

# Pretrial Case Management under the Amended Rules: Too Many Words for a Good Idea

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### I. Introduction

Pretrial control of a civil case is indispensable, particularly under the liberal pleading, joinder, and discovery provisions of the Federal Rules of Civil Procedure. I know of no one who disagrees with this assertion. The Federal Rules encourage and, under the threat of preclusion of claims not raised, require lawyers to plead cases that cannot be tried without patient application of case-management techniques. Liberal discovery rules enhance the prospect of disorder. As Professor Charles Alan Wright has said,

Even the best system of court rules cannot remain static. Experience under the rules, and continued scholarly thinking about problems of procedure, will disclose places in which improvement is possible. Amendment will be

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necessary in other instances to remove unsound judicial glosses on the rules, or to codify desirable lines of decision.<sup>1</sup>

Under these unimpeachable statements, however, there has been, particularly in the past decade, such tinkering and fiddling with the Federal Rules of Civil Procedure that the rulemakers themselves are defeating the objective of a "just, speedy, and inexpensive determination of every action."<sup>2</sup> The 1993 amendment to Federal Rule of Civil Procedure 16, which concerns pretrial conferences,<sup>3</sup> is a symptom of this meddling.

These are strong sentiments. To support them, I will first trace the history of Rule 16 as it began in 1937, as it was amended in 1983 and 1993,<sup>4</sup> and as it stands now. Then, I will describe constructive techniques for managing civil litigation—some inspired by, and some in spite of, the provisions of newly amended Rule 16.

## II. Origins and Development of the Pretrial Conference

In 1937, the pretrial conference was an innovation that had been tried in a few urban areas with great success.<sup>5</sup> The pretrial conference as envisioned in the original 1937 Rule<sup>6</sup> was singular, optional,

1. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 429 (5th ed. 1994).

2. FED. R. CIV. P. 1.

3. *Id.* 16(b)-(c).

4. The 1987 amendment to Rule 16 was purely technical. Fed. R. Civ. P. 16, 28 U.S.C. app. R. 16, at 591 (1988).

5. *Id.* Advisory Committee's Notes; see also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 8.1-8.3 (2d ed. 1993) (discussing the unchanged nature, purposes, and procedural aspects of the pretrial conference and pretrial order).

6. The original Rule 16 read as follows:

### **Pre-trial Procedure; Formulating Issues**

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

limited to attorneys, and fairly open-ended as to subject matter.<sup>7</sup> The conference was to result in a binding order that could be amended to prevent “manifest injustice.”<sup>8</sup> The rule contemplated that one pretrial conference would be held shortly before the scheduled trial, although the Rule did not forbid holding more than one.<sup>9</sup> Was anything wrong with this Rule? Was any change necessary?

Rule 16 was not amended until 1983.<sup>10</sup> The Advisory Committee said then that “there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation.”<sup>11</sup> The Committee said that the Rule’s inflexibility led to over-regulation of “run-of-the-mill cases” and that its “discretionary character . . . and its orientation toward a single conference late in the pretrial process . . . led to under-administration of complex or protracted cases,” which would then “become mired in discovery.”<sup>12</sup>

The Committee also cited four specific criticisms: First, pretrial conferences were often “a mere exchange of legalistic contentions”; second, the conference often resulted only in agreements on “minutiae”; third, the conferences were seen as unnecessary in cases that would have to be settled before trial; and fourth, the conference was seen as unproductive when the attorneys who attended had no authority to bind their clients.<sup>13</sup>

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The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Fed. R. Civ. P. 16, 1 F.R.D. LXXXIX-XC (1941).

7. *Id.*

8. *Id.*

9. *Id.*

10. Fed. R. Civ. P. 16, 28 U.S.C. app. R. 16, at 588 (1988).

11. *Id.* Advisory Committee’s Notes.

