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Forum Juridicum

Pre-Trial on Trial*

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The subject which I am to discuss relates to the most salutary innovation in the administration of justice since the common-law trial replaced trial by battle and trial by ordeal as a method of resolving legal problems. I refer to pre-trial. At the outset, I feel I should state that I am an advocate of pre-trial, if not, in fact, an evangelist on the subject. So if my remarks suffer in some degree from lack of objectivity you will understand the reason.

From time immemorial, lawyers and judges alike have received less than complete approbation from laymen. That really is an understatement. It will be remembered that Plato included no lawyers in his Utopia nor did Sir Thomas More in his. In more recent times, our profession has been subjected to the unedifying spectacle in literature and less of the lawyer being depicted as a shyster, a mouthpiece for mobsters. Nor have judges escaped the calumny. In the cowboy operas which are shown on the TV to the delight of my very own six-year-old son, judges are pictured as corrupt scoundrels. Only Hop-Along Cassidy and Wild Bill Hickok, as the personification of all that is good, can right the wrongs perpetrated on defenseless widows and orphans who are mulcted out of their homesteads and inheritances by unscrupulous lawyers and other bandits.

Much of the criticism directed at our profession is of course utterly without foundation. On the other hand we, as lawyers and judges, must recognize the validity of at least some of the criticism and admit our shortcomings. Perhaps the most valid criticism relates to the law's delay, its technicality and its cost. No one can with fairness say that much cannot and should not be done to expedite the disposition of cases, eliminate the tech-

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nicality of the law and reduce its cost. I am sure everybody is familiar with the magazine articles which are periodically printed showing that in certain metropolitan areas of our country personal injury cases take from three to five years to be brought to trial; that when the breadwinner of the family is injured and unable to work, his family goes on relief, that thus, through the law's delay, economic duress is brought to bear on the personal injury litigant so that he is forced to settle his claim for a fraction of its true value. These articles show the utter inability of the laymen to account for or to excuse the law's delay. If business men have a problem, they sit down at the conference table at the earliest opportunity and try to resolve the problem. They fail to see why some such direct method cannot, in some way, assist in eliminating the interminable delays of the law.

The technicality in the law also baffles the layman. He believes that the only conceivable purpose of technicality in the law is the frustration of justice. It is true that some technicality is inherent in the administration of justice, yet I am certain no one will deny that in some instances layer upon layer of technicality has been placed upon our practice, to such an extent that it is often impossible to determine what the merits of the controversy actually are. In fact in many cases, because of the technicalities, the merits are never reached. That some in our profession have mastered the use of these technicalities in defeating the administration of justice is no reason for their continued sufferance.

It was against this background of growing contempt for the legal process that modern pre-trial made its debut in the City of Detroit in 1929. I say modern pre-trial because it must be remembered that early common law pleadings, like pre-trial conferences, were oral, I assume because neither the judge nor the lawyers could read or write. In those days the plaintiff merely served on the defendant a summons to appear in court. In court, the lawyers representing the litigants would stand before the judge and dictate the pleadings to the court reporter. Counsel for the defendant would answer each allegation as it was made, so that, with the help of the court, those allegations about which there was no controversy were eliminated from the lawsuit and the pleadings were made up only on the controverted issues. It was allegedly to simplify these already most simple pleadings that written common law pleadings were first introduced.

When pre-trial was used in Detroit in 1929, there was no statutory authority or rule of court providing therefor. The judges of the trial court there, in order to overcome congested dockets, began the practice of calling the opposing lawyers in a law suit to the conference table before trial in order to simplify the issues and thereby shorten the trial. The success of pre-trial in Detroit spread rapidly into other areas until finally it was incorporated in the Federal Rules of Civil Procedure in 1938.

That the need for pre-trial is greater today than it was at the time of its inclusion in the Federal Civil Rules in 1938 is testified to by the unprecedented increase in litigation which has deluged our courts. In the past two years alone the number of suits filed in federal courts throughout the country has increased twenty-three per cent, while here in the Eastern District of Louisiana the increase has been fifty-six per cent. And it may be assumed there has been a similar increase in litigation in our state courts.

