

## Proposed Amendments to Rule 16

Rule 16 is amended as follows:

### **RULE 16.** Postassignment Conferences; Scheduling; Management

(a) **Purposes of a** ~~Postassignment Conference[s]; Objectives].~~ In any action, the court may ~~[in its discretion direct]~~ **order** the attorneys ~~[for the parties]~~ and any unrepresented parties to appear for **one or more postassignment** ~~[a conference or] conferences for such purposes~~ **s** as:

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

(b) ~~Scheduling [and Planning. Except as provided in Rule 56.2 or when the judge to whom the action is assigned finds that a scheduling order will not aid in the disposition of the action and enters an order to that effect, together with a statement of reasons and facts upon which the order is based, the judge 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) modifications of the times for disclosures under Rule 26(a) and 26(e)(1) and of the extent of discovery to be permitted;~~

~~\_\_\_\_\_ (5) provisions for disclosure or discovery of electronically stored information;~~

~~\_\_\_\_\_ (6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;~~

~~\_\_\_\_\_ (7) the date or dates for conferences before submission of the action for final disposition, a final postassignment conference, and trial or submission of a dispositive motion; and~~

~~\_\_\_\_\_ (8) any other matters appropriate in the circumstances of the action.~~

~~\_\_\_\_\_ The scheduling order, or the order that a scheduling order will not aid in the disposition of the action, shall issue as soon as practicable but in no event more than 90 days after the action is assigned. A schedule shall not be modified except by leave of the judge upon a showing of good cause.]~~

**(1) *Scheduling Order.* Except as provided in Rule 56.2 or when a judge so orders and provides a statement of reasons and facts on which the order is based, the judge must issue a scheduling order:**

**(A) after receiving the parties' report under Rule 26(f); or**

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in no event more than 90 days after the action is assigned.

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file and hear motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for conferences before submission of the action for final disposition, a final postassignment conference, and trial or submission of a dispositive motion; and

(vi) include other appropriate matters.

**(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.**

~~[(c) Subjects to be Discussed at Postassignment 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;~~

~~\_\_\_\_\_ (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 disclosure and discovery pursuant to Rule 26 and Rules 29 through 37;~~

~~\_\_\_\_\_ (7) the identification of witnesses and documents, the need and schedule for filing and exchanging briefs, and the date and dates for further conferences and for submission of the action for final disposition;~~

~~\_\_\_\_\_ (8) the advisability of referring matters to a master;~~

~~\_\_\_\_\_ (9) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;~~

~~\_\_\_\_\_ (10) the form and substance of scheduling or postassignment conference 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;~~

~~\_\_\_\_\_ (16) access to confidential or privileged information, including business proprietary information, contained in an administrative record, which is the subject of the action; and~~

~~\_\_\_\_\_ (17) such other matters as may aid in the disposition of the action.~~

~~\_\_\_\_\_ At least one of the attorneys participating in any postassignment conference 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.]~~

**(c) Attendance and Matters for Consideration at a Postassignment Conference.**

**(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a postassignment conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.**

**(2) *Matters for Consideration.* At any postassignment conference, the court may consider and take appropriate action on the following matters:**

**(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;**

**(B) amending the pleadings if necessary or desirable;**

**(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;**

**(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;**

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any briefs, and setting dates for further conferences and for submission of the action for final disposition;

(H) referring matters to a master;

(I) settling or using extrajudicial procedures to resolve the dispute;

(J) determining the form and content of the scheduling or other postassignment conference order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, 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);

**(O) establishing a reasonable limit on the time allowed to present evidence;**

**(P) accessing confidential or privileged information, including business proprietary information, contained in an administrative record, which is the subject of the action; and**

**(Q) facilitating in other ways the just, speedy, and inexpensive disposition of the action.**

~~[(d) Final Postassignment Conference. Any final postassignment conference shall be held as close to the time of submission of the action for final disposition as reasonable under the circumstances. The participants at any such conference shall formulate a plan for submission of the action for final disposition. At least one of the attorneys on behalf of each of the parties and any unrepresented parties shall participate in the conference.]~~

**(d) Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.**

~~[(e) 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 postassignment conference shall be modified only to prevent manifest injustice.]~~

**(e) Final Postassignment Conference and Orders.** The court may hold a final postassignment conference to formulate a plan for submission of the action for final disposition. The conference must be held as close to the submission of the action for final disposition as is reasonable, and must be attended by at least one of the attorneys on behalf of each of the parties and any unrepresented parties. The court may modify the order issued after a final postassignment conference only to prevent manifest injustice.

~~[(f) Sanctions. If a party or party's attorney fails to obey a scheduling or postassignment conference order, or if no appearance is made on behalf of a party at a scheduling or postassignment conference, or if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or 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). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing or both to pay the reasonable expense incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that order circumstances make an award of expenses unjust.]~~

**(f) Sanctions.**

**(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b), if a party or its attorney:**

**(A) fails to appear at a scheduling or other postassignment conference;**

**(B) is substantially unprepared to participate — or does not participate in good faith — in the conference; or**

**(C) fails to obey a scheduling or other postassignment conference order.**

**(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.**

**PRACTICE COMMENT:** The attorneys for the parties and any unrepresented parties are expected to consult prior to a postassignment conference. The consultations should pertain to such matters as: access to the confidential portions of the administrative record, if any; the definition of the issues; whether discovery is necessary or permissible; and, the establishment of a proposed discovery schedule, if it is agreed that discovery will be conducted.

**PRACTICE COMMENT:** A party may seek expedited consideration under Rule 3(g). For possible applicability of other scheduling rules, see practice comment to Rule 3(g).

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Nov. 29, 1995, eff. Mar. 31, 1996; Aug. 29, 2000, eff. Jan. 1, 2001; Dec. 18, 2001, eff. Apr. 1, 2002; Sept. 30, 2003, eff. Jan. 1, 2004; Nov. 27, 2007, eff. Jan. 1, 2008; \_\_\_\_\_, 2008, eff. \_\_\_\_\_, 2009.)

#### **Advisory Committee Note**

The language of Rule 16 has been amended as part of the general restyling of these rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 16(c) has also been changed to provide that, at a postassignment conference, the court may require a party or its representative to be “present or reasonably available by other means,” replacing the previous provision that the court may require that a party or its representative be present or reasonably available “by telephone.” When a party

**or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.**