12. *Id.*

13. *Id.*

The Committee's analysis and the criticisms it cited deserve comment because they came as a surprise to able district judges who had used the original Rule 16 in ways that caused none of the problems listed above.<sup>14</sup> The original Rule allowed judges to exercise discretion as to whether the conference would be held and, if one was scheduled, what was to be discussed.<sup>15</sup> Over-regulation, if any, was a function of judges and lawyers not knowing how to use the conference procedure.<sup>16</sup> Furthermore, the alleged vice of under-regulation was also chimerical, for caselaw established the court's right to hold more than one pretrial conference, and many provisions of the Civil Rules gave judges power to direct and manage cases to prevent the waste of judicial, party, and lawyer resources.<sup>17</sup>

The Committee's first, second, and fourth specific criticisms of the previous Rule could have been handled by the kind of pretrial procedure with which many readers are familiar; the judge could have required that the lawyers attending the conference had real authority to make decisions and that real issues were debated and decided. The third criticism—that conferences were unnecessary for cases that would settle—evaporates in light of the fact that conferences were discretionary. The residue, if any, of this criticism shows that the critics did not understand how lawyers use the legal system.

A well-known, federally funded study of civil litigation published in 1983 found that "only 18% of the 1,538 lawyers interviewed [in the sample studied] reported that they [had] con-

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14. As someone who has practiced before judges across the country for more than 28 years, I can affirm that Judges John Singleton and Norman Black in the Southern District of Texas, Judge Warren Ferguson in the Central District of California (later on the Ninth Circuit), and Judge Jack B. Weinstein of in the Eastern District of New York are good examples of judges who avoided the stated pitfalls.

15. Fed. R. Civ. P. 16, 28 U.S.C. app. R. 16, at 588 (1988).

16. See Robert C. Herr, Comment, *The Evidence Ruling at Pretrial in the Federal Courts*, 54 CAL. L. REV. 1016, 1018-19 (1966) (construing the original 1937 version of Rule 16 and gathering authorities showing that district judges possessed considerable authority to manage trials under Rule 16 and other rules). Mr. Herr, a Boalt Hall student and classmate of mine, was counselled during the writing of this thoughtful Comment by Professor David W. Louisell, a principal architect of the 1966 amendments to Rules 19 and 23.

17. *Id.*

ducted any negotiations before the case was filed.”<sup>18</sup> This information must be tempered by the realization that some kinds of cases cannot be settled without litigation: For example, some insurance carriers will not make a reasonable settlement offer until a lawsuit is filed and the case is moved from an adjuster to a lawyer.<sup>19</sup> However, the study leads to the regrettable conclusion that many lawyers do not think seriously about the strengths and weaknesses of their cases until the litigation process is underway.

It is a truism that most civil cases are settled: One hears the figure of 90 percent to 95 percent,<sup>20</sup> but that figure includes a lot of cases that are predestined to a given result when filed, such as many collection matters.<sup>21</sup> Is a pretrial conference unnecessary if the case is going to be settled without trial? Of course not. The Advisory Committee’s Notes to the original 1937 Rules cited studies showing the value of pretrial conferences in inducing settlement,<sup>22</sup> and the civil procedure experts agreed that encouraging settlement and thus reducing court congestion was a hallmark of pretrial procedure.<sup>23</sup> Settlements do not appear overnight like mushrooms on a dank forest floor. Cases are settled under the pressures of trial dates and the focused discovery and meritorious motions of vigorous adversaries.

One final note about the 1937 version of Rule 16 should be mentioned before passing to the 1983 amendments: The 1937 drafters knew very well that the pretrial conference was not the trial judge’s sole opportunity to convene the lawyers and shape the case. The Advisory Committee noted that motions for summary judgment under Federal Rule of Civil Procedure 56(d), if not fully adjudicated, would provide such an opportunity for case management,<sup>24</sup>

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18. David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 110 n.73 (1983).

19. Trying to explain the settlement value of a complex case to a claims adjuster is like trying to explain a sundial to a bat.

20. See, e.g., Robert G. Boomer, *Making the Most Out of Court Ordered Litigation*, 49 DISP. RESOL. J. 17, 17 (1994) (citing statistics that indicate that “about 90% of litigation is settled without an actual trial”).

