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## TIME FOR HOLDING THE PRE-TRIAL CONFERENCE

The Federal Rules of Civil Procedure were designed to expedite the disposition of cases and lessen the cost of litigation, as tersely expressed in Rule 1: "They shall be construed to secure the just, speedy and inexpensive determination of every action." The pre-trial conference under Rule 16 plays an important part in achieving this purpose. One of the prime objectives of a pre-trial procedure is the saving of time and expense both to the litigants and to the courts, by the elimination of non-controversial issues and by stipulation as to matters of evidence, with the view of simplifying, shortening and possibly avoiding a trial.<sup>1</sup>

A vital question to consider in any study of pre-trial procedure is at what stage of the litigation a pre-trial hearing is likely to be most effective. Certain advantages exist for both an early and a late pre-trial conference, therefore, there is no uniformity of procedure followed by the courts with respect to the time at which pre-trial conferences are held. However, under most pre-trial systems, the case is called for pre-trial only once, and that is shortly before the time the case has been docketed for trial.<sup>2</sup> By postponing the pre-trial conference until the parties have completed their preparation for trial, it is felt that simplification of the issues, stipulations as to evidence, settlements, etc., will be most efficiently handled.<sup>3</sup> United States District Judge Moscowitz of New York feels that the best time for the conference is from two to six week prior to the regular trial date, at which time the nature of the proof to be offered is known to the attorneys but the expense of obtaining witnesses and the time consumed in preparing them has not yet been incurred.<sup>4</sup> When the conference is held just before the trial, counsel should be quite well prepared and should have fully explored the various depositions and other discovery procedures. Knowing that the trial will promptly follow assures adequate preparation. If sufficient notice is given of the hearing, counsel will have ample opportunity to complete any necessary discovery and get ready for the conference. Frequently in negligence cases it is considered unwise to hold the conferences until the ultimate extent of the injuries is known.<sup>5</sup> Late pre-trial leads to a much greater percentage of settlements than would result if the pre-trial hearings were held at an earlier stage in the litigation.<sup>6</sup> It is common knowledge that the great majority of cases reaching issue never get to trial. When cases at issue are put on the calendar there is no method of determining how many of them will be continued, postponed, dismissed

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1. *Geopulos v. Mandes*, 35 F. Supp. 276 (D.C. D.C. 1940).

2. Cases on pre-trial docket called for hearing two or three weeks before the date on which they would be reached for trial in due course. Alexander Holtzoff in 1 F.R.D. 759, 761.

3. *Laws, Pre-trial Procedure in the District of Columbia (1939)*, 2 Fed. Rules Serv., L.R. 18.

4. *Glimpses of Federal Trials and Procedures (1934)* 4 F.R.D. 216, 217.

5. Nims, *Pre-trial (1950)*, p. 69.

6. Report of the Committee on Pre-trial Procedure to the Judicial Conference for the District of Columbia, 1 F.R.D. 759, 761.

or otherwise eliminated from the current docket. If pre-trial occurs within a few weeks before the actual trial is scheduled to begin, it is possible to determine with some degree of certainty which cases are actually going into court, the substance of each case, and the length of time that will be required for the trial. This means that a trial calendar can be set at the conference which will enable each lawyer to have a good idea of when his case will be reached. In many instances the cases can be set for a day certain. The saving of time to lawyers and witnesses by such a method is highly desirable.<sup>7</sup>

Some judges call a conference of the attorneys at the beginning of the trial itself. At that time the court endeavors to segregate and eliminate issues, and obtain admissions regarding facts and documents. It is doubtful that this should be considered a true pre-trial hearing. Such a procedure fails to accomplish one of the major purposes contemplated by Rule 16 which is reducing the burden of preparation for trial and elimination of the necessity for the attendance of witnesses to prove uncontroverted facts.<sup>8</sup>

In other jurisdictions pre-trials are held shortly after the pleadings are completed. Although simplification of the issues can not be as efficiently performed early in the case as it can be when the parties have had an opportunity to learn more about the facts, any weeding out of uncontroversial issues would mean a saving in later discovery steps. In the case of *Federal Deposit Insurance Corporation v. Fruit Growers Service Company*,<sup>9</sup> the court suggested that under Rule 16 the conference could be held prior to the time that discovery steps become necessary. Here the deposition of a non-resident witness was taken, but as a result of the limitation of issues at a subsequent pre-trial hearing it was not used. Nevertheless, the cost of taking the deposition was taxed against the losing party. The court indicated that an early pre-trial hearing could have prevented such a situation. Some of the benefits that may reasonably be expected to accrue from pre-trial procedure are lost unless the hearings are conducted at an early stage in the case. If the conference is not held until just before the trial, the efficient practitioner will have prepared for trial and all aspects of the case, not knowing what stipulations will be made at the pre-trial hearing.

Judge Bolitha J. Laws, of the United States District Court for the District of Columbia, has had a long experience with pre-trial. He feels that it is of the utmost importance to keep calendars current and that anyone who has actively practiced law for any length of time has experienced the frustration of clients where cases are long delayed. He believes that in certain categories of cases, pre-trial, shortly after the pleadings are completed, may have much virtue, for such conferences through the clarifica-

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7. Pre-trial Techniques of Federal Judges (1944) 4 F.R.D. 183, 185.

