

15(c)(3) of the Federal Rules of Civil Procedure as transmitted to Congress by the Supreme Court to become effective on Dec. 1, 1991, is amended. See 1991 Amendment note below.

NOTES OF ADVISORY COMMITTEE ON RULES—1993  
AMENDMENT

The amendment conforms the cross reference to Rule 4 to the revision of that rule.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the “institution” of the action. Rule 15(c)(1)(C)(i) omits the reference to “institution” as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its “institution.”

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Rule 15(a)(1) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a “pleading” as defined in Rule 7. The right to amend survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a)(1) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cuts off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar, and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Amended Rule 15(a)(3) extends from 10 to 14 days the period to respond to an amended pleading.

AMENDMENT BY PUBLIC LAW

1991—Subd. (c)(3). Pub. L. 102-198 substituted “Rule 4(j)” for “Rule 4(m)”.

**Rule 16. Pretrial Conferences; Scheduling; Management**

(a) **PURPOSES OF A PRETRIAL CONFERENCE.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting 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 settlement.

(b) **SCHEDULING.**

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—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 any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(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 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 pretrial conferences and for trial; 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) **ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL 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 pretrial conference. If appropriate, the court may require that a party or its rep-

representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial 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 pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial 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; and

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

(d) **PRETRIAL 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) **FINAL PRETRIAL CONFERENCE AND ORDERS.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(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)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial 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 pretrial 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.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1937

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see *A Proposal for Minimizing Calendar Delay in Jury Cases* (Dec. 1936—published by The New York Law Society); *Pre-Trial Procedure and Administration*, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 207–243; *Report of the Commission on the Administration of Justice in New York State* (1934), pp. (288)–(290). See also *Pre-Trial Procedure in the Wayne Circuit Court*, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63–75; and Sunderland, *The Theory and Practice of Pre-Trial Procedure* (Dec. 1937) 36 Mich.L.Rev. 215–226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the “summons for directions,” *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911–1924); N.J. Supreme Court Rules, 2 N.J.Misc.Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J.Misc.Rep. (1933) 955).

2. Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion). Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(b) (Masters; Reference) and 53(e)(3) (Master’s Report; In Jury Actions).

#### NOTES OF ADVISORY COMMITTEE ON RULES—1983

##### AMENDMENT

##### Introduction

Rule 16 has not been amended since the Federal Rules were promulgated in 1938. In many respects, the rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522 (1971). However, in other respects particularly with regard to case management, the rule has not always been as helpful as it

might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial management that meets the needs of modern litigation. See *Report of the National Commission for the Review of Antitrust Laws and Procedures* (1979).

Major criticism of Rule 16 has centered on the fact that its application can result in over-regulation of some cases and under-regulation of others. In simple, run-of-the-mill cases, attorneys have found pretrial requirements burdensome. It is claimed that over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client. Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974). This is especially likely to be true when pretrial proceedings occur long before trial. At the other end of the spectrum, the discretionary character of Rule 16 and its orientation toward a single conference late in the pretrial process has led to under-administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, these cases often become mired in discovery.

Four sources of criticism of pretrial have been identified. First, conferences often are seen as a mere exchange of legalistic contentions without any real analysis of the particular case. Second, the result frequently is nothing but a formal agreement on minutiae. Third, the conferences are seen as unnecessary and time-consuming in cases that will be settled before trial. Fourth, the meetings can be ceremonial and ritualistic, having little effect on the trial and being of minimal value, particularly when the attorneys attending the sessions are not the ones who will try the case or lack authority to enter into binding stipulations. See generally *McCargo v. Hedrick*, 545 F.2d 393 (4th Cir. 1976); Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974); Rosenberg, *The Pretrial Conference and Effective Justice* 45 (1964).

There also have been difficulties with the pretrial orders that issue following Rule 16 conferences. When an order is entered far in advance of trial, some issues may not be properly formulated. Counsel naturally are cautious and often try to preserve as many options as possible. If the judge who tries the case did not conduct the conference, he could find it difficult to determine exactly what was agreed to at the conference. But any insistence on a detailed order may be too burdensome, depending on the nature or posture of the case.

Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices. Flanders, *Case Management and Court Management in United States District Courts* 17, Federal Judicial Center (1977). Thus, the rule mandates a pretrial scheduling order. However, although scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.

#### Discussion

*Subdivision (a); Pretrial Conferences; Objectives.* The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery. In addition, the amendment explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed. Rule 16 thus will be a more accurate reflection of actual practice.

*Subdivision (b); Scheduling and Planning.* The most significant change in Rule 16 is the mandatory scheduling order described in Rule 16(b), which is based in part on

Wisconsin Civil Procedure Rule 802.10. The idea of scheduling orders is not new. It has been used by many federal courts. See, e.g., Southern District of Indiana, Local Rule 19.

Although a mandatory scheduling order encourages the court to become involved in case management early in the litigation, it represents a degree of judicial involvement that is not warranted in many cases. Thus, subdivision (b) permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained. See Eastern District of Virginia, Local Rule 12(1). Logical candidates for this treatment include social security disability matters, habeas corpus petitions, forfeitures, and reviews of certain administrative actions.

A scheduling conference may be requested either by the judge, a magistrate when authorized by district court rule, or a party within 120 days after the summons and complaint are filed. If a scheduling conference is not arranged within that time and the case is not exempted by local rule, a scheduling order must be issued under Rule 16(b), after some communication with the parties, which may be by telephone or mail rather than in person. The use of the term "judge" in subdivision (b) reflects the Advisory Committee's judgment that it is preferable that this task should be handled by a district judge rather than a magistrate, except when the magistrate is acting under 28 U.S.C. §636(c). While personal supervision by the trial judge is preferred, the rule, in recognition of the impracticality or difficulty of complying with such a requirement in some districts, authorizes a district by local rule to delegate the duties to a magistrate. In order to formulate a practicable scheduling order, the judge, or a magistrate when authorized by district court rule, and attorneys are required to develop a timetable for the matters listed in Rule 16(b)(1)–(3). As indicated in Rule 16(b)(4)–(5), the order may also deal with a wide range of other matters. The rule is phrased permissively as to clauses (4) and (5), however, because scheduling these items at an early point may not be feasible or appropriate. Even though subdivision (b) relates only to scheduling, there is no reason why some of the procedural matters listed in Rule 16(c) cannot be addressed at the same time, at least when a scheduling conference is held.

Item (1) assures that at some point both the parties and the pleadings will be fixed, by setting a time within which joinder of parties shall be completed and the pleadings amended.

Item (2) requires setting time limits for interposing various motions that otherwise might be used as stalling techniques.

Item (3) deals with the problem of procrastination and delay by attorneys in a context in which scheduling is especially important—discovery. Scheduling the completion of discovery can serve some of the same functions as the conference described in Rule 26(f).

Item (4) refers to setting dates for conferences and for trial. Scheduling multiple pretrial conferences may well be desirable if the case is complex and the court believes that a more elaborate pretrial structure, such as that described in the *Manual for Complex Litigation*, should be employed. On the other hand, only one pretrial conference may be necessary in an uncomplicated case.

As long as the case is not exempted by local rule, the court must issue a written scheduling order even if no scheduling conference is called. The order, like pretrial orders under the former rule and those under new Rule 16(c), normally will "control the subsequent course of the action." See Rule 16(e). After consultation with the attorneys for the parties and any unrepresented parties—a formal motion is not necessary—the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension. Since the scheduling order is entered early in the litigation, this standard seems

more appropriate than a “manifest injustice” or “substantial hardship” test. Otherwise, a fear that extensions will not be granted may encourage counsel to request the longest possible periods for completing pleading, joinder, and discovery. Moreover, changes in the court’s calendar sometimes will oblige the judge or magistrate when authorized by district court rule to modify the scheduling order.

