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PROCEDURE FOR PRETRIAL CONFERENCES IN THE FEDERAL COURTS*

EDSON R. SUNDERLAND

Rule 16, of the Federal Rules of Civil Procedure, authorizes, but does not require, the court to hold pretrial conferences. The matter is entirely discretionary with the court, and this discretion may be exercised by a general rule instituting a pretrial calendar or by special orders in particular cases. The court in every district is therefore free to make whatever use of this procedural device it may deem desirable.¹

The same freedom of action is accorded to each district court in regard to the methods to be employed in conducting pretrial conferences. The rule provides no procedure whatever, either by way of requirement or suggestion.

This complete absence of regulatory rules gives to the pretrial hearing the maximum degree of flexibility, and enables the judges who use it to exercise the widest possible discretion in devising and utilizing methods for making it effective.

As a result there has been great variety in the methods adopted by different judges in conducting these hearings, and even by the same judge in different cases.

Nevertheless, since all pretrial hearings are designed to accomplish the same general purposes, and since all of them operate under quite similar conditions and deal with substantially similar material, it should be possible to derive from the numerous plans employed certain principles which will facilitate the operation of the pretrial hearing and increase its effectiveness, without restricting its flexibility. These principles, which might well include numerous alternative pro-

Editor's Note: [Journal of the American Judicature Society.] This paper was prepared by Professor Sunderland, of the University of Michigan Law School, at the instance of the Committee on Pretrial Procedure of the Judicial Conference of Senior Circuit Judges, for private distribution to members of the federal judiciary. The numerous practical suggestions it contains make it of equal value to state court judges interested in getting the most out of pretrial, and the *Journal* has obtained permission to publish it for the purpose of making it available to them and to others interested.

* Reprinted from 28 Jour. Am. Jud. Soc. 46 (Aug. 1944). Because of the recent adoption by the Supreme Court of Rule 1, Wyoming Rules of Civil Procedure, establishing pre-trial procedure in Wyoming Courts, it is believed that this article will be of value to the Wyoming judge and attorney. [Ed.]

1. This statement is not entirely true of the Wyoming rule, which provides: "In any action, the court may in its discretion, *and upon request of any party shall*, direct the attorneys of the parties to appear before it for a conference . . ." The italicized clause is an addition to the Federal Rule. The Rules Advisory Committee recommended this change because they felt that although a judge might not be sympathetic to the idea of such a conference, if the conference were actually held much might in fact be accomplished. The addition may also tend to make the practice more uniform in the several judicial districts, and avoid the possibility of attorneys in one district enjoying advantages not available to those in another district. [Ed.]

cesses, would constitute a basic procedure for the administration of the pretrial conference.

The chief obstacle to the development of such a procedure is the want of any adequate means of disseminating information among the judges and lawyers of the several districts regarding the methods employed in other districts. Only by trial and error can a satisfactory plan of operation be developed. As a regular step in our system of litigation the pretrial conference is an innovation, supported by no precedents and by little experience. Each district judge should be able to study the methods used by other judges, compare them with the methods employed in his own court, and vary his own practice from time to time in accordance with the best advice he can get. Only in that way can an adequate procedure for conducting pretrial hearings be developed as a practical evolutionary process. This would require the experiments of the various judges to be reported for the information of other judges engaged with the same problems.

But no such system of reporting has yet been developed upon a scale sufficient to produce very definite results. An examination of the Federal Supplement and the Federal Rules Decisions shows an amazing dearth of material upon the procedure employed in the conduct of pretrial hearings. Even the few cases which report these conferences devote more attention to the results than to the methods by which they were reached.

At the present time, therefore, the chief sources of information as to the actual operation of the pretrial conference must be found in the language of Rule 16, in articles and addresses containing descriptions of the process by judges who have used it, and in the unpublished records and files of their courts. From these enough data can be assembled to give at least a general indication of the way in which an appropriate procedure for administering the pretrial conference is being gradually worked out.

PURPOSES OF THE PRETRIAL CONFERENCE

These are stated in Rule 16. Five specific purposes are expressly mentioned, followed by a sixth designation embracing "such other matters as may aid in the disposition of the action." Analyzing the rule as a whole, it seems designed to serve at least four general purposes:

1. To identify, designate, and clarify the true issues and eliminate apparent issues which present no real controversy.

2. To facilitate proof, by means of stipulations regarding (1) admissions of facts and genuineness of documents, (2) waiver of formal proof of documents and things, (3) physical or mental examination of the person, (4) inspection of books or property, (5) inter-

rogatories and depositions, (6) limitation upon the number of witnesses, (7) references to a master to make findings, and (8) other similar matters.

3. To offer a convenient opportunity for disposing of preliminary matters, such as dismissal, change of venue to another division, judgment on the pleadings, summary judgment, consolidation of cases and separation of issues for trial, fixing the date of trial, etc.

