>
<td>12</td>
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</table>

N.B.: While defense attorneys reported client satisfaction: about 2 to 1; plaintiffs’ attorneys reported client satisfaction: about 3 to 2.

b. Were you satisfied?

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<thead>
<tr>
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<th>D</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
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<td>26</td>
<td>23</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>22</td>
<td>14</td>
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</table>

N.B.: Again, while defense attorneys reported overall satisfaction with the process: better than 3 to 1; plaintiffs’ attorneys were personally satisfied: almost 2 to 1.

c. Do you think the benefits achieved justified the expense (in this case)?

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<th>Other</th>
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</thead>
<tbody>
<tr>
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<td></td>
</tr>
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<td>15</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>Unsure</td>
<td>3</td>
<td></td>
<td></td>
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</tbody>
</table>

N.B.: Defense attorneys reported the benefits of 16B exceeded the expense: better than 2 to 1 – plaintiffs’ attorneys: 5 to 3.
d. Over a third, but less than half, of the cases experiencing a conference settled within 30 days of the conference. Without regard to whether your case settled, do you feel the process justified, in your case, the cost incurred by all parties?

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<tbody>
<tr>
<td>Yes</td>
<td>48</td>
<td>29</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>20</td>
<td>12</td>
<td>7</td>
<td>1</td>
</tr>
</tbody>
</table>

N.B.: Both Defense attorneys and plaintiffs' attorneys said that generally they thought the benefit of 16B justified the cost: better than 2 to 1.

Q9. Other comments or suggestions?

1. This particular case settled after two ADRs. The first ended in a stalemate. The second was held by Judge Bradford. I do not think you can underestimate the impact of hearing from a judge. My client loved Judge Bradford. She respected Judge Bradford. She happened to be a wonderful lady and there was no client control problem, however, the judicial conference was extraordinary. Moreover, this would have been a four-day trial without court intervention.

2. Not appropriate for all cases, sometimes just too far apart. Some mediators are much better than others—few are as good as the judges.

3. I favor the continuation of ADR.

4. My only conviction regarding this process is that a mediation, etc. should take place after more discovery has taken place and not quite so early.

5. Extend the time for completing ADR to six or eight months.

6. Give the attorney sixty days after an answer is filed to agree on a deadline for ADR. If the attorneys cannot agree, then the court should impose a deadline.

7. Parties and adjusters should have some flexibility whether to participate by phone. Although it is important to have everyone attend, sometimes it is expensive and difficult.

8. Counsel and the courts are having to deal with sometimes repeated motions to extend the now early ADR deadline. Counsel should be required to file their ADR report at the same time their estimate of the time for trial is due, i.e., fifteen days following the close of discovery. It will cut down on the
motion paperwork if counsel can decide when the parties and insurers are "ripe" for the ADR.

9. I am in favor of ADR. I do mostly insurance defense work and the process gives me leverage with carriers. That is, carriers know they are required to participate in good faith and by and large do so. Many of these carriers would have refused ADR before adoption of Rule 16B. There is always some value in getting people in the same room even if the case does not settle. My only concern is that some courts are less than flexible regarding enlargements.

10. At the outset, I was delighted with how mediation under Rule 16B worked. Cases that I never thought would settle did. As lawyers began to realize that there was no real consequence to not participating earnestly, I have found the settlement rate decrease. I also have seen many "settled" cases continue to drag on in collateral disputes about what the settlement was.

11. This is a sea change in Maine litigation. It has substantial costs directly associated with it. There is marginal improvement in the settlement rate, but primarily time. Time pressure is completely ramped up in cases compared to ten years ago. Relax the time requirement, please, to reduce the cost and retain the benefits.

12. Could get a lot more cases settled if ADR were not held until (1) after the discovery deadline has expired; or (2) the involved attorneys agree to schedule it.

13. Insurance companies should not be able to select mediators. This happens frequently with only mediators on insurance lists being utilized. The insurance companies also collect a fee for selecting these mediators.

14. The Rule should permit the attorneys to schedule mandatory ADR before the TMC.

15. Want longer and permit counsel to motion the court for exclusion.

16. Sanctions for refusal to participate in good faith, not for being late in scheduling or reporting results.

17. ADR should be scheduled by the parties within one month of the close of discovery. The parties should certify that this has been done within days for trial estimate. Motions would be
filed only when one party wishes to opt out of ADR or one party wishes to force ADR on an earlier day.

18. ADR held before my client added as a party to the lawsuit. Perhaps a problem that the rule should address.

19. There was no real "estate" here. Counsel agreed to handle the lawsuit as though one had been established and limit the claim to the available insurance.

