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Introduction

The objectives of the pre-trial conference are to simplify the trial of law suits, expedite their conclusion, accord litigants a just and speedy determination of their causes, and generally to eliminate or at least to mitigate, the age-old abomination of the law's delay.

Bear these things in mind: the current vogue of resorting to the pre-trial conference has barely attained its majority; a few years prior to 1938 courts here and there happily awoke to its possibilities and began to utilize it[1] on September 1, 1938 the Federal Rules of Civil Procedure became effective, and Rule 16 specifically authorized its use, on an optional basis, and prescribed a few simple regulations; since that date there has been a decided trend toward its adoption as a common procedure; it was regarded as an innovation, and was met with considerable opposition; *but,* its ancestors are of ancient lineage in the common law and chancery courts;[2] trial courts, with their power to control procedures in the causes before them, always have been invested with the power to require a pre-trial conference, without special rule or authorization; and for some unaccountable reason it has taken the courts centuries to realize the potentialities of the procedure.

The current concept of procedure for the pre-trial conference is simple. The lawyer for the plaintiff, the lawyer for the defendant and the judge sit down and talk things over. This takes place some time after the last pleading is filed—after issued joined—and before trial. The underlying idea is to find out what the lawsuit is about, and in what manner it may be tried most expeditiously.

By way of example, at the conference it is developed:

(1) That the parties can agree on certain facts, and that that agreement will make it unnecessary to take certain projected depositions;

(2) That the parties cannot agree on certain other factual claims, and that those will have to be tried out in the usual manner;

(3) That of a dozen-odd documents to be offered in evidence only six really are necessary;

(4) That the parties will agree as to the authenticity of the six documents;

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[1] 20 F.R.D. 485, 519 (1957).

[2] *Ibid.*

(These documents are *then* marked Plaintiff's Exhibit 1, for Identification; Plaintiff's Exhibit 2, for Identification; Defendant's Exhibit A, for Identification; Defendant's Exhibit B, for Identification, etc., and when produced on the trial will be received in evidence without more ado);
(5) That there is a question of law as to the legal effect of two of the documents; and
(6) That there are specific issues of law which will be resolved by the evidence to be adduced on the factual claims in dispute.

The next step is to draw a pre-trial order to be formally signed by the judge and filed in the cause. The order will set forth the matters agreed upon; enumerate the factual issues on which evidence must be taken; describe the exhibits which have been marked for identification; and enumerate the questions of law which must be resolved. That order becomes a blue-print of the trial. It is binding on the parties. Relief from any of its restrictions, before or at the trial, is obtainable only on a showing that a modification is necessary "to prevent manifest injustice."[3]

The pre-trial order thus outlined, for a case of the indicated proportions, will probably be arrived at in the course of a one- to three-hour conference of court and counsel; it will have saved hours of time otherwise to be consumed in the taking of depositions; and possibly will have saved three or four days of trial.

The description is reasonably accurate; enough so to serve as a starting point for discussion. However, being an over-simplification, it must be expanded as we go along to serve the purpose of any reasonably adequate discussion of the subject.

Given a jurisdiction with a single court, a single judge, a couple of terms each year, a term calendar which can be handled by the one judge, cases which are relatively simple, any one of which can be tried in a few hours or a few days, and the procedure just outlined is practicable.

But there are courts with ten, twenty, fifty or more judges. There are cases of infinite complexity which, do what you will, are going to take a long time to try. There are procedures prior to trial, other than the pre-trial conference, which can, and do, result in inordinate delay. The number and the difficulty of the problems encountered in utilizing the pre-trial conference increase in direct proportion to the extent to which these conditions are involved.

Since the procedures prior to trial, other than the pre-trial conference, present the least obvious problems, a word about them is indicated.

