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A PROGRESS REPORT ON PRE-TRIAL CONFERENCES IN NORTH DAKOTA

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THE RULES of procedure in court are subject to change and development as the need for such change appears. Originally under the common law pleadings were made orally in open court. This was gradually changed to a form of written pleadings. Such pleadings, however, became cumbersome and exceedingly technical. Then followed an era in which the rules governing pleadings were liberalized. In the United States the technical forms of common law pleading were abolished in most of the states and a simple petition or complaint setting forth the facts was submitted. To further expedite the trial of cases it has lately been proposed that a conference of court and counsel before trial be held to eliminate all unnecessary matters and to limit the trial to the disputed issues. This procedure has come to be known as pre-trial. Of this movement, Bolitha J. Laws, Chief Justice, U. S. District Court for the District of Columbia, writes:

> "Pre-trial practice has become one of the outstanding modern improvements in the administration of justice. It has won enthusiastic acceptance by a large number of the bench and bar, and has aroused keen interest among laymen. It has been heralded in a popular magazine of national circulation (Reader's Digest) 'as the most revolutionary innovation of the century in our tradition-encrusted, ponderous legal system,' an accolade of no little significance when popular dissatisfaction with the courts has been manifested and the legal profession is actively studying means for improving public relations."

Of this procedure Milton K. Higgins, Bismarck, writes:

> "Personally, I feel that the provision for pre-trial is one of the greatest advances made since my admission to the bar nearly thirty years ago."

The origin of this movement in North Dakota can be traced to a development of the practice by counsel and courts to confer informally on their cases before trial. Regarding that Herbert G. Nilles says:

> "It has long been the custom and usage among the majority of the members of the bar to consult with each other prior to trial and obtain admissions or stipulations concerning non-controversial items."

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Similarly Clyde Duffy writes:

> "Here we get together with the opposing attorney and agree on everything else that can be agreed upon, so that there is seldom any unnecessary proofs or call of unnecessary witnesses. We have found this informal method to be highly satisfactory but obviously there is need for an official pre-trial conference which may be used where the informal method fails."

Gradually the courts took a hand in these conferences. Judge W. L. Nuessle, while on the district bench more than 35 years ago, began to call opposing counsel in conference for the purpose of expediting the trial of cases. Other district judges adopted similar procedure.

The first attempt in the United States to formally recognize this practice was the adoption of a pre-trial rule and docket in the Circuit Court of Wayne County, (Detroit) Michigan, in May, 1926. It was found very successful. It was adopted for the federal courts in 1938 by Rule 16 of the Federal Rules of Civil Procedure. It is now extensively used in most federal courts. It has been adopted by many of the states either by court rule or statute.

In the preparation of the Revised Codes of 1943, a committee of the Bar was appointed to advise the code commission on the rules of practice and procedure to be adopted. That committee was composed of A. M. Kvello, Nels G. Johnson, E. T. Conmy, John J. Kehoe and G. Grimson, chairman. Judge A. M. Christianson was designated by the Supreme Court as an advisory member of the committee.

This committee made a thorough study of this matter of pre-trial conferences. It was found that the whole object of these pre-trial conferences was the simplification of the issues; the elimination of unnecessary technical proof of facts and documents; the reduction of the delays and expense of trials so that a suit would go to trial only on questions on which there was an honest dispute of fact or law. The committee concluded such practice would be of benefit to litigants, courts, attorneys and witnesses and would contribute to the efficiency of the administration of justice. A summary of this study was given to the 1944 session of the North Dakota Bar Association and is found in the proceedings on page 85 of Volume 21, Bar Briefs.

The committee then recommended the adoption in a modified form of the federal rule for conference before trial. In accordance therewith such modified form of the federal rule was introduced into the legislature in 1943 by Senators Kehoe and Streibel of the

Senate Interim Committee and adopted as Chapter 216, S.L. 1943, now Chapter 28-11, North Dakota Revised Code of 1943.