The district courts undoubtedly will develop several prototype scheduling orders for different types of cases. In addition, when no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise. In many instances this will result in a scheduling order better suited to the individual case than a standard order, without taking the time that would be required by a formal conference.

Rule 16(b) assures that the judge will take some early control over the litigation, even when its character does not warrant holding a scheduling conference. Despite the fact that the process of preparing a scheduling order does not always bring the attorneys and judge together, the fixing of time limits serves

to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material. Time limits not only compress the amount of time for litigation, they should also reduce the amount of resources invested in litigation. Litigants are forced to establish discovery priorities and thus to do the most important work first.

*Report of the National Commission for the Review of Antitrust Laws and Procedures 28 (1979).*

Thus, except in exempted cases, the judge or a magistrate when authorized by district court rule will have taken some action in every case within 120 days after the complaint is filed that notifies the attorneys that the case will be moving toward trial. Subdivision (b) is reenforced by subdivision (f), which makes it clear that the sanctions for violating a scheduling order are the same as those for violating a pretrial order.

*Subdivision (c); Subjects to be Discussed at Pretrial Conferences.* This subdivision expands upon the list of things that may be discussed at a pretrial conference that appeared in original Rule 16. The intention is to encourage better planning and management of litigation. Increased judicial control during the pretrial process accelerates the processing and termination of cases. Flanders, *Case Management and Court Management in United States District Courts*, Federal Judicial Center (1977). See also *Report of the National Commission for the Review of Antitrust Laws and Procedures (1979)*.

The reference in Rule 16(c)(1) to “formulation” is intended to clarify and confirm the court’s power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. See generally *Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867 (D.C. Cir. 1960). The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).

The timing of any attempt at issue formulation is a matter of judicial discretion. In relatively simple cases it may not be necessary or may take the form of a stipulation between counsel or a request by the court that counsel work together to draft a proposed order.

Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue for the court, the right to have the issue tried is waived. Although an order specifying the issues is intended to be binding, it may be amended at trial to avoid manifest injustice. See Rule 16(e). However, the rule’s effectiveness depends on the court employing its discretion sparingly.

Clause (6) acknowledges the widespread availability and use of magistrates. The corresponding provision in

the original rule referred only to masters and limited the function of the reference to the making of “findings to be used as evidence” in a case to be tried to a jury. The new text is not limited and broadens the potential use of a magistrate to that permitted by the Magistrate’s Act.

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore’s *Federal Practice* ¶16.17; 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522 (1971). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party’s request, to have settlement conferences handled by another member of the court or by a magistrate. The rule does not make settlement conferences mandatory because they would be a waste of time in many cases. See Flanders, *Case Management and Court Management in the United States District Courts*, 39, Federal Judicial Center (1977). Requests for a conference from a party indicating a willingness to talk settlement normally should be honored, unless thought to be frivolous or dilatory.

A settlement conference is appropriate at any time. It may be held in conjunction with a pretrial or discovery conference, although various objectives of pretrial management, such as moving the case toward trial, may not always be compatible with settlement negotiations, and thus a separate settlement conference may be desirable. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1522, at p. 751 (1971).

In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse. See, for example, the experiment described in Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loyola of L.A. L.Rev. 493 (1978).

Rule 16(c)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Some district courts obviously have done so for many years. See Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 135 (1976). Clause 10 provides an explicit authorization for such procedures and encourages their use. No particular techniques have been described; the Committee felt that flexibility and experience are the keys to efficient management of complex cases. Extensive guidance is offered in such documents as the *Manual for Complex Litigation*.

The rule simply identifies characteristics that make a case a strong candidate for special treatment. The four mentioned are illustrative, not exhaustive, and overlap to some degree. But experience has shown that one or more of them will be present in every protracted or difficult case and it seems desirable to set them out. See Kendig, *Procedures for Management of Non-Routine Cases*, 3 Hofstra L.Rev. 701 (1975).

The last sentence of subdivision (c) is new. See Wisconsin Civil Procedure Rule 802.11(2). It has been added to meet one of the criticisms of the present practice described earlier and insure proper preconference preparation so that the meeting is more than a ceremonial or ritualistic event. The reference to “authority” is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.

