

State of North Dakota

JOINT PROCEDURE COMMITTEE

CHAIR
JUSTICE MARY MUEHLEN MARING
STAFF ATTORNEY
MICHAEL J. HAGBURG

FIRST FLOOR JUDICIAL WING
600 E BOULEVARD AVE DEPT 180
BISMARCK, ND 58505-0530

October 5, 2011

RECEIVED BY CLERK
SUPREME COURT
OCT 05 2011

Honorable Gerald W. Vandewalle, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Rule 16, N.D.R.Civ.P., Pretrial Conferences, Scheduling, Management

Dear Chief Justice:

The Supreme Court recently referred Rule 16 to the Joint Procedure Committee for discussion. The Court asked the Committee to consider whether language that had been omitted from the rule in amendments effective March 1, 2011, should be restored. The omitted language concerned pretrial conferences in matters in which the complaint was served more than six months before being filed.

The Committee addressed Rule 16 at its September 30, 2011, meeting. In the Committee's opinion, the omitted language should be restored to the rule. A rule proposal that would restore the omitted language is attached to this letter.

Thank you for referring this matter to the Committee.

Sincerely,



Mary Muehlen Maring
Chair, Joint Procedure Committee

MH:kh
attachment

RULE 16. PRETRIAL CONFERENCES, SCHEDULING, MANAGEMENT

(a) Purposes of a pretrial conference. In any action, the court may, and when any of the triggering events specified in Rule 16(b) occur must, order the attorneys and any self-represented parties to appear in person, telephonically, or by other electronic means, 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;

(5) facilitating settlement; and

(6) discussing the desirability of using alternative dispute resolution.

(b) Scheduling; Triggering events.

(1) Triggering events. The court must conduct a pretrial conference for the purpose of entering a scheduling order if:

(A) more than six months have passed since filing of the summons and complaint or answer without final disposition of the case or filing of a dispositive motion;

(B) the summons and complaint or answer was served more than six months before filing and ninety days have passed since filing without final disposition of the case or filing of a dispositive motion;

22 ~~(B)~~ (C) a Rule 40(e) notice has been issued and any response to the notice contained
23 a request that the case be left open; or

24 ~~(E)~~ (D) any party makes a written request for a pretrial conference to enter a
25 scheduling order.

26 (2) When conference held. The pretrial conference must be held within 60 days of the
27 triggering event.

28 (c) Attendance and matters for consideration at a pretrial conference.

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

34 (2) Matters for consideration. At any pretrial conference, the court may consider and
35 take appropriate action on the following matters:

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

37 (B) joining other parties and amending the pleadings, if necessary or desirable;

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

40 (D) avoiding unnecessary proof and cumulative evidence, and determining limitations
41 or restrictions on the use of testimony under N.D.R.Ev. 702;

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

- 43 56 and other motions;
- 44 (F) controlling and scheduling discovery;
- 45 (G) resolving issues relating to disclosure or discovery of electronically stored
46 information, including the form or forms in which it should be produced;
- 47 (H) scheduling the identification of witnesses and documents, scheduling the filing
48 and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
- 49 (I) referring issues to a master;
- 50 (J) settling the case and using special procedures to assist in resolving the dispute;
- 51 (K) determining the form and content of the pretrial order;
- 52 (L) disposing of pending motions;
- 53 (M) adopting special procedures for managing potentially difficult or protracted
54 actions that may involve complex issues, multiple parties, difficult legal questions, or unusual
55 proof problems;
- 56 (N) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim,
57 third-party claim, or particular issue;
- 58 (O) ordering the presentation of evidence early in the trial on a manageable issue that
59 could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a
60 judgment on partial findings under Rule 52(c);
- 61 (P) establishing a reasonable limit on the time allowed to present evidence;
- 62 (Q) allocating peremptory challenges; and
- 63 (R) facilitating in other ways the just, speedy, and inexpensive disposition of the

64 action.

65 (d) Pretrial orders. After any conference under this rule, the court must issue an order
66 reciting the action taken. This order controls the course of the action unless the court
67 modifies it.

68 (e) Final pretrial conference. The court may hold a final pretrial conference to
69 formulate a trial plan, including a plan to facilitate the admission of evidence. The conference
70 must be held as close to the time of trial as is reasonable, and must be attended by at least one
71 attorney who will conduct the trial for each party and by any self-represented party.

72 The court may modify the order issued after a final pretrial conference only to prevent
73 manifest injustice.

74 (h) Sanctions.

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

77 (A) fails to appear at a pretrial conference;

78 (B) is substantially unprepared to participate, or does not participate in good faith, in
79 the conference; or

80 (C) fails to obey a scheduling or other pretrial order.

81 (2) Imposing fees and costs. Instead of or in addition to any other sanction, the judge
82 must order the party, its attorney, or both to pay the reasonable expenses, including attorney
83 fees, incurred because of any noncompliance with this rule, unless the noncompliance was
84 substantially justified or that other circumstances make an award of expenses unjust.

85 EXPLANATORY NOTE

86 Rule 16 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March
87 1, 1996; March 1, 2000; August 1, 2004; March 1, 2008; March 1, 2011;_____.

88 Rule 16 was amended, effective March 1, 2000, to add a new subdivision (a)(6)
89 relating to alternative dispute resolution. Under N.D.R.Ct. 8.8, all parties in civil cases are
90 required to discuss early alternative dispute resolution and must file a statement with the
91 district court regarding participation in ADR.

92 Rule 16 was amended, effective March 1, 2011, in response to the December 1, 2007,
93 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
94 were changed to make the rule more easily understood and to make style and terminology
95 consistent throughout the rules.

96 Subdivision (a) was amended and new subdivisions (b), (c) and (e) were added,
97 effective August 1, 2004, to incorporate a mechanism to trigger a pretrial conference when
98 certain events occur in an action.

99 Subdivision (d) was amended, effective March 1, 2008, to add issues related to
100 electronically stored information to the list of possible subjects for discussion at a pretrial
101 conference.

102 Subdivision (d) was amended, effective March 1, 1996, to follow the 1993
103 amendment to Fed.R.Civ.P 16(c).

104 Subdivision (h) was amended, effective March 1, 1990. The amendment is technical
105 in nature and no substantive change is intended.

106 Sources: Joint Procedure Committee Minutes of September 30, 2011, pages _____;
107 September 25, 2008, page 7; April 24-25, 2008, pages 25-26; October 11-12, 2007, page 3;
108 September 18-19, 2003, pages 11-18; April 24-25, 2003, pages 26-30; May 6-7, 1999, pages
109 7-8; January 28-29, 1999, pages 7-12; January 26-27, 1995, page 10; September 29-30, 1994,
110 pages 22-23; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 26-
111 28; January 20, 1984, pages 18-23; September 18-19, 1980, pages 12-13; September 20-21,
112 1979, page 11; Fed.R.Civ.P. 16.

113 ~~Statutes Affected:~~

114 ~~Superseded: N.D.R.C. 1943 §§ 28-1101, 28-1102, 28-1103, 28-1104.~~

115 Cross Reference: N.D.R.Civ.P. 15 (Amended and Supplemental Pleadings),
116 N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 36 (Requests
117 for Admission), N.D.R.Civ.P. 40 (Assignment of Cases for Trial), N.D.R.Civ.P. 41
118 (Dismissal of Actions); N.D.R.Ct. 8.4 (Summons in Action for Divorce or Separation),
119 N.D.R.Ct. 8.8 (Alternative Dispute Resolution).