In §28-1101 of that act the judge of the district court or of the county court with increased jurisdiction, in his discretion, may call for a conference in advance of trial to consider:

"1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary foundation proof and the expense and trouble of securing the same;
4. In personal injury cases, the arrangement for physical examination of either the plaintiff or defendant if required, a stipulation of maps or charts of the location involved and such other facts as measurements, widths of streets, distances, dates, time and weather conditions;
5. The limitation of the number of expert and character witnesses known to or contemplated by the litigants at the time of the conference;
6. The disposal of all preliminary motions including that for continuance."

In §28-1104 the judge is given authority:

"1. To hear and decide any objections or motions regarding the pleadings;
2. Upon motion of either party, to render judgement on the stipulation of the parties, or on the pleadings, if the complaint does not state a cause of action, or the defense is sham or not sustainable;
3. Upon failure of the counsel for the plaintiff to appear to grant a dismissal or nonsuit on motion of counsel for the defendant;
4. Upon failure of the counsel for the defendant to appear, to proceed with the conference within the limitations specified in § 28-1101."

At the request of Judge Harold Medina, Chairman of the Section on Judicial Administration, American Bar Association, and Dean O. H. Thormodsgard of the North Dakota School of Law, an attempt has been made to ascertain to what extent this pre-trial conference has been used in North Dakota and what the attitude of the bench and the bar is toward it. All the attorneys, the judges of the district court, and the county courts of increased jurisdiction have been contacted. The replies show that most of the district judges have used pre-trial conference in some form. The most extensive use, however, has been in the first and third districts. The following are comments thereon by some of the district judges:

Judge A. G. Porter reports that he calls the calendar a week before the jury is called and then holds pre-trial conferences.

> "Many cases are disposed of and the issues pretty well cleaned out for shortening the actual trial of cases."

Judge W. H. Hutchinson writes:

> "When a case comes up where I think that the issue would be clarified and where I believe that things could be stipulated to save time and trial, I call the counsel and the parties into Chambers and sit around the table with them and talk over the issues in the case and usually get an agreement of everything that is not in real controversy."

Judge R. G. McFarland writes:

> "We have a modified form of pre-trial that we use in most every case * * *. I find by this we save much time, and on many occasions further the ends of justice by arranging the course of the trial and simplifying the issues, amending the pleadings and entering stipulations of agreed facts and going over the exhibits to be offered."

Judge A. J. Gronna writes that he uses pre-trial conferences, particularly in negligence cases and finds it "usually successful in accomplishing its object, *i. e.*, to simplify, shorten and, possibly, to avoid a trial."

Judge Harold B. Nelson, in every order for a term of court, provides for pre-trial conferences a week or ten days before opening the term. He thinks that conferences save the attorney "considerable work and the clients considerable money."

Judge Kehoe writes:

> "In advance of calling a jury in a county I make it a practice to set a day in the county for the calling of the calendar with instructions to the Clerk of Court to notify the attorneys in the cases on the calendar to be present. At that time I go over the calendar with the attorneys and they, in round table conference, determine the issues that are to be tried. I never insist upon the attorneys disclosing their position on the issues to be tried."

Judge John C. Pollock has used pre-trial more extensively than any other judge. He sends a notice and a regular calendar for pre-trial conferences to the attorneys having cases on that calendar about a week prior to the holding of the conferences. In that notice is included this paragraph:

> "Counsel for the parties can aid materially in accomplishing the desired result by being prepared to have available the documentary proof, maps, photographs, etc. In the absence of dispute as to qualifications of such exhibits, considerable trial

time can be saved by agreement as to the admissibility of such evidence. * * * It is desirable but not necessary that the parties to the action attend the pre-trial conference."

