Vanderbilt Law Review

Volume 7
Issue 4 *Issue 4 - A Symposium on Federal Jurisdiction and Procedure*

Article 10

6-1954

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SOME BUGABOOS IN PRE-TRIAL

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In view of all that has been written and said for pre-trial conference,[1] it seems rather superfluous, if not presumptuous, to undertake to add to or enlarge upon the subject. Indeed, it might be efficacious to heed Judge Clark's[2] suggestion that the procedural cause would be better served "if something could be done to stop us judges . . . from publishing what we say"[3] about the Rules. But even at the risk of overstating the case, those who have enlisted for the duration never forego an opportunity to strike a blow on the side of simplified procedure.

Pre-trial practice has been acclaimed "one of the greatest contributions to the ministry of justice," and it has been condemned as a "curse," a "joke," a "waste of time and money," and a "means of sand-bagging litigants into a settlement."

The wide divergence of views on this important subject deserves some analysis. Those who condemn the practice may be classified roughly into two categories: (1) those of the profession who are historically and congenitally opposed to any procedural change on the grounds that the old tried and true is good enough and anything new or different is heresy; (2) those who have been the unfortunate victims of the misuse or abuse of the rule by judges who misconceive its real function in the procedural scheme.

To those who oppose the practice as an innovation requiring new techniques, it seems sufficient to say that there is nothing new, novel or ingenious about a pre-trial conference unless, of course, it can be said that applied common sense in trial practice is new and novel. Indeed, some of our clients would doubtless agree with this latter proposition.

There can be nothing radically innovative about the practice of calling counsel for the litigants into a conference with the trial judge after the issues have been joined and discovery is complete, for the purpose of further defining the issues in the light of practiced dis-

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1. See, *e.g.*, NIMS, PRE-TRIAL 309-19 (1950); A.B.A. SECTION OF JUDICIAL ADMINISTRATION, *Report of Committee on Pre-Trial Procedure* app. *A* (1950); Murrah, *Pre-Trial Procedure—A Statement of its Essentials*, 14 F.R.D. 417, 441-46 (1954). See also *Demonstrations of the Pretrial Conference*, 11 F.R.D. 3 (1952); *Pre-Trial Clinic*, 4 F.R.D. 35 (1946).

2. Charles E. Clark, Judge, United States Court of Appeals for the Second Circuit; Reporter to the United States Supreme Court Advisory Committee of Rules on Civil Procedure; Chairman of the Permanent National Judicial Conference Committee on the Rules of Procedure.

3. The *Practical Operation of Federal Discovery—A Symposium on the Use of Depositions and Discovery under the Federal Rules*, 12 F.R.D. 131 (1952).

covery. Quite apart from considerations of efficiency, it is vitally important to a just decision that the case should not proceed to trial upon a welter of issues—some genuine, some frivolous, some material, and some immaterial. We know, of course, that even under fact pleadings, much of the fatty tissue of a law suit survives the gamut of all recognized formal preliminary motions, and that many times the real issue in a law suit is reached only by the cumbersome method of trial and error, while a jury sits in the jury box and busy litigants and witnesses restlessly loaf in the corridors.

Given its proper place in the procedural scheme, there can be no doubt of the utility of pre-trial conference as a common-sense device for securing a just, speedy and inexpensive disposition of litigation. That, we must agree, is the sole object and the only justification for adjective law.

The first declared purpose of a pre-trial is to simplify and attempt to agree upon the issues in a law suit. Opposition has been expressed to the policy of requiring counsel to unequivocally commit himself to the issues to be tried for the reason that subsequent development of the facts may completely change the complexion of the law suit, and that it is unjust to cast the suit into an inflexible mold before the commencement of the trial.[4]

In the first place, the proper use of discovery available under federal and most state rules affords ample opportunity for the development of sufficient facts to enable the parties to define the issues with a reasonable degree of certainty. In the second place, one of the great virtues of pre-trial is its own simplicity and flexibility. It was never intended to irrevocably bind the parties to the course of a law suit. If new and unexpected issues develop in the trial of the case, there is certainly nothing in the rule to prevent the judge from altering or modifying the pre-trial order or agreement in order that the case may be decided upon its merits. And indeed it is the inescapable duty of the judge to vouchsafe that right to all litigants.[5]

The issues having been thus defined by a realistic appraisal of the facts through the proper use of discovery, there certainly can be no valid objection to considering the necessity or the advisability of amending the pleadings to conform to those issues. We know that ofttimes a frank appraisal of facts in the light of discovery eliminates many issues raised by the pleadings or gives rise to new issues which often necessitate reshaping and redirecting the entire suit.[6]

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4. See the comments of Mr. E. E. Thompson in Tilbury, *Pre-Trial Conference in the Kansas City Area*, 21 U. OF KAN. CITY L. REV. 77, 80 (1952).

5. *E.g.*, Smith Contracting Corp. v. Trojan Const. Co., 192 F.2d 234, 236 (10th Cir. 1951); Pepper v. Truitt, 158 F.2d 246, 251 (10th Cir. 1946).

