Alabama Rules of Civil Procedure

III. PLEADINGS AND MOTIONS

Rule 16.

Pre-trial conferences; scheduling; management.

(a) *Pretrial conferences; objectives.* In any action, the court may in its discretion at any time 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.

When the court has not ordered a conference, any party may require the scheduling of such conference on written notice served at such time in advance of trial so as to permit the conference to take place at least twenty-one (21) days before the case is set for trial.

(b) *Scheduling and planning.* The court may 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;

(5) provisions for discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or asserting that certain material is protected as trial-preparation material after the material has been produced; and

(7) any other matters appropriate in the circumstances of the case.

Any scheduling order shall be issued as soon as practicable. Once a scheduling order is issued, the schedule set thereby shall not be modified except by leave of court 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;

(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 voluntary use by all parties of extrajudicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules;

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

(dc) *District court rules*. Pretrial procedure in the district court shall be as follows:

Immediately preceding the trial on the merits, or prior thereto, if justice requires, the court may direct and require the attorneys for the parties to appear before it for a conference to consider and determine:

(1) the simplification of the issues;

(2) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(3) such other matters as may aid in the disposition of the action.

[Amended eff. 8-1-92; Amended eff. 10-1-95; Amended eff. 2-1-2010.]

Committee Comments on 1973 Adoption

Rule 16, as modified by some corollary local rules, has in some instances, done more harm to the image of the Federal Rules than any other rule. At its birth, the informal conference with the court was viewed as a refreshing alternative to the exhaustive and exhausting pleading matches formerly used for issue simplification. As the Rule approaches middle age in the Federal System, its abuse has returned issue simplification to a level reminiscent of the common law technicalities it was designed to replace. The adoption of local rules regulating pre-trials in some federal courts has been done in an effort to relieve court congestion, an admirable end. However, ends do not justify means and this committee condemns the imposition of burdensome and often wasteful requirements on pre-trial preparation. The premise of these requirements arises from the assumption that the lawyer who is overburdened and whose client can no longer finance the extravaganza of paper, minutia, and “busy-work” will settle his case. Of course, no judge has ever been reversed or overworked because of a settlement.

The practicing lawyer is not the sole complainant in this field. Judge Milton Pollack, United States District Judge, Southern District of New York, in an address to the Judicial Conference of the Eighth Circuit, made the following observation:

> "As applied under certain rules of various Courts, pre-trial procedures have resulted in useless, unnecessary, unprofitable expenditure of time, effort, and expertise in the majority of litigation. The average or ordinary case is over-administered, lawyers are put to busy-work resulting in duplication of effort and fruitless preparation and Judges have ignored or made minor use of the work product of the rule. The forgotten man, the client, is made to foot the bill."

Pollack. *Pre-trial Conferences*, 50 F.R.D. 427 (1971).

Judge J. Skelly Wright, formerly of the U.S. District Court in Louisiana, now of the District of Columbia Court of Appeals, has warned that "unless some effort is made to bring the Pre-trial back in focus, so that it can command the respect of the lawyers and then the Judges alike, so that it can save lawyers' time and litigants' money, it is going to suffer the same fate as common-law pleadings." Continuing, Judge Wright points out that routine cases are the "grist of the mill" and "we don't need 15 pages of instruction to tell the lawyer how to get ready for pre-trial in a negligence case." Concluding, Judge Wright urges the bench to "keep it as oral as possible." Nevertheless, few would argue with the premise that some form of pre-trial is essential in many cases under a form of procedure which does not rely upon development of elaborate pleadings as the basis for identification of the issues. See also Judge Charles Clark's opinion in *Padovani v. Bruchhausen*, 293 F.2d 546 (2d Cir.1961).

Equity Rule 38 provided for pre-trial hearings in equity cases and is very similar to Federal Rule 16. Section 1059(15F), Cumulative Supplement to Vol. 14 of the Code provided for pre-trial conferences in civil actions in the Circuit Court of Jefferson County and is very similar to Federal Rule 16. This statute was drawn so as to be workable under the system prevailing in the Jefferson County Courts for the several Circuit judges. It also contained a provision providing that nothing contained in the Code provisions shall impair the right to amend pleadings as provided in Code of Ala., Tit. 7, § 239. Pre-trial orders cannot be effective unless the judge has the right to disallow amendments to pleadings filed subsequent to the pre-trial hearing. However, this is not to suggest automatic disallowance of post pre-trial amendments. See Annot., *Trial of Issues Not Fixed at Pre-Trial*, 11 A.L.R.Fed. 786 (1972).

