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THE FEDERAL RULES: CONTROL OF THE HUMAN EQUATION THROUGH PRE-TRIAL

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I am grateful to the Wyoming Bar for the kind invitation extended to me by your able and gracious President, Mr. Steadman, to address you today. He has informed me that your fine state has recently adopted new rules of civil procedure modeled along the lines of the federal rules. Wyoming thus becomes the 20th state to adopt the federal rules in whole or with certain minor modifications. This is an extremely impressive testimonial to their exceptional utility as tools in furthering the ends of effective, efficient and expeditious justice and you are to be congratulated upon their adoption.

As one jurist commented in discussing the truly remarkable reception accorded the federal rules,

> "A new procedure must be oustanding to be cherished so soon by the legal profession, which in the past has had the reputation of of being unwilling to follow new paths and which was said to cling to the legal maze with gross persistence."
> (Holtzoff, A Judge Looks At The Rules After Fifteen Years of Use).

The reasons behind this well-nigh universal acclaim are not mysterious. They mark a realization that technical forms are unimportant; that procedural rules are merely a means to an end and that the ultimate objective must be to do justice. The rules are characterized by a desire to reduce technicalities to a minimum and to decide all cases on their merits as expeditiously as possible.

How well the rules have succeeded in translating these broad objectives into concrete precepts may be demonstrated by a bare enumeration of a very few of them.

The abolition of procedural differences between law and equity alone obviated a great deal of pedantic disputation. It made it unnecessary for counsel to make the delicate decision of whether to file suit at law or in equity. His client now obtains whatever relief the proof shows he should receive.

One of the most far-reaching changes was in the area of pleadings. Not only were the number of pleadings sharply curtailed, but the abundance of technical requirements that had encrusted themselves upon the pleadings were abolished by the introduction of averments in general terms. No longer are technical deficiencies in pleadings grounds for dismissal.

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The principles governing joinder of parties and claims, and third party practice provide other important innovations. They are designed to permit the disposal of as many controversies as is reasonably possible at one time.

Perhaps the most notable advance and in a sense the very "guts" of the federal rules, are the liberal discovery provisions. Without them it would have been impossible to simplify pleadings and to reduce technicalities. They were designed to convert the lawsuit from a sporting event into a search for truth and justice and in this they have laregly succeeded.

The basic objectives of the rules, as succinctly summarized in the first rule, are "to secure the just, speedy, and inexpensive determination of every action." Candor compels me to state, however, that these objectives have not been invariably attained. No matter what rules are adopted, the human equation remains. And it is this factor which I should like to discuss with you today.

The rules will not provide a panacea for all of your procedural ills for like all human institutions, they are subject to abuse. It is important to remember at the outset that these rules are no more than tools. They represent, in a sense, a great technological advance, but they do not guarantee that justice will naturally ensue. It all depends on what use these tools are put to. Like the ordinary hammer, they are designed and molded for constructive purposes, but like a hammer, they may be used to beat someone unmercifully over the head.

Thus, even after almost 19 years of experience with these rules in the federal courts, there are still a few attorneys who, unfortunately, insist on interpreting freedom from picayune restriction as license for harassment. Judge Medina had occasion in a recent decision to refer to this use of "artful maneuvers and procedural sallies which serve little purpose other than to throw sand in the judicial machinery and to induce payments for what is euphemistically called 'nuisance value.'" (*General Houses, Inc. v. Marloch Mfg. Corp.*, Dec. 26, 1956). The only effect of the federal rules on these fellows is that whereas before, their motion maneuvers were directed toward pleadings, they are now by-and-large transferred to discovery.

Unfortunately, largely as a result of the activities of these very few attorneys, there has been a certain amount of sporadic sniping at the discovery rules. A compilation of these criticisms was made a few years back and it certainly reads like a parade of horrors.

> "It is said: (1) That discovery is expensive and time consuming out of proportion to benefits; that depositions last weeks, interrogatories and admissions cover thousands of items, and motions to produce call for tons of documents. (2) That discovery is used to pry into private affairs not relevant and material to the litiga-

