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RULE 16(B)(4): IS "GOOD CAUSE" A GOOD THING? WHY I HATE SCHEDULING ORDERS

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INTRODUCTION

Federal Rule of Civil Procedure ("Rule") 16 requires courts to issue a scheduling order setting deadlines for the completion of various pretrial proceedings.[1] Rule 16(b)(4) provides that the schedule set by the court "may be modified only for good cause and with the judge's consent," but does not define what is meant by "good cause." This article discusses the vastly different approaches which courts have taken in defining and applying the "good cause"

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[1] Editor's Note: Hereinafter, all citations to the Federal Rules of Civil Procedure will follow this designation.

requirement, and highlights the potentially drastic consequences which may flow from noncompliance with that requirement.

I. THE "GOOD CAUSE" STANDARD

I've had the privilege of serving as a United States Magistrate Judge for over 17 years, and truly enjoy most aspects of the job. Recently, however, a young attorney filed a motion which reminded me - yet again - why I say "most." Throwing himself on his sword, the attorney confessed that he had inadvertently miscalendared the deadline for his expert witness disclosures set by my Rule 16 scheduling order, and he requested an extension. Although the deadline had already expired, he explained that opposing counsel did not oppose his request, and argued that no prejudice would result.

If it were strictly up to me, I would have granted the motion in a heartbeat, thinking "there but for the grace of God, go I." However, my authority to act is constrained by the Federal Rules of Civil Procedure. "Promulgated pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, those Rules are binding upon court and parties alike, with fully the force of law."[2] While the Rules "should be liberally construed," "they may 'not be expanded by disregarding plainly expressed limitations'."[3] One such limitation is found in Rule 16(b)(4), which provides that a scheduling order "may be modified only for good cause and with the judge's consent."

Although the Rules are intended to "promote procedural uniformity across the federal courts,"[4] one will search in vain for a uniform definition or application of Rule 16(b)(4)'s "good cause" requirement. The 1983 Advisory Committee Notes state that "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

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[2] *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020).

[3] Schlagenhauf v. Holder, 379 U.S. 104, 121 (1964).

[4] Rodriguez v. Hirshberg Acceptance Corp., 62 F.4th 270, 273 (6th Cir. 2023). *See also* 1 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, §1.21(1)(b) (Daniel R. Coquillette, et al. eds., Matthew Bender 3d ed. 2023).

the extension."[5] While many courts have adopted this definition, holding that diligence is indispensable to a finding of good cause,[6] others allow consideration of additional factors, such as prejudice.[7] Some courts have even suggested that Rule 16(b)(4)'s "good cause" standard is equivalent to Rule 16(e)'s "manifest injustice" standard for modification of a final pretrial order. [8]

However, I must follow the guidance of the Second Circuit, which has offered mixed signals on the subject of good cause.

II. MIXED SIGNALS

In *Parker v. Columbia Pictures Industries*, the court held that "[a] finding of good cause depends on the diligence of the moving

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[5] FED. R. CIV. P. 16(b) advisory committee's note to 1983 amendment. *See* Schiavone v. Fortune, 477 U.S. 21, 31 (1986) ("Although the Advisory Committee's comments do not foreclose judicial consideration of [a] Rule's validity and meaning, the construction given by the Committee is 'of weight.'" (quoting Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946))); *see also* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE CIVIL, §1029 (4th ed.), Westlaw (database updated April 2023) ("[T]hey provide something akin to a 'legislative history' of the rules . . . .").

[6] *See*, *e.g.*, Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 (11th Cir. 1998) ("[The] good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" (quoting FED. R. CIV. P. 16 advisory committee's note to 1983 amendment)); Kamal v. Eden Creamery, LLC, 88 F.4th 1268, 1277 (9th Cir. 2023) ("'Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification,'" and '["i]f that party was not diligent, the inquiry should end.'" (quoting Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) (alteration in original))); Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 717 (8th Cir. 2008) ("[G]enerally, we will not consider prejudice if the movant has not been diligent in meeting the scheduling order's deadlines.").

