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SOME COMMENTS ON PRE-TRIAL

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As most lawyers know, the term pre-trial is a name for a conference held by a judge with attorneys for the parties in a pending lawsuit to discuss matters which may aid in its disposition. Sometimes the parties themselves attend. They are always free to do so.

Various types of this procedure have been developed since 1929 when it was first used systematically in the Circuit Court of Michigan in Detroit. In some courts the conferences are used to simplify the issues, obtain consents to the admissibility of evidence and exhibits, limit the number of expert witnesses, arrange a date for trial, and, in general, to expedite disposition of the case. In others, it is used, not to simplify the trial and its preparation, but to employ the good offices of a judge as a friendly, impartial intermediary in an attempt to reach some disposition of the case without trial, and in some instances, to transfer it by consent to a lower court.

No legislation is required for the use of pre-trial. It is an exercise of the courts' inherent powers to employ means adequate to dispose of their business. Pre-trial is no longer an experiment. Its usefulness and the practical results it can produce have been well demonstrated. It has been found to be of very real assistance to trial judges. Chief Justice Vanderbilt of New Jersey, in an address to the Conference of Chief Justices in Washington, in 1950, said:[1]

> The great gain is chiefly in the fact that the trial judge knows what the trial will be about before he goes on the bench. No longer does he have to spend the first hour trying to feel his way along and the next hour trying to get out of the mistakes which have been made in the first hour before he knew what the case was about. After a pre-trial conference, the court is in command of the case from the very moment that the trial starts. The result has been not only the shortening of cases, but the improvement of their quality and a very substantial lessening of the number of appeals.

Pre-trial can be used effectively to simplify the preparation for trial and the trial itself. In these conferences, exhibits and testimony are stipulated; routine facts and documents, agree-

* It was only through the good offices of Peter H. Holme, Jr., Judiciary Committee chairman, that Mr. Nims was importuned to write this commentary on pre-trial. A nationally-known authority on the law of unfair competition and trade marks, and senior partner of the New York firm of Nims, Verdi, and Martin, Mr. Nims recently authored a book entitled "Pre-Trial" under the joint sponsorship of the Committee on Pre-Trial Procedure of the U. S. Judicial Conference and the Council of the ABA section of Judicial Administration.

[1] 9 F.R.D. 640.

ments and inspections are agreed to, thus making the attendance of many witnesses at the trial unnecessary; issues are restated and simplified and the trial confined to the real controversy.

It can be used to simplify pleadings. Any lawyer who has had trial experience knows how seldom on the trial are the pleadings of any real value, yet not infrequently their preparation and amendment and the motions which are made regarding them involve substantial expense to the parties. Indeed, at times judges complain that the pleadings frequently fail to give to the court a definite picture of the real issues which are to be tried and not infrequently it has been found that pleadings prevent the court from trying the real controversies involved. In a pre-trial conference many of these difficulties can be adjusted, motions regarding them can be avoided and, in general, much saving in time and expense can be accomplished.

Pre-trial can be used to assist in the settlement of cases without trial. "Since every lawsuit ultimately comes to an end, why not help the parties to reach the end by amicable business-like arrangement? Settled the case will be, if not by argument, then by imposition through judicial pronunciamento, leaving one and not infrequently both of the parties dissatisfied, disgruntled and with respect for judicial process considerably shaken." [2]

It is the unquestioned right of every litigant to have his cases tried with all the formality which the rules provide if he desires, and pre-trial must not be used to interfere with that right. But it is also a litigant's right to have a chance to dispose of his case just as quickly and as expeditiously as possible and by use of the simplest possible methods, a right which we seem to have neglected in the past.

Settlement the Goal in Many Cases Anyway

Before pre-trial was used, ordinarily cases were not settled until trial was imminent, for to talk settlement before that stage was reached, was to suggest lack of confidence in one's case. The result has been that thousands of cases have slept on the calendars of our courts for months, and sometimes for years, before any attempt was made to dispose of them, although if they had been given the opportunity, the parties and counsel in a large proportion of them would gladly have adjusted them in a discussion attended by a judge.

Such statistics as we have seem to indicate that in a very large percentage of the cases begun in our courts, and which make up our calendars, the parties do not use or intend to use the courts for purposes of trial. They expect to dispose of their cases in some other way than by formal trial, but the courts have made

[2] Letter of Judge Harry M. Fisher of Chicago to writer, March, 1947.

very little attempt to facilitate the disposition of cases except through trial. We have very little information as to the proportion of such cases which are settled. We do not know whether or not the number of such settlements is increased by the use of pre-trial, but we do know that where pre-trial is used, particularly where there is a backlog of pending cases, settlements often occur much sooner than they would otherwise.

In the average court, then, the situation is that while cases are pending they are given little if any attention by counsel or by the court except for the taking of depositions and for procedural motions. In almost no jurisdiction does the court employ any fixed procedure to locate those which, if they were discussed by court and counsel, could be settled in the conference or shortly thereafter. Consequently, the litigants are forced to wait until the imminence of the trial compels the counsel to face realities and consider settlement.