> tion. (3) That dilatory discovery motions take up the judges' time and delay disposition. (4) That expensive, dilatory, and embarrassing discovery is deliberately used to harrass the other side into favorable settlement. (5) That attorneys race to be first with discovery to tie up the other side and saddle it with expense, defendants usually having an unwarranted priority. (6) That in practice, relief is unobtainable from judges because at the discovery stage they cannot investigate either the issues or the evidence thoroughly enough to rule effectively; judges tend to say, 'answer the questions and don't bother me with these details.' (7) That non-reviewable rulings on discovery are not uniform among courts, or among different judges on the same court; that even the same judge at different times fails to give consistent rulings; so that wrangling over discovery is encouraged. (8) That suits are tried by deposition or other discovered materials without the prophylactic influence of observing the witness under cross-examination. (9) That perjury is promoted both by furnishing the information with which an unscrupulous party can fabricate a convincing story and by reducing the opportunity to surprise the perjurer with contradictory evidence. And (10) that lawyers use discovery to take advantage of the trial preparations of the other side so that careful investigation is unrewarded and intra-organization reports cannot be frank."
> (William H. Speck—The Use of Discovery in United States District Courts—60 Yale L.J. 1132 (1951).

It is important that these criticisms be placed in their proper perspective. They certainly do not represent a majority view. In fact, they constitute no more than a few still voices in the wilderness when contrasted with the general acclaim accorded the discovery provisions and, more important, their universal utilization. No one doubts, however, that there have been isolated instances, even when the attorneys were acting in the utmost good faith, where the operation of the discovery rules would justify each one of these criticisms.

These abuses have been particularly prevalent in the so-called "big cases"—the large anti-trust actions. In one such case, that of *Ferguson v. Ford Motor Co.*, tried and ultimately settled in the Southern District of New York, the cost of the stenographic transcript of the depositions alone amounted to something in the neighborhood of half a million dollars. And that figure does not include any provision for the cost of microfilming, the cost of making photostats, the cost of printing, travel expenses, and, of course, it includes nothing at all for the charges of the multitude of counsel engaged.

What makes these astronomical expenses even more appalling is the fact that in so many of these cases the percentage of useful information uncovered is so minute. The best estimates are that less than 10% of all the material contained in these voluminous depositions is useful at the trial. And searching for that 10% can be quite a headache.

Last year, in discussing his experiences with the Investment Bankers

case before a bar association meeting on pre-trial, Judge Medina in his usual able and delightful way spoke to the point by recounting the following incident:

> "Have you any idea of how horrible it is in this Federal system of ours to have these depositions taken . . ., thousands and thousands and thousands of pages of irrelevant questions, and this and that and the other thing, until the judge at the trial who hears those depositions read, cannot make head or tail of what is going on. . . . In that Investment Bankers case I said, 'Boys, if you are going to have any depositions, I am going to sit. I don't want to do it. I have plenty else to do, but I think I had better set a pattern, so that you know how to follow,' and I did sit for the first deposition, and put some control over it, and then I got into the Communist case and I had to quit, and all the rest of the depositions had to go on for the next year or so without by being there, and what a mess. What a mess! They came in there; a fellow would say 'Were you in Chicago on the 1st of June, 1938?' He would say 'That House of J. P. Morgan are the biggest crooks I ever hear of' and he would go on for two or three pages, you know. Nobody could stop him. It was in one of these law offices taking a deposition, and they would ask another question, and blah, blah, blah, and that would go on ad infinitum, and I was supposed to find out what they were talking about."

It is little wonder that the attorneys in these protracted cases occasionally discuss such discovery proceedings in terms of cruel and unusual punishment.

Now the last thing I want to do is to give anyone here the impression that I believe the enlightened discovery provisions should not be retained. We don't want to do away with airplanes because occasionally there are accidents. It is important, however, to realize the possible pitfalls, the need for a proper and intelligent approach by the courts and by the bar, the need for skillful utilization of the discovery provisions and the need for some curbs on their misuse.

Discovery has enabled thousands of parties to establish their legal rights which, without discovery, would have been denied them. It has facilitated the proof of substantive rights by making the evidence equally available to all parties. Almost every attorney now agrees that the advantages in obtaining a discovery of the adversary's case fully compensate for what may be regarded as the premature disclosure of one's own case. And it is not a question of the lazy lawyer profiting by the investigation of the other side. It has been the conscientious and industrious lawyer who has been resorting to discovery to try to ascertain all of the facts so that when he goes into court he is fully prepared. The discovery rules have been responsible for a much more cooperative attitude among attorneys. In the overwhelming number of cases information is freely and voluntarily exchanged now where it wasn't earlier, because counsel realize that their adversary could obtain the information anyway through discovery proceedings.