Under the Federal Rules of Civil Procedure parties to a litigation are accorded broad rights of discovery. The right of any party to take the testimony of other parties and witnesses before trial, by deposition, is prac-

[3] CAL. SUPER. CT. RULE 8.7, 8.8; FED. R. CIV. P. 16.

tically unlimited, (Rules 26, 30) except as it is subject to motions to terminate or limit the examination (Rule 30). Interrogatories may be served upon adverse parties, which the latter are required to answer, again subject to a motion to limit (Rule 33). Any party on motion may require any other party to produce documents, papers, accounts, photographs, etc., for inspection and copying, subject again to a motion to limit the discovery (Rule 34). Any party may serve upon any other party a request for admissions (Rule 36). A procedure also is provided to be invoked on refusal to make discovery (Rule 37).

The California Legislature in 1957 amended the Code of Civil Procedure to incorporate, with some modifications, the Federal Rules for discovery, effective January 1, 1958.[4]

Some pre-trial conference rules, including the California rules, require that the procedures for discovery shall be completed before the pre-trial conference.[5] These requirements present one of the most controversial issues with respect to pre-trial conferences, and will be alluded to in discussing some of the pre-trial problems.

It is not possible within any reasonable compass to discuss the multitude of problems involved. Nor is it possible to elaborate the differences between the pre-trial of a small case and the pre-trial of a large case. Suffice it to say that the larger and the more complex the case the greater the scope and the utility of the pre-trial.

These introductory comments will serve to bring into focus the few problems and controversies which it is feasible to discuss.

Discretionary and Compulsory Pre-Trial

Courts vary in the number of judges and the number of cases on the calendar. In the smaller jurisdictions the judge who pre-tries the case probably will preside at the trial. In the larger jurisdictions the best scheme so far devised is to have a pre-trial calendar presided over by a judge who specializes in pre-trial. This means that a different judge will preside at the trial.

Cases vary in size and complexity. At one extreme there is the simple case, to be tried in a few hours or in a few days. At the other extreme are intricate patent cases, long-term accountings, multi-issued stockholders' suits, and multi-issued and multi-partied anti-trust actions.

Any extensive prescription for formalized and rigid procedures is likely to break down under its own weight. Simplicity and flexibility will no doubt enhance the utility of pre-trial.[6]

[4] CAL. CIV. PROCEDURE BEFORE TRIAL (CONT. ED. BAR) 675 (1957).

[5] CAL. SUPER. CT. RULE 8.2; SOUTHERN DIST. RULE 9(c).

[6] 20 F.R.D. 485, 502-03, 509, 525, 531, 560 (1957).

These considerations lead to the conclusion that rules should not require the pre-trial of every case in every court.

Experience has demonstrated that in many cases, where the issues are few and simple, a pre-trial conference is a waste of time. A preliminary survey of the case in conference and the drafting of a pre-trial order days or weeks in advance of trial results merely in a duplication of effort, and practically amounts to trying the case twice.

In a five or ten minute colloquy with counsel on the call of the calendar the judge can determine readily whether it will serve any useful purpose to pre-try a case. He then can set certain of the cases down for trial and put others on a calendar for pre-trial.

The argument against leaving pre-trial to the discretion of the judge is this: Many judges are not "sold" on the pre-trial conference; these judges will not be bothered with it,[7] if they have an option; as a result, even in jurisdictions where the calendar is not crowded, the advantages of pre-trial in reducing the cost of litigation and eliminating delay are lost to the litigant; expense and delay are the focal points of criticism of the administration of justice;[8] and the interests of litigants should be the primary consideration of bench and bar.[9]

The argument for compulsory pre-trial is this: It eliminates the apathy of judges as a factor in adopting the practice; and it makes for a uniformity of procedure.