*Subdivision (d); Final Pretrial Conference.* This provision has been added to make it clear that the time between any final pretrial conference (which in a simple case may be the *only* pretrial conference) and trial should be as short as possible to be certain that the litigants make substantial progress with the case and avoid the inefficiency of having that preparation repeated when there is a delay between the last pretrial conference and trial. An optimum time of 10 days to two weeks has been suggested by one federal judge. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 Just. Sys. J. 135, 141 (1976). The Committee, however, concluded that it would be inappropriate to fix a precise time in the rule, given the numerous variables that could bear on the matter. Thus the timing has been left to the court's discretion.

At least one of the attorneys who will conduct the trial for each party must be present at the final pretrial conference. At this late date there should be no doubt as to which attorney or attorneys this will be. Since the agreements and stipulations made at this final conference will control the trial, the presence of lawyers who will be involved in it is especially useful to assist the judge in structuring the case, and to lead to a more effective trial.

*Subdivision (e); Pretrial Orders.* Rule 16(e) does not substantially change the portion of the original rule dealing with pretrial orders. The purpose of an order is to guide the course of the litigation and the language of the original rule making that clear has been retained. No compelling reason has been found for major revision, especially since this portion of the rule has been interpreted and clarified by over forty years of judicial decisions with comparatively little difficulty. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §§1521-30 (1971). Changes in language therefore have been kept to a minimum to avoid confusion.

Since the amended rule encourages more extensive pretrial management than did the original, two or more conferences may be held in many cases. The language of Rule 16(e) recognizes this possibility and the corresponding need to issue more than one pretrial order in a single case.

Once formulated, pretrial orders should not be changed lightly; but total inflexibility is undesirable. See, e.g., *Clark v. Pennsylvania R.R. Co.*, 328 F.2d 591 (2d Cir. 1964). The exact words used to describe the standard for amending the pretrial order probably are less important than the meaning given them in practice. By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management what is done at one conference may have to be altered at the next. In the case of the final pretrial order, however, a more stringent standard is called for and the words "to prevent manifest injustice," which appeared in the original rule, have been retained. They have the virtue of familiarity and adequately describe the restraint the trial judge should exercise.

Many local rules make the plaintiff's attorney responsible for drafting a proposed pretrial order, either before or after the conference. Others allow the court to appoint any of the attorneys to perform the task, and others leave it to the court. See Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 Va.L.Rev. 467 (1978). Rule 16 has never addressed this matter. Since there is no consensus about which method of drafting the order works best and there is no reason to believe that nationwide uniformity is needed, the rule has been left silent on the point. See *Handbook for Effective Pretrial Procedure*, 37 F.R.D. 225 (1964).

*Subdivision (f); Sanctions.* Original Rule 16 did not mention the sanctions that might be imposed for failing to comply with the rule. However, courts have not hesitated to enforce it by appropriate measures. See, e.g., *Link v. Wabash R. Co.*, 370 U.S. 628 (1962) (district court's dismissal under Rule 41(b) after plaintiff's at-

torney failed to appear at a pretrial conference upheld); *Admiral Theatre Corp. v. Douglas Theatre*, 585 F.2d 877 (8th Cir. 1978) (district court has discretion to exclude exhibits or refuse to permit the testimony of a witness not listed prior to trial in contravention of its pretrial order).

To reflect that existing practice, and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation, cf. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 65-67, 80-84, Federal Judicial Center (1981). Furthermore, explicit reference to sanctions reinforces the rule's intention to encourage forceful judicial management.

Rule 16(f) incorporates portions of Rule 37(b)(2), which prescribes sanctions for failing to make discovery. This should facilitate application of Rule 16(f), since courts and lawyers already are familiar with the Rule 37 standards. Among the sanctions authorized by the new subdivision are: preclusion order, striking a pleading, staying the proceeding, default judgment, contempt, and charging a party, his attorney, or both with the expenses, including attorney's fees, caused by noncompliance. The contempt sanction, however, is only available for a violation of a court order. The references in Rule 16(f) are not exhaustive.