The answer to this increase is not a proportionate increase in judges, court houses and all that goes with them. It must be remembered that the judicial process is a parasite on the economic process. The judicial process produces nothing but resolution, after some delay, of disputes arising out of the economic process, and there is a limit to the added burdens our economy can stand. Consequently, it behooves us all, judges and lawyers alike, to seek out a method of improving the judicial process by increasing its capacity as well as its efficiency. I submit that that improvement is pre-trial.

What is pre-trial? First of all it is relatively new, that is, it has become a part of our procedure since most of us were in law school. Unfortunately, the very fact of its newness has created a hostility toward it. It is a hostility born of ignorance of the process. It is an ignorance nurtured by unfounded gossip. It is a manifestation of the lawyers' traditional inhospitality to change. It is suggested that pre-trial is a means by which a judge coerces lawyers into settlement and thereby avoids the necessity for trial. I say to you such is not pre-trial, but a prostitution of the process. And pre-trial should not be condemned if it appears that on one or more occasions a judge did so misuse the pre-trial conference. In that event the criticism should be levelled at the judge and not at pre-trial. It is also true that in some of our metropolitan areas today there is being indulged a practice

which has been referred to as pre-trial. Under that practice the court confers with counsel solely for the purpose of effecting a settlement or of reducing the quantum claimed so that the case may be tried by an inferior court. Such is not pre-trial. Properly administered that practice may have beneficial results, but it is not to be confused with pre-trial.

The purposes of pre-trial are set out in Rule 16 of the Federal Rules, and Rule 16 has been incorporated verbatim into the Louisiana Practice by Legislative Act. Rule 16 provides that:

"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."

Nowhere in the rule is it indicated that the purpose of pre-trial is to eliminate the necessity for trial. The name itself would indicate otherwise. The first and primary purpose of pre-trial is to simplify the issues. Without pre-trial, the issues are made out in the pleadings. Unfortunately, however, as we all know, it is well-nigh impossible to determine what the issues actually are by reading the pleadings. By using the protective clause, "on information and belief," lawyers allege anything, and consequently it is impossible to say which of the allegations of the petition are admitted and which are really denied. At the pre-trial conference, the wheat is separated from the chaff. The real issues are crystallized either by amendment to the pleading or by pre-trial order which supersedes the pleading.

The issues thus simplified, counsel, under the direction of the court, can then explore the possibility of obtaining admissions of fact and the authenticity of documents in order to avoid

unnecessary proof, after which any matter that may aid in the disposition of the action can be considered.

As will be noted by a cursory reading of Rule 16, no set procedure for pre-trial is outlined. The drafters of the rule, lawyers and judges themselves, realized there would be opposition to an innovation in which lawyers and judges sit down at a conference table and, in a forthright business-like fashion, undertake a discussion of a lawsuit. Consequently, no effort was made to straight-jacket the procedure. In order to win support for pre-trial, the procedure was intentionally left flexible so that it could be made to conform to the personality, if not the eccentricity, of the judge who is to use it. And a good judge will make the procedure conform to some extent at least to the personalities of the lawyers who participate.

As a result of this flexibility, two types of pre-trial conferences have come into use. The first of these is the formal conference which is conducted in the courtroom in the presence of litigants and others who may have some interest in or curiosity about the proceedings. At the formal conference the lawyers representing both sides of the controversy stand together at the bar and have a running conversation with one another through the court. The proceedings are recorded in the usual manner of court proceedings. The conference begins with each side briefly stating its position. The pleadings are studied to determine the necessity of amendment, admissions are made and agreements reached. At the conclusion of the conference the court dictates into the record the pre-trial order outlining the controverted issues to be tried and the stipulations of the parties respecting those issues. The informal type of pre-trial conference is held in the judge's chambers, with only the counsel present. Some judges, on request, allow the litigants to sit in at the conference, and some judges also have the proceedings of the informal conference recorded by the court reporter.

The advocates of the formal conference contend that by requiring the lawyers to appear in open court before their clients, preparation on their part for pre-trial conference is assured. They seem to think that the informality of the conference table encourages laxity and tends to result in more of a "bull session" than in an orderly pre-trial conference. The proponents of the informal conference, on the other hand, feel that the direct approach, which is so effective in resolving legal problems, or any

other problem for that matter, is lost by a stilted courtroom procedure. They feel that an orderly conference can be conducted at the conference table as well as from the bench, and that because of the informality, counsel are more inclined to face up to the real issues and thus eliminate those about which there is no controversy.

