South Carolina Law Review

Volume 1 | Issue 3 Article 2

3-1949

Pre-Trial Conference

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PRE-TRIAL CONFERENCE

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In 1948 the South Carolina Bar Association appointed a committee to study and report relative to adopting a pre-trial conference procedure in this State.[1] At the committee's request the writer has undertaken to explore this phase of modern procedure by sending questionnaires to deans of law schools and to judges in the District of Columbia and in the twelve states in which such procedure is now in use.

The response to the questionnaire has been generous in scope and informative in content. The contents have been summarized with care and thoroughness by Miss Sarah Leverette, Librarian of the Law School, and such summary together with all responses have been turned over to the Chairman of the committee.

Of the twelve states adopting pre-trial conference procedure, Montana alone has put it in force by direct legislative action; the remaining eleven having done so by rule of court under general authority from their respective legislatures. The procedure is discretionary in ten of the states and mandatory in Indiana and Michigan. In South Carolina legislative authorization for the courts to act is now to be found in Section 34 of the 1942 Code.

Whether by Act or by Rule, Federal Rule of Civil Procedure 16 has been closely followed by the states later adopting the procedure, though it was first initiated in the state jurisdictions; Michigan and Massachusetts and the City of Dallas in Texas having taken the lead a decade previously. The Montana Act is typical of the rule of court adopted in the other eleven states. It is as follows:

> "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;

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1. The committee consists of Mr. B. Allston Moore, Chairman; Mr. Carlisle Roberts, Mr. Neville Holcombe, Mr. Hugh O. Hanna, and Mr. J. B. Gibson.

"(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 referee 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 may 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 pre-trial 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."

Taking the states[2] chronologically, Wayne County, Michigan, was the initiator of the movement in 1929. This county includes the populous city of Detroit.

"In that year the law calendar was forty-five months in arrears. Finding on investigation that fifty per cent of the cases set for trial were eventually disposed of by settlement, the judges concluded that if a pre-trial examination of the cases could be had a large number of them would be settled before trial for want of any substantial issue and those which went on to trial would be likely to have many issues eliminated.

"Events confirmed this impression. Pre-trial dockets at law and in equity were established for all cases at final issue. Appearance of counsel before the pre-trial judge was made compulsory. Hearings were informal, and inquiry was made as to what amendments of the pleadings,

2. The twelve states are: Arizona, Colorado, Connecticut, Florida, Indiana, Massachusetts, Missouri, Michigan, Montana, New Hampshire, Ohio, and Texas.

if any, were necessary to state the true issues, whether any matters formally in dispute could be eliminated from the controversy by admissions, whether a settlement of the case might be affected, and if a trial were to be had, how long a time it would probably require."[3]

In May, 1936, the Judicial Council of that state reported:[4]

"A large number of cases are finally disposed of at the pre-trial stage. This alone represents a great saving of time for the court, as well as for litigants and attorneys. Some of the cases so concluded would require several days to try. Others, although their trial might not go far beyond the opening statement of counsel, would nevertheless involve the usual delay in assembling counsel, witnesses and parties, the settlement of an order disposing of the cause, and the inevitable waste of time in waiting for counsel and witnesses in the next case to be called."

The same Council reported in 1947[5] that in the Wayne County Circuit Court 4,907 cases out of 6,355 for disposition, or 77%, had been finally disposed of by pre-trial hearing.

Massachusetts came next in 1935 with a court rule affecting only Suffolk County, which included the populous city of Boston. It was later extended to other counties on a permissive basis, and two such counties are now using the procedure. The result in that state, like in a majority of the others, has been that in the counties having the heaviest concentration of population it works well, while in those of smaller population it has not worked so successfully.

In the few counties in Massachusetts which have this procedure very few judges rotate. Where there is rotation, the following is found:

"The general practice in the counties where the length of a jury sitting is relatively short is for the judge to set aside at the beginning of the sitting enough time for pre-trial conferences to provide cases suffcient to occupy the court for the full sitting. On occasion, because of the belief that it is better not to have the same judge preside at both the pre-trial and the trial, arrangements have been made to have a judge go into a county shortly before the

3. *Trial and Appellate Practice*, by E. R. Sunderland, (2d Ed.), p. 47.
4. *Sixth Annual Report of the Judicial Council of Michigan*, p. 64.
5. *Eighteenth Annual Report*, p. 55.

beginning of a jury sitting and pre-try the cases expected to be reached at that sitting. This device, I am informed by the Executive Clerk to the Chief Justice, has been difficult to work out in practice, and is not very popular with the judges."

"* * * it is generally considered much better for one judge to preside at the pre-trial conferences and another at the trial. The members of the bar generally do not like a pre-trial session if they know that the judge is later going to hear the case on the merits. One of the most important aspects of the pre-trial procedure is the discussion of possibilities of settlement. Counsel are likely to discuss the case pretty frankly, and to dicker back and forth as to terms of settlement. Such discussion is hampered if the counsel realize it is being heard by the judge who will later preside at the trial, and very likely hear motions after verdict. If the same judge hears both, the attorneys are likely to freeze up and conduct their negotiations, if any, outside the courtroom. When that is done, the value of the pre-trial conference is materially lessened. Actually, some of the best pre-trial judges are very adroit in bring(ing) the parties together. I have heard of occasional criticism that some judges go too far in putting pressure on the parties to settle, but the general reaction to this aspect of the procedure has been very good."

