Rule 16, the Litigator's Forgotten Ally

by Joel B. Rosen and R. Monica Hennessy

What would you think if we told you that to get what you want from a federal court you need merely ask, so long as you ask in the right way? To give you what you need, courts require authority to act. For all pretrial matters, the broad authority to tame the tempest of litigation comes from Rule 16.

If there is one word that describes the pretrial process under the authority of Rule 16, it is "discretion." The court has it, and the litigator's principal challenge is to move the court to exercise it. Courts are creatures of habit. Your job then is to give a judge a reason to exercise this discretionary authority to increase your chances of success. Better yet, put the judge in your shoes by supplying context for your request, and success is all but assured.

And how, you may ask, does Rule 16 fit into this picture? In our 28 years of combined experience inside the court as a judge and a career law clerk, we have observed that, to the typical litigator, Rule 16 merely conjures vague images of uneventful court conferences during which settlement and scheduling issues may be discussed. This might sound familiar. You see the date on your calendar. A few weeks (or more likely a few days) before the conference, you might reach out to your adversary and chat about discovery. You might review the discovery and consider what remains to be done. You then arrive at the conference, and the judge asks you where you are with discovery. If the case seems on track, you will receive a revised schedule with more dates and go home. If you were truly prepared, you may have noted discovery difficulties in the offing—large, looming topics that may become the case's (and by extension the court's) albatross. However, because you do not want to upset the court or tip your hand to your adversary, you remain mum. By making that choice, you will have passed up a golden opportunity to put your cause in context, to have the issue viewed in the light most favorable to your client, and to move the court to exercise its discretion to your benefit.

Rule 16, the great enabler, breathes life into the mandate of Rule 1 to construe and administer the rules to secure "just, speedy, and inexpensive determination of every action." Rule 16 imbues federal judges with broad discretion in every aspect of pretrial procedure. It authorizes judges to manage cases early and often, with the express objective of maximizing efficiency and minimizing waste. If used properly, the court's discretion under Rule 16 can further your goals in the case.

For instance, in discovery you are looking to extract all useful information from your adversary while simultaneously shielding your client from burden and abuse. Through Rule 16, you can accomplish just that and impress your client with your ability to navigate the legal labyrinth. But to get there you have to ask the judge in a way that allows for action. In essence, Rule 16 hands judges the keys to the kingdom to be used in their discretion. It sounds really powerful, right? How, you may ask, could you, a savvy litigator, have overlooked its brilliance? Recall in one of the *Indiana Jones* movies that the Holy Grail was not the most opulent but the most ordinary of chalices. While Rule 16 on its face may not be thrilling, it can be a significant ally to a litigator. To whet your appetite, we will discuss some of the key provisions of the Rule and show you how they can be used to your advantage.

Parsing the rule: Resist the eye-glazing reflex and see the power. The first subsection of Rule 16 lays the groundwork for the court's essentially absolute discretionary power. Through Rule 16, the court can expedite the case. The court can take total control of case management so that the case will not be protracted. The court can discourage "wasteful" pretrial activities (and guess who has the discretion to determine what is wasteful). The court can improve the quality of the trial by

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requiring a more thorough preparation. The court can facilitate settlement. And, failing settlement, the court can organize the case for trial.

The court accomplishes these objectives by "consulting with the parties," as provided for under Rule 16. Because the court enters these orders after "consultation," the court will feel justified in relying on its orders to withhold or to permit virtually any pretrial activity that may significantly affect the case.

Take a look at subsection (c) (no, really, take a look at it). As you can see, it covers in laundry-list fashion essentially any topic relevant to federal litigation. And, when used in combination with subsections (a) and (b), there is virtually no pretrial relief that a judge may not grant. To give you a flavor for the breadth of subjects, subsection (c) authorizes a court to consider and take appropriate action with respect to eliminating frivolous claims or defenses, amending pleadings, controlling the schedule and scope of discovery, ordering separate trials pursuant to Rule 42(b), organizing the presentation of evidence at trial, facilitating motions for judgment as a matter of law, and limiting the time to present evidence at trial, to name just a few.