My own preference, and I might say the preference of most of the judges who have made extensive use of pre-trial, is the informal conference. It is my practice to exclude from the conference the litigants and the court reporter. I believe that as soon as you put a lawyer in front of his client he tends to become a thespian, intent primarily upon impressing the client. Under the eyes of his client he is less likely to make concessions and reach agreements with opposing counsel. I exclude the court reporter from the conference because it is my experience that lawyers are inclined to be much more precise about what they say and much more unyielding in what they do when they know that their words and actions are being recorded. The presence of the court reporter gives a formal air to the conference, which, in my judgment, militates against its success.

One of the problems which has arisen in connection with pre-trial is the time before trial for the conference. It is generally agreed that the conference should be held far enough in advance of the trial so as to eliminate preparation made unnecessary by the simplification of the issues and admissions of the other side, and close enough to the trial date to make certain that lawyers have reached the stage of preparation for trial that pre-trial can be of benefit. It is generally conceded that from two to six weeks before trial is the proper time for pre-trial.

In metropolitan areas, there is no problem respecting the time of pre-trial. The lawyers and the court are always available in the same city, and consequently the pre-trial date can be set at any time the court feels it can accomplish the best results. In rural areas, however, the matter is not so simple. One judge sometimes holds court in several places, in each place perhaps only twice each year. Under such circumstances it would be necessary for a judge to go to each place, where he is to hold court, a sufficient time in advance of the opening of the term to conduct pre-trial conferences. The question arises as to whether or not the beneficial results of pre-trial are sufficient to justify this additional burden on the court and on the lawyers who must

attend the conferences. That question must be answered by each judge based on his own experience, after he has given pre-trial a fair trial.

In the Eastern District of Louisiana we have two divisions, the New Orleans Division and the Baton Rouge Division. Perhaps eighty-five per cent of our work is in the New Orleans Division where we ordinarily sit except for two terms each year in Baton Rouge. We have met the time for pre-trial problem with reference to the Baton Rouge Division by going to Baton Rouge four weeks in advance of the opening of the term, at which time we conduct pre-trial conferences in all cases to be tried during the term. Additional pre-trial conferences are held in each case during the term, one to three days before the case is actually brought on for trial. Court opens at 10:00 o'clock and advantage is taken of the hour between 9:00 and 10:00 for holding these conferences. We have found that the trip to Baton Rouge four weeks in advance of the opening of the term for the purpose of holding pre-trial conferences is completely justified by the results achieved. I may say further that the lawyers in Baton Rouge are not only cooperative but they are anxious to have pre-trials because they fully realize the great benefits which ordinarily result therefrom.

For those of you who are not familiar with pre-trial it may be well to outline in detail exactly what is done at a pre-trial conference. Since I know most about what is done at the ones I conduct, I shall outline my own procedure. I am not suggesting it is the best or the only procedure to be used. I am saying that it has worked well in the Eastern District of Louisiana.

The conference is entirely informal, no litigants or court reporters present. The attorneys attend pursuant to a notice issued by the Clerk of Court instructing them to come prepared to make admissions of fact and of the genuineness of documents to be presented at the trial, as well as any other agreements which may simplify the issues and shorten the trial time. This pre-trial notice, incidentally, like the procedure itself, varies with the court conducting the pre-trial. In some districts the notice orders counsel to confer together at least fifteen days prior to the pre-trial conference and reduce to writing such agreements as can be reached at that time. Some pre-trial notices even direct the lawyers to discuss the possibility of settlement of the case before appearing for pre-trial.

The primary purpose of the notice of pre-trial, of course, is to insure that counsel are prepared for the conference, and I may say in passing that the court itself should review the record in order that it will be in a position to go forward with the proceedings without the usual delay caused by familiarizing the court with the case. Counsel and the court thus are prepared for pre-trial when the conference is opened with a brief statement of the case by each side. After hearing the statements, the judge will then state his understanding of the controverted issues, which may or may not be the understanding of counsel. In any event, in this way a common understanding between counsel and court respecting the controverted issues can be reached and thus the issues simplified.

After the issues have been simplified, counsel for both sides are then instructed to request admissions from the other side in order to avoid the necessity of proof. When this is concluded, each side is required to name the witnesses it will use and state briefly what each will testify to, producing at the same time any documents which will be produced at the trial in connection with the witness's testimony. While counsel are stating what witnesses will say, counsel for the other side may probe further into his opponent's case by asking questions respecting the proposed testimony.