6. For concrete examples, see Dow, *The Pre-Trial Conference*, 41 KY. L.J. 363, 366 (1953).

We know that complaints are usually drawn from information obtained from the client who is certainly not disposed to understate his case. Answers and counterclaims are likewise made from information which often does not bear up under the searchlights of discovery. And so, as a practical matter, the real purpose of pre-trial is to develop the issues from investigatory processes and frame the pleadings in conformity therewith. This is done in the pre-trial by a full and free discussion of the case by counsel under the patient guidance of the court. All of this contemplates the cooperation of the lawyers with the court, and it presupposes that the trial judge is more than a mere umpire, but a functionary of the administration of justice. The function of a pre-trial judge is to "actively . . . guide and direct the conference to produce a pre-trial order which will strip the case to its essentials as they have been defined therein and will clearly set forth the factual and legal contentions of the parties upon the issues to be decided at the trial."[7] From a sifting of the issues clear-cut questions of law and fact inevitably emerge. In the words of a distinguished trial judge, "narrowing of the issues actually to be tried eliminates an incalculable amount of unnecessary and purposeless preparation both upon the law and in the marshaling of evidence."[8]

A narrowing of the issues of law and fact gives the judge a grasp of the law suit; it enables him to discern what troublesome questions of law will confront him in the ultimate decision. This affords him an opportunity to ask for pre-trial briefs on the questions so that when the case is tried he will have an intelligent understanding of the legal problems, thus greatly reducing any likelihood of error. Ofttimes preliminary decisions on questions of law greatly affect the ultimate course of the litigation. They enable court and counsel to prepare and proceed intelligently and efficiently. To those who complain that fore-knowledge is conducive to pre-judging, it should be said that in multiple-judge jurisdictions with a central calendar system, the pre-trial judge does not try the case. But even so, knowledge of the facts and law is prerequisite to a decision, and who will say that the longer the court is kept in ignorance of the facts and law the better chance the litigants have to procure a competent decision?

The legal and factual issues having been realistically defined, who could object to exploring the possibility of obtaining admissions of fact and of documents about which there can be no real dispute? Some judges and lawyers apparently entertain the idea that one of

7. MANUAL OF PRETRIAL PRACTICE OF THE NEW JERSEY SUPREME COURT 3 (1953).

8. Delehant, *Pre-Trial Conferences in the Federal District Courts: Their Value for Counsel and for Judges*, 35 J. AM. JUD. SOC. 70, 73 (1951).

the functions of a pre-trial conference is to secure the admission of controversial facts, and this misconception has made many fine trial lawyers chary of the pre-trial conference. It is of first importance to remember that the pre-trial conference is neither the time nor the place for the development or ascertainment of controverted facts. It should always be remembered that pre-trial "should be combined and integrated with discovery procedure as a part of a single mechanism,"[9] and that adequate discovery under available rules is essential to an effectual pre-trial. Every lawyer likes to flavor his law suit with the testimony of his own witnesses on crucial matters, and indeed he has a right to do so. But he has no right to insist upon formal proof of matters and things about which there is no real basis for dispute, or of documents, the authenticity of which is easily ascertainable before trial.[10]

The agreement on the number of expert witnesses at pre-trial may greatly expedite the preparation of the case for trial as well as shorten the trial of the case to the economic advantage of all parties. It has been suggested that counsel usually agree upon such matters in advance of trial, but we know as a practical matter that much time and money are wasted by the extravagant use of expert witnesses in trials where the parties apparently proceed upon the premise that the truth lies in sheer weight of numbers. The judge has no way of avoiding these pitfalls unless he has a preview of what is to come, and the pre-trial conference is certainly an appropriate place to decide matters of this kind after the issues have been defined and agreements have been reached on undisputed matters.

Some complain that pre-trial deprives them of the weapon of surprise to the detriment of their client's cause. This complaint assumes the premise that a law suit is a sporting contest with "no holds barred." It is based upon what we hope is a false notion of the end of the law. The pre-trial is, to be sure, based upon the philosophy that a court room is not an arena for the exhibition of forensic gladiators; rather that it is a place dedicated to the quest for truth and simple justice, and that search is aided by a sane and scientific approach to the solution of the legal controversy. In the language of a distinguished member of the bar, the pre-trial conference, properly conducted, gives the lawyer "a better chance to give a satisfactory answer to the three questions uppermost in his client's mind, namely: What will it cost? How long will it take? And what are my chances of success?"[11]

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9. The comment of John W. Willis in *The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 164 (1952).

10. Nims, *Some Comments on the Relation of Pre-Trial to the Rules of Evidence*, 5 VAND. L. REV. 581 (1952).

11. Troutman, *Pre-Trial Conferences*, 4 MERCER L. REV. 302, 311 (1953).

Undoubtedly the principal and most well-founded complaint against pre-trial is its use as a means of "sandbagging" litigants into settlement of the case. Unfortunately it is true that many well-intentioned judges entertain the notion that the principal purpose and function of pre-trial is to induce the parties to arrive at a settlement. This is particularly true in jurisdictions overburdened with personal injury litigation. In some rare instances it has been justified as a desperate effort to unclog a docket hopelessly in arrears. But the call of the calendar for the purpose of influencing counsel to arrive at a settlement of the case was never the intended function of a pre-trial conference. Indeed, pre-trial in its proper sense contemplates a trial of the case on its merits. It is intended to condition the case for an efficient and economical trial.

A pre-trial is not a market place for trading in accident values.[12] The real function of a pre-trial is to assure every litigant his full day in court; not to deprive him of that day by coercing him to settle his law suit before trial. It is true, however, that in the natural course of things, a successful pre-trial does result in the settlement of many law suits. But settlements should be only the natural by-products of a narrowing of the issues and the ascertainment of uncontroverted facts.

An effective pre-trial enables the lawyer to look at his law suit in the light of realities stripped of the gloss of his client's self-righteousness. It enables him to evaluate his client's cause in the light of facts which he has developed by the use of discovery. It furnishes a hospitable climate for a conciliatory approach under the firm judicious hand of a judge who knows how to suggest without coercive effect.

In the last analysis, the success of pre-trial depends upon an understanding of its fundamental purpose as an integral part of a procedural system designed to bring justice within the reach of all.

12. David W. Peck, *The Pillar of Justice* (Jan. 14, 1952) (an address delivered by Judge Peck, Presiding Justice, Appellate Division, First Department, Supreme Court of New York).