The simple truth of the matter is that the apathetic judge, even under compulsion, makes a mockery of pre-trial.[10] A husband once came to a lawyer's office and said, in effect: My wife won't do this; she won't do that; she has left me; I think she is playing around; I want to do something about it. The lawyer replied that he thought the husband had grounds for a divorce. Whereupon, the husband said: "I don't want a divorce. I want you to bring my wife into court and have the judge make her love me." The probability of enlisting the cordial cooperation of disinterested judges in pre-trial, by a judicial mandate, is about as remote as the probability of arousing the affection of the disinterested wife by a like process. Actually compulsory pre-trial has failed on occasion;[11] and, again, it has been outstandingly successful, in situations, obviously *sui generis,* of an emergency of calendar congestion.[12]

Seemingly the discretionary plan is preferred, and the preference is

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[7] *Id.* at 485, 512–13.
[8] *Id.* at 485, 517–18.
[9] *Id.* at 492–93.
[10] *Id.* at 480, 488, 490–91.
[11] *Id.* at 485, 559–60.
[12] *Id.* at 489, 490.

founded on the hope, supported by experience,[13] that before too long bench and bar will come to a realization of the virtues of pre-trial, and it will enjoy universal acceptance.

Under Rule 16 of the Federal Rules of Civil Procedure pre-trial rests in the discretion of the court. Under the California Rules for Superior Courts, effective January 1, 1957 (Rules 8 to 9), pre-trial is compulsory, except in cases estimated to require two hours or less for trial and in appeals from inferior courts requiring a trial *de novo*. The United States District Court for the Southern District of California has adopted pre-trial rules, effective April 15, 1957,[14] which make pre-trial compulsory in all cases. These Rules, however, provide an escape hatch. Under Rule 9(b) a party may be relieved from compliance with the rules on application to the court, and the requirement for submission to pre-trial is coupled with the provision "Unless the Court or the Judge in charge of the case otherwise directs."

In all probability, both the State Rules and the Southern District Rules for compulsory pre-trial will turn out to be too rigid. As Mr. Alfred J. Schweppe said at the recent Ninth Circuit Judicial Conference, in substance; these rules constitute an interesting experiment, a pioneering step, and a year from now a fascinating report should be forthcoming as to how the mandatory rule has worked.[15]

Where Should the Pre-Trial Conference Be Held?

Unless the rules provide otherwise, the pre-trial conference may be held either in the judge's chambers, or in open court. Under the California Superior Court Rules the choice is in the discretion of the judge (Rule 8.4). The Southern District of California Rules appear to contemplate a conference in open court (Rule 9). The question still appears to be an open one.

Conferences in chambers tend to become too informal; develop into a social occasion for an exchange of amenities; and the expected benefits of informality, such as a greater freedom on the part of lawyers to discuss their cases, have not been realized.[16]

Conferences in open court apparently have proved to be more effective. Even though not too formal, counsels' inherent respect for the court, the superior facilities for marking exhibits and making a record; and the conventional atmosphere and tone of the proceeding yield better results.[17]

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[13] *Id.* at 488–91, 511–12, 522.

[14] S.D. CAL. RULES.

[15] 20 F.R.D. 485, 511–12, 513 (1957).

[16] *Id.* at 498–99, 526, 528.

[17] *Id.* at 485, 498, 499, 526, 528–29.

When Should the Pre-Trial Hearing Be Held?

There should be no inflexible rule as to the time of holding pre-trial conferences. The condition of the trial calendar and the peculiarities of the individual case are among the factors which dictate the timing. This very diversity of considerations indicates that, in the complicated case, it may be wise to hold several pre-trial hearings. The reasons for that can be demonstrated by considering the consequences of a single hearing.

One scheme for the single hearng is to hold it shortly after the joining of issue. The object here is to limit the issues and settle the pleadings. That would seem to be a minimum utilization of the possibilities of pre-trial.

If the scope of this early pre-trial is broadened there are two possible results in a situation where trial is a long way off. (1) The pre-trial record will be awfully cold when trial is reached, will require a lot of warming-over, and will entail a duplication of effort; or (2) the lawyers are likely to assume the attitude, and quite justifiably, that they will have to be freshly and completely prepared for trial a couple of years hence, so why waste a lot of time at this juncture? The result is likely to be an inadequate pre-trial hearing, and an inordinate "hassle" over modifications of the pre-trial order on the trial "to prevent manifest injustice." (FRCP Rule 16).