Take, for example, a discrimination claim alleging age as the basis for discrimination. Federal court dockets are replete with such cases, and the judges are quite familiar with their twists and turns. You represent the employer and, because you have interviewed the actors and reviewed the internal investigation, you know that some witnesses have made vague reference to the plaintiff's health. Your adversary pleads only age discrimination. You have no reason to believe that the claim should be a handicap discrimination claim as well, and you certainly have no obligation to hand your adversary possible additional claims. Nevertheless, there is always the potential that the plaintiff may raise a claim for handicap discrimination at some point in the litigation, toppling your well-orchestrated defense. Rule 16 can come in handy in that instance, providing you with a tool to prevent your adversary from changing the case at the last minute.

Use the Rule 16 conference as an opportunity to discuss with the court the substance of the case and the issues involved. Use clear language, such as, "Your Honor, this discrimination case concerns the plaintiff's claim of age discrimination." Throw in phrases like "the plaintiff has claimed *only* age discrimination." Set the stage and put the case in context at every meeting and in every letter and submission to the court. Provide your discovery promptly so that the plaintiff has the same information that you have. Then, if the plaintiff's counsel decides at some point that the age claim is weak, counsel cannot easily claim that he discovered a new basis for the discrimination that was previously unknown. You will have an ocean of documents otherwise limiting the claim to age discrimination. And you will have provided the court ample support to exercise its discretion to preclude a last-ditch effort to save a weak case or complicate a simple one. Along these same lines, with the aid of Rule 16 and proper groundwork, a court can issue an order precluding evidence that is relevant, and even critical, to your adversary or preventing your opponent from bringing an unscheduled motion for summary judgment.

It is Rule 16 that permits the court to consider pretrial motions in limine, including motions under Rule 702 and "advance rulings on admissibility of evidence." Fed. R. Civ. P. 16(c)(3), (4). Many litigators fail to appreciate that Rule 16 can support a request to limit admissibility at any time in the pretrial process. This means that you need not wait until the eve of trial to move to exclude evidence.

Consider a complex case involving a pharmaceutical patent dispute with an Abbreviated New Drug Application (ANDA) generics twist. The defendant, the ANDA applicant, wanted to gain access through discovery to all manner of underlying research from the plaintiff, who was the original patent holder. On the surface of the case, and in the context of the broad discovery scope of federal rules, the discovery requests appeared to be perfectly logical. The plaintiff, represented by a group of rule-savvy attorneys, however, opposed the discovery requests, arguing that the scope was not appropriate. Recognizing that their scope objection would provide only a temporary fix, leaving open a window for later intrusion, the attorneys did not stop there. Instead, relying on Rule 16, the lawyers also made an application to the court to stay discovery on that particular research pending determination of the admissibility of the research should the matter proceed to trial. They argued that this would be an issue that could be isolated and determined. And it would create an opportunity early in the litigation to eliminate the possibility of exposing highly sensitive information, a motion well worth pursuing given the intense battleground for control of patents and development of generics.

When strategically applied, you may unleash the power of Rule 16, move the court to use its discretion, and maneuver virtually any pretrial activity to your client's advantage.

Mind the local rules. Let us assume that before the Rule 16 conference you have thoroughly analyzed your case and identified the orders you would need to further your strategy in the case. And armed with your context (i.e., story) and your authority (i.e., Rule 16), you are prepared to appeal to the court's discretion. You must take one more step, however, to be completely prepared. Before asking the court to provide relief under Rule 16, review the local rules. In recognition of the fact that each case is unique, Rule 16 authorizes district courts to promulgate local rules to provide additional flexibility in case management. Every judge in the courthouse will be familiar with the local rules of their court, and indeed many may have had a hand in drafting them.

Local rules include such provisions as specific timelines for motion practice, sometimes even including reference to a procedure for supplementing motions. Local rules often incorporate concepts of courtesy and professionalism, in deference to a fundamental premise of federal litigation condemning trial-by-ambush and other gladiatorial tactics. To that effect, local rules often require attorneys to reach out to each other to manage issues or disputes before involving the court. Even if the local rules do not, a court will look more favorably on the applicant who has attempted to minimize cost and maximize efficiency by seeking consent of the adversary. Where consent does not appear likely, there is still the opportunity to simplify the issues before seeking court involvement. In a typical motion cycle, judges receive countless requests for discovery intervention. The vast majority of these requests include issues that the parties could have worked out among themselves. We have observed on countless occasions that, when left together in a closed room at the courthouse, adversaries tend to come to a resolution or otherwise to narrow disputes on their own. The worst thing you can assert on a discovery application is general complaints about your adversary's discovery responses

without any indication that efforts have been made to resolve the issues. If the rules require that attorneys attempt to resolve the discovery dispute before bringing it to the court's attention, be sure to let the court know that you have attempted to do so and that those issues before the court are the ones that could not be resolved despite counsel's best efforts. Believe us, the court will appreciate your efforts.

