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PRETRIAL PROCEDURE IN THE DISTRICT OF COLUMBIA

by

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Laws' delays and its technicalities have accompanied the administration of justice from time immemorial. They have been even deplored and ridiculed in literature. Some types of legalistic reasoning were lampooned by Aristophanes in "The Clouds". Shakespeare speaks of "nice sharp quillets of the law". In Hamlet's soliloquy, law's delay is included in the catalogue of ills of the world. Perhaps the most powerful caricature of laws' delays is found in Dickens' immortal classic, "Bleak House", in the guise of the interminable law suit entitled *Jarndyce v. Jarndyce.*

For centuries these concomitants of litigation were accepted as necessary evils. They were considered inevitable. The obvious fact that courts exist for the benefit of the public and not for the advantage of the legal profession, did not seem to be realized or understood. At least, it was ignored. It was not until our own times that there dawned on the bench and bar the thought that neither technicalities nor delays were indispensable. Steps were then taken in an endeavor to extirpate them. The strongest blows for the abolition of technicalities in legal procedure were struck by the adoption of the Federal Rules of Civil Procedure in 1938,[1] and the Federal Rules of Criminal Procedure in 1946. Several of the States followed the lead of the Federal courts. New Jersey, Minnesota, Iowa, Utah, Arizona, Colorado, and New Mexico are among the outstanding examples.

A vital contribution to reducing laws' delays and the expense of litigation, as well as eliminating technicalities, has been made by the comparatively recent adoption of a device that has come to be known as pretrial procedure. As is true of many outstanding inventions and discoveries, pretrial procedure was initiated more or less accidentally. In the latter part of the 1920's, the State court judges in Detroit, were confronted with an accumulation of cases that caused a delay of several years in the disposition of the docket. Some drastic remedy was necessary. The judges, led by Judge Ira Jayne, commenced a call of equity cases with a view to determining how many of them could be disposed of without a trial; or, in the alternative, to what extent trials could be shortened by

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[1] Even under the Federal Rules of Civil Procedure, some vestigial relics of legal technicalities are to be found, e.g., Rule 25(d). See *Snyder v. Buck,* 340 U. S. 15 (1950). No doubt they will eventually be eliminated by amendments.

eliminating non-controversial issues and stipulating facts. This course was so successful that it became a permanent feature of court procedure in Detroit. The example of Detroit was successfully emulated in Boston.

In essence a pretrial hearing is nothing but a conference of counsel for the respective parties, conducted under the supervision of and with the aid of the Court for the purpose of clarifying the issues and formulating them in concrete, specific form; eliminating issues that appear on the basis of the pleadings, but are not actually in controversy; and narrowing the questions to be tried. Another purpose of pretrial is to secure a stipulation in regard to as many facts and the authenticity of as many documents as possible, in order to reduce to a minimum the evidence to be introduced at the trial, thereby shortening the trial and reducing the cost of litigation.

In retrospect there seems to be nothing peculiarly ingenious or novel in the idea of a pretrial conference. Many important and even pioneer inventions, however, seem perfectly obvious after they have been made. One is apt to wonder why no one thought of them before. This circumstance does not detract from the value of the step taken by the inventor. This characteristic is likewise true of pretrial procedure. The idea should have occurred to lawyers and judges centuries ago, but the fact remains that it did not.

Pretrial procedure must not be confused with attempts to compromise or settle cases. While such dispositions are a common by-product of pretrial and a very large percentage of cases are settled either at the conclusion of the pretrial hearing, or as a result thereof, thereby reducing arrears in crowded dockets, nevertheless, the primary purpose of pretrial is to eliminate non-controversial issues, to define the questions to be tried, and to stipulate facts and documents. In recent years in some metropolitan centers, State courts have adopted the practice of calling the calendar of cases for the purpose of determining which of them can be settled or otherwise disposed of without a trial. This step is commendable, but should not be called pretrial. It is an entirely different approach.

A complete utilization of the opportunities presented by pretrial procedure can be attained only by full and affirmative cooperation on the part of counsel and the court, and participation in the proceeding on the part of each. Counsel must be as thoroughly prepared for a pretrial hearing as for the trial itself. The judge must share the responsibility for its success. Both court and counsel must exhaust every possibility of eliminating non-controversial issues and stipulating facts in order to reduce the length, and decrease the expense, of the trial. Every drop of juice must be squeezed out of the orange, so to speak, before the pretrial is concluded. Pretrial generally requires a much greater participation

on the part of the judge than is true of the trial itself. At times it is much more exhausting and fatiguing for the judge than presiding at a trial. He must continually interrogate counsel in order to attain a sharp, precise definition of the issues and to overcome the natural tendency of lawyers to state their contentions in general form. He 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.

