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David Dow

University of Nebraska

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The Pre-Trial Conference

By David Dow*

In civil litigation disputes are supposed to be settled in accordance with the facts and the applicable law. Procedure is the mechanics of this process of settling disputes. After hundreds of years of experimenting it is pretty generally agreed that it is better to have one procedural system for all kinds of civil cases rather than to have different systems depending on whether the basic dispute involves an assault and battery, a failure to pay a promissory note, a mortgage foreclosure, or a complicated fraud. It is also generally agreed that the system should be uniform throughout all the courts of general original jurisdiction, at least within each State. It is better to have all lawyers fairly familiar with one system than to have so many different systems that no one could be familiar with them all. Even the differences today between civil and criminal procedure are the cause of tremendous confusion in the minds of many lawyers. It is infinitely better that the lawyer's time be spent on the merits of his case and not on wading through a multitude of procedural peculiarities.

The amazing thing is that we have been able to devise any single system which can adequately solve all of the problems of procedure which may arise in the hundreds of different kinds of disputes which the courts are daily asked to settle. There are, of course, many who do not think we have yet devised such a system; no one believes we have reached perfection. But without doubt, the changes that are being made today are in the direction of simplifying the rules so that there will be less chance of stumbling into technical pitfalls and of providing flexibility in the rules so

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* Professor of Law, University of Nebraska College of Law, Lincoln, A.B., J.D., University of Michigan. Member New York and Nebraska bars.

1 Over the past ten years no subject has been given more pages of print in the Law Reviews and Bar Journals than that of Pre-Trial. I can therefore hardly claim originality for any of the ideas expressed here. I have rather attempted to point out the relation of Pre-Trial to the various aspects of civil litigation, to show its tremendous scope, and to raise a number of the important problems which the average trial lawyer and judge will meet in using it, with the hope that such an over-all picture will make its general use understandable and that such familiarity will help to make it successful in Kentucky.
that they do, more adequately, provide a means of handling many
different kinds of cases.

The pre-trial conference\(^2\) is one of the devices for securing
this flexibility. In point of time it normally comes toward the end
of the period set aside for the determination and disclosure of
what the disputes really are, that is the pleading stage, and shortly
before the time for the presentation of information and argument
to the dispute-settler, that is the trial stage. It is designed to
provide certainty and flexibility in both the pleading and trial
stages, to tie the two together, and to help in the securing of in-
formation. There is nothing particularly new or unusual in a con-
ference between the judge and attorneys. Such conferences have
always been held informally and problems of law or fact peculiar
to the case discussed and sometimes solved. The novelty so far
as American administration of justice is concerned lies in making
the conference explicitly a part of the expected procedure of a
civil case and in providing formal sanctions to make it a useful
device.\(^3\)

But the pre-trial conference is also new in another context.
The Federal Rules of Civil Procedure, and those now adopted in
Kentucky, establish a method of determining and disclosing the
precise nature of the disputes quite different from that of the
Common Law or the American Codes. This determination of

\(^2\) Rule 16 of the Kentucky Rules of Civil Procedure, promulgated by the
Court of Appeals of Kentucky, effective July 1, 1953 provides as follows:

In any action, the court may in its discretion, and the circuit court shall on
motion, 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 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 commissioner;
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 or
before the trial to prevent manifest injustice. The court in its discretion may
establish by rule a pre-trial calendar on which actions may be placed for considera-
tion as above provided and may either confine the calendar to jury actions or to
nonjury actions or extend it to all actions.

\(^3\) The history of the formal Pre-Trial movement has been too often explained
to repeat here. See 38 Ky. L.J. 302; Sunderland, The Theory and Practice of Pre-
Trial Procedure, 36 Mich. L. Rev. 215 (1937); Articles cited in 3 Moore's Fed-
eeral Practice 1102; Nimel, Pre-Trial 1-12.
issues is no longer to be a battle of evasion required to be fought out in the mists of uncertainty but is to be postponed until the parties and their attorneys have had an opportunity, buttressed by the sanctions of the discovery rules, to learn the evidence of the facts behind the claims or defenses of both sides. To be sure, the complaint and answer must set out the confines of the controversy in a general way, but the formulation of the precise issues or disputes is to await the development of the facts. Consequently it is highly desirable to provide a time and a proceeding wherein that can be done, and this is one of the functions of the pre-trial conference under the so-called “notice theory” of pleading. It may not always be necessary even under this theory of pleading, but it is much more apt to be so than under the method of fact pleading of the Field Codes. In this sense the order which results from the pre-trial conference becomes a part of the technical process of pleading.