There is, however, one additional factor which must be mentioned. The elimination of complex and unduly technical pleading requirements and their replacement by the pleading of general averments, entailed to some extent, the sacrifice of the role played by the old pleadings in particularizing the issues. Under the federal rules, issue may be joined with both sides having little or no idea of what issues will eventually be determinative at the trial. It was hoped that discovery would serve to take up this slack by clarifying and limiting the issues before trial, but, unfortunately, we have found that in practice, attorneys seem to get so involved with the twigs and leaves of little details that they seldom see the trees, let alone the forest. This accounts for the estimated 90% waste effort in discovery in the "big" cases, that I mentioned earlier.

Fortunately, there is a solution to the abuses of discovery and its failure on occasions to satisfy the need for confining and clarifying the issues. In fact, the rules themselves provide the answer. It is the pre-trial conference. More specifically, it is the pre-trial conference tailored to meet the needs of the particular case. While the latter may seem an obvious cliche—it was by no means obvious to most of us for a good long time. And we are still in the process of studying just what kind of pre-trial conference is best suited to certain types of cases. It is now generally agreed, after a superb study compiled by a Committee of the Judicial Conference under the chairmanship of Judge Prettyman, that in the protracted case, pre-trial conferences must be extremely extensive and must commence at the inception of the action to impose a tight control on the entire discovery process. We have also finally come to appreciate, after a good deal of trial and an equally good deal of error, that pre-trial is not merely the handmaiden of the "big" case. That although it may require a somewhat different form in the small case, it is vitally important that counsel in every case sit down with a judge at some point before trial and discuss freely what they believe the case to be all about. The pre-trial conference is not an added frill on the mantle of judicial administration, it is an absolute essential to the proper functioning of the federal rules. It is not a job for errand boys or a young clerk fresh out of law school, as some lawyers seem to think; it is a job requiring the utmost skill and ingenuity of experienced counsel and experienced judges. The more successful a judge is in encouraging the lawyers to lay their cards on the table, to reveal just what their case will consist of, what the defenses will be, etc., the more successful the conferences are in clarifying and limiting the issues, in curbing discovery abuses by limiting the scope of discovery and by providing for day-to-day supervision where necessary, in obtaining stipulations and admissions, in shortening the length of trial and in permitting the attorneys to re-assess their cases in the light of all this new information. It is, of course, a truism by now, that once the parties are given a full picture of the strengths and weaknesses of their own and their adversary's positions, there is a great likelihood that they will be able to compromise their disputes amicably without a trial.

Back in the 1920's, Judge Ira Jayne of Michigan made this startling discovery when he instituted a pre-trial conference procedure for the first time in this country to alleviate a congested calendar situation in Detroit. The validity of his conclusion was recently reaffirmed dramatically in the Southern District of New York after we made a second important discovery.

We had attempted at one point to utilize the same type of full dress pre-trial conference for all cases. Instead of encouraging informality and flexibility our procedures were becoming formal and rigid. We weren't getting the full benefits of pre-trial; the attorneys were becoming discouraged and disgruntled with what they were coming to consider a waste of their precious time and as their cooperation began to lag, the procedure became much more of a waste of time until finally it was necessary to drop it entirely.

As always, necessity was the mother of our modest discovery. A little over two years ago our district was confronted with an appalling condition of calendar congestion and delays. At that time there were 10,334 cases on our civil docket and approximately 5,000 additional cases were being added annually. 5,630 cases were awaiting trial on our five civil calendars. They expected a long wait. There was a three and one-half year waiting period for jury personal injury actions from the time of filing a note of issue. Actions on the admiralty calendar had a two year waiting period and non-jury cases other than personal injury and death actions had a two and one-half year delay before trial. Even more foreboding, a greater number of cases were being added to our trial calendars each month than we were disposing of by trial. Our backlog was growing rather than diminishing.

Now you gentlemen who have never experienced calendar congestion may wonder how we ever got into this fix in the first place. Of course, the backlog was not something that accumulated overnight, it had developed over a long period of years in which the court did not have the judicial manpower to cope with its overwhelming volume of litigation. Located in the greatest financial and industrial center in the world, complicated commercial litigation and important criminal cases naturally tend to gravitate to this district. As of June 1956, one-third of all copyright cases, one-fourth of all government civil anti-trust suits, and about one-fifth of all private anti-trust suits were on the docket in this district. In addition, New York being the largest port in the nation, 44% of the admiralty and maritime litigation in the federal courts is filed in the Southern District and more than one-half of all Jones Act suits involving injury to seamen. The statistics of the Administrative Office indicate that the number of pending civil cases *per judgeship* in the Southern District of New York is about twice the national average.