21. See, e.g., Trubek et al., *supra* note 18, at 84-89.

22. Fed R. Civ. P. 16, 1937 Advisory Committee’s Notes, 28 U.S.C. app. R. 16, at 588 (1988).

23. *Id.*

24. *Id.*

and the Committee added that the Rule 12(g) provision for consolidation of motions would also allow judges to exercise early control.<sup>25</sup>

Beyond these examples expressly noted by the drafters, the discovery rules provided for protective orders and other mechanisms of judicial supervision to prevent discovery abuse and to focus the parties' efforts on the central issues.<sup>26</sup> Additionally, the joinder, consolidation, and severance provisions of Rules 18,<sup>27</sup> 20,<sup>28</sup> and 42<sup>29</sup> encouraged litigation-shaping motions practice and judicial action in multiparty and multiclaim cases. Finally, caselaw had confirmed that federal judges have the power that trial judges routinely exercise in other systems to rule before trial on evidence-admissibility issues beyond the original Rule's reference to document admission.<sup>30</sup> Not all evidentiary matters are susceptible to pretrial resolution,<sup>31</sup> but it often helps the parties rethink their cases if a major category of evidence is ruled inadmissible. Texas lawyers

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25. *Id.*

26. The original versions of Rules 30(b) (made applicable to interrogatories), 31(d), 33(b), and 37 provided for challenges to discovery requests and for sanctions against abusers and disobedient parties. Fed. R. Civ. P. 30(b), 31(d), 33(b), 37, 28 U.S.C. app. R. 30(b), 31(d), 33(b), 37 (1988). Within the scope of these Rules, lawyers could and did fashion discovery plans to accomplish discovery and minimize court intervention. Under the original Rule 56(f), a motion for summary judgment could provoke a request for focused discovery looking toward efficient pretrial resolution of some or all issues in the case. Fed. R. Civ. P. 56(f), 28 U.S.C. app. R. 56(f) (1988). The system under those rules did not seem—to those of us who practiced before it—noticeably less efficient than what prevails today.

27. FED. R. CIV. P. 18(a) Advisory Committee's Notes (permitting a party to plead multiple claims of all types against an opposing party).

28. *Id.* 20(a)-(b) (stating that persons may join an action when asserting a right to relief arising out of the same transaction, but also stating that a court reserves the right to order separate trials to prevent delay, expense, or embarrassment).

29. *Id.* 42(a) (stating that a court may order consolidation when actions arising out of a common question of law are pending before the court, but adding that the court may order separate trials to expedite the resolution of cases or to save expenses).

30. See Herr, *supra* note 16, at 1033-38 (presenting a collection of authorities and a practical suggestion as to the kinds of evidentiary issues most amenable to pretrial resolution).

31. For example, it will often be impossible before trial to apply the balancing test mandated by Federal Rule of Evidence 403 because the precise impact of the advice will not be apparent until some evidence has been heard. FED. R. EVID. 403.

know this as “motion in limine” practice, a mainstay of civil and criminal litigation.

### III. The 1983 Amendment to Rule 16

The amended 1983 Rule expressly introduced the concept of a pretrial conference, held early in the litigation, that would lead to the issuance of a scheduling order with cutoff dates for pleadings, discovery, and motions.<sup>32</sup> Such orders were allowed under the

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32. The 1983 amendment made Rule 16 read as follows:

**Pretrial Conferences; Scheduling; Management**

(a) **Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating the settlement of the case.

(b) **Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include

- (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) **Subjects to Be Discussed at Pretrial Conferences.** The participants at any conference under this rule may consider and take action with respect to

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

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- (2) the necessity or desirability of amendments to the pleadings;
  - (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
  - (4) the avoidance of unnecessary proof and of cumulative evidence;
  - (5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
  - (6) the advisability of referring matters to a magistrate or master;
  - (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;
  - (8) the form and substance of the pretrial order;
  - (9) the disposition of pending motions;
  - (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
  - (11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

**(d) Final Pretrial Conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

**(e) Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

**(f) Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the



former Rule,<sup>33</sup> but it was wise to expressly signal that early judicial intervention can help put a case on track. Unfortunately, however, the 1983 version of Rule 16(a) has a hortatory tone inappropriate to a set of rules governing specific conduct.<sup>34</sup> The 1970 amendments to the discovery rules had encouraged judicial intervention to schedule the sequence and timing of discovery,<sup>35</sup> and the 1980 amendments called for an early "discovery conference."<sup>36</sup> To some extent, therefore, the 1983 language was unnecessary and duplicative. For example, Rule 16(c)(1) says that the conference may consider "elimination of frivolous claims or defenses."<sup>37</sup> The summary judgment provisions of Rule 56,<sup>38</sup> the "failure to state a claim" provisions of Rule 12(b)(6),<sup>39</sup> and, of course, Rule 11,<sup>40</sup> already address this issue. Additionally, Rule 16(c)(4) speaks to "avoidance of unnecessary proof and of cumulative evidence,"<sup>41</sup> but that falls within the scope of Federal Rule of Evidence 403 and subsection (c)(3) of Federal Rule of Civil Procedure 16, which deal generally with "admissibility of evidence."<sup>42</sup>

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reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 16, 28 U.S.C. app. R. 16, at 578 (1988).