As is true under Rule 37(b)(2), the imposition of sanctions may be sought by either the court or a party. In addition, the court has discretion to impose whichever sanction it feels is appropriate under the circumstances. Its action is reviewable under the abuse-of-discretion standard. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

#### NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

#### NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

*Subdivision (b).* One purpose of this amendment is to provide a more appropriate deadline for the initial scheduling order required by the rule. The former rule directed that the order be entered within 120 days from the filing of the complaint. This requirement has created problems because Rule 4(m) allows 120 days for service and ordinarily at least one defendant should be available to participate in the process of formulating the scheduling order. The revision provides that the order is to be entered within 90 days after the date a defendant first appears (whether by answer or by a motion under Rule 12) or, if earlier (as may occur in some actions against the United States or if service is waived under Rule 4), within 120 days after service of the complaint on a defendant. The longer time provided by the revision is not intended to encourage unnecessary delays in entering the scheduling order. Indeed, in most cases the order can and should be entered at a much earlier date. Rather, the additional time is intended to alleviate problems in multi-defendant cases and should ordinarily be adequate to enable participation by all defendants initially named in the action.

In many cases the scheduling order can and should be entered before this deadline. However, when setting a scheduling conference, the court should take into account the effect this setting will have in establishing deadlines for the parties to meet under revised Rule 26(f) and to exchange information under revised Rule 26(a)(1). While the parties are expected to stipulate to additional time for making their disclosures when warranted by the circumstances, a scheduling conference held before defendants have had time to learn much about the case may result in diminishing the value of the Rule 26(f) meeting, the parties' proposed discovery plan, and indeed the conference itself.

New paragraph (4) has been added to highlight that it will frequently be desirable for the scheduling order to include provisions relating to the timing of disclosures under Rule 26(a). While the initial disclosures required by Rule 26(a)(1) will ordinarily have been made before entry of the scheduling order, the timing and sequence for disclosure of expert testimony and of the witnesses and exhibits to be used at trial should be tailored to the circumstances of the case and is a matter that should be considered at the initial scheduling conference. Similarly, the scheduling order might contain provisions modifying the extent of discovery (*e.g.*, number and length of depositions) otherwise permitted under these rules or by a local rule.

The report from the attorneys concerning their meeting and proposed discovery plan, as required by revised Rule 26(f), should be submitted to the court before the scheduling order is entered. Their proposals, particularly regarding matters on which they agree, should be of substantial value to the court in setting the timing and limitations on discovery and should reduce the time of the court needed to conduct a meaningful conference under Rule 16(b). As under the prior rule, while a scheduling order is mandated, a scheduling conference is not. However, in view of the benefits to be derived from the litigants and a judicial officer meeting in person, a Rule 16(b) conference should, to the extent practicable, be held in all cases that will involve discovery.

This subdivision, as well as subdivision (c)(8), also is revised to reflect the new title of United States Magistrate Judges pursuant to the Judicial Improvements Act of 1990.

*Subdivision (c).* The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party. Of course settlement is dependent upon agreement by the parties and, indeed, a conference is most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1.

Paragraph (4) is revised to clarify that in advance of trial the court may address the need for, and possible limitations on, the use of expert testimony under Rule 702 of the Federal Rules of Evidence. Even when proposed expert testimony might be admissible under the standards of Rules 403 and 702 of the evidence rules, the court may preclude or limit such testimony if the cost to the litigants—which may include the cost to adversaries of securing testimony on the same subjects by other experts—would be unduly expensive given the needs of the case and the other evidence available at trial.

Paragraph (5) is added (and the remaining paragraphs renumbered) in recognition that use of Rule 56 to avoid or reduce the scope of trial is a topic that can, and often should, be considered at a pretrial conference. Renumbered paragraph (11) enables the court to rule on pending motions for summary adjudication that are ripe for decision at the time of the conference. Often, however, the potential use of Rule 56 is a matter that arises from discussions during a conference. The court may then call for motions to be filed.