The other ten states have adopted the new procedure at different times within the last eight years, and hence one finds it more or less in an experimental stage. However, from the data that has been furnished one can find, if not an exact answer, at least an approximate one to some of the queries which arise in connection with a prospective adoption of this procedure which has done, on the whole, "excellent work in reducing the disposition time on cases and the backlog of civil cases."

Should the judge who presides at the conference later try the case? The tendency is to have different judges, wherever possible, for the two functions. This is so, even in several jurisdictions where judges do not rotate.[6] Where there are several judges in densely populated centres, one will take care of

6. District of Columbia, Michigan, and Ohio.

all the pre-trial work and no case is tried before him while he is acting in that capacity.

One comment is that it makes no difference whether the same judge performs both functions.[7] Another says the same judge may well perform both functions only if a jury is to pass on the facts, the reason being, with its psychological impact, that attorneys do not feel free to discuss the situation fully, especially as regards a probable settlement, before a judge who is to later pass on the facts.[8]

Where the judges rotate or circuit,[9] or where there is a flexibility which is almost but not quite the same thing,[10] there is difficulty in the solution of this phase of the procedure.

Where there is circuiting, one comment is that, at least from the standpoint of the judge, it makes a great difference in his proper handling of the case at the trial if he has presided at the pre-trial hearing.[11]

In Wayne County, Michigan, there are eighteen judges who circuit, one of whom handles nothing but pre-trial conferences for a year. One is informed that there this method has worked well.

In Florida several judges have four or more counties and move from one to the other. Other circuits have two or more judges who rotate. The terms of court are from one week to a month. The pre-trial and trial judge is the same, though in the circuits with many counties where a judge must move from one county to another, difficulty is still encountered in the judge's finding time in advance for pre-trial conferences. As a consequence, only about 40 per cent of the judges use the procedure, since it is discretionary; and, it is said, that both Bench and Bar are more favorably inclined to the practice of working out a method whereby a different judge will preside at the trial.

The following comment may be noted:

> "I have consulted with many of the various trial judges of the state relative to the procedure and some are most enthusiastic and use it extensively, while others are just

7. Colorado.
8. Massachusetts and Connecticut.
9. New Hampshire.
10. Connecticut, Florida, and Texas.
11. New Hampshire.

as firm in their view that it is a waste of time and accomplishes nothing. Unless the trial judge sympathetically administers the procedure, it does not accomplish what was expected of it. In large cities the judges are using it extensively and are most enthusiastic in the results attained."

"It is in the country circuits where a judge goes from one county to another in holding court that it does not work so well. In metropolitan cities the judge who presides at the pre-trial conference usually is the judge who tries the case. In circuits having many counties constituting the circuit and the judge goes from one county to the other holding court they often find it difficult to take the time in advance of the court for a pre-trial conference. These pre-trial conferences should be held very shortly before the actual trial, otherwise the attorneys in the case are very apt not to be prepared to bring about by stipulation all the desired results. In Florida these pre-trial conferences usually take place within a week before the actual trial and very seldom more than two weeks before the trial. However, in circuits consisting of several counties, many judges have found their pre-trial conferences a great aid in trying the case as well as a great time saver. Other judges, as I have before stated, feel that it is a mere waste of time."

The judicial situation in New Hampshire is more closely analagous to that in South Carolina. All judges rotate or circuit from county to county, sitting for terms of from six weeks to three months. The pre-trial conference is discretionary with the judge. The following is typical of the way in which the procedure is handled:

Taking a six week term as an illustration, the judge notifies the clerk a few weeks before the term starts to list six or eight cases for pre-trial with notice that trial for the same will be the week after. On appearance for pre-trial, the lawyer is asked if he is prepared for trial the next week. If not (party unavailable or some other reason), it is set for conference at a later date. Usually about three out of eight are ready; the others are settled or discontinued. During the first week of the term the court gets out another list of cases for pre-trial the following week to be tried the week after pre-trial. This procedure continues from week to week during the term. If

the court finds cases are not being settled or pre-trials are taking too much time, he may cut down on pre-trials for the succeeding weeks.

The procedure in New Hampshire was initiated in 1946 but, on the whole, seems to be well on the way to practical success, especially in four out of the state's ten counties in which the work of the court is on a big city basis.

As to the reaction of the New Hampshire Bar on whether the same judge should perform both functions of presiding at the pre-trial and later trying the case, one finds the following comment from high judicial authority:

> "As to the reaction of members of the bar if one Judge presides at the conference and a different Judge at the trial, I have had no reaction and do not feel that the members of the bar have particularly noticed much difference. So far as the members of the Court are concerned there is a great difference, particularly when the plan of pre-trying a case within a week before its actual trial is followed. In that situation the Judge still carries in his memory a good part of the conference and I have personally had no difficulty with lawyers departing from the conference agreements which has caused any difficulty. The reaction of a Judge who is in a pre-trial conference knowing that he is going to conduct the trial is far better than the reaction of a Judge who is simply conducting a pre-trial conference and knows the trial will be up to some other Judge."