33. *Id.* 16 Advisory Committee's Notes at 588.

34. The court and parties are admonished to eliminate "frivolous claims and defenses" and to "avoid . . . unnecessary proof." FED. R. CIV. P. 16(c)(1), (4). What next? An admonition to show up on time?

35. The detailed "protective order" provisions added to Rule 26(c) in 1970, coupled with the judicial discretion-party autonomy provisions of Rule 26(d), provided an express basis for the detailed discovery plans that became the norm in complex cases. FED. R. CIV. P. 26(c)-(d).

36. FED. R. CIV. P. 26(f). Once Rule 26(f) had made explicit the judicial power formerly exercised under the more general Rule provisions, there was in my view no more need to tinker with the Rules. Judges and parties could craft discovery plans, and courts could even set up model plans for classes of cases.

37. Fed. R. Civ. P. 16(c)(1), 28 U.S.C. app. R. 16(c)(1) (1988).

38. FED. R. CIV. P. 56.

39. *Id.* 12(b)(6).

40. *Id.* 11.

41. *Id.* 16(c)(4).

42. FED. R. EVID. 403 (authorizing the exclusion of evidence if the court believes that the needless prevention of cumulative evidence outweighs the probative value of the material); FED. R. CIV. P. 16(c)(3).

The language in the 1983 version of Rule 16(e) modified the standard for amending pretrial orders and provided that only the “order following a final pretrial conference” was subject to the “manifest injustice” standard.<sup>43</sup> All other orders could be modified by a subsequent order without consideration of injustice.<sup>44</sup> This distinction introduced needless complexity in an area already beset with difficulty. The hoary doctrine of “law of the case” provides sufficient guidance as to when interim orders may or should be modified.<sup>45</sup> The “manifest injustice” language, when limited to final pretrial orders, makes sense because such orders are designed as blueprints for an imminent trial to be relied on by the parties and counsel.

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43. Fed. R. Civ. P. 16(e), 28 U.S.C. app. R. 16(e), at 587-88 (1988).

44. *Id.*

45. For a thoughtful discussion of this doctrine in the context of pretrial orders in multidistrict cases, see Justice Ruth Bader Ginsburg’s opinion—written while she was Judge Ginsburg—in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1174-76 (D.C. Cir. 1987).

#### IV. The 1993 Amendment

After less than ten years experience with the 1983 version, the Rules' amenders changed Rule 16 again.<sup>46</sup> Some of the amend-

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46. The amendment changed only subsections (b) and (c), which now read as follows:

**(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

- (1) to join other parties and to amend the pleadings;
- (2) to file motions; and
- (3) to complete discovery.

The scheduling order may also include

- (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

**(c) Subjects for Consideration at Pretrial Conferences.** At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

- (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
- (2) the necessity or desirability of amendments to the pleadings;
- (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
- (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;
- (5) the appropriateness and timing of summary adjudication under Rule 56;
- (6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

ments make sense, such as those clarifying the timing of an initial scheduling conference<sup>47</sup> and those more closely tying that initial conference to the cooperative discovery efforts envisioned by Rule 26.<sup>48</sup> The rest of the changes to Rule 16, however, continue the practice of listing tasks the Rule drafters believe can be handled at conferences, followed by a catch-all authorization.<sup>49</sup>

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- (7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
  - (8) the advisability of referring matters to a magistrate judge or master;
  - (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;
  - (10) the form and substance of the pretrial order;
  - (11) the disposition of pending motions;
  - (12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
  - (13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;
  - (14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);
  - (15) an order establishing a reasonable limit on the time allowed for presenting evidence; and
  - (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

FED. R. CIV. P. 16(b)-(c).

47. *Id.* 16(b).

48. *Id.* (allowing the district or magistrate judge to enter a scheduling order identifying times for obtaining discovery and responding to questions pertaining to the identity of persons either having discoverable knowledge as those expected to be called as expert witnesses).

49. *Id.* 16(c).