4. To encourage settlements.

1. IDENTIFYING THE TRUE ISSUES

Two methods appear to have been used for this purpose.

In one the judge himself examines the file of the case in advance of the hearing, and by analyzing the pleadings and other papers on file makes a preliminary determination of the essential issues. This obviously imposes a substantial burden upon the judge. At the hearing he states in the presence of counsel what he conceives to be the nature of the case, and the real issues involved, and by mutual discussion an agreement is thereupon reached as to what matters of law or facts are indispute. This agreement is then dictated into the record of the pretrial hearing as an order limiting the scope of any subsequent trial that may take place.

Under the second method, instead of carrying the main burden of preparation himself, the judge requires counsel for each party to participate in the preparation by filing and serving, in advance of the hearing, proposed findings of fact and conclusions of law covering the case as counsel sees it. As to each finding a memorandum may be required stating the nature of the evidence by which counsel proposes to establish it, and as to each conclusion of law, a reference may be required to any controlling statute or judicial decision. This procedure not only aids the judge in obtaining an accurate understanding of the case, but compels counsel to make a careful study of it in advance of the conference. By this means both judge and counsel are prepared to act promptly and effectively in agreeing upon an order designating or eliminating various issues of law and fact.

Some judges have sought to reach the same result by warning counsel in advance of the necessity of preparation for the pretrial hearing. Judge Laws, in the District of Columbia, has used the following form of notice: "Lately it has been noticed that a number of counsel at pretrial hearings have not been sufficiently prepared to adequately conduct the hearings. It is important that a full and frank discussion of facts should be had at pretrial hearings and also that points of law with relation to the cases should have been studied prior to the hearing, to the end that untenable issues may be eliminated. Moreover, counsel should not appear at pretrial hearing without hav-

ing discussed with their clients the possibility of compromise settlements. In cases where actual financial losses are claimed, an accurate up-to-date statement should be prepared and be available. In personal injury cases counsel should have the advice of a competent physician with respect to claims of personal injuries, so as to be able to inform the court at pretrial as to what will actually be claimed rather than what is claimed in the declaration filed fourteen to twenty months previously. Wherever cases involving many documents or complicated issues are called, it will be of assistance if counsel arrange to confer prior to pretrial hearings."

2. FACILITATING PROOF

The ordinary machinery established for making proof contemplates a strictly adversary proceeding in which the proponent must carry the burden of affirmatively establishing admissibility. This frequently makes it necessary to incur much expense and inconvenience to satisfy formal requirements of proof, such as calling custodians of books or documents of persons having knowledge of handwriting, establishing the regularity and authenticity of entries in books of account, proving the authorship of letters received through the mails, laying a foundation for introducing secondary evidence, dispensing with the testimony of attesting witnesses, authenticating copies of public documents, justifying the use of maps, diagrams and charts, etc. Any or all these requirements may be waived by the parties as a means of avoiding expense and delay, and the pretrial conference offers a convenient occasion for fixing the scope and terms of such waivers.

In one case, unreported, where a large number of documents were involved, the pretrial order recited stipulations in regard to the genuineness of documents and to the use of copies of original documents, with 98 pages of listed items of exhibits.

Subsequent resort to compulsory discovery processes may also be limited or avoided by considering, at the pretrial hearing, what discovery ought to be had by way of inspection of documents or things, mental or physical examination, interrogations, admissions and depositions. The pretrial discussion is likely to indicate the particular matters regarding which the several parties are in need of material information which can be furnished by their adversaries. The precise nature and extent of the desired information, and the conditions under which it should be suffered, can readily be fixed by the stipulations set forth in the pretrial order. Such a method of dealing with discovery, in connection with the identification and designation of the issues, will tend to prevent expensive discovery excursions into matters not really involved in the case, and to restrict the methods by which discovery is to be obtained to those which are most economical and convenient. It

has been held that costs cannot be taxed for fees of witnesses called to give depositions upon matters outside the scope of the issues as fixed by the pre-trial hearing. *Federal Deposit Ins. Co. v. Fruit Growers' Service* (1941, D.C.E.D. Washington.) 2 F.R.D. 131.

Cases sometimes involve operative or mechanical processes which are so complicated as to lead the parties to provide special devices for exhibiting them at the trial. The need for such devices may appropriately be taken up at the pretrial hearing. In a case where a party spent several thousand dollars preparing elaborate illustrations and exhibits in the form of photographs and moving pictures to be used at the trial, it was held that this expense could not properly be taxed against the unsuccessful opponent where it had not been approved by the court at the pretrial hearing. *Gotz v. Universal Products Co.* (1943 Dc. Del.) 3 F.R.D. 153.