The framers of the Federal Rules of Civil Procedure, after scrutinizing the successful experiments in Detroit and Boston, adopted a rule providing for pretrial procedure in the United States district courts (Rule 16). Inasmuch as this step was regarded as a far-reaching innovation, the rule was made optional. Each District Court was empowered to exercise its own choice as to whether the rule should be invoked and, if so, to what extent.[2]

The United States District Court for the District of Columbia was one of the pioneers in making use of the pretrial procedure rule. Within a year after the Federal Rules of Civil Procedure were promulgated, this court at the instigation of Judge Laws, who subsequently became its Chief Judge, adopted a mandatory pretrial rule. Provision was made for assigning every civil case for pretrial before it was reached for trial. An exception was made for matrimonial litigation, suits against the Commissioner of Patents to authorize the issuance of a patent, and actions against the United States on life insurance policies.[3] Another provision of the local rules is to the effect that cases on the pretrial calendar should

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[2] Rule 16 of the Federal Rules of Civil Procedure reads as follows:
"*Pretrial procedure; formulating issues.*
In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference 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 proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action.
The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

[3] Rule 11(d) of the Rules of the United States District Court for the District of Columbia.

be pretried as provided by Rule 16 of the Federal Rules of Civil Procedure.[4]

One of the judges of the Court is regularly assigned to conduct pretrials. These assignments rotate every three months, as is likewise true of the other judicial assignments of the Court. As a result of the adoption of this practice, every civil case, other than those in the excepted categories, is pretried as a matter of course before it is reached for trial. The requirement of pretrial is mandatory. Failure of counsel to appear at the pretrial hearing may result in the invocation of the same penalty as is imposed for failure to be present at the trial. In other words, judgment by default may be taken against the absent party.

The United States District Court for the District of Columbia has unique jurisdiction of unusually wide scope, owing to the fact that the District is a Federal area and, therefore, has no tribunals corresponding to State courts. All civil cases involving $3,000 or over, as well as all felony cases, are tried in the Federal court, in addition, of course, to the cases of types which elsewhere come into the Federal courts. The court is an exceedingly busy tribunal with a very heavy docket of various types of cases. Because of the volume of its business and because it adopted a mandatory pretrial rule, this court has probably employed pretrial procedure to a greater extent than most other tribunals.

There are indeed other Federal courts that continuously use mandatory pretrial practice with success, for example, the courts for the District of Massachusetts, the District of Oregon, and the Eastern District of Michigan. A little over a year ago, mandatory pretrial procedure was introduced in the Southern District of New York. Many Federal courts employ pretrial for selected cases. Among the States, New Jersey is notable for the introduction of pretrial procedure under the dynamic and enlightened leadership of Chief Justice Vanderbilt.

It seems pertinent at this point to summarize the actual procedure at pretrial hearings, as they are conducted in the District of Columbia. It must be borne in mind that a pretrial hearing is a formal part of the litigation, as much as the trial itself, with consequences equally binding. Most of the judges conduct pretrials in the courtroom with the same formality as a trial. A few members of the court prefer to handle pretrial conferences in chambers. The writer adheres to the former practice, although it must be admitted that the matter is one of choice and taste. Ordinarily the pretrial hearing is opened by a statement on the part of counsel for the plaintiff summarizing the issues from his point of view. The presiding judge may interrogate him in order to elucidate and

[4] Rule 12 of the Rules of the United States District Court for the District of Columbia.

crystallize specific issues. For example, if the plaintiff's counsel states that it is alleged that the defendant was negligent, the court will ask him to state in detail the specific negligence claimed. After the plaintiff concludes his statement, a similar course is pursued with the defendant's counsel. As the hearing progresses, the presiding judge from time to time dictates provisions of the pretrial order to a typist in the courtroom who typewrites it on a printed form. After the issues are specifically framed in this manner, and uncontroverted matters expressly eliminated in the proposed pretrial order, as a result of the foregoing interchange, the parties then proceed to stipulate facts or documents, or both. Stipulations are proposed by either counsel, and frequently additional stipulations are suggested by the court. In fact, the judge must take an active part in the pretrial in order to make it effective. Without his participation, it is likely to prove useless and abortive, and to result in very little else than a futile restatement and summary of the pleadings. Finally matters relating to future proceedings are taken up. They involve such subjects as additional discovery, interchange of information, limitation of the number of expert witnesses, and the like.