8. Ibid.

9. Federal Deposit Insurance Corporation v. Fruit Growers Service Company, 5 Fed. Rules Serv. 54d. 143, Case 4 (D.C. E.D. Wash., 1941).

tion of pleadings and the revelation of the position of counsel with regard to law and facts may bring about stipulations, not only as to documents and the like, but as to the ultimate facts to be proved. This makes possible not only the prompt disposition of frivolous cases, but oftentimes brings about dismissal of unfounded cases and keeps down burdensome costs and helps to reduce the time required for trial in many cases which otherwise may be prolonged beyond reason.<sup>10</sup>

In complicated cases, it may be necessary to allow more time between the pre-trial conference and trial, or to hold more than one conference.<sup>11</sup> The court's discretion in the operation of Rule 16 is sufficiently broad to justify directing more than one pre-trial conference. In granting a motion for a further pre-trial conference, Judge Moscowwitz said, "There has been one pre-trial conference in this case which was concluded. The fact does not preclude another conference."<sup>12</sup> References to successive pre-trial conferences appear in a number of decisions.<sup>13</sup> In the district of Oregon the practice has been followed of holding two or more conferences: a preliminary one early in the case, to lay out the general course of the litigation, dispose of interlocutory matters, etc., and a later conference at which the issues may be definitely stated for trial in light of the information the parties have obtained by discovery. At times a further conference is warranted. Thus every step in the litigation is conducted under the supervision of the court and unreasonable delay is avoided.<sup>14</sup>

The general scheme of this Oregon procedure could possibly become a part of Rule 16. The Advisory Committee on Rules for Civil Procedure has recommended an amendment to Rule 16 which reads as follows: "Where protracted litigation of an action is probable, it may be assigned, by the chief judge or as otherwise provided by local rule, to a designated judge for the trial of the action and for the direction and control of all matters preliminary to trial, including control of the taking of depositions and of discovery and the entry of orders for the protection of the parties on proceedings in discovery." This addition to the rule is intended to give or confirm in a particular judges broad and flexible powers over the proceedings before trial, as well as to insure that the judge who hears the pre-trial motions will also try the case.<sup>15</sup>

Pre-trial conferences held early in the litigation, or successive conferences, may go far toward meeting public demands for a simpler and

10. Nims, *Pre-trial* (1940), p. 73.

11. Kincaid, *A Judges Handbook of Pre-trial Procedure*, 17 F.R.D. 435, 437.

12. *La Canin v. Automobile Insurance Company of Hartford*, 41 F. Supp. 1021, 1022 (E.D. N.Y. 1941).

13. *Glaspell v. Davis*, 2 F.R.D. 301 (D. Ore. 1942); *Daitz Flying Corporation v. United States*, 4 F.R.D. 372 (E.D. N.Y. 1945); *Noble v. Kovanagh*, 66 F. Supp. 258 (E.D. Mich. 1946); *Montgomery Ward v. Fidelity Deposit Company*, 65 F. Supp. 611 (N.D. Ill. 1946); *Clay v. Galloway*, 177 F.2d 741, 742 (5th Cir. 1949).

14. Report of the Committee on Pre-trial Procedure to the Judicial Conference for the District of Columbia, 1 F.R.D. 759, 763.

15. Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts (1955), p. 25.

speedier method of disposing of civil controversies. Pre-trial procedure was designed to strip the dispute of non-essentials and to mold it into such form that disposition of the contest would be fair and proper with the least amount of time and expense. These objectives can be better accomplished when the judge acts as an active director of the litigation. With this informal and expedient method, the pre-trial judge not only advances the cause of the administration of justice but also enhances the respect of the public for our courts.

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### LIABILITY OF INSURANCE COMPANIES FOR ADVERTISING ENCOURAGING LOW VERDICTS

In 1953 a group of insurance companies published in several national magazines<sup>1</sup> a series of advertisements which related to the verdicts of juries sitting in judgment on suits involving personal injuries. The advertisements were not directed at any individual litigation and could be interpreted simply as urging jurors to render decisions according to the evidence. However, connecting the parts of the advertisements dealing with the effect of high money judgments on the cost of insurance premiums and with the tendency of jurors to give excessive awards, they could also be interpreted as attempting to influence juries to render low verdicts. Although all of the advertisements were not the same, there were two features that were identical; one was the relationship between judgments and the cost of premiums, and the other was the tendency of jurors to give excessive awards in claims for damages in suits involving personal injuries.

Two cases resulted directly from the aforementioned advertisements. In *Hendrix v. Consolidated Van Lines*,<sup>2</sup> a proceeding was brought against two insurance companies for indirect contempt of court in causing the advertisements to be published. The case grew out of an action for damages to an automobile and for personal injuries, the plaintiff claiming that a verdict based solely on the evidence had been seriously prejudiced as a result of the advertisements. The trial court found for the defendant and on appeal the Supreme Court of Kansas held that the contempt charged was criminal and dismissed the case on the ground that there is no right of appeal from a judgment of not guilty of criminal contempt. In *Hoffman v. Perrucci*,<sup>3</sup> while an automobile accident suit was pending, plaintiffs filed a motion for issuance of a contempt citation in that the advertisements constituted jury tampering. The trial court found for the defendant and on appeal to the United States Court of Appeals the action was dismissed since the motion was one for citation

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1. Life Magazine, Jan. 26, 1953, p. 91; Life Magazine, Mar. 9, 1953, p. 157; The Saturday Evening Post, Feb. 14, 1953, p. 118; The Saturday Evening Post, Mar. 28, 1953, p. 155.
  2. *Hendrix v. Consolidated Van Lines*, 176 Kan. 101, 269 P.2d 435 (1954).
  3. *Hoffman v. Perrucci*, 222 F.2d 709 (3rd Cir. 1955).