20. Before imposing sanctions for failure to designate a neutral in a timely fashion, the court should at least attempt to contact counsel and check on the status of selection. With indigent litigants, in particular, it is sometimes difficult to find an appropriate neutral who will serve pro bono in thirty days.

21. If mandatory ADR is to be continued it should not be required until discovery is complete. There should be an "opt out" if both attorneys agree that it is a waste of time and resources.

22. Build in a procedure for some extensions of time without court approval.

23. ADR caused plaintiff's initial attorney to withdraw. I assumed the file and accepted a higher post-mediation offer.

24. This is a very good program that is a natural addition to modern rules of procedure and discovery.

25. Mediation needs to be required in District Court.

26. I approve of the ADR process, and would like to see it used in civil cases in District Court where the amount in controversy exceeds a set amount.

27. The good faith requirement should extend to the adjuster whose presence should be mandatory.

28. I like the system the way it is. The Courts have been agreeable to allow flexibility in timing. This is good and should be encouraged.

29. Set the ADR deadline between four and six months as opposed to between two and four months.

30. Require adjusters to have "full" settlement authority.
31. Allow the parties, by agreement only, to postpone ADR by up to thirty or sixty days upon filing certification that they have conducted discovery expeditiously and in good faith, but need the following discovery ... in order to participate in ADR in a meaningful way.

32. Only that we modify the process to assure that the case is well enough developed before mediation so the parties and mediators have the facts and can judge the strength of the claims and cost of settling.

33. I think that the judicial settlement conferences offer at least two additional benefits. First, to the extent that these conferences are conducted at a courthouse, the parties are perhaps more inclined to think that they have had “their day in court.” Secondly, notwithstanding the high quality of our ADR mediation group, I believe that the parties may be more impressed by the fact that the mediator is a judge.

34. In this particular case, the Defendant would not even discuss settlement at the mediation. This is the only case I have had where the Defendant would not even discuss settlement at mediation.

35. It is a good mandate, though it needs some flexibility depending on the nature of the case.
APPENDIX F

CLIENT LETTER

To: Whom it May Concern

From: Hon. Howard H. Dana, Jr.

Re: Court-connected ADR Survey

If you are reading this, it means that your lawyer has forwarded it to you. In a recent case in the Superior Court of the State of Maine, you either participated in an ADR conference (mediation, arbitration or a neutral evaluation) or your case settled on the eve of that conference.

Requiring clients and their lawyers to participate in an ADR conference before trial is new to our Superior Court and we would like to get your reaction to the process, the timing and the cost. We appreciate your taking a few moments to answer our questions and returning the “Party Survey” in the enclosed stamped self-addressed envelope.
APPENDIX G

CLIENT SURVEY

Please circle the most appropriate answer to the following questions:

1. Were you a plaintiff or a defendant in the lawsuit referenced in your lawyer’s letter?
   P  D  Other

2. Did the case settle as a result of the mediation, arbitration or case evaluation?
   Y  N  Unsure

3. Was the timing of your conference with the mediator, arbitrator, or evaluator appropriate?
   Too soon  Just right  Too late

4. Was the cost of the conference (including the cost of your participation, your lawyer’s participation and your share of the neutral’s fee) worth the benefits (if any) received?
   Y  N  Unsure

5. Generally, are you glad that the Court system required the parties and their lawyers to meet with a neutral (such as a mediator, arbitrator, or case evaluator) to facilitate settlement discussions?
   Y  N  Unsure

6. Many lawyers have said that the timing of the conference should be set by the lawyers at a time of their choosing. They believe that forcing the parties and the lawyers to meet before discovery is complete can be unproductive. Others feel that the attempt to settle the case early saves the cost of trial preparation. Should the lawyers have the discretion to set the time of the ADR conference whenever they jointly agree or should the Court system set the time of the conference?
   Lawyers set time  Court sets time

7. Do you have any other suggestions how the court system could have made settling or resolving your case more likely or easier?
   Y  N  Unsure
APPENDIX H

Other Suggestions from Clients

1. (From a D that did not settle): “There are cases where we don’t want to pay anything and I do not feel the Courts should have the right to force settlement, even when it is obvious the claim is completely frivolous.”

2. (From a D who settled in conference): “Give plaintiffs’ lawyers the right to make ‘offers of judgment’ equivalent to protect against defense lawyers who unnecessarily keep the clock running just to build up fees.”

3. (From a P who settled in conference): “I was so happy to settle out of court. I have never been in court for any reason and was petrified about facing that!”

4. (From a D who settled and thought the lawyers should set the time of the conference): “but if the Court sets the time it may urge the lawyers to try to get things together before that time arrives and not to linger.”

5. (From an insurance adjuster who was unsure whether the case settled as a result of the mediation): “Many settle after being set up at a mediation.”