In the District of Columbia, it is customary at the close of the pretrial hearing for the judge to explore with the attorneys the possibility of a settlement. Such dispositions frequently result from these informal discussions, either at the pretrial hearing, or more frequently between the pretrial and the trial. As a consequence a large proportion of lawsuits are settled, the backlog of cases diminished, and the disposition of the docket expedited.

Since the judge dictates provisions for the pretrial order to the typist in the courtroom from time to time as the hearing progresses, the order is ready for the signature of the attorneys and the judge as soon as the pretrial is concluded. The practice is for the typist to hand the proposed order to counsel who immediately examine it, make any necessary corrections, and sign it before leaving the courtroom. It is not customary to report pretrials stenographically. This course is, however, followed in exceptional cases involving complicated issues. While the average pretrial consumes about one-half hour, a few cases require longer time, sometimes as much as a half-day, and occasionally even several sessions. In such unusual instances, the judge does not attempt to dictate the pretrial order to the typist in the courtroom. It is prepared by counsel from the stenographic transcript of the proceeding. These deviations from the usual practice occur only on comparatively rare occasions.

Inasmuch as the pretrial hearing is a part of judicial procedure, the pretrial order is binding on the parties and governs the subsequent course of the litigation. Its provisions are obligatory both on counsel

and the trial judge, when the case comes to trial on the merits.[5] If either party desires a change in the pretrial order, a motion to amend should be made before the pretrial judge prior to the trial. To prevent manifest injustice, leave to amend may even be granted by the trial judge, if necessary, with the added condition that the trial be continued in case the opposing party is taken by surprise and is prejudiced thereby.

It may be useful to consider in some detail the various types of matters that can be stipulated at pretrial, or that can emerge as a result of the hearing. As already indicated, the pretrial may be divided into two principal parts: a clear and precise definition of the issues to be tried, and the elimination of issues not actually or seriously in controversy; second, stipulations of facts and documents. In a long and complicated case the benefits of pretrial are manifest. A narrowing and a definition of the issues are particularly important in such instances. Formal facts that are matters of record can be stipulated; documents can be identified and marked, and an agreement reached that they may be admitted in evidence at the trial without formal proof of authenticity, or of mailing or receipt, as the case may be. Parties may protect themselves in making such a stipulation by reserving the right to object on the ground of irrelevancy or incompetency. The number of expert witnesses, if any, to be called may be limited. Pertinent information may be exchanged. By these means the expected length of a protracted trial can be substantially reduced and thereby a crowded docket can be expedited.

Doubt has, at times, been expressed as to the usefulness of pretrial in short simple cases, especially in negligence cases of the average type. The writer ventures to suggest that such skepticism can arise only as a result of lack of thorough familiarity with pretrial procedure, or failure to exhaust its possibilities. Practical experience demonstrates that a great deal can be accomplished at pretrial in such cases.

The usual complaint in a negligence suit under the new rules is short and indefinite. Such pleadings are encouraged.[6] Negligence may be, and in fact should be, pleaded generally without specification. A pleading may charge two or more defendants in the alternative. When the case reaches the pretrial stage, however, attorneys for the respective parties must be in a position to be specific, just as specific as they would be at the trial itself. Consequently, in a negligence case the plaintiff must designate at pretrial of what he claims the defendant's negligence consists. By the same token the defendant must be in a position to particularize with precision in what respect he claims the plaintiff is

[5] See *McCarthy v. Lerner Stores*, 9 F. R. D. 31 (1949).
[6] Form 9, Appendix of Forms, F. R. C. P.

guilty of contributory negligence, if that is a defense. The pretrial order should specify the exact negligence claimed. It is not sufficient to say merely that the defendant drove carelessly and recklessly, or that he failed to give full time and attention to his duty as a driver. Such generalities do not advance the cause. What did he do that he should not have done, or what did he fail to do that he should have done. Examples of appropriate specifications of negligence are the following:

> "The defendant drove through a red traffic light."
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> "The defendant drove at an excessive rate of speed."
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> "The defendant failed to yield the right-of-way to the plaintiff, etc."