The most telling amendment is to Rule 16(c)(16), which formerly read "such other matters as may aid in the disposition of the action," and was changed to "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action."<sup>50</sup> "Facilitate" is twenty-five cents of word<sup>51</sup> when a nickel's worth will do—and did. The commandment of "just, speedy, and inexpensive" has appeared in Rule 1 from the beginning.<sup>52</sup> Are we to think that judges and lawyers forgot it on the trek from Rule 1 to Rule 16, or that collective amnesia may strike participants in pretrial conferences?

Rule 16, in its present complexity, celebrates the triumph of experience over experience. Essentially anecdotal evidence of particular problems displaces the broader counsel of experience. But time has taught that rules designed for discretion should be supple, adaptable, comprehensible, and textually consistent from year to year. Thus the balance between innovation and tradition can be more easily kept. The 1993 version of Rule 16 upsets that balance.

## V. When, Why, and How To Use Pretrial Conferences

Trial judges and lawyers have great discretion in using pretrial conferences to move cases to resolution by agreement, alternative dispute mechanisms, or trial. There is no platonic ideal of case management; judge-to-judge, district-to-district, and case-to-case variation is inevitable. Wise lawyers and judges know—and the Advisory Committee's Notes to these successive amendments bear it out—that different cases will require different mechanisms for control.

Judicial time is a scarce resource, and pretrial conferences can help allocate it fairly. Lawyers' time is expensive, and pretrial conferences encourage its efficient use. Witness, party, and juror time is most important of all, for such individuals are the consumers of legal services and of justice. We should be concerned when they mock lawyers. In the words of Stevie Smith,

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50. *Id.* 16(c)(16).

51. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 236 (1987) (calling "facilitate" jargonistic).

52. FED. R. CIV. P. 1.

It is the privilege of the rich  
To waste the time of the poor.<sup>53</sup>

The ideal pretrial process can be achieved within the framework of the present Rule 16. But the reader will see that a simpler Rule would do just as well.

Three stages of pretrial judicial intervention are used to manage a lawsuit: scheduling, managing, and preparing to try. Every lawsuit benefits from application of judicial energy at these three stages. Once, lawyers lived in the courthouse or in Inns of Court where their litigation docket was the stuff of daily conversation. Today, a more impersonal and complex world calls for judicial control. Dispute resolution is not, in its essence, private ordering—every private resolution depends on state power for binding effect. In an easier time, more of the process could, arguably, be left to private initiative. I am not insisting that any such halcyon days existed, but if they did, they are gone; thus, the three stages of judicial intervention are necessary.

#### A. *Scheduling*

The present version of Rule 16 is right in providing for an early conference.<sup>54</sup> However, it is a mistake to provide for initial conferences in both Rule 16 and the discovery rules,<sup>55</sup> and the latter provisions should be dropped.

Often, the scheduling conference is a creature of local rules; the lawyer will get a notice and just show up. But the prudent lawyer should inquire about the local practice and try to get an early session with the judge. Before the conference, the lawyers should meet to reach agreement on as many matters as possible. The major topics discussed at scheduling conferences are case sequence; timing and limits on discovery, including the exchange of expert reports; joinder, severance, consolidation, amendment and related matters, and cutoff dates for taking these steps; the timing of Rule 12 and

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53. STEVIE SMITH, *Childe Rolandine*, in COLLECTED POEMS 331, 331 (James McGibbon ed., 1976).

54. FED. R. CIV. P. 16.

55. *Id.* 16(b).

Rule 56 dispositive motions,<sup>56</sup> and a trial date. This list is not exhaustive: No list can be because every case is different.

Different types of cases demand different conference discussions. Consider some of the types of cases likely to settle or be resolved by summary judgment. Federal Employer's Liability Act (FELA)<sup>57</sup> cases, at least those with no arcane liability issues, are usually resolved before trial.<sup>58</sup> In FELA case conferences, the emphasis must be on limiting discovery to a manageable size, scheduling the case in a reasonable way, and concluding pretrial work with both sides designating experts and announcing readiness for trial. There may also be some joinder issues to consider. The initial conference sets standards and ensures that the parties do not overuse procedural devices to impede movement of the case. Most FELA cases settle, but usually under pressure of a trial date and after the parties have taken some discovery,<sup>59</sup> so the initial conference is still vital to the process.