Although many details attendant to pre-trial will have to be resolved by local rule, such local rules will be made pursuant to the provisions of Rule 83, Local Court Rules. In that Rule it is expressly provided that local rules shall not in any manner be inconsistent with the Alabama Rules of Civil Procedure and it is further provided therein that said local rules shall not become effective until approved by the Supreme Court of Alabama.

Committee Comments to October 1, 1995, Amendment to Rule 16

The amendment to subdivision (a) modifies the present version of F.R.Civ.P. 16(a). It contains additional language that emphasizes that the trial court may, in its discretion, conduct a pretrial conference at any time. It also states the sense of the former rule whereby a party has a right to a pretrial conference on notice, provided the notice is served in sufficient time to permit the scheduling of a pretrial conference. Without such safeguard, a notice or demand for a pretrial conference could become a device for obtaining a continuance.

The amendment to subdivision (b) modifies the present version of F.R.Civ.P. 16(b). It makes a scheduling conference discretionary and it does not require that one be held within one hundred twenty (120) days after the filing of the complaint as is the case under F.R.Civ.P. 16(b).

The amendment to subdivision (c) modifies the present version of F.R.Civ.P. 16(c). It deviates from the federal rule by making express reference to the Alabama Civil Court Mediation Rules added to former Rule 16(6) by an amendment effective August 1, 1992.

The amendment to subdivisions (d), (e), and (f) comport those subdivisions to F.R.Civ.P. 16(d), (e), and (f), respectively, with no substantive modification.

Committee Comments to Amendment to Rule 16 Effective February 1, 2010

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37 and 45, which govern discovery of electronically stored information ("ESI"). The amendment to Rule 16 adds new paragraphs (b)(5) and (6) and renumbers former paragraph (b)(5) to (b)(7).

If discovery of ESI is anticipated by the parties, the issues unique to such discovery should be addressed early, hence the new provision in subdivision (b)(5) inviting the court to address any such issues in its scheduling order. However, many cases will not involve discovery of ESI, because the parties may be satisfied that traditional discovery – i.e., providing hard copies of materials – will be sufficient. Such may be the case when the parties do not possess a significant volume of ESI and production of hard copies is more efficient and will provide the needed information. In such cases, the court need not and should not

compel the parties to address ESI discovery issues in a scheduling order, at a discovery conference, or otherwise.

Recognizing that the volume of ESI produced may be exponentially larger than prior "paper discovery" and that the parties may wish to expedite the production of ESI, subdivision (b)(6) allows the parties to agree (and the court to adopt their agreement as its order) concerning nonwaiver of any claim of privilege or work-product protection in the event such materials are inadvertently produced. For example, the parties may agree that the producing party will initially produce responsive material without conducting a review for documents protected by the attorney-client privilege or materials protected as work product, with such a review to follow the receiving party’s review of the materials and its designation of which materials it desires. If privileged or protected materials are designated by the receiving party, the producing party may then assert the privilege or protection without having waived the privilege or protection by earlier producing such material.

Alternatively, to expedite production and to accommodate a fast-paced review of whether a claim of privilege or protection applies before production, the parties may agree that the claim of privilege or protection is not waived by virtue of the inadvertent production of such materials. Under such an agreement, if protected materials are inadvertently produced, the producing party may assert the privilege or protection postproduction and obtain return of the materials, with the receiving party's retaining its right to argue that the material in question is not privileged or protected in the first instance.

A corresponding change has been made in Rule 26(b)(6)(B), which addresses the procedure to be followed in the event of inadvertent production, regardless of whether the parties have entered into any agreement. Of course, Rules 16 and 26 are procedural in nature and do not address substantive waiver law, and, in the absence of an agreement, the question whether a producing party has waived a claimed privilege or protection will be decided under substantive waiver law. Although the court may not enter an order contrary to substantive waiver law in the absence of the consent of all parties, it may enter such an order with consent and enforce the terms thereof.

District Court Committee Comments

The pretrial procedure should be available in the district court but on such drastic modification as to render it unsuitable to refer to Rule 16(dc) in terms drawn primarily from ARCP 16. Consequently, Rule 16 has been rewritten in the form appearing herein. As a practical matter, the procedure envisioned by Rule 16(dc) is but a codification of the practice that has heretofore existed in many inferior courts.

Note from the reporter of decisions: The order amending, effective February 1, 2010, Rule 16, Rule 26, Rule 33(c), Rule 34, Rule 45, and Form 51A, and adopting effective February 1, 2010, Rule 37(g) and the Committee Comments to Amendment to Rule 16 Effective February 1, 2010, the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, the Committee Comments to Amendment to Rule 33(c) Effective February 1, 2010, the Committee Comments to Amendment to Rule 34 Effective February 1, 2010, the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, and the Committee Comments to Amendment to Rule 45 Effective February 1, 2010, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.