The first function, then, of the pre-trial conference is to consider “the simplification of the issues” and “the necessity or desirability of amendments to the pleadings.” In this it should be so developed that the pleadings and the order taken together provide a fair blue print of the way in which the trial is expected to develop. Since it is agreed that one of the basic functions of pleadings is to give notice of one’s claims and defenses, it follows that the attorneys should be able after the conference to state with confidence and certainty precisely what issues will be presented for determination at the trial. There is no place under these rules for the kind of surprise that was quite possible under the permissible broad pleading concepts of the Common Law, and even under the Field Codes, where an allegation of general negligence would support any kind of negligent conduct which might be proved at the trial. The problems of variance should be anticipated and erased at the pre-trial conference.

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4 Perhaps resulting in the startling disclosures that the defendant was negligent in that he was driving his car negligently and the plaintiff was equally at fault in that he was not conducting himself with the care and prudence that a reasonably prudent man would have exercised under the circumstances.
5 I place “notice” in quotes because it seems to me to be a misnomer. The problem is notice of what?
6 It is interesting to note that pre-trial has a major role in the system of pleading suggested by Professor Cleary. The Uses of Pleading 40 Ky. L.J. 46 (1951).
7 CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, 300.
The variance problem can arise, of course, with respect to various levels of generality. In the first place it can involve completely different claims arising out of different fact occurrences. Even under "notice" pleading these should have been separately stated in the complaint. But so long as the statute of limitations has not run, there is no reason to deny to the plaintiff the right to amend them in the pre-trial conference. The defendant would undoubtedly be entitled to a continuance if he could show that he could not be adequately prepared to meet them, but one of the purposes of the pre-trial conference is to set the trial for a day certain. Similar considerations should govern the addition by defendant of a counter-claim, either compulsory or permissive. There is an added problem here in the rare case in which the defendant is a non-resident and it would be impossible to obtain personal jurisdiction over him if the plaintiff were required to start a new action. It is unlikely that the court would have the power to permit such an amendment.\(^8\)

In the second place the plaintiff may be proceeding on different theories of substantive liability: contract or tort, express contract or quantum meruit, trade mark infringement or unfair competition, actual or constructive fraud. Or he may be seeking alternative remedies. Here it is not so clear that the complaint will, or necessarily should, have disclosed the true legal theory of the claim. In fact the plaintiff may be changing, or adding to, his concept of the case at the time he brought the action. It is clear, however, that the defendant is entitled to know the various theories that plaintiff proposes to try, just as plaintiff is entitled to know the various defenses that defendant proposes to try. Since alternative, hypothetical, and inconsistent pleading is specifically permitted by the Rules,\(^9\) there should be no objection to bringing in such new theories at this stage, with the possible objection of a substantive estoppel if a different remedy is sought after defendant has detrimentally changed his position in reliance on the remedy first claimed.

In the third place the plaintiff may be adding what courts have sometimes called a new "ground of recovery" or new speci-
fications of wrong or injury within the same legal theory and
cause of action, such as different specifications of negligence,
different damages resulting from the same wrongful acts, addi-
tional breaches of the same contract, new acts by defendant
which also constitute a nuisance. Here the Rules do not contem-
plate that any such grounds will have been delineated in the com-
plaint. Nor is there any particular necessity that they be stated
in the record in order to apply the doctrines of res judicata or
collateral estoppel in some future case. Whether or not this sort
of thing should be dealt with at the pre-trial conference is not so
clear. As to items of damage, yes, and it is doubtful if plaintiff
would even object to such a disclosure. But with respect to a
precise description of the way in which defendant acted wrong-
fully there must be kept a fair balance between the idea of notice
to defendant such that he will be able to meet the plaintiff’s
claim with well prepared evidence and argument, and permitting
plaintiff sufficient latitude to take fair advantage of the evidence
as it actually develops at the trial.\textsuperscript{10} Nor should defendant’s search
for information and understandable efforts to confine the plaintiff
go so far as to violate the privilege of plaintiff’s counsel not to dis-
close all of his work-product or plan of conducting the trial. At
least this is so if the rule of \textit{Hickman v. Taylor}\textsuperscript{11} is to be followed
in Kentucky.\textsuperscript{12}

Rule 30.02 in fact goes so far as to prevent one party from
securing the production and inspection of any writing that reflects
an attorney’s legal theories. But the discovery of an attorney’s
memoranda may be entirely different from requiring him to be
specific about the particular theory or theories of substantive law
on which he intends to rely at trial. This type of disclosure can
hardly be said to hamper counsel unduly in his preparation for
trial by keeping him from writing down his ideas and making a
trial brief, which was the reason given by Justice Murphy for his
dictum with regard to the disclosure of legal theories in \textit{Hickman
v. Taylor}.\textsuperscript{13} An examination of the various examples of pre-trial
conferences\textsuperscript{14} indicates that the general theory of recovery claimed

