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# THE PRETRIAL CONFERENCE: CONCEPTIONS AND MISCONCEPTIONS

ALFRED P. MURRAH\*

As Chairman of the National Pretrial Committee since 1948, it has been my pleasant duty to contact every federal judge upon his assuming office to attempt to win him to the cause of pretrial by pointing out the advantages of its efficient use, and offering the assistance of the national and circuit pretrial committees. Each new judge is invited to sit with a seasoned pretrial judge of his own choice, to observe the pretrial techniques employed by him, not for the purpose of slavishly adopting the methods used by that judge, but for the purpose of affording the new judge an opportunity to observe successful pretrial in practice.

So much has been written on the subject,<sup>1</sup> so many demonstrations have been conducted throughout the country by trial judges, so much overwhelming evidence in its favor, that it seems almost incredible that lawyers and judges continue to doubt the efficacy of the practice.

Nineteen years after the official adoption of the pretrial conference as a federal court rule and by at least thirty-six states, there remain able, efficient and conscientious judges yet unconvinced. Indeed, pretrial has been called the bastard of the law, even a premature bastard; and in more refined terms, a curse, a joke, a waste of time and money, a means of sandbagging litigants into a settlement—a perfunctory nuisance. Ironically enough, close investigation reveals that all of these are truly representative epitaphs, depending upon concept and practice. Those who have made a special study of the use of pretrial in the federal courts of the country readily admit a justifiable basis for every one of the derogatory labels. Those of us of the Bench and Bar who abhor and deplore procedural change in any form, and those who yet cling to the idea that the trial of a case is a sporting game of skill and chance have difficulty adjusting ourselves to a new concept in the juridical search for truth, which is justice. For, undoubtedly, pretrial, after the exhaustion of discovery, is a relatively new procedural approach in the judicial process. Our reluctance to embrace the new concept of pleadings and practice exemplified in the new rules is born of our congenial aversion to procedural change of any kind. Lord Campbell once said that “the due administration of justice depends more upon the rules by which suits are conducted than on the perfection of the code by which rights are defined.” Lord Macmillan said that “Reform of procedure is always a ticklish business for we grow accustomed to paths we have long trodden however tortuous. But the task must be undertaken from time to time if the

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1. Nims, Pretrial; bibliography attached to Report of Committee on Pretrial Procedure of Section of Judicial Administration, American Bar Association (1950).

vehicle of the law is to keep pace with the changing requirements of the age."<sup>2</sup>

And so has been the way of pretrial conferences. I cannot ever forget one experience which vividly illustrates the burdens of those who advocate procedural change. It was soon after the reorganization of the New Jersey judicial system under its new Constitution. Vanderbilt was the author and the architect, and the new Chief Justice, the bar association of that state was in convention and all of the judges were there. The new Chief Justice had arranged a pretrial demonstration by Chief Judge Laws of the District Court of the District of Columbia for the purpose of devising pretrial techniques for the vitalization of the newly adopted compulsory pretrial court rule. All of the judges were arrayed down front to witness the demonstration. As Chief Judge Laws and his team of able lawyers from Washington moved toward the narrowing of the issues in a complicated lawsuit, obtaining admissions of a fact about which there was no material dispute, and otherwise stripping the lawsuit to its bare bones, the judges got up to leave, one by one, until in the end only a few remained. Chief Justice Vanderbilt was disappointed but not deterred. Writing later on the subject of clearing congested calendars, Vanderbilt mentioned the demonstration, stating, "The judges of our law courts, however, by and large saw nothing good in it, and it required the utmost in persuasion in some instances to get them to give the matter the effort which it requires, for a good pretrial conference in a complicated case is no mean intellectual feat."<sup>3</sup> A *Handbook on Pretrial* was promulgated and made available to all of the judges of the New Jersey courts, providing in part for a check list of sixteen specific points or matters which ought to be the subject of inquiry at the pretrial.<sup>4</sup>