Another idea as respects the single pre-trial hearing is to set it closer to the trial date. This will eliminate the objections just noted as to the earlier hearing, but at the same time it gives rise to other shortcomings.

In this second procedure it usually is required, either as a matter of practice[18] or by rule[19] that counsel be prepared for trial in advance of the conference, and that preliminary motions, depositions, submission of interrogatories, requests for admissions and all procedures for discovery be completed.

The all-important object of the pre-trial hearing is to eliminate delay and waste of time and effort. Delay and waste cannot be eliminated if the pre-trial conference is postponed until after they have come to pass. Certainly one of the most prolific sources of delay and waste is to be found in the field of these preliminary procedures.

Take only the matter of depositions for example. The federal rules for the taking of depositions (Rules 26-31) are more than liberal. It is not necessary to enumerate their details. Suffice it to say that "Wide is the gate, and broad is the way, that leadeth to destruction, and many there be which go in thereat."[20] (Matthew 7:13). These rules provide an open commission which any lawyer worth his salt is going to use to cover the water-

[18] NIMS, PRE-TRIAL 148 (1950).

[19] 17 F.R.D. 439, 442, 445, 479; CAL. SUPER. CT. RULE 8.2.

[20] Mathew 7:13.

front, out of a super-abundance of caution. The result is countless reams of unnecessary depositions.

It seems perfectly obvious that pre-trial conferences could eliminate the necessity for the taking of many depositions, and could effectively limit the scope of those which prove to be necessary.[21]

By the same token, the pre-trial conference could resolve many of the problems customarily thrashed out in an infinity of preliminary motions, expedite the production and authentication of documents, and eliminate the necessity for extended interrogatories and demands for admissions.

These considerations indicate a rather definite course of action graduated according to the size of the case.

1. Visualize the probable utility of several pre-trial hearings.
2. Forget any rigid time schedule for pre-trial hearings, such as X days after issue joined or X days before trial. Employ a flexible schedule which meets the requirements of the particular case.
3. Require counsel to be prepared for the first and each succeeding hearing in conformity with the projected scope of the hearing, but do not dissipate entirely the benefits of the procedure by requiring counsel to be prepared for trial at the outset, and to have exhausted all of the wasteful preliminary processes before the hearings start.
4. Instead of requiring counsel to be ready for trial, utilize the hearings as a means of *getting ready for trial* expeditiously and efficiently by eliminating so much of the preliminaries as can reasonably be dispensed with. In each case it will be necessary to cut the pattern to fit the cloth.
5. Keep in mind that pre-trial hearings do not necessarily terminate with the beginning of the trial. As the trial progresses it may be found expedient at the close of one stage and before passing to the next to hold another conference and still another.[22] If these may not properly be called "pre-trial" conferences, call them "intra-trial" conferences. It's the same difference. In the *Investment Bankers' Anti-Trust* case, Judge Medina called them "pow wows."
6. And also keep in mind that the objective is not to put the case in a straight-jacket, but to construct a framework, designed according to the art of the profession and upon which the case itself may be constructed, using only the sound timber of its merits.

Should the Pre-Trial Hearings Be Held Before the Judge Who is to Try the Case?

Unfortunately that question cannot be answered according to your conviction. In courts with large calendars and many judges it has been

[21] 13 F.R.D. 225-26 (1952); 16 F.R.D. 75, 80 (1954); 20 F.R.D. 532 (1957).
[22] 13 F.R.D. 222 (1952).

found necessary to have a pre-trial calendar and a special pre-trial judge.[23] There, when a case is reached for trial the trial judge is confronted with a pre-trial order which has been settled by someone else.

Apart from this situation, imposed by the press of business, the preference of some lawyers for different judges at pre-trial and trial is understandable, whether you agree with it or not.

There is a lurking suspicion on the part of the lawyers that the pre-trial judge may be inclined to pre-judge the case, and that it would be better to bring a fresh mind to the trial, particularly if there has been unavailing discussion of settlement.