Such specifications should be called for and required by the trial judge and included in the pretrial order. Similar specifications as to contributory negligence, if any is claimed, should likewise be exacted of the defendant. Statements of this kind frame and limit the issues to be tried. Each side should also be required to state its exact version of the accident, and these versions should be included in the pretrial memorandum. Both parties are then on notice as to exactly what is to be claimed and determined at the trial, and the trial judge is in a position to restrict the evidence to the issues so formulated.

A great deal can be accomplished in respect to the damages claimed. The plaintiff should be required to particularize his claim for special damages, if any, stating, for example, the amount claimed for medical expenses, setting forth the name of each physician and the sum charged by him; the amount incurred for hospital expenses; the cost of transportation, and miscellaneous expenses, in each instance itemizing them. If any loss of earnings is claimed, not only should the amount be stated in the pretrial order, but also the method by which the computation is made. There should be a statement whether the plaintiff claims any permanent injury and, if so, the exact nature of the alleged permanent injury should be included in the pretrial order. At times, plaintiff's counsel will express uncertainty as to the character of permanent injuries that are to be claimed at the trial. Such an attitude should not be tolerated. Counsel should be as well prepared at pretrial as they are supposed to be at the trial, and, if necessary, the pretrial can be continued for a day or two in order to prevent any injustice being done to either party. Before the pretrial is concluded, the plaintiff should be on record in the pretrial order as to the exact nature of the permanent injuries claimed.

When it comes to stipulating facts and documents, there is a wide sphere for agreement even in such ordinary cases. Plaintiff's counsel should be required to produce all hospital bills, medical bills, bills for

repairs to a vehicle, and all other bills, which form the basis of a claim for special damages. The bills should be initialed by the judge and an endeavor should be made to stipulate that they may be admitted in evidence, without formal proof, subject to the opposing party's right to object as to relevancy or competency, if such a reservation is desired. If street measurements are of any importance, and are going to be introduced at the trial, information as to them should be obtained by counsel prior to pretrial and the necessary data stipulated and included in the pretrial order. This is likewise true of such matters as the location of "Stop" signs and the timing of cycles on which traffic lights were being operated at the place where the accident occurred. Employment and leave records should likewise be stipulated. The writer has seen too many instances in which representatives of the government are subpoenaed to produce routine records, such matters as street measurements, or the operation of the traffic lights, or leave taken by employees. This course is not necessary if proper preparation is made for the pretrial hearing. It not only consumes the time of the court unnecessarily—time which can be devoted to the trial of other cases—but it also involves a useless expense to the very party who subpoenas the witness. Moreover, it is an imposition on the taxpayers to take Government officials and employees away from their duties and bring them to court, time and time again, to testify to routine matters. If diagrams are to be used, they can be prepared in advance and stipulated at pretrial. Photographs and X-ray films should be identified and stipulated. Candor constrains the writer to state that the basic difficulty is that all too often some lawyers do not thoroughly prepare their cases for pretrial or do not grasp its potentialities. They either do not know what information they will need, or are not willing to go to the trouble of securing it in advance. Perhaps the occasional imposition of a penalty on an attorney, such as assessing costs against him personally, for producing testimony in respect to which he should have endeavored to secure a stipulation at pretrial, may cure some of the recalcitrants.

In a death case, the age of the deceased and his life expectancy according to the mortality tables may be stipulated, as is also true of the life expectancy of the alleged dependents, as well as their identity. Facts of record, such as the probate of a will, or the issuance of letters of administration, should be stipulated.

In an action of libel, the fact of publication and the extent of its circulation is a reasonable subject for a stipulation and frequently eliminates a great deal of costly and laborious proof at the trial. In a contract case, the contract or the documents constituting the agreement can generally be stipulated, as well as the facts relating to the alleged

breach, and at least some of the facts which form the basis of the calculation of damages. In fact the possibilities are legion and depend very largely on the ingenuity and industry of counsel and on the extent of the participation of the judge, who is in a position to suggest matters concerning which stipulations may be made.

Pretrial has become a definite and important part of the disposition of civil actions in the District of Columbia. Its benefits are manifest. The active bar generally favors its use. It can be utilized even to a greater extent than has been the case heretofore and its ramifications and potentialities can be explored more fully than has often been the case. If this is accomplished the advantages derived from pretrial will become greater than they have been in the past.