Now before I tell you how we extricated ourselves from this seemingly insoluble dilemma—let me tell you that we did. In spite of the continuing

and even expanding volume of litigation in our district, this is our present situation: We now have fewer cases pending on our trial calendars than at any time during the past 25 years, with the exception of the war year 1943. As of the close of the past fiscal year on June 30th, there were only 821 cases on all five of our civil calendars. There are cases being tried where the *accident,* mind you, took place less than 6 or 7 months prior to trial. During the past year it has been possible for litigants to obtain a trial within one to four months after they signify their readiness for trial. Moreover, there is every indication that this current status will be maintained in the future.

It does sound fantastic. But these results were not achieved by brushing up on our alchemy. Here's how it was done.

A careful investigation revealed that the following conditions were largely responsible for our difficulties. An overwhelming majority of the cases on our trial calendars were largely unprepared and an equally large number were cases that would never be tried for varying reasons.

With this "dead wood" represented in our statistics as ready cases awaiting trial, our calendars were presenting a distorted picture of the extent of our backlog. Largely because of these misleading statistics, and the expected delay before trial, attorneys were almost automatically placing every case upon the trial calendars by filing a note of issue without waiting until their trial preparations were complete and with little regard being paid to the possibility or even probability of settlement. This, in turn, added to the statistical backlog and further encouraged this practice. We were faced with a classical vicious circle.

Since many cases were settled during trial or on the eve of trial or were adjourned because of non-readiness, all too frequently judges in the most congested trial parts were left without any cases ready to be tried—and so the backlog grew. Meanwhile cases in which the attorneys were prepared and the litgants were desirous of a trial, were being left waiting for months and years further down the calendar lists, blocked from reaching the top by this "dead wood" on the calendar.

We concluded that our primary concern would have to be with alleviating that condition of the calendars which prevented a reasonably prompt trial of cases in which litigants were ready and desirous of a trial. This was adopted as our working definition of calendar congestion.

Statistics indicated that we could not look to more trials alone for a solution of our problem. Relying solely on more trials would be like attempting to bail out a rowboat which has a gaping hole in its bottom. Cases would be added faster than they could possibly be disposed of by trials.

If we were going to be at all successful, we concluded, it would be necessary to adopt a different procedure which would afford full justice

to the litigants. The procedure chosen was the informal pre-trial conference.

On October 3, 1955, calendar control was taken out of the hands of the calendar commissioner where it had rested for many years and was placed in the hands of rotating calendar judges. It was hoped that the judges assigned to the calendar term, called Part I, would be able to weed out from the trial calendar the "dead wood" of cases which were destined to be settled or in which trial preparations were far from complete.

Under this new Part I procedure, assignment judges screened every case pending on our five civil calendars last year—checking on trial preparation, narrowing the issues and discussing settlement. In a nine month period, 7,229 civil cases were pre-tried by the assignment judges. Largely as a result of these conferences, a total of 7,162 cases were terminated, i.e., closed out and off the dockets, eliminating a backlog representing over eight years of court time.

The key to our successful "Now you see it, now you don't" performance was our recognition that pre-trial is not just for the big case and that it need not be the complete and formalized proceeding seemingly envisioned by the Federal Rules. Instead, pre-trial can be and is a vital, flexible tool in the hands of the trial judge or court in its daily confrontation of the hundreds and thousands of so-called little or average size cases which compose the bulk of our calendars.

Of course, pre-trial is no cure-all, and it must be applied with careful thought and hard work—but properly used, it can work judicial miracles.

I don't believe it necessary to bore you with a lengthy discussion of the detailed operation of our new procedures. I am confident that the people of Wyoming will never permit themselves to get into the type of fix that we found ourselves in.

If there is one lesson that our experience reveals, however, it is that pre-trial must never be permitted to become over ritualistic. It operates at its peak efficiency only when it is adapted to the particular needs of the court and of the particular case.

Where a large, complex and protracted suit may call for lengthy and frequent full dress conferences in open court with a reporter taking down every word, the average negligence action may only require, what Judge Medina likes to call a "pow wow"—an informal talk in his chambers where we can visualize him saying to the lawyers "O.K. boys, let's cut out the nonsense and talk turkey. What's this case all about?"

Whatever kinks there are in the machinery of the federal rules may be removed by a little pre-trial elbow grease. When the machinery is well greased, the federal rules are the most effective tools yet discovered for the attainment of our sole objective—impartial justice, and I congratulate you again upon your adoption of these rules for it manifests that enlightened approach so necessary in coping with modern day litigation problems.