

**UNITED STATES DISTRICT COURT**  
FOR THE EASTERN DISTRICT OF MICHIGAN  
505 THEODORE LEVIN UNITED STATES COURTHOUSE  
231 W. LAFAYETTE BOULEVARD  
DETROIT, MICHIGAN 48226

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**NOTICE OF PROPOSED AMENDMENTS TO LOCAL RULES**  
**AND PROPOSED NEW RULES**

At its regular meeting on May 12, 2014, the Court approved for publication and comment a comprehensive revision to LR 16.3, Mediation, in order to be consistent with 28 U.S.C. § 651(b) which requires that all United States district courts authorize the use of alternative dispute resolution processes in all civil actions.

Under the proposed revisions, existing LR 16.3, Mediation, has been removed and replaced with LR 16.3, Alternative Dispute Resolution: General Provisions.

Additionally, existing LR 16.4, Pretrial Filings and Exchanges, has been renumbered as LR 16.8. New LR 16.4 will be Facilitative Mediation.

As such, the following are the proposed new rules:

- LR 16.3 Alternative Dispute Resolution: General Provisions
- LR 16.4 Facilitative Mediation
- LR 16.5 Case Evaluation
- LR 16.6 Settlement Conferences
- LR 16.7 Other ADR Procedures
- LR 16.8 Pretrial Filings and Exchanges [formerly LR 16.4]

In order to be assured consideration, comments in writing, which may include recommended changes to the proposed amendments and new rules, should be received by the Court not later than Friday, July 11, 2014. Comments may be sent to [Local\\_Rules@mied.uscourts.gov](mailto:Local_Rules@mied.uscourts.gov) or to Local Rules, 505 Theodore Levin United States Courthouse, 231 W. Lafayette Boulevard, Detroit, Michigan 48226.

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[Additions are indicated by underline, and deletions by strikethrough.]

**LR ~~16.3~~ Mediation**

- (a) ~~Mediation Under MCR 2.403. Michigan Court Rule 2.403, as amended from time to time, applies to civil cases that the court selects for mediation, subject to the provisions of this rule.~~
- (b) ~~Excepted Cases. Cases in which the United States is a party are not subject to mediation.~~

~~(c) — Mediation Panel; Stipulation of the Parties.~~

~~(1) — Cases will be mediated by the Wayne County Mediation Tribunal Association or another Michigan state trial court mediation system unless the court orders otherwise. For cases mediated by the Wayne County Mediation Tribunal Association, the tribunal clerk is the mediation clerk. For all other cases, the parties may stipulate to or the court may order the procedures that will apply.~~

~~(2) — The parties may stipulate to procedural rules for mediation. The stipulation may include, by way of illustration, binding mediation, special mediation, binding special mediation, and the award of attorney fees as a sanction. In a special mediation, the parties control selection of the mediators.~~

~~(d) — Actual Costs. Actual costs, including attorney fees, may be awarded under this rule where permitted by law or consent of the parties.~~

~~(e) — Relationship to Offers of Judgment. When both Fed. R. Civ. P. 68 and this rule require an award of costs, Fed. R. Civ. P. 68 supersedes this rule for the costs to which it applies and this rule applies to any other costs.~~

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**LR 16.3      Alternative Dispute Resolution: General Provisions**

**(a) ADR Favored.** The judges of this district favor alternative dispute resolution (ADR) methods in those cases where the Court determines, after consultation with the parties, that ADR may help resolve the case. The ADR methods approved by these rules include Facilitative Mediation (Rule 16.4); Case Evaluation (Rule 16.5); Settlement Conferences (Rule 16.6); and other procedures to which the parties consent (Rule 16.7). In addition, the Court will consider other ADR methods proposed by the parties.

**(b) Court Administration of the ADR Program.** ADR is authorized in all civil actions in this district under 28 U.S.C. § 651(b). Each ADR program is governed by these rules.

**(c) Consideration of ADR in Appropriate Cases.** As part of the conference held under Rule 26(f) of the Federal Rules of Civil Procedure, all litigants and counsel must consider and discuss the use of an appropriate ADR process at a suitable stage of the litigation.

