Agenda E-21
Rules
March 1991

ADDENDUM TO THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your committee has learned that the text and Advisory Committee's note to a proposed revision of Rule 16 that had been approved by the Advisory Committee on Civil Rules were inadvertently omitted from the materials actually submitted by the Standing Committee on Rules of Practice and Procedure to the Judicial Conference for its September 1990 meeting. Accordingly, although a brief description of the proposed change to Rule 16 was included in the Standing Committee's report to the Conference, the text and notes were not actually before the Judicial Conference when it approved the Standing Committee's report. Likewise, although a reference to a proposed amendment of Rule 16 is included in the transmittal letter from the Conference to the Supreme Court, dated November 19, 1990, the text and notes were not actually submitted to the Supreme Court. A supplemental submission with respect to Rule 16 was made by the Administrative Office to the Supreme Court on December 27, 1990, but the material so transmitted represented an earlier draft and not the revision that had been approved by the Advisory Committee and the Standing Committee.

For your information, the correct text of proposed Rule 16 that should have been transmitted along with the Advisory Committee notes is attached to this addendum.

In view of the foregoing, it is the conclusion of your committee that the Conference has not, in fact, approved any proposed revision of Rule 16 and that the Supreme Court should be asked to disregard the proposed Rule 16 amendment now pending before it. Your committee further concluded that none of the four changes to Rule 16 which the Standing Committee on Rules of Practice and Procedure had originally approved is critical. Three of the changes were included only to provide a convenient cross-reference to other portions of the Rules. The fourth is a substantive change but not of great consequence. The Advisory Committee on Civil Rules is now considering several other changes to Rule 16 and the four changes contained in the 1990 revision can conveniently be included in the version that the Advisory Committee will be submitting at a later time.

Recommendation 5: That the Conference recommend to the Supreme Court that it disregard any proposed revision of Rule 16 of the Federal Rules of Civil Procedure, at this time. For the sake of clarity, it is explicitly stated that this recommendation to disregard applies only to Rule 16 and not to recommendations for amendments of other rules.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

February 25, 1991

TO: Chairman and Secretary, Standing Committee on Rules

My understanding is as follows:

1. The text and Advisory Committee's note to a proposed revision of Rule 16 that had been approved by the Advisory Committee on Civil Rules were inadvertently omitted from the materials actually submitted by the Standing Committee to the Judicial Conference for its September 1990 meeting. Accordingly, although a brief description of the proposed change to Rule 16 was included in the Standing Committee's report to the Conference, the text and notes were not actually before the Judicial Conference when it approved the Standing Committee's report. Likewise, although a reference to proposed amendment of Rule 16 is included in the transmittal letter from the Conference to the Supreme Court dated November 19, 1990, the text and notes were not actually submitted to the Supreme Court.

2. A supplemental submission with respect to Rule 16 was made by the Administrative Office to the Supreme Court on December 27, 1990, but the material so transmitted represented an earlier draft and not the revision that had been approved by the Advisory Committee and the Standing Committee.

3. The Supreme Court is being advised of the error and asked to disregard the supplemental submission with respect to Rule 16 and perhaps to withhold action on the proposed Civil Rules amendments until after the Judicial Conference's March 1991 meeting.

4. The Standing Committee will be submitting to the Judicial Conference an amendment to its report for the March 1991 meeting. After noting the problem regarding revision of Rule 16, the amended report may recommend to the Judicial Conference:

(A) that the Conference recommend to the Supreme Court that it approve for transmission to Congress the revision of Rule 16 (with Committee Notes) that had earlier been approved by the Advisory Committee and Standing Committee, or

(B) that the Conference recommend to the Supreme Court that it disregard any proposed revision of Rule 16 at this time and approve for transmission to Congress only the proposed revisions of the Civil Rules that had earlier been voted on by the Conference and sent to the Supreme Court.

You have asked for my comments as to (A) or (B) above.

I believe that (B) is the better course of action. None of the four changes in Rule 16 included in the revision the Advisory Committee had recommended is critical. Three of the changes were included only to provide a convenient cross-reference to other portions of the Rules. The fourth--changing the date prescribed for scheduling orders from 120 days after service of a complaint to 60 days after appearance of a defendant--is a substantive change, but not of great consequence. The Advisory Committee is presently considering several other changes to Rule 16, and the four changes contained in the 1990 revision can conveniently be included in the proposed changes we will be submitting to the Standing Committee later this year. This will have the advantage of avoiding the confusion that could result by having Rule 16 amended in successive years.