\textsuperscript{10} See, for example, \textit{Duffy v. Gross}, 121 Colo. 198, 214 P. 2d 498 (1950).
\textsuperscript{11} \textit{329 U. S. 495} (1947).
\textsuperscript{12} That it was intended to be followed is clear from the Notes of the Kentucky
\textsuperscript{13} \textit{Supra}, Note 11.
\textsuperscript{14} Such demonstrations have been printed in various legal journals. For typical
by plaintiff is one of the things which may properly be con-
15 sidered. Even under Codes which do not adopt the broad prin-
ciples of discovery it is certainly not uncommon for trial judges
to require counsel to exchange trial briefs of the law they think
applicable, often of the evidence as well. It is to be hoped that
the theory of pleading which requires notice of a party’s position
sufficient for his opponent to meet it fairly, if he can, will not be
endangered by a Rule which was designed merely to make sure
that all of an attorney’s office memoranda would not be subject to
indiscriminate inspection.

The pre-trial conference has yet another function with respect
to the pleading stage of the law suit. Not only must there be a
time and place for permitting changes and additions, but also for
deletions. The Rule provides that there be an effort to simplify
the issues. Defense counsel has just as much right to know that
plaintiff is not going to press a particular claim or theory of
liability as he has to know what he is going to litigate at trial.
And similarly plaintiff has a right to know what defendant in good
faith intends to controvert at the trial and what defenses which
he pleaded he intends to litigate and those he does not. But
this particular facet of the Rule is more specifically a part of the
problem of fact admissions.

The issues can also be simplified, or the decision of them
simplified, in another way. Certain issues of law may be presented
under Rule 12 either by answer or by motion and may be heard
either before or at trial in the discretion of the judge. By the
time of the pre-trial conference the case may very well be at such
a stage of fact development and agreement that such issues can
be then determined, or that the judge can see that a hearing on
the specific issue in advance of trial would be advantageous. If
so, these problems should be raised and considered.

The case as pleaded may also involve a large number of un-
related claims, or a number of different parties whose claims or

examples, see: 38 Ky. L. J. 309 (1950); Nimis, Pre-Trial, 191; 4 F.R.D. 35
(1944); 11 F.R.D. 3-43 (1950); 40 ILL. B. J. 348 (1952).

See also Delehant, The Pre-Trial Conference in Practical Employment: Its
Scope and Technique, 28 NEB. L. REV. 1, 18 (1948).

It should be noted throughout that Rule 16 speaks of “considering” various
problems of pleading and trial. Many things may be thus brought before the
conference and discussed without there being any intention of reaching a final
decision.
defenses may be in part related to each other and in part not.
The theory of the Rules is that such a mixture of claims, counter-
claims, and cross-claims and of different parties can harm none
of the parties during the pleading stage; but it may be quite harm-
ful at the trial stage, particularly when a jury is involved. Even
the plaintiff who has joined a large number of claims—for over-
time wages due 100 employees under the Fair Labor Standards
Act, for example—may not wish to try all of these claims together
for fear of confusing the jury. Under Rule 42 either party may
ask that these several claims be severed for trial. A separate
motion for this purpose can, of course, be made, but there is no
reason why it cannot also be considered at the pre-trial confer-
ence. A decision may be made there or a separate hearing
ordered for further consideration. Similarly the problem of con-
solidation could be covered. It should be remembered, however,
that opposing counsel is entitled to notice of the hearings on such
pre-trial motions\(^2\) and could quite properly object to any decision
of them at the pre-trial conference when he was not advised in
advance that they would be brought up. The possibility that such
problems might be raised for discussion at the pre-trial confer-
ence does not mean, therefore, that they should be decided there,
but the discussion may measurably lead to a more expeditious de-
termination at a later date.

The second major function of the pre-trial conference deals
with the problem of simplifying the trial; indeed, it also may lead
to an abandonment of the trial altogether. The Rule provides
that the conference may consider the “possibility of obtaining ad-
missions of fact and documents which will avoid unnecessary
proof” and the “limitation of the number of expert witnesses.”
This supplements the discovery rules with respect to judicial ad-
missions by seeking to cut out issues of ultimate fact—the
existence of a contract, for example—upon which there is no real
controversy; with respect to evidential facts by seeking admissions
where there is no controversy but where the ultimate fact may
still wish to be controverted—the weather conditions at the time
of an accident, for example; and with respect to seeking stipula-
tions which will avoid a mass of cumbersome formality in the lay-
ing of the technical foundation for the admission in evidence of

\(^2\) Rule 5.01.
documents or of testimony when those foundation facts have no direct bearing on ultimate issues in the case. It is less formal than the procedure under Rule 33 or Rule 36 but the effect is apparently the same if the opposing party is willing to make the admission. The fact admitted cannot be controverted at the trial. If the opposing party is not willing to make the admission the sanctions of Rule 37 are not applicable to the request made at the pre-trial conference. Thus Rule 36 must still be followed if the opposing attorney is unable to make the admission at the conference.