Paragraph (6) is added to emphasize that a major objective of pretrial conferences should be to consider appropriate controls on the extent and timing of discovery. In many cases the court should also specify the times and sequence for disclosure of written reports from experts under revised Rule 26(a)(2)(B) and perhaps direct changes in the types of experts from whom written reports are required. Consideration should also be given to possible changes in the timing or form of the disclosure of trial witnesses and documents under Rule 26(a)(3).

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. §§473(a)(6), 473(b)(4), 651–58; Section 104(b)(2), Pub. L. 101–650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.

The amendment of paragraph (9) should be read in conjunction with the sentence added to the end of subdivision (c), authorizing the court to direct that, in appropriate cases, a responsible representative of the parties be present or available by telephone during a conference in order to discuss possible settlement of the case. The sentence refers to participation by a party or its representative. Whether this would be the individual party, an officer of a corporate party, a representative from an insurance carrier, or someone else would depend on the circumstances. Particularly in litigation in which governmental agencies or large amounts of money are involved, there may be no one with on-the-spot settlement authority, and the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility. The selection of the appropriate representative should ordinarily be left to the party and its counsel. Finally, it should be noted that the unwillingness of a party to be available, even by telephone, for a settlement conference may be a clear signal that the time and expense involved in pursuing settlement is likely to be unproductive and that personal participation by the parties should not be required.

The explicit authorization in the rule to require personal participation in the manner stated is not intended to limit the reasonable exercise of the court's inherent powers, *e.g.*, *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989), or its power to require party participation under the Civil Justice Reform Act of 1990. See 28 U.S.C. §473(b)(5) (civil justice expense and delay reduction plans adopted by district courts may include requirement that representatives "with authority to bind [parties] in settlement discussions" be available during settlement conferences).

New paragraphs (13) and (14) are added to call attention to the opportunities for structuring of trial under Rule 42 and under revised Rules 50 and 52.

Paragraph (15) is also new. It supplements the power of the court to limit the extent of evidence under Rules 403 and 611(a) of the Federal Rules of Evidence, which typically would be invoked as a result of developments during trial. Limits on the length of trial established at a conference in advance of trial can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial. Any such limits must be reasonable under the circumstances, and ordinarily the court should impose them only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination.

#### COMMITTEE NOTES ON RULES—2006 AMENDMENT

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is

amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. See *Manual for Complex Litigation* (4th) §11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

*Changes Made After Publication and Comment.* This recommendation is of a modified version of the proposal as published. Subdivision (b)(6) was modified to eliminate the references to "adopting" agreements for "protection against waiving" privilege. It was feared that these words might seem to promise greater protection than can be assured. In keeping with changes to Rule 26(b)(5)(B), subdivision (b)(6) was expanded to include agreements for asserting claims of protection as trial-preparation materials. The Committee Note was revised to reflect the changes in the rule text.

The proposed changes from the published rule are set out below. [Omitted]

#### COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

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.

*Changes Made After Publication and Comment.* See Note to Rule 1, *supra*.

#### TITLE IV. PARTIES

##### **Rule 17. Plaintiff and Defendant; Capacity; Public Officers**

###### (a) REAL PARTY IN INTEREST.

(1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

- (A) an executor;
- (B) an administrator;
- (C) a guardian;
- (D) a bailee;
- (E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the United States for Another's Use or Benefit.* When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) *Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) CAPACITY TO SUE OR BE SUED. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) MINOR OR INCOMPETENT PERSON.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

- (A) a general guardian;
- (B) a committee;
- (C) a conservator; or
- (D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

(d) PUBLIC OFFICER'S TITLE AND NAME. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Pub. L. 100-690, title VII, § 7049, Nov. 18, 1988, 102 Stat. 4401; Apr. 30, 2007, eff. Dec. 1, 2007.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1937

*Note to Subdivision (a).* The real party in interest provision, except for the last clause which is new, is taken