You asked whether in the other proposed revisions of the Civil Rules currently before the Supreme Court there are any technical amendments that should be suggested in light of the Judicial Improvements Act of 1990. My review indicates that the only change of text that might be suggested is in the proposed revision of FRCP 72(a). In the caption of this rule, and at four places in the rule, "magistrate," "magistrates," and "magistrate's" should be changed to "magistrate judge," "magistrate judges," and "magistrate judge's," respectively. (To the extent not dealt with by the Supreme Court, the Advisory Committee will be submitting these, together with similar changes in other rules, later this year.)

I hope that these comments, which are my own and have not been discussed with other members of the Advisory Committee, will be of some help.

Sincerely,

Sam C. Pointer, Jr., Chairman
Advisory Committee on Civil Rules

cc: Professor Paul D. Carrington

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

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(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~~ 60 days after ~~filing~~

~~of the complaint~~ the appearance of any defendant. 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;

(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 disposition of issues, claims, or defenses pursuant to Rule 56, provided that all parties shall have had reasonable

opportunity to discover and present material pertinent to the disposition;

(5 6) 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 7) the advisability of referring matters to a magistrate or master;

(7 8) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8 9) the form and substance of the pretrial order;

(9 10) the disposition of pending motions;

(10 11) 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;

(12) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, or cross-claim or with respect to any particular issue of fact arising in the case;

(13) 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 entered pursuant to Rule 50(a) or a judgment on partial findings pursuant to Rule 52(c); and

(14) 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.

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ADVISORY COMMITTEE NOTES

Subdivision (b). The purpose of this amendment is to provide an appropriate time for the initial scheduling order required by the rule. The former rule allowed 120 days from the date of filing of the complaint. This was not an appropriate time because Rule 4(m) allows 120 days after filing for service of the summons, and service may therefore not be effected in many cases until late in that period. The scheduling order cannot be appropriately made until at least one defendant has appeared in the action and is available and prepared to participate in the conference. The revision allows only 60 days, but measures the time from the date of a defendant's appearance. In cases involving multiple defendants, the court is required to exercise discretion in scheduling in order to protect the interests of those who are late in being joined or served.

Subdivision (c). This subdivision is amended to reflect changes in Rules 50 and 52, and to provide appropriate cross-references to Rules 42 and 56.

New paragraph (5) calls attention to the appropriate uses of Rule 56 as a means of reducing the scope of controversy. Timely use of the provisions of that rule, especially subdivision (d) can narrow the compass of discovery, and thereby result in substantial economies to the parties, who may otherwise be obliged to discover factual material bearing on issues that are not genuinely in dispute or that are immaterial as a matter of law.

Use of Rule 56 at a pretrial conference is not uncommon and has been approved by courts of appeals. E.g. Portsmouth Square, Inc. v. Shareholders Protective Committee, 770 F. 2d 866, 869 (9th cir. 1985). The court should, however, in every case employ caution comparable to that employed when a motion under Rule 12(b)6) is converted into a motion under Rule 56. Cf. Davis v. Howard, 561 F. 2d 565, 571 (5th cir., 1977); SCHWARZER TASHIMA & WAGSTAFF, CAL. PRACTICE GUIDE: FED. CIV. PRO. BEFORE TRIAL 9.233 (1989). This means that any party opposing a disposition be given a reasonable opportunity to employ discovery and to prepare papers in opposition to the disposition.

A court in considering a motion for summary judgment in a non-jury action may determine from the materials presented on the motion or at pretrial conference that a controlling issue may be quickly resolved at trial. When this occurs, the court may usefully consider the employment of the provisions of new paragraphs (12) or (13).

New paragraph (c)(12) calls attention to the possible use of Rule 42 to structure a trial. When it appears that a very long trial is planned by the parties, the court may employ that rule to conduct a separate trial on an issue that may be dispositive of a case. Or the rule may be employed to assure that the proceeding does not overtax the trier of fact. Cf. In re Japanese Electronic Products Antitrust Litigation, 723 F. 2d 319, 366-369 (Gibbons, J., concurring).

Paragraph (c)(13) is added to call attention to the revisions of Rules 50 and 52 that facilitate the use of the authority of the court to enter judgment as a matter of law as soon during trial as it appears that this is the proper disposition of a claim or action. The amendments to these rules may enable the court to spare the parties and itself the expense of prolonged trials in cases that can be resolved on the basis of the evidence bearing on a single issue by scheduling the trial to reach a probably dispositive issue early in the trial. Trials of complex cases may be scheduled accordingly.