Once you have conferred with your adversary, look again to the local rules for your next step. Many local rules direct litigators to write to the court before filing formal motions. Whatever the method of contact, whether formal motion or letter application, again, let the court know the efforts you have made to minimize the dispute before bringing it before the court. Do not forget to provide a draft order with your application or opposition. Refer specifically to Rule 16(c)(11), and request the relief. Identifying an authorizing rule will assist the court in responding promptly to your request. Follow this process each time an issue arises, and your effectiveness will increase.

To go or not, that is the question. To ensure that Rule 16 works to your advantage and not to your detriment, the right person must attend the court conference. Rule 16 demands that attorneys become partners with the court in effectuating the objectives of the federal rules. The rule requires that "[a]t 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." Fed. R. Civ. P. 16(c). In short, power talks. It is risky, to say the least, to send to a Rule 16 conference an inexperienced associate without full knowledge of the case or authority to make decisions. Imagine (and we have seen plenty of instances of this) that you send this ill-prepared person, whom we will call "the pawn," to the conference and your adversary raises an issue that the court wants to address right there. The pawn cannot, through no fault of his own, respond substantively. But you could have, and everyone knows it. The best-case scenario has the judge adjourning the conference for another day when you are available. The worst-case scenario, which is not unlikely, finds the judge sanctioning you for failing to appear. Or, if you happen to be someone less than the top cheese at your firm, the judge might even pick up the telephone and call the managing partner, whom the judge has known for 20 years, and tell that long-time colleague how you are not giving your cases the proper attention (yes, we have seen this, too). We recommend that you do not take this chance.

Instead, ask for an adjournment. Rather than send an attorney with insufficient knowledge of the case, a better practice would be to call the court and request an adjournment so that an attorney who is familiar with the case may attend. The worst that can happen is that the court will say no. At the very least, you would find out whether the court is approachable on such subjects. Follow up with a confirming letter stating that you have requested an adjournment because you are not available, your request has been denied, and you will have a colleague attend in your stead. A letter like this will remind the court of your request (the court gets countless such requests each week and truly may not recall) and will allow the court to set the proper expectation for the conference and perhaps save your understudy unnecessary grilling and potential embarrassment. If the court grants your adjournment, then you have the benefit of being present. If the court does not grant adjournment, you will at least be aware of the court's level of flexibility. It is a win-win.

Do not make the mistake of waiting until the last minute to approach the court for an adjournment. As soon as you know you cannot attend, contact the court immediately. Of course, before making such a request, you must first call your adversary. You may have built up a mountain of acrimony, but you have to swallow your ire for a few minutes if you want your application to be considered seriously in federal court. Pick up the phone and let your adversary know that you will be contacting the court for an adjournment and that you will advise the court whether you have your esteemed colleague's approval—or disapproval.

Only after you have given it the old college try may you call the court and ask, nicely (yes, it matters just as much now as in kindergarten), how the court would like to consider your application for an adjournment, by telephone or in writing. Be prepared to explain your needs on the phone. Keep it brief and to the point. If the clerk directs you to send a letter, send one that succinctly outlines your problem. This is not the time to make the judge aware of all of your disdain for your adversary's tactics. This is the moment to crack open your dusty federal rules and throw in a Rule 16 reference. Do not ask for more than you need. Maybe you can still make the conference if it is conducted by telephone. The rule specifically permits telephone conferences, which may allow you to participate.

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See Fed. R. Civ. P. 16(b). You may be surprised to find that even the courts with the most intractable reputation will be moved by such an application.