Significant Experiments in New York

In the last few months, however, several of the courts of general jurisdiction in New York, the Supreme Courts of New York (Manhattan), Kings (Brooklyn) and the Bronx counties, have made significant and suggestive uses of pre-trial for the purpose of disposing of pending cases which can be settled. In New York county pre-trial conferences are used for the single purpose of settlement of pending jury negligence cases. More than a year ago this court, which then had and still has a very large backlog of pending cases, began to call these cases in pre-trial conferences, beginning with those at the head of the calendar. Cases are now being pre-tried that will not be reached for trial for about two years. The result has been the settlement of about 40% of the cases pre-tried. These conferences have demonstrated that, with the aid of the court, counsel for both plaintiff and defendant are only too willing to dispose of many cases of this sort without trial at almost any time after they are at issue.

About a year ago, the Justices of the Supreme Court of Kings County installed what they term a Calendar Classification and Control System, which also has had significant results. In May, 1949, the court began calling pending negligence jury cases to determine whether or not they involved issues sufficiently serious to warrant retaining them in the Supreme Court, or whether they might be transferred by consent to lower courts. A collateral result of this procedure has been many settlements. In the court year 1949-1950, 9,032 cases were called on this calendar. Of these 31% were settled, 18% were transferred to lower courts and 47% were retained in the Supreme Court. The remaining 4% were deferred. The parties in the cases that were settled obtained a dis-

position of them many months sooner than they otherwise would have.

From the fact that settlements occur in pre-trial conferences, it has been inferred that in the conferences judges use undue pressure on counsel to settle. Some judges have done this, but there is a widespread feeling that this is unwise and not in the spirit that should pervade these conferences. Such use of pre-trial is believed to be rare today. A judge who uses pressure to get settlements discredits the procedure, defeats his own ends, and deprives himself and his court of the very great benefits that pre-trial properly used can confer. Indeed, many judges in these conferences do not even mention the possibility of settlement, but wait for the suggestion to come from counsel. And it is a common occurrence that when a case is discussed in the calm, friendly, informal atmosphere of one of these conferences, somehow a case is apt to look differently to both counsel from what it does in their own offices.

Judge Harry M. Fisher, of the Circuit Court of Cook County, Chicago, Illinois, described pre-trial in his court thus:[3]

> The conferences are informal. The parties sit around the judge's desk in chambers; they may even smoke, if they desire. The plaintiff's counsel makes a brief statement of the nature of his case and the theory or theories upon which he predicates his claim. The defendant's counsel then states the nature of his defence. A discussion follows in which the judge participates quite freely. He often requires the production of exhibits, including photographs, X-rays, and, where those are available, doctors' and hospital records and bills. Police reports of accidents, writings, deeds, discovery depositions, and witnesses' statements are examined by the judge without regard to the competency or incompentency as evidence. Often, upon request of a party, the judge indicates his views upon the admissibility in evidence of a particular exhibit. If no final disposition of the case is made, the court certifies all matters agreed upon in order to obviate as much as possible the necessity of making preliminary or merely formal proof. But such certifications are exceedingly rare. The great majority of lawyers are cooperative and rely upon the promises of their adversaries with reference to the elimination of proof. But by far the most gratifying and valuable gains from these conferences are derived from amazing volume of final dispositions brought about by amicable settlements.

Should Pre-Trial Be Compulsory or Only on Request?

There is considerable difference of opinion as to whether pre-trial should be compulsory, or should be used only on request of counsel, or on order of the court. In New Jersey its use is compulsory in all civil cases. In the United States District Courts, and in the courts of general jurisdiction of Boston, Chicago and Detroit, among others, it is used in most or all civil cases. All the methods of using pre-trial are being experimented with, and we shortly

[3] Fisher, *Judicial Mediation: How It Works Through Pre-Trial Conference.* 10 U. of Chi. L. Rev. 453.

shall have ample data as to the results. One thing seems certain—it is most unlikely that anything but benefit can come from a discussion of a pending lawsuit by counsel and court.

Pre-trial is not an arbitration, either voluntary or compulsory, nor is it a new theory of reformers—it is a natural development in American courts. For years, judges in different states have occasionally called in conference the attorneys in pending cases to discuss the coming trial. This has been done, for example, in North Dakota, Tennessee, and Kansas. Even a cursory study of the results of the use of pre-trial in recent years can hardly fail to raise the question as to whether or not we have not reached a time when if we are to arrest the increasing lack of confidence in the courts we should not consider very seriously whether it is not possible to devise some procedure in the courts which will involve the discussion and disposition of all cases before a formal adversary trial is had, with its delay and expense.