Another class of cases that may not require trial are those presenting complicated issues that will lead to motions for summary judgment. Consider a complex, employment class-action, brought under the Employee Retirement Income Security Act (ERISA)<sup>60</sup> and the Age Discrimination in Employment Act (ADEA).<sup>61</sup> The ERISA claim might present a threshold issue of standing, which can be resolved on motion for summary judgment once discovery has helped establish certain basic facts. Additionally, if there is a serious challenge that the ADEA action is time barred, the court

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56. *Id.* 12, 56.

57. 45 U.S.C. §§ 51-60 (1988).

58. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2399-2400 (1994) (holding that a FELA action does not lie for emotional harm unless plaintiff is within the zone of impact danger). An emotional harm case might, under this decision, be resolvable on summary judgment after discovery. *Id.*

59. *See, e.g., Thomas E. Baker, Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 86 (1992) (stating that most FELA cases settle, particularly when railroad employees are involved).

60. 29 U.S.C. §§ 1001-1461 (1988).

61. 29 U.S.C. §§ 621-634 (1988). One example of an ADEA case that fits this description is one in which I participated. *Raymond v. Mobil Oil Corp.*, 7 F.3d 184, 186 (10th Cir. 1993) (barring ADEA claims due to failure to comply with the statute of limitations); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (10th Cir. 1993) (barring ERISA claims for lack of standing).

might consider ordering discovery focused on that issue, leading to presentation of a motion for summary judgment.

Finally, consider the use of scheduling conferences in complex class actions.<sup>62</sup> In a class action, the trial judge may use the initial scheduling conference to order an initial round of discovery devoted to class certification, focusing on such issues as numerosity and commonality. The scheduling order might also set a hearing date for a motion to certify the class. If there are dispositive issues lurking—such as standing or statute of limitations—it may be wise to certify the class so that the resolution of those issues has the broadest possible preclusive effect.

In its essence, the initial scheduling conference is an exercise in sorting. The goals are to identify the nature and extent of judicial resources that ought to be expended, and to set limits on discovery and motions practice so that parties do not take advantage of one another by running up litigation expenses. Under the Civil Justice Reform Act,<sup>63</sup> some innovative district plans have codified this scheduling practice with some success. In the Eastern District of Texas, for example, the judges have established a “tracking” system that sorts cases according to complexity.<sup>64</sup>

### *B. Management*

Case management is a chameleon-like concept, changing according to the judge who is doing the managing. Wise management not only keeps track of the case but also keeps pressure on the parties to complete discovery, to file dispositive motions, to structure the case for trial, and to explore settlement. Unwise management,

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62. For an example of an initial pretrial conference in a complex, multidistrict case, see Sam C. Pointer, Jr., *Complex Litigation: Demonstration of Pretrial Conference*, Annual Henry W. Strasburger Lecture on Trial Advocacy (Feb. 25, 1987), in 6 REV. LITIG. 285, 287-98 (1987) (providing an edited transcript of a hypothetical pretrial conference).

63. 28 U.S.C. §§ 471-482 (Supp. 1993).

64. See CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, art. 1, reprinted in TEXAS RULES OF COURT—FEDERAL 367, 368 (West 1994) (adopting a plan in the Eastern District of Texas to reduce abuse of discovery, increase judicial management, and reduce attorney's fees pursuant to the Civil Justice Reform Act of 1990).



on the other hand, interferes with the adversarial process.<sup>65</sup> Unfortunately, rules cannot force lawyers or judges to be wise; at best, the Rules give lawyers and judges an opportunity to be so.<sup>66</sup>

Even if the judge has not set schedules and limits in a scheduling conference, the management phase offers the parties a chance to structure the case. For example, a party with good summary judgment prospects can focus discovery on the dispositive issues and file a Rule 56 motion at any time.<sup>67</sup> When the motion is filed, the movant can seek to end, restrict, or focus discovery to permit early resolution of the case.<sup>68</sup>

The courthouse has one entrance—through the complaint-filing section of the Clerk's office. But it has several exit doors, and the proper one for each case is chosen in the management phase. That