More than any other Rule 16 conference, the door to the Joint Final Pretrial Conference has a permanent sign that reads "No Stand-Ins Allowed." The attorney who appears at this conference must be one of the trial attorneys. And to this conference, you are to bring a very important document: the Joint Final Pretrial Order. It is important because the joint final pretrial order entered pursuant to Rule 16(e) supersedes the pleadings: The complaint, answer, and counterclaims no longer exist. "The order shall control the subsequent course of the action unless modified by a subsequent order." Because the order represents a joint effort of the parties, due process is satisfied. These orders have many elements, but they typically identify the witnesses who will appear at trial, list exhibits to be used, stipulate to facts, and identify claims and defenses. Do not overlook the importance of this document. Make sure that every claim or defense you continue to pursue appears in the order. If you forget something, such as a claim or a witness, the standard for amending such an order is quite high: manifest injustice.

What constitutes manifest injustice will have a familiar ring in its focus on fairness, efficiency, diligence, and lack of

prejudice. Courts consider many factors, including (1) prejudice or surprise to the nonmoving party, (2) whether the party has the ability to cure the prejudice, (3) how much the modification would disrupt the orderly and efficient trial of the case, (4) whether the movant acted in bad faith, (5) the diligence of the movant in discovering the necessity for amendment earlier, (6) the validity of the justification offered by the party, (7) the significance of the proposed amended information, and (8) whether the decision to amend is a matter of a new strategy or tactic. The more crucial you can show the need for the change to be, the more likely your request will meet the manifest injustice standard. Carry with you the old adage, 99 percent of life is just showing up, and you will fare well with federal court conferences.

Reputations: You can't change them like a pair of worn socks. In the world of discretionary decisions, your credibility with the court looms large. Judges share information about attorneys. If you lose your reputation with one judge, there is a fair chance that the other judges in the courthouse will hear about it. It is part of their due diligence.

Think of your reputation like a glass of water, transparent in its purity. If the water were to spill on the ground, you might be able to recover a good deal of liquid before it disperses, but the dirt will cloud the glass. It is true that the dirt will eventually settle, leaving the glass clear once again. But it will not take much effort to stir it up again; better never to have spilled it in the first place.

Preserve your reputation by being straight with the court. Judges are well aware of the vagaries of discovery. If you are seeking new information, do not try to sell it as a supplement to discovery under Rule 26(e). Your adversary will not hesitate to point out that the theory is new, and you will lose credibility with the court. Your reputation stays with you forever; do not sell it for a short-term return. In the context of a Rule 16 request, which is subject to the court's discretion, the key to success is convincing the court of your diligence, and you cannot afford to have chinks in your armor.

Diligence: It's all about you. Demonstrating diligence is key to modifying any orders under Rule 16. Suppose you seek to modify the court's scheduling order. In that case, *you* are the focal point of the court's analysis in determining whether there is good cause for modification. To show good cause, you must show that you were diligent—not idle, indolent, or cavalier. What does it mean to work diligently? Diligence, as with many things, is in the eye of the beholder. Learn the modus operandi of the judges before whom you will appear. Take the time to research any opinions or orders that may have found their way to an online search engine. You can gain great understanding of whether a judge will exercise discretion by reading between the lines of issued decisions.

To let you in on a little secret, federal judges are human beings. Though there are exceptions, judges perceive, perhaps contrary to popular opinion, that lawyers are human beings as well, with lives and practices that may extend beyond the case before that particular court. They are not unmoved by dilemmas faced by attorneys, including personal dilemmas. Judges, however, have obligations that extend beyond any particular case. It is a bedrock concept of our societal construct, dating all the way back to the Magna Carta (and you thought the last time you would hear about that was in elementary school): "To no one will we sell, to no one will we deny or delay right or justice." So, while a judge may feel compassion for an attorney who was not able to identify the needed discovery during the discovery period, to persuade the judge to exercise discretion to re-open discovery, the attorney must demonstrate more than the human factor.

To do so, you have to give the judge context. Take time with the court to review the facts of the case. This will allow the court to understand the necessity for the information you seek or the adjustment you request. Then refer to Rule 16, which enables the judge to re-open discovery. Context is more than just the facts, it is also the process by which you have arrived at your current position of need. Without context, your actions will appear haphazard or careless—and certainly not diligent. If you can establish a reasonable context, you can prevail.