[7] *See* Springboards To Educ., Inc. v. Hous. Indep. Sch. Dist., 912 F.3d 805, 819 (5th Cir. 2019) ("There are four relevant factors to consider when determining whether there is good cause under Rule 16(b)(4): '(1) the explanation for the failure to timely [comply with the scheduling order]; (2) the importance of the [modification]; (3) potential prejudice in allowing the [modification]; and (4) the availability of a continuance to cure such prejudice.") (alterations in original); *See also* High Point Design LLC v. Buyers Direct, Inc., 730 F.3d 1301, 1319 (Fed. Cir. 2013) ("When assessing whether good cause has been shown, 'the primary consideration is whether the moving party can demonstrate diligence.' . . . A district court can, however, 'consider . . . whether allowing the [extension] at this stage of the litigation will prejudice defendants.").

[8] Burks v. Okla. Publ'g Co., 81 F.3d 975, 979 and n. 1 (10th Cir. 1996) (although the "manifest injustice" standards "address[] the modification of a final pretrial order, we discern no reason why [they] should not also apply to a decision to modify a scheduling order before a final pretrial order has been entered."); Jorgensen v. Montgomery, 2008 WL 4083014, n.2 (D. Colo. Sept. 3, 2008) ("The same . . . analysis governing Rule 16(e) motions applies with equal force to Rule 16(b) motions.").

party."[9] Yet in *Kassner v. 2nd Ave. Delicatessen Inc.*, decided several years later, the court stated that diligence "is not . . . the only consideration. The district court, in the exercise of its discretion under Rule 16(b), also may consider other relevant factors including, in particular, whether allowing the [extension] will prejudice defendants."[10]

That language has led some lower courts in my circuit to conclude that they have discretion to grant an extension "even where the moving party has not shown diligence in complying with [the] deadline.""[11] However, since later panels of a circuit court of appeals are "bound by the decisions of prior panels until such times as they are overruled either by an en banc panel . . . or by the Supreme Court,"[12] the prevailing view appears to be that *Kassner* has not dispensed with *Parker*'s requirement of diligence for a finding of good cause.[13] That conclusion is bolstered by Second Circuit decisions issued after *Kassner*.[14]

If my young attorney friend were seeking to extend another type of missed deadline, he might resort to Rule 6(b)(1)(B), which authorizes an extension "after the time has expired if the party

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[9] *See* Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000).

[10] Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 244 (2d Cir. 2007).

[11] Fresh Del Monte Produce, Inc. v. Del Monte Foods, Inc., 304 F.R.D. 170, 176 (S.D.N.Y. 2014).

[12] United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022).

[13] *See* Woodworth v. Erie Ins. Co., 2009 WL 3671930, *3 (W.D.N.Y. Oct. 29, 2009) ("The Court interprets [*Kassner*] to mean that, even where the moving party has been diligent, a court may nonetheless *deny* a late motion to amend when it would prejudice the non-moving party. The Court does not understand . . . *Kassner* to mean that where the moving party has *not been diligent,* a court may nonetheless grant the motion if it would not prejudice the non-moving party.") (emphasis in original); Kodak Graphic Commc'ns Canada Co. v. E.I. Du Pont de Nemours & Co., 2011 WL 6826650, *3 (W.D.N.Y. Dec. 28, 2011) ("This Court does not interpret *Kassner* to . . . [mean] that the lack of prejudice to the non-moving party would negate the requirement that the moving party act with diligence . . . ."); 3 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE,' §16.14[1][b] (Daniel R. Coquillette, et al. eds., Matthew Bender 3d ed. 2023) ("The existence or degree of prejudice to the party opposing modification may supply an additional reason to deny a motion to modify a scheduling order, but it is irrelevant to the moving party's exercise of diligence and does not show good cause.").

[14] *See* Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009) ("Whether good cause exists turns on the 'diligence of the moving party'" (quoting Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003))); Gullo v. City of New York, 540 F. App'x 45, 47 (2d Cir. 2013) (Summary Order) ("That defendants suffered no prejudice does not change the fact that plaintiffs failed to [act] with diligence. . . . [T]he absence of prejudice alone does not constitute good cause under Rule 16.").

failed to act because of excusable neglect.*"* However, "it is not the requirements of Rule 6(b), but the 'good cause' standard of Rule 16(b) which governs this motion,"[15] and "Rule 16(b)(4)'s 'good cause' requirement, which focuses on diligence, is more onerous than Rule 6(b)(1)(B)'s 'excusable neglect' requirement."[16] While "miscalendaring a deadline can . . . constitute excusable neglect[,]"[17] it "does not meet the good-cause standard of diligence[] under Rule 16(b)."[18]