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65. For example, merits discovery should begin immediately in most cases. In a complex case, however, it might be wiser to limit initial discovery to a dispositive issue—such as standing, causation, or statute of limitations—and hear an early summary judgment motion. A case-management order that fails to set limits may well encourage lengthy and expensive discovery before any dispositive claim can be heard. For example, in *Raymond v. Mobil Oil*, 983 F.2d 1528 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 81 (1993), in which I was lead counsel, uncontrolled merits discovery dragged on for many months, leading to an exchange of more than 100,000 pages of documents and many depositions. It proved almost impossible to conclude any phase of discovery and compel a hearing on a motion for summary judgment, which was limited to the issue of whether the plaintiffs' claims were time barred. When the motion was finally heard and denied, the trial judge did agree to certify the question under 28 U.S.C. § (129(b)) (1988) for immediate appeal. The court of appeals decided the case and issued an opinion just nine days after oral argument. The opinion justifies a conclusion that an early case-management order directing discovery on limitations issues would have saved an enormous amount of court time and party resources.

66. Almost all pretrial practice is effectively unreviewable by appellate courts, which is probably a good thing. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778-82 (1957) (expressing doubt that appellate judges would improve matters by becoming more involved in review of interlocutory orders). Note, however, that exceptions to unreviewability are inevitable. See, e.g., *In re Showa Denko KK L-Tryptophan Prods. Liability Litig.-II*, 953 F.2d 162, 165 (4th Cir. 1992) (accepting an interlocutory appeal certified by the district judge under 28 U.S.C. §1292(b), and reviewing a discovery order used for case-management purposes in a complex case); see also MICHAEL E. TIGAR, *FEDERAL APPEALS: JURISDICTION & PRACTICE* §§ 2.09, 3.05 (2d ed. 1993) (citing cases involving permissive appeals in other complex cases).

67. FED. R. CIV. P. 56.

68. *Id.*

door might be settlement, perhaps aided by mediation. It might be an effort at alternative dispute resolution (ADR), with the option of returning to court if ADR does not terminate the case. Other exit alternatives include summary judgment and trial.

There is no secret to case management. It rests on verifiable facts:

- I. Many lawyers do not move their cases except under pressure. Therefore, resolving cases requires judicial initiative.
- II. One can often identify cases that can be mediated or settled well before discovery is complete, thus providing an opportunity to end the litigation and save party and judicial resources.
- III. Discovery abuse can be curbed by visible, principled, early judicial intervention that rules on the first wave of objections and tells the lawyers to quit messing around.
- IV. The judge can influence the parties' settlement and case preparation efforts through timely rulings on procedural, evidentiary, and legal issues presented as early as possible.

This list may make it seem that the proponents of case management and I are hostile to trials. Not at all. Many cases must be tried, because the parties do not agree on a settlement value, because important values are served by a public airing of the dispute, or for other good reasons. Everybody who practices in federal court knows that in some districts you cannot get a trial these days because of crowded dockets and the pressure of preference items such as criminal cases.<sup>69</sup> Case management can help by identifying the cases that will probably be tried and allowing for better allocation of scarce trial time.

The key concept in management is flexibility. It was probably wise to amend Rule 16 to signal the propriety and importance of management.<sup>70</sup> However, once the concept was spelled out, there was no need to list potential management issues. It would have been enough to make clear the trial judge's power and the advocates'

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69. See, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 401 (1992) (stating that evidence indicates that "[i]n many districts, the major reason for the backlog of the civil docket is the . . . requirement that criminal cases may be heard expeditiously").

70. FED. R. CIV. P. 16.

duties, leaving the rest for commentary, experience, and an occasional court decision. To restate the point, simplicity and consistency serve well: Consider how Rules 8 and 9 have efficiently regulated modern pleading practice, with only an occasional need for corrective and explanatory work by the Supreme Court.<sup>71</sup> One other effective management tool, reference of issues to a special master, is worthy of mention. The 1983 Rule 16 amendments broadened the potential responsibilities of the magistrate (now the magistrate judge) and master.<sup>72</sup> The traditional "special master," defined in Federal Rule of Civil Procedure 53, conducts hearings and makes a "report" to the court.<sup>73</sup> The procedure is rather cumbersome and is seldom used.<sup>74</sup> The Advisory Committee is currently considering wholesale changes to Rule 53 that would identify the three situations in which a master's services might be helpful.<sup>75</sup> The Rule would authorize "a pretrial master," "a trial master," and a "post-trial master."<sup>76</sup> The trial master would execute the functions now described under Rule 53.<sup>77</sup> The post-trial master would handle such issues as damages allocations in class action suits that have been settled or tried to verdict.<sup>78</sup>

The pretrial-master rule, however, would codify a practice now used by some judges in complex cases and assist materially in the management function. Today, many (if not most) district judges delegate the management function partially or wholly to a magistrate judge, who returns the case to the judge when it is time for a final

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71. *See* *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (emphasizing the liberal pleading standards under the Rules in general). When some appellate courts began to stray from these principles, the Court briefly and unanimously set them straight. *See, e.g.,* *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1162-63 (1993) (emphasizing that only in cases of fraud or mistake are heightened pleading standards appropriate).