There may be a number of simple admissions that the attorney can make where it is clear that the facts cannot be controverted, but which could not have been made at the time the answer or reply was drafted. On the other hand the demand may also be for admissions which the attorney cannot be expected to make on short notice. Such problems should properly be handled under Rule 36, and other information which should properly be sought under Rule 26 relating to depositions or Rule 34 relating to the production of documents is not within the scope of the admissions of fact referred to in Rule 16. The judge should be alert to prevent such inquiries which should be otherwise prosecuted under procedures which provide proper notice and time as well as other safeguards. The informality of the pre-trial conference should not be a cloak for evading those safeguards. The point to be made is that the judge should not at this stage of the case attempt to coerce an admission which an attorney is unwilling to make, though he should make sure that the attorney is acting in good faith in refusing.

It may be with respect to the admission of the genuineness of documents or waiving the foundation for the admission of such documents as maps or charts or tabulations that the attorney is unwilling to make the requested waiver without a further opportunity to examine the map or chart or tabulation and perhaps to question the person who actually prepared it. As a matter of fact this sort of admission might just as well be handled by a simple informal request for a stipulation, though the presence of the

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20 Delehant, supra n. 15, at 21-22.
judge at the pre-trial conference may very well have the salutary effect of preventing an attorney from denying the request merely from a desire to be troublesome. The problem can be handled in several ways. Requesting counsel might well supply the attorney with a copy of the document in advance of the conference together with a notice that the demand for admission will be made at the conference. If this has not been done it is not unusual to provide in the order that the document will be deemed admitted insofar as foundation is concerned unless within five days the opposing attorney specifically declines to make the admission, giving his reasons therefor. Or the attorney may simply agree to make a written stipulation covering the foundation facts after he has had an opportunity to examine the proposed exhibit, without any binding reference to the problem in the pre-trial order.

The provision of Rule 16 with regard to the limitation of the number of expert witnesses may cause some confusion. Section 593 of the Civil Code of Practice of Kentucky provided that the trial court may "stop the production of further evidence on a particular point, if the evidence upon it be already so full as to preclude reasonable doubt." This section has been before the Court of Appeals of Kentucky on a number of occasions and it has indicated that the trial court has no power to limit the number of witnesses in advance, nor at the trial unless the condition of certainty has occurred, and even then there is some doubt if the issue to which the evidence is directed is a primary issue in the case. This section of the Civil Code has been repealed by Senate Bill 212, 1952 Legislature, Section 5, and Rule 16 is the only legislative action to take its place. The fair intendment of this legislative action seems to be that the trial court is now given the power to limit in advance the number of expert witnesses to be heard at the trial, a power which they did not possess before. In view of the previous decisions of the Court of Appeals and the

Pre-trial is especially effective in this respect in complicated equity trials involving a large number of exhibits. Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41 (1952); Demonstration of Pre-Trial Procedure in an Antitrust Case Involving Patent Issues, 13 F.R.D. 207 (1953).

requirements of the due process clause of the Federal Constitution, it seems equally clear that the power to limit does not mean the power to deny either party the right to use any expert witness necessary to a fair presentation of the case on an issue which is the proper subject of expert testimony. It may be noted that other States do not thus restrict this power to limit the number of witnesses to experts. Nebraska by Court Rule 24 extends the power to any "improper cumulative testimony"; North Dakota to "character witnesses" and other States by judicial decision have permitted the judge to limit the number of general witnesses.

The fifth subdivision of the Rule permits the consideration of the "advisability of a preliminary reference of issues to a commissioner." This must be read in connection with Rule 53 covering commissioners and the various statutes which permit the use of a master or special commissioner. It must also be kept in mind that the Kentucky Rules differ here, in at least one important respect, from the Federal Rules. Under Federal Rule 53 a reference may be ordered in both jury and nonjury actions. In jury actions the report of the master is limited to his findings, it does not include the evidence, and the report is admissible as evidence of the matters found by him. In Kentucky the use of a commissioner is limited to court (i.e., nonjury) actions by Rule 53.02.