With that notice and calendar he sends an outline covering the subjects to be considered at each conference in accordance with §28-1101. The subjects to be considered are listed as follows:

Statement of allegations of pleadings:

Issues agreed upon:

Amendments to pleadings:

Agreed facts:

Documentary Proof:

Plaintiff's Exhibits, ---

Defendant's Exhibits, ---

Medical Examinations:

Plaintiff ---

Defendant ---

Number of Witnesses:

Plaintiff ---

Defendant ---

Estimated Time of Trial:

Miscellaneous:

Between each of these headings sufficient space is left for the entry of whatever agreement there has been under each subject. Then the concluding paragraph reads:

"The foregoing memorandum for use at the trial of the above entitled action, agreed upon by the undersigned attorneys for the parties to the action at the pre-trial conference held before John C. Pollock, Judge, on the_____Day of_____A.D. 195__, is hereby approved."

A place is then provided for signature of the attorneys and the approval of the judge. It is important to note that these pre-trial conferences are held about two weeks before the jury trials.

Following this procedure Judge Pollock held pre-trials before the regular terms of court in 1952 and 1953 in the following counties: Cass, Barnes, and Grand Forks. At these conferences

143 cases were on the pre-trial calendar. After the conferences only 73 were left for trial. Judge Pollock estimates that 66 days of trial work was saved. On Nov. 16, 1953, he writes:

> "My experience with it (pre-trial) has been that the lawyers are coming to a point where they are asking for pre-trial without waiting for the court to call them. There have been four or five of such requests here in Cass County since the first of the year. * * * Both Judges Burtness and Sad have also been impressed with the results and are now also using pre-trial before commencing jury terms. I have had excellent cooperation from the lawyers wherever it has been used. * * * I never make a practice of attempting to force settlement in pre-trial. I do, however, at the close of the pre-trial, ask them if they have considered settlement and if a disposition to talk settlement is shown I leave the counsel and their clients talk the matter over. In many instances this practice has resulted in a settlement within a very short period of time following pre-trial."

All of the attorneys contacted in the first district expressed themselves as favorable to pre-trial conferences as conducted by Judge Pollock. The following quotations are from their letters:

H. G. Nilles:

> "In the beginning I was not too enthusiastic about the idea of pre-trial conferences. However, I have changed my mind. As these conferences are conducted by Judge Pollock I would say it is an excellent idea. The conferences are entirely informal. No pressure is put on counsel for either side. Judge Pollock uses tact, and frequently, as a result, cases are disposed of without trial. I might say I have had the same experience with Judge Sad. As I see it the success of this procedure depends greatly upon the judge and how he handles it."

E. T. Conmy:

> "The few cases we have had which have been called for pre-trial we have felt have benefited from this procedure. We are personally convinced that in many cases pre-trial would be most effective and useful, and I know Judge Pollock has made good use of it."

J. F. X. Conmy:

> "Judge Pollock has made considerable use of pre-trial procedure here in Cass County. It is the writer's opinion that it is well worth while. It serves to eliminate, in advance of trial, many technical objections that would otherwise delay trial before a jury. It also brings the lawyers and their clients to a realization that they are soon going to have to 'fish or cut bait.' This results in negotiations for settlement and often brings about a settlement that would not be accomplished during the course of actual trial."

L. E. Oehlert favors pre-trial because (a) it assists in the simplification of issues of both fact and law, (b) it aids in reducing the length of litigated cases by securing voluntary admissions on undisputed evidentiary matters, and (c) it is conducive in affecting settlements of litigated cases.

"All the experiences that I have personally had with pre-trial have been good."

Roy K. Redetzke:

"Another lawsuit in which I was interested and in which the pre-trial conference was called fully demonstrated the beneficial possibilities of the act. The complaint and the answer were voluminous but as a result of the pre-trial conference all of the paragraphs of the complaint were eliminated except four, in which the one material issue remained. In addition some 25 or 30 exhibits were agreed upon and stipulated into the record. The time of trial consumed about two-thirds of a day whereas otherwise it might well have extended into five or six days."

A. R. Bergesen:

"Judge Pollock has used this procedure to a considerable extent. It is my observation that the use of the procedure is beneficial. In many instances the conferences have resulted in a shorter trial because the issues are determined in advance."