Take the judge down your path of thought. Guide the judge through the process. We often forget what we did not know before we started the case. You have been living with the case, while, to a federal judge, your case will be one of hundreds of active cases on her watch. If you find yourself in the unenviable position of having missed a critical piece of evidence, walk back through the process, in your mind and with your documents, then build your way back to the present. This will assist you in establishing context for the judge and enable the judge to find that you have, indeed, been diligent.

Good cause: It's not just about you. A fair number of courts have elevated diligence above any other element of "good cause." Indeed, some courts have noted that if there is no diligence, the inquiry stops. It appears from these decisions that courts have jettisoned fairness, reasonableness, and prejudice from the analysis. But this is not so. Think again of context. Diligence is devoid of meaning in a vacuum.

When you are faced with an argument that you have been less than diligent, address first the lack of prejudice to the other party. We have seen attorneys perform feats of great wonder in demonstrating prejudice on behalf of their own client, and you need to focus on overcoming these arguments. The judge already knows that the status quo is bad for you; you are making the application, after all. Establish your client's context, but do not dwell on it. Quickly move on to how it does not prejudice your adversary. If, for example, you want to amend your complaint, explain to the court how, after two years of litigation, it will not prejudice the other party. Look at the discovery amassed to date. Does it cover the documents and testimony your adversary would need to support the defense to your new claim? Consideration of an opponent's case can only help us prepare our own case—in every aspect of litigation.

Fairness and reasonableness incorporate the prime mover, Rule 1. Talk about the complexity of the case, the volume of discovery necessary, the number of witnesses over whom none of the litigants had any control, the privilege issues that required resolution. Once you have addressed these items, move on to the concerns of Jane and John Q. Public. If the final pretrial conference—or even more significantly, the trial date—was set, a court will be loath to delay the case by modifying a scheduling order. But focusing on the essential fairness and reasonableness of the relief you seek in the context of the case as a whole can lead a judge to find that you have worked in concert with the rule's mandate to "facilitate the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(16).

Third parties are part of discovery, too. Courts will not easily be moved to exercise discretion to modify a scheduling order because you failed to plan properly for third-party

discovery. As Rule 16 scheduling orders govern all discovery, they also govern discovery sought from third parties by way of Rule 45 subpoenas. Courts understand that involving third parties may require additional time. If a Freedom of Information Act request is pending from the inception of discovery, then you will have a much better chance of obtaining an extension of the discovery schedule than if you have not yet even made the request. When you are considering case development and strategy, consider third-party discovery at the outset rather than making the mistake of waiting until you complete party discovery. Courts routinely grant applications for protective orders to prevent untimely discovery that could have been sought within the scheduling order's limits. Do not get caught on the short end of that argument.

Be proactive, not reactive. One of the cardinal rules of influencing the court to exercise its discretion in your favor is to be proactive. Take the example of a burdensome request for discovery early in the case. You have two choices. You could object. Then your adversary will prepare a motion to compel, and you will find yourself before the court defending your position. Instead, be proactive, using Rule 16. Put yourself in the driver's seat. Rather than waiting for motion practice, you could write to the court and request a Rule 16 conference to discuss the complexities of the case and your need for guidance. The court may not grant a conference, in which case you will have no choice but to follow the former route. If the court does grant a conference, however, you will have created an opportunity to access the court's discretion through Rule 16.

If you want to increase your chances of having a request for a conference granted, avoid aggressive, accusatory, and incendiary epithets tossed blithely at your adversary in your letter to the judge. In our many years on the bench and with the court, we have seen countless such letters. They were not persuasive to us, and we doubt that they are persuasive to other jurists. Rather, such letters often lead a court to consider the request merely an opportunity to posture with your adversary rather than a viable opportunity to manage the case effectively. When you are tempted to add in superfluous barbs, shake your head and focus on the facts. Refer to the proper section of Rule 16, and raise your issue with the court by painting a contextual picture and highlighting your diligence.

One final word. This discussion is merely the tip of the iceberg comprising the many functions of Rule 16. The court's discretion under Rule 16 is as broad and deep as the sea, and the potential uses of the rule are as numerous and varied as the creatures who live there. If you bear in mind the forces that affect the waves of discretion and use Rule 16 to chart your course, you will smoothly navigate your way to successful litigation. ◻