

August 26, 2011

Roger W. Mullins, Esquire
106 Church Street
Tazwell, VA 24651

In re: Boyd-Graves Conference Study Group on Revision
of Virginia Supreme Court Rule 1:18(B), Pretrial Scheduling
Order

Dear Roger:

Our study group consists of C.J. Steuart Thomas, III, Judge Clifford R. Weckstein, Douglas P. Rucker, Jr., John T. Jessee, Lawrence D. Diehl, Robert T. Mitchell, Jr., Marni E. Byrum, and myself. Our group's charge was to consider whether subparagraph B of Rule 1:18 should be revised. As explained below, we agree that the Boyd-Graves Conference should recommend revision of subparagraph B. We also suggest that our conference appoint a new study group next year to consider whether further revisions are needed to clarify Rule 1:18.

The basic issue is whether Rule 1:18(B) should be revised to allow the trial court to enter the Uniform Pretrial Scheduling Order (contained the Appendix of Forms) without 14 days advance notice to counsel when an agreed pretrial order has not been submitted under subparagraph A of Rule 1:18. As you know Rule 1:18(A) currently provides that counsel may submit an agreed pretrial scheduling order. When an agreed order has not been submitted under subparagraph A of the Rule, then under subparagraph B the court may then enter the Uniform Pretrial Scheduling Order upon the request of counsel for a party, or in the court's discretion, after giving 14 days advance notice to all counsel. Further, if there is any objection to the entry of the uniform order, the court must then hold a hearing prior to the entry of the order.

As reflected by Rule 1:18, there is a general agreement among the judiciary and the bar that pretrial orders promote efficient the orderly and efficient administration of trials. Under the current Rule 1:18(B), the trial court must follow an awkward and time
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consuming procedure to achieve entry of the uniform pretrial order that has been approved by the Supreme Court and is familiar to attorneys and judges. Therefore, our group discussed whether the court should be allowed to enter the uniform order after the lapse of a period of time in the cases where an agreed order has not been submitted.

After discussion, we concluded that the trial court should be allowed to enter the uniform order without giving advance notice when counsel have not submitted an agreed order. The main issue centered on the time period that should be given to counsel to submit the agreed order under Rule 1:18(A) before the court can enter the Uniform Pretrial Scheduling Order. We concluded that the trial court should be allowed to enter the uniform order when thirty (30) days have passed after the court has scheduled a trial date. This period of time, of course, gives counsel the from the time of filing the case until 30 days after the court establishes a trial date to submit an agreed pretrial order.

Further our study group has added a sentence to Rule 1:18(B) that requires the court to hold a hearing on the motion of any party objecting to, or requesting modification of, the pretrial order.

Enclosed is a copy of the proposed revision to Rule 1:18. The parts that are underlined have added by our group, and the parts that have a strikethrough have been deleted. I have also enclosed of copy of the Uniform Pretrial Scheduling Order.

Last, discussion of this issue has caused members of our group to consider whether litigants, bench and bar might benefit from additional revisions to clarify Rule 1:18. We suggest further study of Rule 1:18 prior to The Boyd-Graves Conference in 2012. For purposes of future discussion, two suggested revisions of Rule 1:18 are enclosed. At this time, of course, we recommend only the modest revision of subparagraph B to this Rule discussed above.

Thank you for allowing us to study this issue.

Sincerely yours,

J. Michael Gamble

Enclosures

cc: Study Group

PROPOSED REVISION TO RULE 1:18

Rule 1:18. Pretrial Scheduling Order

A. In any civil case the parties, by counsel of record, may agree and submit for approval and entry by the court a pretrial scheduling order. If the court determines that the submitted order is not consistent with the efficient and orderly administration of justice, then the court shall notify counsel and provide an opportunity to be heard.

B. In any civil case ~~where in which~~ a pretrial scheduling order ~~is~~ has not been entered pursuant to paragraph A of this Rule, and more than 30 days have elapsed since a trial date was entered on the court's calendar or in the court's computerized case management system, the court may, upon request of counsel of record for any party, or in its own discretion, enter the pretrial scheduling order contained in Section 3 of the Appendix of Forms at the end of Part I of these Rules (Uniform Pretrial Scheduling Order). ~~No court shall enter the Uniform Pretrial Scheduling Order unless notice has been provided to all counsel of record at least 14 days prior to entry of the order. Upon motion by any party objecting to entry of the Uniform Pretrial Scheduling Order, the court shall hold a hearing prior to entry of the order.~~ The court shall hold a hearing on the motion of any party objecting to, or requesting modification of, the pretrial scheduling order entered pursuant to this paragraph. With the exception of domestic relations cases, a court may not enter a scheduling order which deviates from the terms of the Uniform Pretrial Scheduling Order unless either (1) counsel of record for all parties agree to different provisions, or (2) the court, after providing an opportunity for counsel of record to be heard, makes a finding that the scheduling order contained in the Appendix is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case.