Of course, the lawyer's attitude will depend on which way the wind blows. In one case he may be delighted to continue before the same judge; in another he may yearn earnestly for a change. But, generally, since you cannot predict the direction of the judicial wind, the lawyer would prefer to operate under a rule which will insure him a change of climate after the pre-trial.

This is hardly a sound view. By way of illustration, eliminate the pre-trial and you have pretty much the same situation. When a case comes before the trial judge he may be the same judge who heard a motion to dismiss, or a motion for a change of venue, or who passed on objections to a discovery deposition. In any event, in the early stages of the trial he may be called upon to settle one or more preliminary issues, and by that time one lawyer or another may wish he were before another judge.

This view also assumes a general disability on the part of the bench to withhold judgment until the case is fully presented. If we were to indulge the assumption that there are incompetent judges, the situation would not be remedied by dividing responsibility between the pre-trial and the trial judge.

The better view seems to be that it is the function of pre-trial to utilize the talents of court and counsel in preparing for an expeditious and economical trial. Much of the benefits will be lost if any member of the triumvirate (plaintiff's lawyer, defendant's lawyer and the judge) yields to a substitute, and especially if that member be the judge.

As Judge Kincaid has said: "The best friend the trial judge will ever have is the pre-trial tool."[24] Through its use he is thoroughly educated in the case. He has the briefs of counsel at hand. "He is master of the situation from the beginning to the end."[25] To which may be added, he will be the more the master of it if his contact with the case has been a personal

[23] 17 F.R.D. 484 (1955).

[24] *Id.* at 443.

[25] *Ibid.*

contact rather than a vicarious participation through the reading of the pre-trial order of another judge.

For the protracted case it is imperative that the pre-trial judge be the trial judge, particularly in view of the fact that the pre-trial hearings will be a course of continuing education for the trial team of court and counsel.

Even in jurisdictions where a specialized department for the pre-trial of the run-of-the-mill litigation is borne of necessity, it certainly is feasible to assign the comparatively infrequent case of large proportions to a trial judge early enough to permit him to organize and conduct the pre-trial phases of the litigation.[26]

What Should Be the Scope of the Pre-Trial Stage of the Trial?

To a certain extent that has been touched upon already. In practice the scope is varied. It may be confined to a clarification of the pleadings; it may include the disposition of preliminary motions, the inducement of admissions, obtaining stipulations as to the issues of fact and law, and the screening of documentary evidence. The pattern for one case is not necessarily suitable for another case.

It has been said that pre-trial is not a substitute for discovery,[27] and that is a sound view. But in the larger case it will fall short of its purpose unless it encompasses, so far as practicable in a given case, all of the preliminary procedures provided for in the rules.

It can be employed to clarify the pleadings, to dispose of preliminary motions, to adduce admissions, to procure stipulations, to screen a deluge of exhibits, to delineate and limit the matters in dispute (both as to preliminary matters such as the discovery process, with all of its ramifications, and issues going to the merits) and to boil the controversy down to its bare essentials.

All this sounds like a long and tedious process. But it has been tried and proved. It does take time and patience. But the time is *de minimus* as compared to the elapsed time before trial if the parties are left to their preliminary remedies by the ordinary processes, *e.g.*, motions directed to the pleadings with briefs and arguments; the submission of interrogatories, with motions for protective orders under Federal Rule 30; requests for admissions, with court hearings on written objections under Federal Rule 36; motions for orders for the production and inspection of documents, and argument of the motions; and endless depositions, with motions to limit their scope and frequent resort to the court for rulings.

Much of this can be short-circuited by a comprehensive pre-trial pro-

[26] 20 F.R.D. 485, 532, 534 (1957).

[27] 17 F.R.D. 442 (1955).

gram, thus minimizing the delay in reaching trial, and the trial itself will be measurably simplified and abbreviated.

Who Should Draft the Pre-Trial Order?

