

RECENT CHANGES IN THE NEW HAMPSHIRE SUPERIOR COURT  
ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

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**GOOD BYE RULE 170 - HELLO RULES 32, 33 AND 34**

As of October 1, 2013, the New Hampshire Superior Court Rules 32, 33 and 34 describe the forms of alternative dispute resolution under the aegis of the New Hampshire Superior Court.

These new rules and related forms are on the New Hampshire Judicial Branch Website

<http://www.courts.state.nh.us/adrp/superior/index.htm>.

**I. RULE 32**

New Hampshire Superior Court Rule 32 describes, in general, the alternative dispute resolution (ADR) process and the qualifications, training and selection (NB there are changes from the previous standards described in Rule 170) of the “neutrals” serving as mediators, neutral evaluators, and arbitrators. Arbitration is specifically governed by Rule 33 and RSA 542 as described in Section II, below.

ADR professionals are referred to as “neutrals”. The process of selecting the neutral is described in detail as well as the training required for being a neutral.

Per Rule 32, all civil cases in the New Hampshire Superior Court will be assigned to some type of ADR, with the exception of cases where the parties have represented to the court that they have engaged in some type of formal alternative dispute resolution before a neutral third party prior to filing suit. Also exempted, will be cases when a motion is filed within 180 days of the court ordered service date and a party(ies) demonstrate “good cause”. It remains to be seen what New Hampshire jurists will consider sufficient as “good cause.”

The ADR Order will be contained in the Case Structuring Order issued by the court in Item #17 in the “Case Structuring and ADR Order” form (NHJB-2700-S (10/10/13) and will show the parties’ approved stipulation (or court’s order when there is no stipulation) which will specify either mediation, neutral case evaluation or binding arbitration.

In addition to the entry fee a \$10 “surcharge” shall be collected from all civil cases at the time of entry and shall be deposited in the mediation and arbitration fund established under RSA 490-E:4. There are no longer any rostering fees.

## **II. RULE 33, ARBITRATION BY AGREEMENT**

Rule 32 indicates that all civil disputes will be assigned to arbitration upon agreement of the parties or as mandated by a written contractual provision requiring arbitration. Rule 33 must be reviewed in conjunction with the New Hampshire Arbitration Statute, RSA 542, which is specifically referred to in Rule 33. The parties may choose either a single or a three-person panel, and in the event the parties cannot agree upon the panel number, a three-person panel will be utilized for all cases involving claims or counter-claims exceeding \$100,000 or cases involving three or more parties, a single member panel will be utilized for all cases involving claims or counter-claims of \$100,000 or less. Rule 32 outlines how the arbitrator(s) are to be paid. The parties may select arbitrators not on the court’s list of approved arbitrators.

Rule 33 also describes the procedure for the conduct of the arbitration hearing and allows for a preliminary hearing if requested by any party, but may not be totally clear regarding the role of the arbitrator(s) regarding discovery disputes. Of particular concern is refusal to answer interrogatories or produce requested documents. It would appear that the court will probably maintain jurisdiction and exercise authority despite the “stay” of proceedings if serious disputes arise regarding discovery unless the arbitration agreement specifies the clear authority of the

arbitrator(s) in lieu of the court's authority. There are provisions in RSA 542 for compelling the attendance of witnesses by a summons per RSA 516 and that depositions may be taken pursuant to RSA 517.

Rule 33 requires that all arbitrators, however selected, shall be neutral and serve with impartiality. There are also conflict and "appearance of conflict," "reasonable inference of bias," and potential unavailability disclosure requirements.

Arbitrators, similar to other neutrals, have immunity serving under Rule 33 per RSA 490-E.

An appeal to the New Hampshire Supreme Court may be taken from an order confirming, modifying, correcting, or vacating an award, or from a judgment entered upon an award, as in the case of appeal from the superior court to the Supreme Court.

### **III. RULE 34 JUDGE-CONDUCTED INTENSIVE MEDIATION**

This rule is essentially the former Superior Court Rule 170-B and applies to "complex" cases which are defined as a case where there is a "realistic possibility" that the damages awarded could exceed \$250,000, and in cases where relief other than monetary damages is being sought and where the trial can reasonably be expected to last more than five trial days. Upon agreement of the parties, the presiding justice may assign a complex case for intensive mediation, and this assignment can be made at the case structuring conference or at any time after the case structuring order has been issued but shall not be made later than 90 days before the trial date, except for good cause shown.

The mediator for intensive mediation conducted under Rule 34 must be an active, senior active or retired superior court justice other than the justice to whom the case has been assigned for trial or who has presided over any pretrial hearings or ruled upon any pretrial motions. In

addition, all justices who serve as mediators under Rule 34 shall have completed an approved mediation training program. Judge Conducted Intensive Mediation sessions shall normally be held at a court facility, but subject to the availability of the facilities shall be held in a location other than the court where the case will be tried.

The immunities enjoyed by the judges in this form of mediation are described in Rule 34 but not with reference to RSA 490, or as the judges are performing quasi-judicial functions under the auspices of the court.

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This article is intended to provide only as a brief overview of the new rules and some of the major changes from the previous Rule 170 but is not designed to be an exhaustive and comprehensive analysis and description of the new rules and all of the changes. Practitioners are urged to review, in detail, Rules, 32, 33, 34 and RSA 542.