North Dakota Law Review

Volume 39 | Number 2 Article 2

1963

Pre-Trial Procedure

W. C. Lynch

PRE-TRIAL PROCEDURE

W. C. LYNCH*

The Pre-Trial Conference has become an established part of civil procedure in most of the district courts in the state of North Dakota. The advantages and practical value of the use of the pre-trial conference has become so well established that it perhaps is no longer necessary to defend its use. Nevertheless, the procedure followed varies from district to district within the state and we continue to find many lawyers, whether they be recent law-school graduates or those having years of experience, who either have never participated in a pre-trial conference or are in some doubt as to the procedure followed. Therefore, we will briefly consider in this article the following:

(1) The objectives and results of the pre-trial conference.

(2) The procedure followed in the pre-trial conference, together with some suggested forms.

(3) The role of the judge, lawyer and the parties.

OBJECTIVES

The first objective of a pre-trial conference is to determine the specific issues that are in dispute. The second objective is to prepare the trial judge and the counsel for the actual trial of the lawsuit. The third objective is to promote the interests of justice in seeing to it that the litigants receive a fair and expeditious trial in which a party prevails by neither surprise nor technicalities.

If these three basic and fundamental objectives are kept in mind by the presiding judge and counsel, the pre-trial conference will be successful.

PROCEDURE—FORMS

Rule 16 of the North Dakota Rules of Civil Procedure sets forth the rules pertaining to pre-trial. Rule 16 provides

* LL.B., University of North Dakota; North Dakota District Judge, Fourth Judicial District.

that after issue is joined, the court, in its discretion, may order a pre-trial conference to be held in any action, and it further provides that a pre-trial conference shall be ordered upon written request of a party. As a practical matter, however, it will be the judge that orders the pre-trial conference on the court's own motion. Pre-Trial should be ordered in all jury cases and in all complex court cases.

It is important that the pre-trial conference be held at least two or three weeks before either the call of the calendar or the date the case is set for trial. It is equally important that counsel by given notice of the date set for the pre-trial conference at least ten days prior to the hearing so that counsel may complete their discovery proceedings and properly prepare their case for the pre-trial hearing.

To accomplish the objectives of pre-trial, the order calling the conference should be substantially as follows:

STATE OF NORTH DAKOTA)
) ss
COUNTY OF .....)

IN DISTRICT COURT
..... JUDICIAL DISTRICT

(Name)	)	
	Plaintiff,)	ORDER FOR
	)	PRE-TRIAL
vs.	)	CONFERENCE
	)	Civil No. .....
(Name)	)	
	Defendant.)	

Good cause appearing therefor, upon the Court's own motion, IT IS ORDERED:

(1) That a Pre-Trial Conference on this case will be held ....., 196....., at ..... o'clock ..... m., in the

undersigned Judge's Chambers in the courthouse at ...., North Dakota.

(2) That each party appearing in the action may attend in person and shall be represented at the pre-trial hearing by an attorney who has full knowledge of the case and authority to bind such party by stipulation.

(3) That each counsel prepare in writing in advance of the pre-trial hearing, in duplicate, a factual statement of their claims, together with a list of all witnesses, their addresses, and a list of all exhibits to be offered.

(4) That counsel submit at the hearing all documentary proof, photographs, X rays, etc., so they may be marked as exhibits in the case in advance of trial and offered in evidence.

(5) That counsel be prepared to discuss applicable and unusual points of law that will arise in the case.

(6) That, if a jury has been demanded, counsel submit requested jury instructions.

(7) That counsel are requested to meet prior to pre-trial and discuss and consider possibilities of settlement.

(8) That counsel will make sure that all unfiled or withdrawn pleadings are in the Clerk's file prior to the time of the pre-trial conference.

(9) That counsel confer prior to the hearing and determine and reduce to writing all facts that may be stipulated and for which no proof will be required at the trial of the case.

(10) That the Clerk shall forthwith serve this Order by United States mail upon all parties appearing in the case pursuant to Rule 5, North Dakota Rules of Civil Procedure.

Under Rule 16, N.D. R. Civ. P., upon failure of counsel to appear, this Court has authority to grant a motion for dismissal or to proceed with the conference, as may be appropriate. No request for adjournment will be considered unless in the form of a motion or stipulation showing cause for adjournment.