Donald H. Crothers:

"From a limited experience that this office has had with them (pre-trials) we have found them to be very favorable. It assists the attorneys in arriving at the true issues of the cases prior to the actual trial and dispenses with much of the superfluous material that might otherwise be allowed to enter into the case."

Harold D. Shaft:

"We have been much pleased with our experience, as it seems to eliminate much time consuming bickering at the trial, and to enable both sides to present a more simple and understandable case when trial is reached, as well as to enable the trial court to do a little preliminary research on knotty legal questions which will arise, instead of having to make split-second decisions during the course of the trial. We have also found it a good opportunity to bring about compromise settlements before trial, and dispose of nuisance cases."

Roy Ployhar:

"All the judges of the first judicial district use some form of pre-trial practice which, in my opinion, has worked out quite successfully. If it serves no other purpose it gives the trial judges an opportunity to discuss the cases on the calendar with

opposing counsel before they are called for trial and eliminates a good many surprises and delays which might otherwise come up in the course of the trial. * * * Our method of pre-trial conference in this district is very informal and I think that this is the way it should be conducted. We do not expect our adversary to disclose anything that may have a tendency to damage his client's cause and I have never found the trial courts unreasonable in requiring any admissions."

L. T. Sproul:

"Pre-trial procedure has been used by Judge Pollock in this district and in my opinion the procedure successfully and satisfactorily disposes of many cases without trial and shortens the time of trial materially in those cases which are not settled and do go to trial."

Judges Hutchinson and Porter use pre-trials in many cases. The report of the attorneys practicing before them show an approval of pre-trial conferences:

Vernon M. Johnson, President, North Dakota State Bar Association:

"Judge Hutchinson uses pre-trial conferences a great deal. They are very informal in their nature but I have found them to be most useful and definitely feel that a great deal has been accomplished in these conferences. I am particularly impressed with the manner in which they are handled by Judge Hutchinson. Ordinarily he calls the term for about two weeks ahead of the date when the jury is to report. We have a call of the calendar and at that time inquiry is made if any of the cases lend themselves to pre-trial conferences. Those that do lend themselves to pre-trial conferences are set down for specific dates for such pre-trial conferences a day or so after the call of the calendar and well in advance of the jury reporting in for the term. In a great many cases these pre-trial conferences have resulted in settlements and have completely disposed of the cases on the calendar. In many other cases they have eliminated much of which would otherwise be routine proof and have shortened the trial of the cases considerably. I also feel that these pre-trial conferences have clarified the issues and have generally been worthwhile from the standpoint of all concerned. I am a strong believer in a pre-trial conference method and urge its more extensive use."

John Hjellum:

"We had a 'pre-trial conference' in connection with an automobile accident in Ashley before Judge Hutchinson. We were able in a few minutes to go over the matter of the 'special damages' including the automobile, doctor, hospital, and I believe a couple other small items and to agree upon the same. It was most helpful and undoubtedly saved us some additional

expense and, perhaps, an additional day or half day of trial. We also had a pre-trial conference in Foster County before Judge Thom which involved plaintiff, defendant, garnishees and six interpleaded defendants. It was a mess. The entire questions were legal in nature and we were able to resolve all of the issues in a pre-trial conference among the six lawyers involved in about 2½ hours of time. If we had tried the case I suppose it would have taken us a minimum of two days."

T. L. Brouillard:

"In our local practice here we have resorted to pre-trial conferences on only a few occasions and we feel that in many cases such procedure results in a great saving of time."

Charles S. Ego:

"If properly applied it (pre-trial) is bound to simplify issues and speed up trials."

A. W. Aylmer:

"I do hope the pre-trial procedure can be adopted and used in all the district courts of this state."

E. O. Kroshus:

"Pre-trial should become a definite part of our practice just as soon as possible."

The attorneys from other districts where some form of pre-trial conferences have been held also report favorably.

Milton Higgins:

"My experience with pre-trial conference has been very good. * * * I am satisfied that it will be used more all the time as its value comes to the attention of the bench and bar."