STUDY POSSIBILITY 1

Rule 1:18. Pretrial Scheduling Order

- A. In any civil case the parties, by counsel of record, may agree and submit for approval and entry by the court a pretrial scheduling order. If the court determines that the submitted order is not consistent with the efficient and orderly administration of justice, then the court shall notify counsel and provide an opportunity to be heard.
- B. In any civil case ~~where a pretrial scheduling order is not entered pursuant to paragraph A of this Rule~~ **in which no such order has been entered** ~~the court may, on request of counsel of record for any party~~ **may move the court to enter a pretrial scheduling order. Rule 4:15 and all other provisions of these Rules shall apply to such a motion. [N.B. other provisions of current Paragraph B are now in Paragraph C.]**
- C. In any civil case ~~where a pretrial scheduling order is not entered pursuant to paragraph A of this Rule~~ **(a) in which a trial date has been set and more than 30 days have passed since the trial date was entered on the court's calendar or in the court's computerized case management system, and (b) in which no pretrial scheduling order has been entered, the court may upon request of counsel of record for any party, or in its own discretion in the exercise of its discretion, on its own motion and without notice, enter the Uniform Pretrial Scheduling Order contained in the Appendix of Forms to this Part I of these Rules** ~~pretrial scheduling order contained in Section 3 of the Appendix of Forms at the end of Part I of these Rules (Uniform Pretrial Scheduling Order). No court shall enter the Uniform Pretrial Scheduling Order unless notice has been provided to all counsel of record at least 14 days prior to entry of the order.~~ **The court shall cause copies of the order so entered to forthwith be transmitted to counsel for all parties. If any party objects to or requests modification of that order within 14 days of its entry, or such longer time as the court may allow, the court shall (a) hold a hearing to rule upon the objection or request or (b) with consent of all parties and approval by the court, enter an amended pretrial scheduling order. [N.B. Further provisions now in Paragraph B have been moved to Paragraph D.]**
- D. ~~With the exception of~~ **Except in domestic relations cases,** a court may not enter a scheduling order ~~which~~ that deviates from the terms of the Uniform Pretrial Scheduling Order unless either (1) counsel of record for all parties agree to different provisions, or (2) the court, ~~after providing an opportunity for counsel of record to be heard, makes a finding~~ **finds** that the scheduling order contained in the Appendix is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case, **and provides the parties an opportunity to be heard on that finding.** Any agreed-upon scheduling order that deviates from the Uniform Scheduling Order shall be accompanied by a writing, signed by at least one attorney of record for each party, specifically and accurately calling to the court's attention each deviation between the Uniform Pretrial Scheduling Order and the proposed order.

STUDY POSSIBILITY 2

Rule 1:18. Pretrial Scheduling Order

- A. A Uniform Pretrial Scheduling Order is contained in the Appendix of Forms to this Part I of these Rules.
- a. In any civil case the parties, by counsel of record, may by agreement submit for approval and entry by the court a pretrial scheduling order consistent with the Uniform Pretrial Scheduling Order.
 - b. In any civil case the parties, by counsel of record, may by agreement submit for approval and entry by the court a pretrial scheduling order that deviates from the Uniform Scheduling Order. Any agreed-upon scheduling order that deviates from the Uniform Scheduling Order shall be accompanied by a writing, signed by at least one attorney of record for each party, specifically and accurately calling to the court's attention each deviation between the Uniform Pretrial Scheduling Order and the proposed order.
 - c. In any civil case in which no pretrial scheduling order has been entered, counsel of record for any party may move the court to enter a pretrial scheduling order. Rule 4:15 and all other provisions of these Rules shall apply to such a motion.
 - d. In any civil case (i) that has been set for trial, and (ii) in which more than 30 days have passed since the court set the trial date, and (iii) in which no pretrial scheduling order has been entered, the court may in the exercise of its discretion, on its own motion and without notice, enter the Uniform Pretrial Scheduling Order, causing copies of the order to forthwith be transmitted to counsel for all parties. If any party objects to or requests modification of that order within 14 days of its entry, or such longer time as the court may allow, the court shall (a) hold a hearing to rule upon the objection or request or (b) with consent of all parties and approval by the court, enter an amended pretrial scheduling order
- B. With the exception of domestic relations cases, a court may not enter a scheduling order that deviates from the terms of the Uniform Pretrial Scheduling Order unless either:
- a. counsel of record for all parties agree to different provisions of which the court approves; or
 - b. the court finds that the Uniform Pretrial Scheduling Order is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case.
 - i. When the parties, or any of them, have tendered a pretrial scheduling order, the court shall provide the parties an opportunity to be heard before making that finding.
 - ii. When the court has entered a pretrial scheduling order on its own motion, in accordance with the provisions of paragraph A (d) of this Rule, the court shall provide the parties a prompt opportunity to be heard after making the finding described in this subparagraph B (b) of this Rule.

~~Rule 1:18. Pretrial Scheduling Order~~

~~A. In any civil case the parties, by counsel of record, may agree and submit for approval and entry by the court a pretrial scheduling order. If the court determines that the submitted order is not consistent with the efficient and orderly administration of justice, then the court shall notify counsel and provide an opportunity to be heard.~~

~~B. In any civil case where a pretrial scheduling order is not entered pursuant to paragraph A of this Rule, the court may, upon request of counsel of record for any party, or in its own discretion, enter the pretrial scheduling order contained in Section 3 of the Appendix of Forms at the end of Part I of these Rules (Uniform Pretrial Scheduling Order). No court shall enter the Uniform Pretrial Scheduling Order unless notice has been provided to all counsel of record at least 14 days prior to entry of the order. Upon motion by any party objecting to entry of the Uniform Pretrial Scheduling Order, the court shall hold a hearing prior to entry of the order. With the exception of domestic relations cases, a court may not enter a scheduling order which deviates from the terms of the Uniform Pretrial Scheduling Order unless either (1) counsel of record for all parties agree to different provisions, or (2) the court, after providing an opportunity for counsel of record to be heard, makes a finding that the scheduling order contained in the Appendix is not consistent with the efficient and orderly administration of justice under the specific circumstances of that case.~~