The practice in this respect is varied. In some jurisdictions the lawyers draft proposed orders, serve them, and then work out the final text of the order before the pre-trial judge. In others the pre-trial judge dictates the order at the conclusion of the hearing, or shortly thereafter.[28]

Any lawyer, of course, would prefer to have a voice in the drafting of the order. If the case is complicated to a greater or lesser degree an acceptable practice is available. As each stage of the pre-trial proceedings is completed the conclusions arrived at can be crystallized by a statement on the record,[29] or a draft of the relevant provisions of the ultimate order can be formulated then and there. These can be discussed, settled and dictated to the court stenographer as the hearing progresses. By this means the order for all practical purposes, will be completed at the conclusion of the hearings, and will be the joint product of the efforts of court and counsel. The order probably will be acceptable to all parties.

But what if it is not? As it is built up counsel can express his disagreement with any particular conclusion, and register his objection. On the trial he can move for a modification of the order "to prevent manifest injustice"[30] and if his motion is denied he may have laid the ground for an appeal from an adverse judgment.

Some Objections to Pre-Trial Procedures

Although pre-trial in essence is as old as the common law itself, certainly as old as the courts of chancery, it came to be rarely availed of in the law courts and was not known by that name. When the Federal Rules dug it out of the debris of antiquity and made it a primary procedure, it was thought to be an innovation, and was met with widespread opposition. It has been supposed that this opposition came from lawyers trained in the old tradition, with an "ingrained and traditional reluctance . . . to disclose their hands."[31]

I am coming around to the view that it has a much broader base. Since retiring from the practice of the law I have spent three years teaching. At Hastings College of the Law I have conducted a practice court. Every student has been privileged to argue a motion and to try a jury case presided over by one of the local superior court or district judges. In conference

[28] *Id.* at 482.

[29] 13 F.R.D. 226 (1952).

[30] FED. R. CIV. P. 16.

[31] Wiggenhorn, as quoted in NIMS, PRE-TRIAL 67 (1950).

with the participants I have discovered that these youngsters, who have never seen the inside of a court room, have a reluctance to disclose their hand as ingrained and as stubborn as that of the most hard-bitten trial advocate of long experience. From which I conclude that this reluctance is not confined to the legal profession but is universal and congenital. That may indicate that there is something more to be overcome than the practices of tradition. But, continued experience at the bar under the new order may do the trick. The trial lawyer soon learns that this matter of disclosure is a two-way street. My adversary learns a lot about my case, but I learn as much about his. As a result we both come up to trial better prepared, and we both are protected from surprise.

It has been said that while pre-trial does much to assure a trial on the merits it also does much to eliminate the skill, resourcefulness and ability of trial counsel as elements in winning law suits. Along with this go the current laments over the decline in the art of advocacy.

These appraisals are specious. The whole field of litigation has changed in character within the space of three or four generations, at most. The age-old dramas of love, life and death still reach the court room, but the great bulk of litigation today has to do with complex problems of economics, business and social progress. The art of advocacy now savors less of the forensic and more of the pragmatic. If we are never again to have a Daniel Webster it may well be because in the cast of characters for today's court room drama there is rarely a Webster role.

Yet in today's litigation there is ample room for all the skill and ingenuity a lawyer can muster, ample room for that phase of advocacy which calls for art supreme in the investigation, organization, arrangement and presentation of a cause and the writing of concise, cogent and persuasive briefs. There still is room for the forensic phase of the art in examination, cross-examination and oral argument, but it has lost precedence in favor of the pragmatic.

If pre-trial will speed the lagging pace of the judicial machinery and move us one whit closer to substantial justice, what room is there for regret that the art of advocacy becomes less colorful and more efficient?

In the middle of the thirteenth century trial by ordeal was abolished during the reign of Henry III.[32] After several hundred years we had progressed to the enlightened stage, to adopt the words of Professor Sunderland, of trial "from ambush."[33] With the aid of the pre-trial device we may be about to progress by another transition, accomplished with more commendable dispatch, to the stage of trial on the merits.

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[32] 12 ENCYC. BRIT. 852 (14th ed.).

[33] NIMS, PRE-TRIAL 2 (1950).