Nels G. Johnson:

"From such experience as I have had with pre-trial practice and the results therefrom I am of the opinion that it would be advantageous in many cases to reduce the issues and thus expedite the handling of the actual trial."

Alvin C. Strutz:

"Personally, I believe that there could be a lot more accomplished if the trial judges would request the parties to hold pre-trial conferences. * * * It limits the amount of time necessary in the trial of cases, and in many cases it results in settlements. I don't know whether it would be proper for the trial judges to suggest that pre-trial conferences be had, but if they did, I am satisfied that it would save them much time in the trial of cases."

Robert W. Palda:

"I know that such procedure would shorten up the trial work and it would be a saving to the taxpayers. It is difficult, how-

ever, to get the various lawyers to travel long distances prior to the actual date. * * * It would appear to me, however, that this would eventually make a saving to the client and the trial would in all probability be made shorter."

Bruce Van Sickle:

"I have had two occasions to utilize a pre-trial conference. I have made a motion to strike portions of pleading. * * * It is my own feeling that if a series of pre-trial hearings were required before the calling of a jury term, many of the doubtful cases would be taken care of in advance."

W. R. Spaulding:

"In the very few cases in which I have participated in the pre-trial conference the results have been satisfactory. In one case in particular before Judge Nelson, Paul Campbell and I were able to dispose of very nearly all the fact questions at the pre-trial conference and the case was submitted on brief without formal trial."

John A. Stormon:

"It is the practice of each judge to be here about two weeks in advance of the term of court to go over the calendar with the attorneys and attempt to dispose of matters on the calendar so as to know just exactly what work is coming up for trial at the term of court, and whether or not a jury is necessary. The practice seems to be very satisfactory and generally successful and undoubtedly saves the county considerable expense, for occasionally we find that a jury term is not required."

Chief Justice Morris was a member of a panel for discussion of pre-trial at the 1953 meeting of Chief Justices. In preparation for that seven questions were submitted to the trial courts which Chief Justice Morris circulated among the district judges of this state.

The first question sent out by the Chief Justice inquired what should be the extent of the trial judge's power to eliminate issues against the wishes of either party. The answer of the judges indicated that in their opinion such power should be exercised only to the extent authorized by the Act. The court has power to pass on motions to strike, to make pleadings more definite and certain, to pass upon demurrers, amendments, etc.[1]

The second question was whether pre-trial should be made mandatory. Upon this the opinion of the judges was about equally divided. It seemed to be the general thought, however, that in negligence cases pre-trial should always be used. The hope was

1. N.D. Rev. Code §28-1104 (1943).

expressed that upon better acquaintance both by counsel and courts with the purposes and procedure of pre-trial it would come into general use.

The third question was when, if at all, the matter of settlement should be brought up. On that the answers varied. The majority seemed to think it should not be brought up until after the clarification of the issues. Some thought that even then it should only be brought up at the discretion of the attorneys and not unless the circumstances seemed to indicate desirability of a discussion of settlement. All agreed that no pressure should be exercised by the judge in the matter of settlement.

The fourth question was whether the results of a pre-trial conference should be embodied in an order or memorandum. The opinion expressed by the judges was unanimous that it should be and the statute[2] so provides. Judge Pollock's method in that respect has been described. Another method suggested is for the court to dictate such a memorandum to include all the stipulations and orders made and identification of exhibits admitted. That should be done in the presence of counsel on both sides and their approval entered in the memorandum. That memorandum, in whatever form made, "controls the subsequent course of the action unless the ends of justice require its modification."[3]

The fifth question was in regard to where the conference should be held. The majority of the judges favored holding it in Chambers and having it informal but under control of the court.

The sixth question was an inquiry as to the weaknesses of pre-trial procedure. The opinion of the judges was that the weakness lay in the failure of the attorneys to cooperate. Some attorneys have also claimed the judges were too arbitrary and too technical.