To make the pretrial hearing most effective in simplifying and facilitating proof, the items of evidence upon which the parties intend to rely should be clearly shown at the hearing. This may be accomplished by the filing and serving, in advance of the pretrial conference, of proposed findings of fact with a specification under each of the character of the evidence by which it is to be established. Where such proposed findings are not used, lists of items of proof to be dealt with at the conference may be required in advance from each of the parties, and the stipulations to be embodied in the order can then be readily passed upon item by item. In lieu of such lists the judge may request the exhibits themselves to be brought to the pre-trial hearing, where they can be dealt with one at a time, or group by group, with a view to eliminating all unnecessary expense, delay and trouble in making them available as proof.

As a means of avoiding unnecessary expense in carrying on proceedings for discovery, there will be an advantage in holding the pre-trial conference as soon as possible after the pleadings are filed. On the other hand, stipulations regarding the narrowing or elimination of issues can usually be made more effectively after the parties have thoroughly canvassed the possibilities of proof by the use of discovery. Only experience will show whether an earlier or later date will be likely to yield the greater benefits, and how far early hearings may be advantageously supplemented by adjourned hearings at later dates.

Some judges in effect postpone the pretrial conference to the date set for the trial itself, by undertaking, before the trial is actually begun, to segregate and eliminate issues and obtain admissions regarding facts and documents. It is doubtful, however, whether this should be considered in any true sense a pretrial hearing; for it does nothing to reduce the burden of preparation for trial or to relieve witnesses from the duty of attendance. It merely constitutes a very desirable

feature of the trial itself in cases where no real pretrial hearing has been held.

3. DISPOSITION OF PRELIMINARY MATTERS

Many provisions of the present federal rules are designed to effect economy of time and effort by encouraging or requiring the simultaneous rather than the successive presentation of matters requiring adjudication. It is contemplated, as a general principle, that when any feature of a case is brought up before the judge for consideration, the occasion should be availed of for bringing up all other matters then in dispute which can be conveniently presented and dealt with at the same time.

This principle is broadly applicable to the pretrial hearing. The purpose of such a hearing, as stated by Rule 16 (6), includes the consideration of all matters which "may aid in the disposition of the action."

If, therefore, it should appear on the pretrial hearing that the court lacks jurisdiction of the case, or that the action or some part of it should be dismissed on the merits, or that the pleadings are such that judgment should be rendered thereon, or that a summary judgment ought to be entered, every consideration of efficiency and convenience would demand that the proper order or judgment should then and there be entered, subject to such continuance, if any, as justice might require.

Orders prescribing or limiting subsequent proceedings in the cause, such as transfer to another division in the district, consolidation of cases, or separation of issues, for trial, fixing the date of trial, are also appropriate on the pretrial hearing, as well as orders for adjourned sessions of the pretrial hearing itself.

Some judges use a form of notice of pretrial hearing containing a warning that the court may proceed to judgment on such hearing. Perhaps a broader notice should be employed, making special reference to the various preliminary matters which might be brought up for determination.

4. ENCOURAGEMENT OF SETTLEMENTS

One of the major purposes served by the pretrial conference is to afford a convenient occasion for discussing the possibilities of a settlement. It is always embarrassing for one party to suggest settlement to the other, because such a suggestion may be thought to carry the implication that the party lacks confidence in his case. When, however, the discussion of settlement comes up in the regular course of procedure, as a normal part of the pretrial conference and at the instance of the presiding judges, this cause of embarrassment disappears.

The exact position and the degree of importance to be assigned to this feature of the pretrial conference, are matters regarding which there is a considerable difference of opinion.

Some judges, considering this the chief purpose of the proceeding, open the conference with a request for suggestions of settlement, and deal with other features of the conference as more or less incidental to that fundamental aim.

Other judges conduct the pretrial conference on the assumption that a trial is expected to take place, and that the chief purpose of the conference is to reduce as far as possible the time, money and effort which must be expended by parties, counsel, witnesses and the court both in preparing for it and carrying it through. These judges believe that settlements are usually based upon an understanding by each of the parties of the elements of strength and weakness in their several positions, and that when these elements are exposed by the pretrial discussions, admission and stipulations, the foundation for a settlement has been laid, and its consummation will require comparatively little direct aid from the judge.

The effect of these two views as to the emphasis to be placed on settlements is likely to be reflected in the procedure employed in administering the conference. If settlement is the primary objective, less attention will probably be given to detailed stipulations for facilitating proof, and to the disposition of preliminary matters, because in the event of a settlement they will become unnecessary.

It would seem, therefore, that the maximum benefit from the pretrial conference would be obtained if it were administered primarily for the purpose of designating and eliminating issues, facilitating proof and disposing of preliminary matters, with settlements playing a secondary role.