> "Pre-trial procedure appears to be a very definite improvement in the work of a Trial Court but means a lot of hard work for the Judge. The lawyers are not prone to reach an agreement unless they are prodded or led into such agreements and the Court is the only one who can prod or lead. The procedure will not work if the lawyers are not cooperative and do not have their cases fully prepared at the time of the conference. We are still largely in the educational stage so far as getting the cooperation of the lawyers in preparing their cases before conference. Where the education has been completed and the cooperation is given, the procedure functions with great success. Where the education has not been completed or where the lawyers will not fully cooperate in spite of education, the procedure has been of some help

but not of the greatest possible assistance. * * * I think that the success of the procedure depends upon the willingness of the Court to work on it and the eventual cooperation of the lawyers with the Court in making it work."

A comment by the same authority suggests that the elapsed time between the pre-trial conference and the trial should be not less than four days or more than two weeks, unless exceptional circumstances require a different period; and states further that the pre-trial judge and trial judge should be the same. In Connecticut, another of four states in which there is rotation, but rather on the Florida plan than on the New Hampshire one, different judges perform the two separate functions in the large counties with populous centers; while in small counties the same judge performs both. However, comment is strongly in favor of separating the functions, especially in non-jury cases.

Texas also has a divided set-up. There is no circuiting of judges in the counties having the large cities but only in the smaller counties. The procedure was adopted in 1941, though the city of Dallas had used it successfully prior to that time, and is still in a more or less experimental stage in the state at large.

The following comment helps size up the situation in that state:

> "* * * usually the judge may have his pre-trial conferences on a set day, say the first day of the term, in rural sections and may try the cases on the following days. If the lawyers cooperate and *only actually undisputed and indisputable matter* is elicited, the procedure works, otherwise not. In this state we are carrying on an educational campaign in support of pre-trial procedure, under which persons more or less conversant with it hold 'institutes' for various local bars at their annual meetings. The response is cordial."
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> "If the judge first asks for rough statements of each side of the case and then for admissions of manifestly conclusive matter and then develops additional undisputed matter, much time may be saved. If he undertakes to enter the controversial side of the case he ordinarily accomplishes nothing. It seems to me that the key to the hearts of the lawyers is for the judge to make it plain

that he is only asking for uncontroverted matter and that if any lawyer makes an admission or agreement that he afterwards desires to withdraw he may withdraw or amend. Sometimes the judge is able to bring the parties to a settlement because each is of himself unwilling to show weakness by broaching settlement and the suggestion from the judge removes that embarrassment and brings the parties into negotiation."

With respect to whether (1) a stenographic record is made of the pre-trial conference, or (2) a stipulation signed by the attorneys is filed, or (3) an order or memorandum setting forth the results is filed by the judge, there is almost unanimity to the effect that the first is not used, except in New Hampshire. There it is used along with a statement dictated by the judge as to the results of the conference. The reason for not having a stenographic record in the other jurisdictions seems to be because it would act as a deterrent to a free discussion of settlements. So, either the second or third methods is most commonly used, with sometimes both combined.

Whichever is used, it is binding on the trial judge, whether or not he presided at the conference and also on the parties, unless for good cause an amendment is allowed.

Thus it seems that pre-trial procedure is still in its infancy in several jurisdictions, while in others it is gradually attaining adult stature. That it is workable is certain, but each jurisdiction must work out a method which will meet its local situation. Other states with circuiting judges have overcome that obstacle, if such it be, and appear to be working the problem out in a practical way. South Carolina can doubtlessly do likewise.

It is to be noted from the foregoing that centers of large population first needed the aid of this procedure, and in those centers especially has the procedure proven most successful; probably because it was so sorely needed, it just had to work, else the existing courts would become stalled or additional courts would have to be provided.

Whether or not South Carolina has now reached the point of density of population, industrial growth and general economic progress as to require pre-trial conference procedure in her courts, is a matter of present interest. If the State has, then it is a matter of deep concern.

The State is now in a mushroom growth of industrial expansion. Public Utilities are expanding rapidly. One such is

South Carolina Law Review, Vol. 1, Iss. 3 [1949], Art. 2

now ready to spend $12,000,000. Industries large and small are starting up, are moving or expanding from other states to various counties with millions in capital investment. The State's Port Authority is rapidly expanding into one of the largest of its kind on the Atlantic Seaboard, moving annually over $60,000,000 of industrial products. Small towns in the last decade have grown into cities, and cities are fast taking in ever-growing residential and industrial territories.

The result can be more courts with greatly added expense to the taxpayers, or continuing congestion of dockets with attendant delays, waste and expense to litigants and public alike, or the adoption of a pre-trial conference procedure as the final solution.