Ten years later, Vanderbilt's efforts were triumphantly rewarded. On invitation of the Section of Judicial Administration at the Annual Meeting of the American Bar Association, Chief Justice Vanderbilt brought his team of judges and lawyers to Philadelphia to demonstrate the techniques by which he had lifted the New Jersey judicial system from the bogs of desperation to a shining example for all to see who would look. After a brief introduction by the distinguished Chief Justice, Mr. Justice Brennan, then of the Supreme Court of New Jersey, proceeded to outline with convincing clarity the phenomenal results of discovery and pretrial conferences in the New Jersey courts. The opening sentence of his remarks was, "In New Jersey pretrial conference procedure is championed as the most important of all the pretrial devices designed to assure every litigant that his lawsuit will be disposed of without undue delay and with maximum protection against a result prejudiced by judicial error or influenced by maneuver or surprise."<sup>5</sup>

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2. Macmillan, *Law and Other Things*, 35.

3. Vanderbilt, *Clearing Congested Calendars*, 14 N.A.C.C.A. L.J. 326, 337. (1954).

4. New Jersey Supreme Court, *Manual of Pretrial Practice* (1953).

5. Brennan, *Remarks on Pretrial*, 17 F.R.D. 479 (1955).

As we left the federal courtroom in Philadelphia, one judge, whom I respect and admire, turned to me to say that pretrial procedure was undoubtedly a wonderful thing in New Jersey, but it simply would not work across the river in his jurisdiction. But it has worked there, and the statistics prove it.

On June 30, 1955, when a three-judge committee in the Southern District of New York was appointed by the Chief Judge to study methods of alleviating the appalling condition of the calendars, there were 10,334 cases on the civil dockets and 5,000 additional cases being added annually. There were 5,680 cases waiting for trial on the five civil calendars and the estimated time between issue and trial was over four years. By the common sense use of pretrial conferences, adapted to the peculiar problems of that jurisdiction, today it is possible for litigants to obtain a trial within one to four months after they signify their readiness for trial. In a nine months' period, 7,229 civil cases were pretried by the assigned judges. In the language of Judge Irving Kaufman, a member of the Committee who is also a member of the National Pretrial Committee: "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 eight years of court time."<sup>6</sup> Now, pretrial had been previously inaugurated in the Southern District of New York and abandoned as a failure—a waste of time. Unfortunately, pretrial conferences have been adopted in other jurisdictions with enthusiasm, to be later condemned and abandoned.

And so, the question arises, what is the difference between success and failure? The answer is clear and unequivocal. It lies first in the proper concept of what a pretrial is intended to achieve. Some have construed it as a vehicle for coercing lawyers into settlements, thus denying their day in court. Others have conceived the function to be the settlement of all issues of fact, whether controverted or not, forgetting that discovery rules are available for such purposes and should be exhausted before pretrial conference. These practices have resulted in deep resentment by members of the Bar and rightly so, for the pretrial function is certainly not the avoidance of trial; it is preparation for trial. Still other judges conceive it to be the judge's function in a pretrial to merely call the lawyers together for the purpose of making formal inquiry, first, whether the parties have agreed upon a settlement, and if not, whether they could agree upon anything else. One judge told me just the other day the purpose of pretrials in his court was merely to determine whether the costs had been paid and to agree on a trial date. These conferences are very properly called perfunctory nuisances or even bastards of the law—they make the way of the pretrial advocate hard and disillusioning.

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6. Kaufman, Calendar Decongestion in the Southern District of New York, *Journal of American Judicature Society* (October-December 1956).

The success of pretrial depends upon a proper appreciation of its intended function. It means that the judge must be willing to assume his role as the governor of the lawsuit, not a mere umpire. Judge Holtzoff says that a judge "must not be satisfied to accept counsel's statement of the issues without further analysis. He must constantly draw on his own imagination to suggest subjects for stipulation. Without such active leadership on the part of the judge, pretrial procedure is not likely to achieve success."<sup>7</sup>

In the language of Chief Judge Charles Clark, pretrial requires real skill on the part of the judge. "To me," said Judge Clark, "successful pretrial represents the perfection of the judicial art." He went on to say, "I hope judges will come to realize more and more how they can demonstrate skill and effective use of their judicial post at this preliminary stage of litigation."<sup>8</sup> This distinguished judicial scholar did not stop at stressing the opportunities for judicial craftsmanship open to the pretrial judge. He thinks, as do all of us, that there are like opportunities for counsel's craftsmanship in the highest tradition of professional practice.