There is a little doubt that the Federal Rules, in dealing with court actions, contemplate the use of masters in both equitable and non-jury law cases where exceptional conditions require it. This is not so clear in Kentucky. One statute provides that the commissioner "shall discharge the duties and have the power of a master in chancery and as provided by law and the rules of the court." This statute can be construed to include non-jury law actions when taken in conjunction with Rule 53.02 which certainly may be a "rule of court" within the language of the statute. The Court of Appeals of Kentucky has, however, on several occasions referred to the commissioner as "merely an agent or as-

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26 See 21 A.L.R. 335 (1922); 48 A.L.R. 947 (1927).
27 E.g. Ky. Rev. Stat. §§ 27.010; 27.020; 27.040; 27.050; 27.060; 27.100; 25.280; 376.110.
28 Fed. R. Civ. P. 53(b) and 53(e) (3).
29 See 5 Moore's Federal Practice 2939-2946.
30 Ky. Rev. Stat. § 27.040 (2). Compare § 27.100: "The master commissioner shall settle the accounts of insolvent estates adjudicated in the circuit court and perform such other duties as the court requires of him."
sistant of the chancellor," which might be taken to limit his power to equity cases. From the practical point of view there would seem to be no reason why a commissioner should not be used in a non-jury law action, if exceptional conditions require it, to hear evidence and report such evidence and special findings with respect to complicated factual issues. The trial process is no different in an equity case from that in a non-jury law case, through the equity case is probably more likely to develop complicated accounting problems or similar complicated fact issues in which the device of a reference will save the time of the court and the more informal hearing will better serve the needs of counsel and witnesses.

The Rule also contains an omnibus clause permitting the consideration of "such other matters as may aid in the disposition of the action." Under this almost any problem could be determined, but it may be well to suggest a few of the principal items. In the first place the result of the discovery procedure and the actual admissions which have been made by the parties may show that as a matter of law there is no fact issue to be determined. In this case the action is in such shape that a motion for a Summary Judgment under Rule 56 would be in order, and other courts have gone so far as to enter an order disposing of the case in accordance with the admitted facts. A similar situation may arise when the court considers whether or not a motion to dismiss for failure to state a claim for which relief can be granted has been made but has been postponed under Rule 12. It seems preferable that only in clear cases where all counsel consent should such a determination be made at the conference. The problems should properly be brought on for separate hearing by a formal motion, though the groundwork can be laid at the conference.

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81 Dunlap v. Kennedy, 73 Ky. (10 Bush) 539 (1874); Richardson's Guardian v. Frazier, 247 Ky. 59, 56 S.W. 2d 708 (1933); Shannon v. Ray, 280 Ky. 31, 132 S.W. 2d 545 (1939).

82 Hillsborough County v. Sutton, 150 Fla. 601, 8 So. 2d 401 (1942); cf. Clay v. Callaway, 177 F. 2d 741 (5th Cir. 1949); Nims, Pre-Trial 121-129.

83 "On some occasions attorneys undertake to employ a pre-trial conference as the time for the argument and presentation of motions. While that practice may not be said always to be inappropriate, it is not the orderly course to pursue. Motions ought quite uniformly to be separately heard pursuant to formal setting. Actually their hearing is foreign to the thought underlying the institution of pre-trial procedure. And in almost no event should an attorney be allowed to insist upon the hearing, during such a session, of a motion or other pleading which he then serves for the first time on his adversary." Delehant, supra note 15, at 25.
In many cases there may be issues of law which would normally be handled at the trial but which can be more efficiently handled in advance of the trial. Among such questions is the troublesome one of the allocation of the burden of proof in cases where the law is not yet clear. If this can be decided before trial it will leave counsel in a much better position to prepare for the trial itself. Even if the burden is wrongly allocated it may be that the verdict can be won on the evidence if counsel knows ahead of time which way the judge is going to hold. He will not have to run the risk of guessing wrongly that the judge will cast the burden on the opposing party. At least if the issue of burden of proof is discussed ahead of the trial it will give the judge a better chance of making a correct ruling at the trial than if the problem comes to him suddenly without an opportunity for independent consideration and research.

It may also be possible to determine ahead of the trial some of the problems of admissibility of evidence which are bound to arise at the trial. These may include such problems as whether a particular issue is the proper subject of expert opinion evidence, or whether certain parts of a proposed exhibit should be excluded as hearsay or opinion, as in death certificates. So long as the determination of the admissibility does not depend on the finding by the judge of facts which are not admitted the admissibility of evidence can be handled at the conference, but if evidence is necessary the conference is hardly the place to offer such evidence. Similarly, it may be possible to lay the groundwork at the conference for the use of demonstrative evidence such as a skeleton, or the mock-up of the scene of an accident. It is also proper to consider the correct form of instruction on an issue on which the law is in doubt.