72. FED. R. CIV. P. 16(c)(8).

73. *Id.* 53.

74. *Id.* 53(b) ("A reference to a master shall be the exception and not the rule.").

75. I have seen some of the drafts and committee comments on this proposed Rules change. The correspondence was shared with me by Judge Patrick E. Higginbotham, Chair of the Civil Rules Advisory Committee. Letter from Judge Patrick E. Higginbotham, Chair, Civil Rules Advisory Committee (Aug. 19, 1994) (on file with author).

76. *Id.*

77. *Id.*

78. *Id.*

pretrial order.<sup>79</sup> The magistrate judge may hear and make recommendations on dispositive motions, or the judge may retain that power.<sup>80</sup> If the district judge and magistrate judge have a working partnership, this system works well to ensure that delegation of the management function does not consign the case to an oubliette.

The Rule 53 amendments being discussed would allow the appointment of pretrial masters to fill the role magistrate judges are currently serving.<sup>81</sup> A pretrial master can be invaluable in a complex case because she is typically appointed for a particular case and is more accessible than a busy magistrate.<sup>82</sup> Pretrial masters will be particularly helpful in districts with heavy criminal dockets, where magistrate judges are already overworked with warrants, arraignments, and minor criminal matters.<sup>83</sup> There is nothing in the present Rules that forbids the appointment of pretrial masters, so an amendment to the Rule would simply clarify the practice. I hope, however, that the drafters will be content to revise Rule 53 to make clear the power to appoint pretrial masters, and not take the occasion to rewrite at length and insert additional and unnecessary Rule provisions.

### C. *Preparing to Try*

The final pretrial order is the classic expression of management of pretrial procedure—it lists the issues to be tried, identifies witnesses and exhibits, and sets the rules of the contest. Thus, the final conference or conferences—which provide one last chance for pretrial evidentiary rulings, consolidation, severance decisions, and even dispositive motions—focus the litigants' efforts in preparing to actually try the case.

The order focuses the parties and the court. It makes (or should make) everybody realistic. My own approach to litigation calls for focusing early on “the story” of the case, and then constantly

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79. Letter from Edward H. Cooper to Judge Patrick E. Higginbotham and Wayne D. Brazil (July 29, 1994) (on file with author).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

revisiting the central themes in light of legal and factual research.<sup>84</sup> Many lawyers head down the final stretch towards trial with a jumbled bundle of concepts, discovery, witnesses, and exhibits. I can recall a case in which the week before jury selection was to begin, my opponents claimed they would introduce more than 20,000 exhibits. They wanted the court to approve special procedures, such as the use of video scanning equipment, so that they could show those exhibits to the jury. I thought my opponents were delusional—the proposed document list contained many items of doubtful admissibility, and I suspected the lawyers had not made a realistic appraisal of which documents were important and which were not. After all, if the parties wrongly predict that the trial will consume fifteen to twenty court days when it can be tried efficiently and effectively in five to eight days, someone else's access to civil jury time is being hampered.

In sum, the traditional use of the final pretrial order has proved to be durable and right.

## VI. Conclusion

Pretrial control of civil cases is of proven benefit, as is the use of flexible rules that enable and guide judicial and party discretion. But the descent into procedural particularism exemplified by the 1993 amendments to Federal Rule of Civil Procedure 16 is antagonistic to the Rules' goal of a speedy and inexpensive determination of every action. While the expansion of Rule 16 made some good points, the amendments were largely unnecessary. With due respect to the Rule drafters, I remind them that their pencils have two ends—one for writing and one for erasing. The time has come to turn the pencils around.

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84. My views on this subject are set out in MICHAEL E. TIGAR, *EXAMINING WITNESSES* 1-28 (1993).