DATED THIS ..... day of ....., 196...., at ...., North Dakota.

BY THE COURT:

.....
District Judge

The Clerk of the District Court prepares the order for pre-trial, together with the usual affidavit of mailing, and serves the order by mail. The form itself is either printed or mimeographed.

An examination of the pre-trial order will reveal that the court is actually ordering counsel to properly prepare for trial. The order requires no more than the experienced counsel will do in preparation for trial. When counsel have finished their preparation for the pre-trial conference they will find that they are indeed "ready for trial".

It is not unusual for the busy practitioner to postpone the actual study, research, appraisal, and preparation for trial until just shortly before the actual trial date. He then usually finds that he has not allowed himself sufficient time in which to plan his trial strategy, research the points of law that he discovers are likely to arise, and adequately prepare his case for trial. The result is that in all too many cases, and as a result of the "last-minute pressure," the case is either tried without adequate preparation, settled for less than its actual value or not settled when it should have been. The properly conducted pre-trial conference can, therefore, be very helpful to counsel and, perhaps more important, to their clients.

Except in extremely complex cases, pre-trial conferences are set at 45-minute intervals and usually can be completed within one-half hour. However, to properly pre-trial a case within these time intervals, it is necessary that the presiding judge conduct the conference in an orderly manner and not let the conference deteriorate into an unrestrained argument between counsel or the parties.

The judge should deliberately and systematically cover each of the items that must be considered at a pre-trial conference if the conference is to be of value. A check-list of matters to be considered has been found to be an in-

valuable tool for the judge to use in conducting the conference.

The following pre-trial checklist is used in auto negligence cases and can readily be adapted and modified to meet the requirements of other cases.

The checklist used in our court is as follows:

PRE-TRIAL CHECKLIST

(1) CHECK PLEADINGS

(a) The Court should inquire of each counsel as to whether or not his pleadings are in order or whether counsel intends to move for amendments prior to trial. (See Rule 15 N.D. R. Civ. P.). The Court, either on motion or on its own initiative, may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter (Rule 12 (f) N.D. R. Civ. P.).

(b) The Court should inquire whether or not all necessary or indispensible parties have been joined.

(2) MOTIONS PENDING OR ANTICIPATED

(a) To avoid surprise and delay, the Court should inquire of counsel whether they intend to file further motions of any kind prior to trial.

(b) Motions pending or to be made should be set for hearing and disposed of prior to trial.

(3) DISCOVERY PROCEEDINGS PENDING OR ANTICIPATED

(a) Inquire of both counsel as to whether or not further discovery procedures such as interrogatories or depositions are pending or anticipated prior to trial. If further depositions are anticipated, obtain stipulations as to the time of taking.

(4) STATEMENT OF CLAIMS AND STIPULATIONS

(a) Have counsel file and exchange factual statements of their claims.

(b) File any written stipulations of any facts

agreed upon and for which no proof will be required at the trial of the case and discuss with counsel the possibility of stipulating as to any other matters.

(5) MARK ALL EXHIBITS

(a) Call for all plaintiff's exhibits and have them marked by the court reporter. Attempt to reach agreements with counsel as to foundation and admissibility of maps, sketches, diagrams, photographs, etc. Determine whether medical reports have been exchanged and whether doctor and hospital bills, hospital records, X rays, medical charts, or other similar exhibits may be admitted in evidence without further foundation and without having to establish reasonableness and authenticity. Counsel should be cautioned that failure to produce exhibits presently in his possession and not submitted at pre-trial may result in such exhibits being inadmissible at the time of trial. Other exhibits discovered subsequent to pre-trial and to be used at the trial are directed to be shown to opposing counsel upon discovery and prior to trial.

(b) Same procedure is followed with regard to all defendant's exhibits.

(c) Exhibits are either returned to the custody of respective counsel or filed with the Clerk.

(d) If admissibility in evidence of any exhibit is questionable, have counsel brief the issue.

(6) APPLICABLE LAW AND UNUSUAL ISSUES BRIEFED

(a) Require counsel to file pre-trial briefs on the law they contend applies to their case.

(b) Inquire whether there are any novel or unusual legal issues which will arise at the trial of the case and request counsel to furnish briefs within a specific time prior to trial.