III. CONSEQUENCES OF ENFORCEMENT

And that's where things get uncomfortable – for as the court recognized in *Ikona v. AHC of Overland Park, LLC*, "denying Plaintiffs the ability to disclose experts could effectively be dispositive of the case."[19] Reasoning that "[t]he decision to exclude evidence is a drastic sanction[,]" the court believed that it "must consider lesser sanctions."[20] Thus, "[a]lthough Plaintiffs ha[d] not established good cause to amend the Scheduling Order under Rule 16(b)(4)," the court granted "a limited extension for the simple reason that denying the motion [to extend] could result in a case-dispositive result."[21]

While I can understand the motivation for that decision, I fail to see how the denial of a motion to modify a scheduling order can be considered a "drastic sanction." Rule 16(f)(1)(C) (entitled "Sanctions") allows the court to "issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its

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[15] Shemendera v. First Niagara Bank N.A., 288 F.R.D. 251, 252 (W.D.N.Y. 2012).

[16] McCann v. Cullinan, 2015 WL 4254226, *10 (N.D. Ill. July 14, 2015). *See also* Bowman v. Korte, 962 F.3d 995, 996 (7th Cir. 2020) ("'[G]ood cause'[] imposes a more difficult standard than 'excusable neglect' . . . because the former implies justification rather than excuse (negligence can be excused but not justified).").

[17] EuroChem Trading USA Corp. v. Ganske, 2019 WL 11556774, *1 (W.D. Wis. May 10, 2019).

[18] Henly v. Biloxi H.M.A., LLC, 2023 WL 6975749, *3 (S.D. Miss. Jul. 10, 2023); *see also* White Way, Inc. v. Firemen's Ins. Co. of Wash., D.C., 2022 WL 17177371, *4 (D. Kan. Nov. 23, 2022) ("[C]ounsel's failure to accurately record a crucial deadline . . . weighs against any finding of good cause.").

[19] Ikona v. AHC of Overland Park, LLC, 2022 WL 4245478, *7 (D. Kan. Sept. 15, 2022).

[20] *Id.*

[21] *Id.* at *8. *See also* Summers v. Mo. Pac. R.R. Sys., 132 F.3d 599, 605 (10th Cir. 1997) and Straus v. DVC Worldwide, Inc., 484 F. Supp. 2d 620, 633 (S.D. Tex. 2007), both reaching the same result.

attorney . . . fails to obey a scheduling or other pretrial order," [22] and "[a] court may impose sanctions pursuant to Rule 37(b)(2)(A) only when the transgressing party has violated a prior court order."[23] However, far from violating a scheduling order, a motion to modify seeks to *avoid* a violation, by extending the deadline for compliance. Therefore, although the denial of that motion may lead to the exclusion of evidence from the case, the denial is not itself a sanction, much less a drastic sanction.

In any event, sanction orders must be "just".[24] "In determining whether a sanction is 'just', the record should be reviewed to ascertain whether the district court abused its discretion,"[25] and the court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."[26] However well-intentioned the court may be, "the application of Rule 16(b)'s good-cause standard is not optional,"[27] and therefore may not be ignored. "[Federal] [c]ourts have no more discretion to disregard [a] Rule's mandate . . . than they do to disregard constitutional or statutory provisions . . . ."[28]

Thus, in *Petrone v. Werner Enterprises, Inc.*, the Eighth Circuit reversed the district court's modification of a scheduling order where good cause was lacking:

> "Plaintiffs did not show good cause to modify and extend the Rule 16(b) deadline . . . . Nevertheless, relying on Rules 1 and 37(c)(1), the district court modified the schedule, extended the deadline to disclose expert reports. This was error. Nothing in the text of either rule allowed the district court to bypass the mandatory good-cause standard under Rule 16(b)(4). Indeed, such a reading 'would render scheduling orders meaningless

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[22] FED. R. CIV. P. 16(f) (emphasis added).

[23] Yukos Cap. S.A.R.L. v. Feldman, 977 F.3d 216, 234 (2d Cir. 2020).

[24] *See* FED. R. CIV. P. 16(f)(1) "("[T]he court may issue any just orders . . . ."); *see also* FED. R. CIV. P. 37(b)(2)(A) ("[T]he court . . . may issue further just orders.").

[25] *See* Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine, 951 F.2d 1357, 1366 (2d Cir. 1991).