If there is any problem involving the right to a trial by jury it can certainly be handled thus ahead of the date set for trial without the necessity of a motion to transfer the cause from one docket to another. A word of warning may not be out of place in this connection. Although the right to trial by jury is guaranteed by the Kentucky Constitution and by Rule 38.01, under Rule 38.02 a jury must be specifically demanded, either generally or

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35 Section 7.
as to specific issues, in writing not later than ten days after the service of the last pleading directed to the issue. Thus the demand must not be put off until the pre-trial conference. In the Federal Courts there has been, however, some litigation with respect to the right of a party to demand a jury after an amendment to the pleadings which may, of course, be often granted at the pre-trial conference; and the more extensive use of juries in state courts may lead to similar problems there.

As interpreted by the Federal Courts the right to a jury under the Constitution\(^\text{36}\) and the Rule\(^\text{37}\) is dependent on the nature of the particular issue to which the demand is addressed, viewed historically; the action in its entirety is not necessarily one to be tried to a jury, or one to be tried to a judge.\(^\text{38}\) And this point of view is particularly significant when the same action may involve a multitude of claims and defenses, both alternative and independent, some of which are historically legal and some equitable. The result has been that an amendment which does not introduce new issues does not permit either party to demand a jury as of right then for the first time.\(^\text{39}\) If a new legal issue is thus introduced by amendment, a jury may be demanded as to that issue but not as to any other issues in the case,\(^\text{40}\) and the question of the effect upon the action of such demand may be considered by the judge in determining whether or not to permit the amendment.

Under this category also comes one of the very important functions of the pre-trial conference, which is to explore the

\(^{36}\) U. S. Const., Amendment VII.


\(^{38}\) See: The Right to Jury Trial Under Merged Procedure, 65 Harv. L. Rev. 453 (1952) where the distinction between "issue" orientation and "action" orientation is carefully examined. 5 Moore's Federal Practice 24-30. The Circuit Courts are in disagreement as to the proper method of handling a case where the same issue is involved in both a legal and an equitable claim. The First Circuit has permitted the judge to foreclose jury action on the issue by trying the equitable claim first, Orenstein v. U. S., 191 F. 2d. 184 (1951), while the Eighth Circuit has held that the constitution requires that the jury first determine the issue, Leimer v. Woods, 196 F. 2d 828 (1952).


\(^{40}\) 5 Moore's Federal Practice 325-329. Where the plaintiff has originally asked for an equitable remedy and damages in connection therewith it may be conceived that the latter is merely an adjunct to the equitable action and that a jury is not therefore a matter of right, though this is not wholly consistent with the "issue" theory. If the plaintiff waives his equitable remedy, he is not then entitled to a jury on the damage claim, In re Canister Co., 182 F. 2d. 510 (3rd Cir. 1950); but if he secures an amendment striking the equity claim he may have a jury, Bereslavsky v. Coffey, 161 F. 2d. 499 (2d Cir. 1947). In the latter case the judicial discretion has been invoked.
amount of time it is estimated the trial will take so that the trial judge may set the cases on the trial docket for a day certain with some assurance that the dates will be kept and that he can keep his engagements in other parts of his circuit. It is also desirable for counsel to have a day certain for trial when there are witnesses to be brought in from out of town. To be sure, this sort of problem can be and now is handled in an informal application to the judge, but the conference provides a particular time for bringing the problem to the attention of the judge when he has all of the pertinent facts before him for decision including the probable trial dates of other cases on the calendar.

A further problem which is considered under the omnibus clause, and which is a natural by-product of the attempt to settle a trial docket, is the troublesome one of settlement. Much of the objection to the pre-trial conference comes from attorneys who feel that they will be impelled to a settlement which they would not be willing to make if it were not for the pressure of a judge intent on clearing his docket. Nothing is said about settlement in the Rule, but under the federal Rule and similar rules in other States there can be no doubt that this may be one of the major items at the conference.41 In the Chicago courts, for example, settlement appears to be a primary issue and special forms are provided for the judge to use in making recommendations for a fair compromise.42 The genesis of formal pre-trial in the United States stemmed from a desire to clear dockets of cases which would never come to trial, and the success in this endeavor has always been pointed to as one of the great arguments for its adoption. Although a procedure for getting rid of cases which apparently are never going to be tried is a desirable thing in many courts, the worth of pre-trial in the other areas should not be thus minimized by an overemphasis of one of its many purposes. Nor should such emphasis be mistaken as an invitation for a judge to set himself up as an arbitrator of liability and damages when it is apparent that the parties, or one of them, wants a trial by jury. If the jury is to be done away with in civil cases, as it has for all practical purposes in England, it should be done in the open, and

41 Nimis, Pre-Trial 12.
not by indirection. Nor should decisions be arrived at without a complete opportunity for developing the facts.