**(d) Confidentiality.** All ADR proceedings are considered to be compromise offers and negotiations within the meaning of Federal Rules of Evidence 408.

**(e) Neutrality of Evaluators, Mediators, and Arbitrators.** If at any time a person

assigned to be an evaluator, mediator, or arbitrator becomes aware of, or a party raises an issue with respect to, that person's neutrality because of some interest in the case or because of a relationship or affiliation with one of the parties, the person shall disclose the facts with respect to the issue to all of the parties. If a party requests that the person withdraw because of the facts so disclosed, the person may withdraw and notify the court that another evaluator, mediator, or arbitrator should be appointed. If the person determines that withdrawal is not warranted, the person may elect to continue. The objecting party may then ask the court to remove the person by filing a motion. The court will remove a mediator for any reason set out in 28 U.S.C. § 455 for disqualification of a judicial officer.

**(f) Status of Discovery, Motions and Trial During the ADR Process.** Cases referred to ADR continue to be subject to the case management schedule established by the judge assigned to the case. Unless otherwise ordered, parties are not precluded from filing pretrial motions or pursuing discovery. Referral of a case to ADR is not grounds to avoid or postpone any deadline or obligation imposed by the case management order unless ordered by the Court.

**(g) Attorneys' Responsibility for Payment of Fees.** The attorney or law firm representing a party participating in ADR is directly responsible for fees payable to the Court, mediators, or arbitrators. Parties not represented by an attorney are personally responsible for fees. To the extent consistent with ethical rules, the attorney or law firm may seek reimbursement from the client. If any attorney or unrepresented party is delinquent in paying any fee required to be paid to a mediator or arbitrator under these rules, the mediator or arbitrator may petition the Court for an order directing payment, and any judge or magistrate judge assigned to the case may order payment, upon pain of contempt.

**COMMENT:** Responsibility for payment of fees to mediators can be adjusted by the Court. In cases in which a party is represented by a *pro bono* attorney under the Court's *pro bono* counsel program, volunteer mediators are available at no cost to the parties. See also LR 16.4(d).

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**LR 16.4      ~~Pretrial Filings and Exchanges~~ Facilitative Mediation**

**(a) Definition.** Facilitative Mediation (FM) is a flexible, nonbinding dispute resolution process in which an impartial third party — the mediator — facilitates negotiations among the parties to help them reach settlement. FM seeks to expand traditional settlement discussions and broaden resolution options, often by going beyond the issues in controversy. The mediator, who may meet jointly and separately with the parties, serves as a facilitator only and does not decide issues or make findings of fact. Cases will be

assigned to FM if the district or magistrate judge, after consultation with counsel or the parties, is satisfied that the selection of FM will assist in the resolution of the case.

**(b) Qualification of Mediators.** Mediators must be qualified by training or experience. Completion of a mediator training course conducted by the Michigan Institute of Continuing Legal Education, or other qualified CLE provider, is sufficient to establish qualifications. Each judge may maintain a list of qualified mediators to assist the parties in their selection of a mediator.

**(c) Selection of Mediator.** The parties may select their own qualified mediator. If a case is to be referred to FM and the parties cannot agree on a mediator, the judge assigned to the case may select a mediator from nominations submitted by the parties or from the judge's qualified mediator list. Once the mediator is selected, the court will enter an order appointing the mediator and referring the case to FM. The judge assigned to the case may refer a case to another judicial officer, including a magistrate judge, for FM.

**(d) Compensation of Mediator.** The mediator shall be paid his or her standard hourly rate, assessed in as many equal parts as there are separately represented parties, unless otherwise agreed in writing or ordered by the court. The mediator is responsible for billing counsel and unrepresented parties.

**COMMENT:** Responsibility for payment of fees to mediators can be adjusted by the Court. In cases in which a party is represented by a *pro bono* attorney under the Court's *pro bono* counsel program, volunteer mediators are available at no cost to the parties. See also LR 16.3(g).