(7) DISCUSS SETTLEMENT POSSIBILITIES

(a) Inquire of counsel as to prospects for settlement. Do not urge or coerce settlement, but encourage a frank discussion of compromise and settlement.

(8) JURY INSTRUCTIONS

(a) Have counsel file their requested jury instructions and exchange copies with each other.

(9) TRIAL DATE AND LENGTH

(a) Obtain an estimate of the length of the trial and set the trial date.

If the presiding judge conducts the pre-trial conference by following the checklist and the items to be covered in the order as listed, he will find no time is wasted, argument among counsel will be minimized and the desired results will be obtained.

Under the provisions of Rule 16 N.D. R. Civ. P., if counsel for one of the parties doesn't appear at the pre-trial conference the court has the authority to grant a motion for dismissal or, in the alternative, it may proceed with the conference.

It is also very important that, if possible, the attorney who is going to actually try the case appear and participate in the pre-trial conference. If the trial counsel cannot appear at the time designated for pre-trial, it is far better to have the conference continued to a date mutually satisfactory to court and counsel.

The pre-trial order is either prepared by the court or by one of the parties' lawyers as directed by the judge.

The pre-trial order may be in substantially the following form:

STATE OF NORTH DAKOTA)
) ss
COUNTY OF .....)

IN DISTRICT COURT
..... JUDICAL DISTRICT

(Name),	)	
	Plaintiff,)	
	)	PRE-TRIAL
vs.	)	ORDER
	)	Civil No. .....
(Name),	)	
	Defendant.)	

(List the names and addresses of all counsel and parties appearing.)

A pre-trial conference was held in the above-captioned action on the .....day of ....., 196...., the Hon. ....., District Judge, presiding.

APPEARANCES

(1) PLEADINGS

(Insert any amendments that are to be made to existing pleadings and portions of the pleadings that are stricken.)

(2) MOTIONS PENDING AND ANTICIPATED

(Set forth any additional motions contemplated or pending and times set by the court for hearing on the motions.)

(3) DISCOVERY PROCEEDINGS PENDING OR ANTICIPATED

(Set forth all discovery proceedings contemplated and definite dates for depositions as agreed upon by the parties.)

(4) STIPULATIONS

(Set forth all stipulations of facts as filed with the court or agreed upon at pre-trial.)

(5) EXHIBITS

(a) The following Plaintiff's exhibits were identified and are received in evidence: (List and identify all exhibits offered and received in evidence.)

(b) The following Plaintiff's Exhibits have been marked and identified and objection is made as to their being received in evidence: (List and identify exhibits objected to by defense counsel.)

(c) The following Defendant's Exhibits were identified and are received in evidence: (List and identify all exhibits offered and received in evidence.)

(d) The following Defendant's Exhibits have been marked and identified and objection is made as to their being received in evidence: (List and identify exhibits objected to by plaintiff's counsel.)

(e) All exhibits marked and identified were filed with the Clerk of the District Court (or returned to the custody of the respective attorneys).

(f) Any exhibits hereafter discovered for the first time will be shown to opposing counsel before trial.

(6) WITNESSES

(a) The names and addresses of witnesses for the Plaintiff are as follows: (List names and addresses of all plaintiff's witnesses.)

(b) The names and addresses of witnesses for the Defendant are as follows: (List names and addresses of all defendant's witnesses.)

(c) The names and addresses of any witnesses hereafter discovered by either party will be given to opposing counsel prior to trial.

(7) BRIEFS ON NOVEL OR IMPORTANT ISSUES

(a) Counsel will file briefs within the next (five) days on the following items: (List all items or issues to be briefed, including admissibility of contested exhibits.

(8) ESTIMATED LENGTH OF TRIAL AND TRIAL DATE

(a) Estimated length of trial is now ..... days.

(b) The case will be called for trial on the ..... day of ....., 196...., at ..... o'clock, ... m., in the ..... County Courthouse, at ....., North Dakota.

DATED this ..... day of ....., 196...., at ....., North Dakota.

BY THE COURT:

.....
District Judge,
.....Judicial District,
State of North Dakota

The Clerk of the District Court prepares the usual affidavit of mailing and sees to it that the court's order is properly served and filed. The Clerk's duty is set forth in Section 11-17-01 (d) N.D. Cent. Code.