[26] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

[27] Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 717 (8th Cir. 2008); I*n re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 843 (6th Cir. 2020).

[28] Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (alterations in original).

> and effectively read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure.'"[29]

In theory, Rule 16(b)(4)'s "good cause" standard is more flexible than Rule 16(e)'s "manifest injustice" standard for modifying a final pretrial order.[30] However, for those courts which hold that good cause "depends" or "turns" on the diligence of the moving party,[31] the exact opposite is true: whereas the "manifest injustice" standard allows consideration of prejudice and whether it can be cured,[32] the "good cause" standard (at least in my circuit) does not.[33] "The irony here is that the wooden application of the good-cause standard . . . is even more rigorous than the stricter "manifest injustice" standard . . . ."[34]

CONCLUSION

In every Rule 16 scheduling conference, I remind counsel that the scheduling order deadlines are intended to be serious, and can be modified only for good cause. I repeat that warning in my scheduling orders, citing *Parker*. And yet, human nature being

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[29] Petrone v. Werner Enterprises, Inc., 940 F.3d 425, 434 (8th Cir. 2019).

[30] *See* FED. R. CIV. P. 16(b), (e) advisory committee's note to 1983 amendment ("Since the scheduling order is entered early in the litigation, this standard seems more appropriate than a 'manifest injustice' or 'substantial hardship' test . . . . In the case of the final pretrial order, however, a more stringent standard is called for . . . ."); CHARLES ALAN WRIGHT ET AL., 6A FEDERAL PRACTICE AND PROCEDURE CIVIL, § 1522.2 (3d ed.) ("The use of the good-cause standard, rather than allowing modification only in cases of manifest injustice as is done for other pretrial orders, indicates that there may be more flexibility in allowing some relief.").

[31] *See e.g.*, Parker v. Columbia Pictures Indus., 204 F.3d 326, 335 (2d Cir. 2000); Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009).

[32] Rapco, Inc. v. Comm'r, 85 F.3d 950, 953 (2d Cir. 1996) ("Appropriate factors to consider include: '(1) the prejudice or surprise in fact to the opposing party; (2) the ability of the party to cure the prejudice; (3) the extent of disruption of the orderly and efficient trial of the case; and (4) the bad faith or willfulness of the non-compliant party.' . . . Prejudice to the party seeking amendment or modification of the order is also relevant."); Madison Consultants v. Fed. Deposit Ins. Corp., 710 F.2d 57, 62 n. 3 (2d Cir. 1983) ("[W]e have not viewed . . . modification [of pretrial orders] with hostility . . . . Defendants here would not be seriously prejudiced if plaintiffs were permitted to amend the pretrial order . . . .") (alterations in original).

[33] *See* Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009).

[34] Millenkamp v. Davisco Foods Int'l, Inc., 448 F. App'x 720, 724 (9th Cir. 2011) (Korman, J., dissenting).

what it is, "the best laid plans of mice and men oft go awry,"[35] and I am then called upon to decide whether a missed deadline may properly be extended.

In the case of counsel's miscalendared deadline for expert disclosures, stacked against several compelling reasons why the deadline should be modified (namely the critical importance of expert evidence to plaintiff's case, the fact that the extension was unopposed, and that no trial date had been set), was one reason why the deadline should not be modified. Since I must apply the Second Circuit's definition of good cause, I could not honestly conclude that counsel's miscalendaring of the deadline for expert disclosures demonstrated diligence.

Unfortunately, that is the only reason that counts, since courts have "no authority to subvert the plain meaning of the federal rules despite harsh results."[36] And that, my friends, is why I hate scheduling orders.

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[35] Sahara Health Care, Inc. v. Azar, 975 F.3d 523, 525 n. 1 (5th Cir. 2020); With a shout out to Robert Burns' poem entitled "To a Mouse" ("The best-laid schemes o'mice an' men / Gang aft agley"). *See* Robert Burns, *"To a Mouse*," POETRY FOUNDATION, https://www.poetryfoundation.org/poems/43816/to-a-mouse-56d222ab36e33 [https://perma.cc/P94A-7UC5] (last visited Mar. 29, 2024).

[36] DeRango v. United States, 864 F.2d 520, 524 (7th Cir. 1988) (citing Polylok Corporation v. Manning, 793 F.2d 1318 (D.C. Cir.1986)).