The final question requested suggestions for improvement of the procedure. The answers to that can perhaps be summed up in the words of Judge Hutchinson. He says:

> "I doubt whether changes in the law would be of any particular benefit. The pre-trial conference will become more popular when the attorneys get more familiar with the use and when the judges have a better concept of its purposes."

From the research thus made some conclusions can be drawn. Pre-trial is generally favored. Both judges and counsel hope for

2. N.D. Rev. Code §28-1102 (1943).
3. N.D. Rev. Code §28-1102 (1943).

its general use. There has been some misunderstanding by a few of the lawyers and a few of the judges as to the real purposes of the pre-trial conference. It is not contemplated to be a trial in the ordinary sense of the word. It is only a conference by the counsel and court over the mechanics by which the trial will be carried on and a preview of the cause itself only to the extent of elimination of undisputed issues and the settlement of preliminary motions.

While a few attorneys have called for such conferences it seems likely that the initiative for calling pre-trial conferences will have to be taken by the judge. In so doing it is essential that notices of the conference should be given the attorneys in sufficient time so that they can prepare for it. Where the lawyers have come prepared much good has been accomplished. Then some method should be reached whereby the pleadings are filed in the clerk's office before the conference. The suggestion has been made that the statute[4] be amended to require the filing of the pleadings or a copy thereof with and as a part of the note of issue. Conferences should be held long enough before the jury term to give counsel time to prepare for the trial along the lines arrived at in the conference.

While it takes some time and expense to attend such conferences the elimination of unnecessary issues and undisputed facts and the witnesses to prove such matters and the shorter time of actual trial will make up for that loss. The attorneys, after the conference, will then only have to prepare for the disputed issues. Some attorneys are afraid to go into these conferences for fear they may unwittingly admit something to the detriment of their client's case. It is not proposed that any admission be made on contested matters. Others fear some attorneys may use these conferences as fishing expeditions to find out the strength or weakness of the opposition rather than to simplify the issues. Others fear the judge may take sides or become prejudiced. All those matters are largely in control of the presiding judge. He can by showing fairness and exercising tact largely prevent any such dangers.

After a thorough conference, the trial should become a search for justice rather than a contest of wits. All the rights of litigants are preserved. Neither attorneys nor clients have a right to ask for more.

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4. N.D. Rev. Code §28-1208 (Supp. 1953).

REFERENCE NOTES

In the October, 1953, issue of Federal Rules Decisions published by West Publishing Co., Vol. 14, No. 6, p. 417, there is an excellent article on the pre-trial procedure by the Hon. Alfred P. Murrah, Judge, U. S. Court of Appeals, Tenth Circuit, Chairman of the Pretrial Committee of the Judicial Conference of the United States. His article is followed by notices and orders on pre-trial proceedings as actually used in different federal courts and a very complete pre-trial bibliography referring to articles and books published on the subject.

See also Nims, Pretrial (1950), the most comprehensive work on pre-trial in existence; The Improvement of the Administration of Justice, a handbook prepared by the Section of Judicial Administration, available on request to the American Bar Association, 1140 N. Dearborn Street, Chicago, Ill. A "Manual of Pre-trial Practice" is available on request to the Administrative Office of the Courts, State House Annex, Trenton, N. J. See also Grimson, *The Pre-trial Conference,* 21 N.D. Bar Briefs 85 (1945); Laws, *Pre-Trial—Its Purpose and Potentialities,* 21 Geo. Wash. L. Rev. 1 (1952); La Plante v. Implement Dealers Mutual Fire Ins. Co., 73 N.D. 159, 12 N.W. 2d 630 (1944); Klitske v. Herm, 242 Wis. 456, 8 N.W. 2d 400 (1943); State *ex rel.* Kennedy v. District Court, 194 P.2d 256, (Mont. 1948), annotated in 2 A.L.R.2d 1050; Jenkins v. Divine Foods, 3 N. J. 450, 70 A.2d 736, 22 A.L.R. 2d 593, 599 (1950).

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