ROLE OF THE JUDGE, LAWYERS, AND PARTIES

The actual conduct of the pre-trial conference is governed by the presiding judge. The success of the conference is largely dependent upon the judge maintaining control and seeing to it that the goals of pre-trial are accomplished.

The judge should prepare himself for the conference by examining carefully the pleadings in the case file and acquaint himself with the issues involved and the applicable law.

Although it is preferable, it is not necessary that the judge who presided at the pre-trial conference be the same judge who will preside at the actual trial of the case. However, the judge will find that pre-trial is the best tool available in helping him in the actual trial of the case no matter how much actual experience he may have had as a lawyer and as a judge. I believe it would be the unusual case in which the judge would not find some new and difficult point of law presented to him for his decision. Pre-trial enables the judge to prepare for the trial by analyzing the briefs of the parties and researching the difficult issues that apparently will arise. His decisions during the trial will be based on his research of the law rather than on "snap judgments" reached while on the bench and which all too often give rise to reversible error.

By acquainting himself with the issues involved and the trial theory, the judge is better able to determine the

admissibility of the evidence offered and reject the irrelevant and immaterial.

Without the pre-trial conference the judge usually finds himself pondering and researching points of law far into the night and even then wishing he had just a little more time to research and consider the difficult problems that have arisen during the actual trial. Pre-trial helps the judge research the applicable law in advance of trial.

The most difficult and pressing task the trial judge has in the actual trial of a case is the preparation of the jury instructions. Without pre-trial, requested instructions are usually presented to the judge at some stage during the actual trial. In complex cases the judge may find that he does not have a library accessible to check the citations given by counsel in support of their requested instructions, and again the chance of costly error is multiplied by either the giving or denying of the requested instruction without adequate research. By receiving the request jury instructions at the time of pre-trial, the trial judge is able to do a more adequate job of preparing the jury instructions. The great bulk of the jury instructions are then prepared prior to trial rather than being typed by the court reporter during the argument of counsel.

The trial judge's objective should be to avoid delay, promote justice, and secure the trial of the basic issues involved in the least amount of time and with the least amount of expense to the parties. The obtaining of a fair settlement of a case is a by-product of a successful pre-trial conference.

The litigant will find that the use of pre-trial will save him a great deal of expense by shortening the actual trial time of the case, eliminating the necessity of calling many witnesses that otherwise could be called to lay the foundation for certain exhibits and in testifying as to issues that are not in dispute.

We encourage the attendance of litigants at the pre-trial conference. Although some feel that the attendance of a litigant at a pre-trial conference prevents a frank discussion by counsel as to the strength and weaknesses of the case, this is not borne out by experience. If a litigant at-

tends a pre-trial conference he sees for the first time the issues involved in his case reduced to fundamentals. He is then better able to evaluate his own case and more intelligently determine whether to settle or to litigate.

The lawyer will find that the pre-trial conference will save him work and worry.

There is less work because the lawyer does not have to spend long hours of research preparing for issues and points of law that, because of pre-trial, need not be litigated. He finds there is less worry as a result of the pre-trial conference because he does not have to be concerned about surprise or of overlooking a basic issue. The lawyer also finds that because of the pre-trial conference he is better prepared for trial.

He further finds that in the preparation in advance of the jury instructions he has actually prepared the law of the case.

The strength and weaknesses of his client's case are readily apparent to him as a result of the pre-trial conferference. The lawyers finds himself better able to properly advise his clients as to whether to settle or litigate and he has more confidence in his advice based on his knowledge of the evidence that will be produced at the trial.

No lawyer appreciates learning for the first time at the actual trial of the case that there are a few things about the case his client did not reveal to him and, in addition, there exists some damaging evidence that his client either did not know about or failed to disclose. The time for the lawyer and the client to learn of the strength and weaknesses of their case is prior to the trial. Whether the lawyer finds that the case is stronger or weaker than he had realized, as a result of the pre-trial conference he is able to make a better decision as to whether to settle or litigate.

A good and successful pre-trial conference is a result of the cooperation of the judge and counsel. Experience has established that such a pre-trial conference frequently saves days of trial time.

The use of pre-trial conference is now far beyond

the experimentation stage. Its value has been proven in our federal and state judicial systems.

Pre-trial procedure is here to stay, and all of us, judges, lawyers and litigants, and society in general, will be better off the more it is used in our courts.