**(e) The Mediation Process.**

(1) Unless the mediator directs otherwise, not less than seven (7) calendar days before the scheduled facilitative mediation session, each party participating shall provide the mediator with a concise memorandum, no more than ten (10) double-spaced pages in length, setting forth the parties' position concerning the issues to be resolved through FM, including issues of both liability and damages. The mediator may circulate the parties' memoranda.

(2) The mediator will schedule and preside over the mediation session(s). The mediator may meet jointly with the parties and caucus separately with each party or group of parties. The mediator does not decide issues or make findings of fact. The mediator may determine the length and timing of the session(s) and the order in which issues are presented, and shall send a notice of the agreed upon time and place to all participating parties. The mediator shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(3) Party responsibilities. All parties or individuals with settlement authority are required to attend the facilitative mediation sessions, unless otherwise ordered by the court. Each party must be accompanied at the FM session by the lawyer expected to be primarily responsible for handling the trial of the matter. The court will excuse a party or lawyer from attending the mediation session in person only upon a showing of extraordinary circumstances. Corporate parties must be represented by an agent with authority to negotiate a binding settlement. In cases involving insurance carriers, the insurer representative with settlement authority must attend in person.

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**LR 16.5 Case Evaluation**

**(a) Case Evaluation Under Mich. Ct. R. 2.403.** Michigan Court Rule 2.403, as amended from time to time, applies to civil cases that the court selects for case evaluation, subject to the provisions of this rule, but only if the parties consent to be bound by the provisions of that rule, including provisions assessing sanctions.

**(b) Excepted Cases.** Cases in which the United States is a party are not subject to case evaluation.

**(c) Case Evaluation Panel; Stipulation of the Parties.**

(1) Cases will be evaluated by the Wayne County Mediation Tribunal Association or another Michigan state trial court case evaluation system unless the court orders otherwise. For cases evaluated by the Wayne County Mediation Tribunal Association, the tribunal clerk is the case evaluation clerk. For all other cases, the parties may stipulate to or the court may order the procedures that will apply.

(2) If the assigned judge approves, the parties may stipulate to procedural rules for case evaluation that differ from the procedures set forth in the Michigan Court Rules.

**(d) Actual Costs and Attorney's Fees.** Actual costs, including attorney fees, may be awarded under this rule. However, if a statute or Federal Rule of Civil Procedure also authorizes the payment of attorney's fees, duplicate costs and attorney's fees may not be awarded.

**COMMENT:** For example, if attorney fees are awarded pursuant to Fed. R. Civ. P. 68 - Offers of Judgment, or 42 U.S.C. 1988 - Civil Rights Cases, the same fees may not be awarded pursuant to this Local Rule.

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**LR 16.6      Settlement Conferences**

The judge assigned to the case may order a settlement conference to be held before himself or herself, another district judge, or a magistrate judge. All parties may be required to be present. For parties that are not natural persons, a natural person representing that party who possesses ultimate settlement authority may be required to attend the settlement conference in person. In cases where an insured party does not have full settlement authority, an official of the insurer with ultimate authority to negotiate a settlement may also be required to attend.

**COMMENT:** The Court may consider assigning a settlement conference to another judicial officer rather than ordering a case to Facilitative Mediation when the amount in controversy is low or a party appears *pro se*.

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**LR 16.7      Other ADR Procedures.**

A judge may utilize other methods of court-ordered alternative dispute resolution procedures, including Summary Jury Trials, Summary Bench Trials, and Arbitration, or recommend or facilitate the use of any extrajudicial procedures for dispute resolution not otherwise provided for by these Local Rules.

**(a) Case Status.** If a reference to extrajudicial procedures is made, all further court-ordered case management procedures may be stayed and the case may be administratively closed for statistical purposes.

**(b) Subsequent Case Activity.** If the case is resolved extrajudicially, then the administrative closing order may be supplemented with a dispositive order. If the case is not resolved extrajudicially, the case may be returned to a court-ordered case management protocol for processing and ultimate disposition upon motion by any party.

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**LR 16.48      Pretrial Filings and Exchanges**

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May 23, 2014