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The Effectiveness of Pre-Trial Conference Under the New Rules of Civil Procedure

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Pre-trial practice was commenced in the Fayette Circuit Court a number of years before the new Rules were adopted. The splendid co-operation of the members of the Bar made this possible. The new rules have helped to strengthen this practice and make it more effective. Greater advantages would be possible if we had more time and additional facilities for developing these pre-trial hearings. In this article we will discuss some of the things which are necessary to make pre-trial a success.

The first step at a pre-trial is to see if all of the necessary parties have been brought into the action. In certain cases it is easy to overlook a necessary party. If an infant's property is involved the infant must be properly before the court. The courts still jealously guard the rights of infants and liberality of construction has not yet gone so far as to permit their property rights to be affected unless the statutes are strictly complied with.

The next step at a pre-trial conference is to see if the questions involved have been properly raised so that they can be presented to the jury in an understandable manner. This may require cutting through red tape and simplifying the issues. Usually there are material facts about which there is no substantial controversy which can be taken care of by stipulation. Counsel can usually agree upon what material facts are in actual controversy.

It often develops at pre-trial that the pleadings are not complete or that they do not accurately present the issues. Amendments are usually liberally allowed. This should not encourage attorneys to abuse this privilege, but they should come to the pre-

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trial with their cases as accurately prepared as if they were going into final trial. If an amended pleading is necessary and is allowed, it should be filed at once and the pre-trial order should note the filing and the nature of the amendment.

Since pleadings have been made so simple by the new rules the purpose and helpfulness of pre-trial has become more necessary. Judge Ford said that pre-trial procedure, including pre-trial conferences, "are designed to supplement pleadings and thereby afford more expeditious methods for narrowing litigation to the genuine issues which are material to the case, to the end that 'the just, speedy and inexpensive determination of every action' may be secured."[1] He went on to say of the case before him, "Strict construction of pleadings, for which defendant contends, is not in harmony with these rules, and no longer prevails in the Federal Courts".[2]

Much as some of us regret to see some of the old methods pass away and although we have a feeling of nostalgia sometimes when we see the nonchalance with which strictness of pleadings is brushed aside, the states are rapidly adopting more liberal rules and coming into harmony with the federal courts.

If the parties have not exhausted the possibility of shortening the trial of the case by admissions the court should insist that this source of facilitating the trial be taken up at the pre-trial. Often admissions are made on the date of the trial which could just as well have been made prior to that time and thus save the adverse party the trouble and expense of meeting an issue which really never existed.

When the real controversy is understood the next step is to consider the question of proof. There are usually a number of facts which can be covered by stipulation if taken up in time. Questions of physicians, hospital and drug bills may be agreed upon, or it may be stipulated that the bills for these things may be proved by filing statements of the parties without additional proof.

The case may present some unusual and difficult questions of evidence. The attorneys should come to pre-trial with their authorities for and against the admission of such testimony so that the court may have an opportunity to decide in advance of the trial if the testimony is admissible. This would facilitate the

[1] Perry v. Creech Coal Co., 55 F. Supp. 998, 999-1000 (E.D. Ky. 1944).
[2] *Id.* at 1000.

trial of the case and the court will not be as apt to err in its decision.

The question of the number of witnesses which a party will be allowed to introduce where their testimony becomes merely cumulative should also be considered, as well as expert testimony in certain cases.

In automobile accident cases the question may be involved as to the existence and effect of a City ordinance. If so, is it necessary to plead the ordinance and how must it be proved? Will the party who is relying on it be allowed to introduce it informally, or will the adverse party require that it be proved according to the strict rules of evidence?

Lawyers frequently come to the pre-trial table without their instructions. Perhaps this has been because the courts have been too liberal in allowing them to have additional time to submit them. The court really does the lawyers an injustice when it permits them to approach the trial date without having prepared their instructions. Instructions are instruments with which a jury case must be tested. If a lawyer can't write instructions to fit his case there is something wrong with the case, or else the lawyer does not understand it. It is a waste of time to send a case to the jury without proper instructions.

Usually the plaintiff's case hangs on Instruction No. 1. This instruction ordinarily sets out some duty which defendant owed the plaintiff which he has failed to carry out. For breach of this duty the plaintiff claims damages against the defendant. It is important to plaintiff that this instruction be properly drawn. There is no need to get a verdict from the jury for your client and then lose it because of an erroneous instruction. The lawyer knows, or should know, his case and not ask for an instruction to which he is not entitled.

Sometimes unexpected evidence in a case may call for an instruction which cannot be anticipated at the pre-trial, but as a rule most of the instructions can be submitted to the court at pre-trial. This gives the judge an opportunity to study them and he is in better position to pass upon questions of evidence at the trial.

I do not believe the court should try to force a compromise or a settlement of a case, but that its offices should be used to point

out to litigants when a settlement should be made. Often some good, common horse-sense talked at a pre-trial conference will cause the contestants to use horse-sense and settle what might be a long, drawn out litigation. One thing about a settlement of a law suit is that a settlement by agreement ends it finally. Whereas, if you win a case before a jury you still have to face a motion for a new trial. If this is overruled you may have to defend an appeal, and if this is won you may still lose on a petition for rehearing. This is all expensive.

I like to think of a pre-trial conference as a meeting where the court and attorneys meet and discuss and decide upon the manner in which the questions at issue may be tried and decided fairly to each party expediently as possible and with little expense.

Pre-trial should have as one of its objects a trial which will be a final adjudication of the case, if possible, and to this end efforts should be made by all parties to avoid errors which may cause a mistrial.

Pre-trial is not a forum in which an attorney should expect or hope to obtain an advantage by reason of some sharp practice. It is a forum in which lawyers and judges should exert their best efforts to see that justice is done.

Under the New Rules a co-operative Bar and a sympathetic judge can do much to facilitate trials, reduce the cost of litigation, bring about some speedy settlements of law suits and raise the bench and bar in the estimation of the public.

It is important that as soon as possible after a pre-trial conference is held a pre-trial order be entered, showing just what was done and agreed upon at the pre-trial. If possible, this order should be dictated at the conference before the meeting is adjourned. In this way misunderstanding may be avoided and the records will be kept in better shape.

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