THE GAME IS OFTEN NOT WORTH THE CANDLE

Thousands of cases, particularly routine negligence cases, are finally ended by trial or otherwise for comparatively small amounts. Two tests made recently show that in one jurisdiction 40% of a mass of such cases were ultimately disposed of for less than $700, while in another test, covering from January 1, 1944, to January 30, 1947, 46% of a large group of such cases were settled for less than $1000. When we realize that jury trials, on the average, take from two to two and one-half days and when one considers the expense to the state of maintaining a jury court, as well as the expense to the litigant of preparation for trial and of the trial itself, the use of jury courts for these cases becomes decidedly unfortunate from a practical, common sense point of view. No attempt is made here to argue or even suggest any relaxation or abandonment of the right to a trial by jury, but surely there is something to be said for urging the courts to find a simpler, less expensive method than a jury trial to decide whether a defendant shall pay a nominal sum, $500 or $750, for a minor injury to person or property.

In many of these cases, of course, the question of liability is involved, but in hundreds of others that liability is obvious or conceded. Where this is so, there is very little if any difference between the adjustment of one of these claims and claims on insurance policies, thousands of which are disposed of satisfactorily every month by friendly adjustment. If the courts fail to provide common sense methods for handling these routine cases satisfactorily to the public, undoubtedly a way will be found to accomplish this outside the courts.

Pre-trial seems to meet general approval of laymen. Explaining pre-trial to a layman is very easy to do, for anyone can under-

stand at least some of the potentialities of an informal conference in which a judge and the lawyers in a case sit down together and discuss possible ways of disposing of it. The layman's reaction to such an explanation will give the lawyer an insight into the public's impression of present day court methods.

By simplifying trials pre-trial can make a definite contribution toward increasing public confidence in and respect for law. Talk to persons who have served as jurymen, witnesses or litigants in civil trials, and listen to their accounts of dreary hours of waiting in court for cases to be reached. After the trial begins, they listen to objections to testimony, to motions to strike and to arguments of what to them seem useless technical points. They watch highly respected and honest people prevented from telling their story in a natural, sincere way, or from telling it at all, by what seems to them captious and technical objections. They see obviously honest witnesses prevented from expressing their opinions as to every day experiences of life. Ask these laymen *their* opinion of the law!

Pre-Trial Aids Bar's Relations With Public

Many of these conditions in our courts which irritate the public and impair respect for law can be eliminated if before the trial occurs there is a frank, friendly discussion of the case by counsel for both parties before a judge of the court. This can occur at any time issue is joined. One of the most important functions of a successful business today is the cultivation of friendly relations with its customers and with the public. Our public relations—the opinion of the courts held by the average citizen—is a subject which has been seriously ignored by the organized bar and by lawyers individually. To this extent, our attitude seems to be that a dissatisfied public is more advantageous to us than the satisfied one, that it is better for us to have the public dread the courts and avoid them than for them and for us to enjoy its confidence and respect.

This attitude of ours is the natural outcome of the experience of lawyers over the years. For generations, unlike our professional friends, the physicians, we have followed the same steps, used the same verbiage and formulas and followed the same procedures. We have not controlled the rules under which we work. The legislatures have done that for us. Uniformity in ideas and ideals have been our lot, our practice and our great misfortune. To us a defective system is not considered a handicap for it operates on us all alike. Change, therefore, seems not to interest us. The *London Times* once said that "There seems to be something in the profession of the law which binds its votaries to the defects of the system."

In one of Dr. Weir Mitchell's interesting, but almost forgotten novels, "Hugh Wynne," he dealt with conditions in Philadelphia in Revolutionary times and referred to James Wilson, then a leading lawyer of the city and later member of the Supreme Court of the United States, and to its foremost physician, Dr. Benjamin Rush. If Lawyer Wilson were to return to practice today, he would find many procedures and methods in use with which he was reasonably familiar and which he could use without too much difficulty. But if Dr. Rush were to return to the practice of medicine, the vocabulary of his associates would be unfamiliar and the procedures and remedies which he had known would have been largely forgotten; and if he were to attempt to use a modern operating room, he would not even know how to "scrub up."

Pre-Trial Is in Step With the Times

Some of the unfortunate results of this inertia—this clinging to old paths—this opposition to better ways—are now visible. Recent studies show that for some time there has been a drastic falling off in the number of civil cases tried in our courts, and that in some categories such falling off is 50% or more. This can mean but one thing: the public is fed up with the methods used by the courts in handling routine civil cases and is disposing of many of them outside the courts. This is indicated only too clearly by the practice of including in practically all contracts arbitration clauses which rule out resort to the courts if the contracts are breached. It is evidenced also by the use of arbitration by trade associations, the by-laws of some of which provide that no lawyers shall be employed in arbitrations.

In the address above referred to,[4] Chief Justice Vanderbilt said in this connection:

> The disappearance of the vast amount of litigation now carried on through workmen's compensation bureaus, the vanishing of entire industries from the courts through arbitration agreements, are but shadows portending far more drastic changes in the court room if we do not awaken to a sense of our responsibility for the efficient administration of justice.

Pre-trial is not a complete answer to these problems by any means. But it does seem to offer a practical method of meeting some of them which it seems unwise for us to ignore. It has been proven beyond question that pre-trial can be used to give the litigant far better service than he is getting today in most of our courts. Also, it offers us an opportunity to improve the practical working of democracy in America, which at this juncture is a matter of some importance, not only to ourselves, but to many others outside of our borders.

[4] Note 1, *supra*.