6. (From the same adjuster who thought the cost of the conference was not worth the benefits): “Having participated in hundreds – many voluntary and now court mandated – too soon and costs too high. Suggest you allow adjuster option to attend without counsel. This would be well received.”

7. (From the same adjuster): “Some cases are straight forward with legitimate differences in value, and mediation will not change that. If both parties waive mediation it should be eliminated. In this case, both attorneys were experienced, but additional material (meds) had yet to be obtained. With full meds – mediation was not necessary. Mediation needs both parties to work. We wish to use it, if the situation warrants. To be honest – cases have settled that I never gave a chance.

8. (From a P who settled at the session and wants the court to continue to set the time for the conference): “otherwise it may not happen and a lot of time and money can be expended needlessly.”

9. (From the same adjuster, but in another case that did settle at the mediation that was timed “just right” and the benefits worth the cost): “Mediation needs both parties on board. Should be voluntary not mandated.”

10. (From a P who did not settle, but thought the court should set the time of the conference): “I am not sure about this but my gut reaction is that if lawyers can make more money by setting time, I don’t like it.”
11. (From the same P): “I wish we could have met face to face with our Defendants. Instead we were in separate rooms with messages being shuttled between rooms.”

12. (From a P who did not settle): “It is unwise to require medication before discovery is complete or while motions for summary judgment (or motions to dismiss experts, etc.) are pending. We were required to attend one mediation before discovery; two settlement conferences before the trial judge ruled on outstanding motions for summary judgment. Both experiences were very aggravating, time consuming, expensive for the defendant since they had two attorneys, an insurance adjuster present. They complained that their expenses were so high that this was their justification for offering a low settlement amount. These two settlement conferences were aggravating and time consuming and the defense had no incentive to settle before the judge’s running was complete and all parties knew this. My suggestion – if the court is going to order the parties to negotiate – do so after discovery is complete and motion rulings are determined. Prior to that allow (even encourage) parties to mediate and settle. If they have this inclination, they will do so on their own.”

“I would have been more satisfied with the process if our final mediator/judge had studied the case before meeting with us. He made it known at the beginning that he had read nothing about the case except a letter from the defense attorney. Therefore his guidance was based on a 15 minute presentation by counsel for each side and a short question/answer period with defendant/plaintiff. It was clear he did not know or understand the merits of the case; and, therefore, his guidance seemed more about manipulating the emotions of the parties rather than highlighting the legal merits of the case. I thought this whole experience was about laws being violated, and I expected more emphasis on this from the Maine Superior Court. Our settlement judge could at least have read the trial judge’s summary judgment rulings – at least. Thousands of pages of documentation were available for review. Although it is important for the mediator to inform the parties about the practical aspects of the case (i.e., adverse publicity, the extended time period for appeal, etc.) it is equally important to provide realistic overview of the laws and this can only be done by someone who understand the case. Require the mediators to be prepared by studying the case in advance with whatever documentation is available.”

13. (From a D who did settle): Adjusters should be permitted to participate by phone.
APPENDIX I

NEUTRAL LETTER

As you may have heard, I have been studying the impact of 16B on the operation of the Superior Court. I have been sharing my "updates" with a growing list of people both within and outside the court system. Most recently, I have sent a letter to a representative sample of attorneys whose cases have experienced a 16B conference seeking their input and the input of their clients. Without meaning to bury you in paper, I enclose a copy of my most recent update including the very first report on the responses of lawyer and client participants.

From our review of case dockets, you are one of a relatively small group that collectively served as the mediators in over two-thirds of the cases I have been studying. As such, I seek your guidance, advice and input with respect to the future of 16B.

Without meaning to limit you, I particularly would like your thoughts on the following subjects:

Timing: Many lawyers, clients and some mediators have suggested that 16B would be vastly improved if mediation could occur when the lawyers decide it will be most productive. Others have suggested that to leave the timing of the mediation to negotiation will result in most cases being mediated on the eve of trial. For those cases that could have settled earlier, the economic cost of delay may be substantial. Further, it may not be efficient or even appropriate to mandate private ADR on the eve of a Superior Court mediation session? If, on the other hand, one can document that a particular insurance company never increases their original offer until the eve of trial (if then), does it make sense to require mandatory mediation during discovery?

Good Faith: Should 16B be amended to require that all participants participate in the 16B mediation in "good faith"? Although this suggestion appears to be overwhelmingly popular with attorney respondents, some fear that such an amendment will generate lawsuits within lawsuits and drag mediators into those disputes.

Any guidance you would be willing to share with me would be much appreciated. You might also wish to share your views with Warren Silver, Esq., chair of the Civil Rules Committee.

Sincerely,

Howard H. Dana, Jr.
Associate Justice

HHD/ald
Enclosures
cc: Warren M. Silver, Esq.