The purpose of requiring counsel to state his case in such detail and to answer the questions of opposing counsel respecting his case is to eliminate the possibility of surprise testimony at the trial. At the pre-trial conference each side is required to disgorge all of its evidence. Its facts are laid bare for opposing counsel to see. There are then no secrets unknown to the opposing side. If the lawyer does not know what he will be required to face at the time of trial, it is because he has not made effective use of pre-trial.

After counsel have laid bare their cases, a trial date is set, after which the court asks the simple question, "Have both sides exhausted the possibility of compromise?" For a moment there is ordinarily no sound from any one, an unusual condition to find among lawyers. Neither side wants to lose the tactical advantage of keeping his mouth shut and thereby requiring the other side to broach the subject of settlement. If neither side starts talking, it is usual to require the plaintiff to state in what area he thinks the case should be settled, after which the same question is asked

of the defendant. In that way settlement negotiations are started under the very eye of the court. By this time the lawyers are under no delusion as to the strength of their case or the weakness of their opponent's. Gone is the confidence based on ignorance. The balloon is burst and each lawyer gets down to earth and the realities of the situation. In that atmosphere settlements result, not necessarily at the conference table itself, but before the date of trial.

As a result of the frequency with which cases have been settled after pre-trial conference, extravagant claims have been made for pre-trial as a medium for settling cases without trial. These claims have given the opponents of pre-trial an opportunity to argue that settlement of cases is the only purpose of pre-trial and that settlements are sometimes attended by some degree of coercion on the part of the pre-trial judge. Actually, the settlement of cases is merely a by-product of the pre-trial process, the primary purpose of pre-trial being the simplification of the issues and thus the saving of trial time. Pre-trial should not be condemned, however, because, after the issues have been simplified and both sides really know what the case is all about, settlements result from the fact of that knowledge.

With reference to the settlement of cases I cite the following statistics. For the fiscal year 1953, that is, from July 1, 1952, to June 30, 1953, there were terminated in the Eastern District of Louisiana five hundred eighty-one cases. Sixty-nine, or twelve per cent, of these were actually tried, and three hundred fifteen, or fifty-four per cent, were pre-tried. No definite claims can or should be made from these figures alone. There is no way to determine exactly what caused a law suit to settle, for we know that many cases in effect settle themselves. These statistics, however, do indicate the probability that pre-trial has been effective to some extent at least in terminating litigation before trial.

No discussion of pre-trial would be complete without some reference to discovery. I know that there is opposition among the bench and the bar to discovery just as there is to pre-trial. There are also those who, while fully appreciative of the benefits of pre-trial, feel that discovery unnecessarily increases the costs of litigation with the result that it is beneficial only to litigants who can pay the costs. Be that as it may, it would appear that pre-trial and discovery is a packaged deal; you can't take one without the other. Much of the benefit from pre-trial is im-

possible without discovery. Unless a party can be required to make admissions of fact and of the genuineness of documents, unless a party can be required to answer interrogatories, unless there is a means available to a party by which he can determine in advance of the trial what the witnesses will say, it is impossible to simplify the issues of a law suit by eliminating those issues about which there is no contest. Without discovery, the opposing side cannot be required to state the names of the witnesses he may use and what they will say. Without discovery, trial of the law suit becomes a trial from ambush rather than a trial in open light of day. It may well be that through elimination of surprise, a law suit is no longer the sporting venture it once was. No longer can counsel stand behind the portals of justice and sand bag their opponents as they enter. No longer can a surprise witness be produced whose testimony could have been completely discredited if known in advance of trial. Perhaps discovery and pre-trial have eliminated some of the challenge which the barrister has always felt in the trial of a law suit, but it must be remembered the purpose of a trial is to resolve justly a legal dispute between litigants and not necessarily to provide a forum for the exhibition of legal skill and/or skulduggery.

In closing let me say that in the relatively brief time that pre-trial has been in use, it has, without question, won for itself a permanent place in the procedure of our national courts. As to its future in the state courts, pre-trial is on trial. Let its proponents continue to explain and to sustain it and let its detractors particularize their objections. To paraphrase the words of Oliver Cromwell, "Let there be light, so there can be reason." In this way pre-trial can find its place, if one it has, in the procedure of the courts of our states.