To those lawyers who harbor the idea that the pretrial conference is for the law clerks, let me suggest that more and more the quietude of the pretrial conference will be the atmosphere in which the rights of the parties are shaped and molded ultimately into a just and righteous judgment.

If you are interested in techniques, and there are many effective ones, you are invited to read a very exhaustive article by two members of the Wisconsin Bar, appearing in the January, 1954, issue of the *Wisconsin Law Review*. This article is a survey of pretrial in the State of Wisconsin, primarily in the state courts, where it is undoubtedly used effectively in the efficient administration of justice in that state. Your attention is particularly invited to a form of pretrial notice by Judge Tehan which serves to apprise the lawyers of what may be expected of them at a pretrial, thus enabling them to be prepared. When lawyers come into the pretrial conference without any well-convinced idea of what is to be expected of them, they are chary, cautious and reluctant. In a pretrial handbook, prepared and distributed under the auspices of the Pretrial Committee of the Section of Judicial Administration of the American Bar Association in 1955, seventeen distinct and separate points are suggested as topics for discussion in pretrial.<sup>9</sup> If the lawyers know in advance that they must be prepared to discuss these various points, and the judge has them before him as he guides the case through its pretrial process, there can be no doubt of the advantages to be gained in the procedure, regardless of the type of case involved.

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7. Holtzoff, *Pretrial Procedure in the District of Columbia*, Cath. U.L. Rev. (January 1953).

8. Ohio State L.J. 163.

9. Kincaid, *A Judge's Handbook of Pretrial Procedure*, 17 F.R.D. 437 (1955).

In the language of Chief Judge Duffy, of the Seventh Circuit, "attorneys at a pretrial conference owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be. Rule 16 has done much to eliminate sham and surprise in the preparation and trial of cases in the federal courts."<sup>10</sup> And, to those who are dubious about power to conduct an effective pretrial, let me quote Judge Huxman: "The spirit of a pretrial procedure is not only to call the parties together and ask them to stipulate as to all matters concerning which there can be no dispute, but to compel them to stipulate and agree as to all facts concerning which there can be no real issue. The court has a right to compel the parties to do this."<sup>11</sup>

Pretrial is not self-executing. Its effectiveness depends upon the attitude of the judge and the co-operation of the lawyers in the case. It requires hard work and patience on the part of both the lawyer and the judge. Nor is it a panacea for all of our judicial ills. It is only one of the modern procedural tools available to the Bench and Bar, which, when skillfully used, will undoubtedly aid in the expeditious and economical disposition of civil litigation. In the language of a great lawyer of the South, wherever it is effectively used, "the lawyer has a better chance to give a satisfactory answer to the three questions uppermost in his client's minds, namely, what will it cost; how long will it take; and what are the chances of success?"<sup>12</sup> If it will take too long and cost too much, nothing else matters.

It is only by the diligent and efficient application of our learning and professional skill that we can hope to merit the place in the public estimation which we claim, and to render to the public the services which they are entitled to expect from us. We live in a dynamic, pulsating world—a world of change, if you please—in a world where the new is obsolete while it is yet on the drawing board. The law must keep pace or something else will surely take its place. Justice is the greatest interest of man on earth—it is the most precious heritage of a free society. We are its trustees with the inescapable duty to administer it—to preserve it and to perpetuate it. Certainly we can best perform our task by the skillful use of the tools at hand.

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10. *Cherney v. Holmes*, 185 F.2d 718 (7th Cir. 1950).

11. *Berger v. Brannan*, 172 F.2d 241 (10th Cir. 1949).

12. Troutman, *Pretrial Conference*, *Mercer L. Rev.* (Spring 1953).