Yet, with the foregoing warning in mind, there is every reason to encourage the settlement of disputes when it is mutually agreeable to all parties. If such a settlement is possible, it is desirable that the State provide a time and place and an atmosphere in which the unfortunate distrust of one party or attorney for another may be dissipated. This is the primary function of the judge in the promotion of settlements at the pre-trial conference: to encourage but never to coerce. If this is the fundamental principle, then the subsidiary questions become those of application of that principle rather than flat rules of thumb as to what a judge may or may not do in encouragement. The question is not whether the judge should suggest a fair figure, whether he should give his opinion as to the outcome of the issue of liability or the issues of affirmative defenses, or who should initiate the settlement discussion, but rather the manner in which these things are done by the judge so that neither party shall have the impression that he has been forced into a settlement without a full opportunity to present his case.

There are certain collateral problems as to how the pre-trial conference should be handled which deserve attention but about which it is difficult, if not impossible, to suggest any definite rules of procedure. It has already been suggested that if the conference is to develop all of the various functions as thoroughly as possible the time of the conference must be placed fairly near to the time at which trial is contemplated. The Rule does not provide that the conference shall be mandatory in all cases, though it is if requested by counsel, nor does it seem advisable that it should be unless the preparation of a trial docket is of major importance and this can only be facilitated by a preview of all cases, whether or not other advantages might be gained.

Similarly such questions as the formality with which the conference is conducted, and whether a special calendar should be set up will depend on the personality of the individual judge and the amount of litigation in that court. But these problems, and particularly the one of the proper time for the conference, are complicated by the practical question of where the judge is. The Rule makes no requirement as to where the conference should be
held, but under Rule 77.02 it would appear that the conference is a proceeding which may be held anywhere. Since the conference does not contemplate a "hearing" in the sense that any formal motions are to be determined, it can be held outside the judicial district. If, however, it should appear that the conference might develop any problem which would be the proper subject of a hearing, it should be held within the judicial district in which the action is pending in order to conform to Rule 77. Thus the primary consideration as to the time and place should be the convenience of the judge and the attorneys. This problem is partly solved by the provision of Rule 78 that in each county there shall be at least one motion day every month.

The Rule contemplates that there will be an order reciting the action taken at the conference. Such order is "to control the subsequent course of the action unless modified at the trial to prevent manifest injustice." Specific amendments to the pleadings and admissions and stipulations should of course be included in the order. Many judges state specifically in the order what the issues at trial will be, and since this is one of the primary functions of the conference it seems desirable for the order to do so. Any extra burden on the judge at the pre-trial stage will be amply repaid at the trial. It is the general practice of the federal judges to prepare the report themselves, some requiring the approval of the attorneys to be noted by signature on the final report. All apparently agree that the report should be subject to exception by the attorneys if it does not accurately state the results of the conference, though the final determination is, by the Rule, that of the judge.

As might be expected the question of how the order may be modified and what factors involve "manifest injustice" has been a fruitful source of litigation in the federal courts and in those states where the Rule has been adopted. Many of the decisions are collected by Nims and others and a detailed discussion of the

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43 Rule 16.
45 Delehant, supra n. 15, at 26.
46 Shafroth, Pre-Trial Techniques of Federal Judges, 4 F.R.D. 183, 192 (1944). It may also be drafted by the attorneys to be settled by the judge, similar to an equity decree. Burton v. Weyerhauser Timber Co., 1 F.R.D. 571 (1941).
47 Nims, Pre-Trial 163-174.
48 60 Yale L. J. 175 (1951); 3 Wyo. L. Rev. 78 (1948).
cases here would not materially add to those discussions. The re-
sults may be summarized somewhat as follows.

The question of amendment or change may arise in three dif-
ferent areas: whether specific admissions of facts should be modi-
fied or stricken; whether issues which were not advanced at the
pre-trial or were specifically excluded from the case can be tried;
whether new parties or new claims can be added. Since the basic
consideration is one of justice to both sides on the merits of the
controversy, the first question to be answered is whether the re-
quested amendment unduly prejudices the opposing party. The
time when the change is offered is most significant here, since if
it is made by a formal motion to amend the conference order in
advance of trial the chance of prejudice is substantially lessened.
Although there is no express provision for successive conferences
in the same case, the federal courts have uniformly assumed that
they may be held within the discretion of the court. The
second
question is the extent to which the party offering the amendment
will be prejudiced if it is denied; will a denial have the effect of
excluding from the consideration of the judge or jury a fact issue,
or a claim or defense, which if it were permitted to be tried might
probably change the outcome of the action? To what extent will
the offering party be forever barred from litigating that particular
issue? In this respect it is less likely that the court will permit an
amendment which will add new parties or claims than one which
will withdraw a fact admission or add new issues by way of new
theories of recovery or defenses. The third question is whether
the party offering the amendment has acted in good faith. Here
the extent to which the opposing party has fairly disclosed his own
facts and theories is relevant, as well as the question of whether
the change is dictated by the discovery of new facts after the pre-
trial conference which the party should not have been expected
to have discovered before the conference. Also the time when the
amendment is offered, or notice thereof first given, is again im-
portant in assessing the good faith of the moving party.

It will be noted that the foregoing considerations are much the
same as those which should apply in determining a motion to
amend the pleadings under the Codes; but an entirely different

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4 Nims, Pre-Trial 151-152; 1 Barron and Holtzoff, op. cit. supra n. 19,
at 961.
policy problem is present when we are dealing with rules or procedure similar to the federal rules and particularly Rule 16. This Rule is specifically designed to provide a time and a place where desirable amendments can be made and where agreements limiting the issues to be tried can be fixed. In order to make Rule 16 effective, counsel must be warned that the agreements reached at the conference are not to be idly set aside. And since actions speak louder than words some courts have been exceedingly strict in refusing amendments or changes in the pre-trial order. At the very least the trial and appellate courts should require the party seeking to change the pre-trial order to make a clear showing of good faith, of injustice if the change is not permitted, and of relatively small prejudice to the opposing party. Anything less would seriously hamper the effectiveness of the procedure.

Nor does it appear that such an attitude of reasonable adherence to the order in any way conflicts with the provision of Rule 15.01 that amendments to the pleadings “shall be freely given when justice so requires.” When, however, there has been no amendment to the order proposed but the parties have actually litigated an issue not covered by the pleadings of the order, a refusal to treat that issue as a part of the litigation does conflict, in theory at least, with Rule 15.02. Even here the New Jersey Supreme Court has required a strict adherence to the limitations of the pre-trial order and reversed for a new trial when the judgment was based on issues actually litigated but not covered. Perhaps the result in this case should depend on whether there was any objection to the litigation of the issue at trial, since if there was an objection it cannot be said that there has been any consent, either actual or implied, to try the issue. It may also depend upon the precision with which the order states the issues to be tried.

It should be pointed out, in conclusion, that one of the primary benefits of pre-trial is the better acquaintance of the trial judge with the real controversy and consequently his ability to conduct

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61 Many cases are collected in 22 A.L.R. 2d 599 (1952).
the trial efficiently. This is, of course, particularly true when the same judge handles both the pre-trial conference and the trial; but it will also be true in other cases if the pre-trial judge is careful to draft an order clearly delineating the issues. Thus, it is incumbent on the judge as well as the attorneys to see that as many of the problems as possible are dealt with at the conference. It is suggested that to assure complete coverage, the judge prepare a comprehensive check-list of all such problems for his own use. In many cases it would probably be helpful if a copy of this check-list was sent to each attorney along with the direction to appear before the court for the conference. Not all items on the list would be relevant to every case; but it would emphasize the importance of the conference, the kinds of problems which can be solved before trial, and would encourage counsel to a proper preparation for the pre-trial conference. Such a checklist might be somewhat as follows:

SUGGESTED CHECK-LIST OF ITEMS WHICH MAY BE RAISED AT THE PRE-TRIAL CONFERENCE

I. Amendments to the Pleadings
   A. New Parties
   B. New Claims or Counterclaims
   C. New Theories of Liability
   D. New Allegations of Wrongful Conduct
   E. New Elements of Damage
   F. New Defenses
   G. New Remedies

II. Striking Matter from the Pleadings

III. Consideration of Problems Presented by Motions or Pleas in Abatement
   A. To Dismiss for Failure to State a Claim
   B. Relating to Jurisdiction
   C. Relating to Venue
   D. Relating to Separate Trials or Consolidation
   E. Relating to Provisional Remedies such as
      1. Temporary Injunctions
      2. Attachments
      3. Security for Costs
IV. Admissions of Fact
   A. Relating to Defendant’s conduct
   B. Relating to Plaintiff’s Conduct
   C. Relating to General Conditions Relevant to the Case
   D. Relating to Damages
   E. Relating to Value

V. Admissions Relating to the Genuineness of Documents

VI. Waiver of Foundation for Admission of Exhibits
   A. Maps or Charts
   B. Tabulations
   C. Photographs
   D. Blue Prints
   E. Abstracts
   F. Hospital Records
   G. Public Records
   H. Business Records

VII. Limitation of the Number of Expert Witnesses

VIII. Preliminary Reference of Issues to a Commissioner

IX. Possibility of Summary Judgment

X. Special Trial Procedures
   A. Burden of Proof
   B. Admissibility of Evidence
   C. Jury or Non-Jury Trial—Need for Alternate Jurors—Stipulation with Respect to Majority Verdict
   D. Proper Form of Instructions
   E. Need for Special Verdict or Interrogatories (Rule 49)
   F. Probable Time of Trial—Length and Date

XI. Possibility of Settlement

XII. Statement of Issues Remaining for Trial