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Pre-trial in the Courts: An Opinion
by Aaron Jacobson*

While the Techniques of Modern Pre-Trial have been the subject of much discussion and considerable writing in recent years—with this procedure enjoying the unique distinction in law of an early and almost universal acceptance—little if anything has been said of it critically. This is so perhaps because of the thirst among the legal confraternity for a means of modernizing its litigant-court relationships and in a manner acceptable to all. Nor does the writer mean to telegraph a negative sentiment. Coming out against pre-trial in these days of impatience over—and a growing intolerance of—heavy docket backlogs and calendar congestion is tantamount to judicial heresy. It should not be surprising, therefore, to find this surge of enthusiasm for what has been hailed as the dietary answer to the over-weighted form of justice, cloaked as it is in the handsome robes of ritual and decor.

No claim is made, it is true, that pre-trial is the panacea for what all the courts. But in adopting it, there seems to have been a haste which has bypassed the usual introspective examination characteristic of our judiciary.

A critical examination, as seen by this writer, would take the form of two broad questions:

One—Is pre-trial, viewed in the overall perspective of the administration of justice, a healthy additive to the courts?

Two—If so, is it an end in itself, or is it simply one of a number of modernizing influences, without all of which it remains ineffectual?

It will be seen, in the attempt to answer these questions, that haste may have veiled many objectionable aspects of the pre-trial conference.

A Description of the Pre-Trial Conference

The Hon. Clarence L. Kincaid in his widely-distributed "A Judge's Handbook of Pre-Trial Procedure," comments that the "increased use of arbitration within industry is chargeable directly to the dissatisfaction of businessmen with the cost and lack

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of early finality experienced in submitting their controversies to the court.” ¹ Similarly, Harry D. Nims, writing in his exhaustive treatment of the subject, mentions that “in recent years, largely because of procedural defects in our courts, the public have sought, and in many instances found, methods of disposing of their civil controversies outside the courts.” ² Hence, the monetary threat which, among others, appears to have triggered the onset and early adoption of pre-trial.

By way of definition, the Hon. Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, finds pre-trial to be “a device for the improving of trials in the interest of justice, for shortening them and incidentally for promoting settlements as each side learns for the first time of the strength of his adversary’s case and the weakness of his own.” ³

Mr. Nims breaks down his conception of it into two types of conferences: “(a) The conference to simplify the issues, obtain consents to the admissibility of evidence and exhibits, limit the number of expert witnesses, arrange a date for trial, and, in general, to expedite disposition of the case; and (b) The discussion of routine pending cases by the court and counsel to consider, not methods of simplifying the trial, but to use the good offices of a judge of the court as a friendly, official, impartial intermediary in an attempt to reach some disposition of the case without trial . . .” ⁴ (emphasis added).

In its most orthodox form, pre-trial is conceived as operating, first, by a rule of court that requires the pre-trying of all civil cases before trial; second, by cases being calendarized for pre-trial conferences, just as cases are docketed for trial in a given order; third, by the mandatory appearance at the court-specified time of opposing counsel and their parties of interest; fourth, by a sitting down in either the open court or in chambers for an informal discussion which is given, however, a pattern of procedure; fifth, by an attempt to stipulate facts and issues about which there are no disputes; sixth, by an attempt to settle the case, if settlement is possible, and if it is not, by an entering into the proceedings of a record of the pre-trial, showing the stipulations agreed upon.

¹ 17 F. R. D. 439.
² Pre-Trial, by Harry D. Nims, p. iv.
³ The Challenge of Law Reform, p. 63.
⁴ op cit, p. 12.
THE INCONSISTENCIES OF PRE-TRIAL

In actual practice, there are as many varieties of pre-trial as there are temperaments of pre-trying judges, and, as Mr. Nims points out, "No orthodox way of conducting pre-trial has been developed." 5

Another writer goes further with the observation that "one judge will exert great pressure to induce parties to settle; another will be interested principally in persuading parties to drop their demands for jury trials; a third will feel that he should not induce the parties to do anything beyond what they had agreed to prior to the conference; a fourth will thoroughly analyze the case and do what he can to reduce the problems of proof and the length of the trial." 6 The writer made this additional comment: "Judges are only human, and each approaches his judicial function differently. Knowing the characteristics of the particular judge before whom your pre-trial conference is to be held is second in importance only to knowing all you can about the judge in a non-jury trial." 7

It becomes the simplest of inferences, then, to conclude that a given pre-trial will obtain only that measure of success as is permitted by the probity of the pre-trying judge. It must further follow that pre-trial is not a successful procedure per se. "Pre-trial is not self-executing. It requires a sympathetic, co-operative and industrious attitude on the part of both judge and attorney." 8

This is not true of general trial procedure. There, the judge is contained within a strict framework of rules and laws that dictate his conduct, and the checks and balances of our system of jurisprudence ensure to a proven degree a uniformity of conduct. This cannot be said of pre-trial, where informality and a relaxation of rules in effect remove that uniformity which systems of justice have striven so long to reach. For what is pre-trial, in actuality, but a miniature trial. The judge is in his court. So are opposing counsel and their clients. The case in question is discussed, argued, limited by stipulation and very often settled and dismissed.

5 op cit, p. 13.
7 ibid.
8 17 F. R. D. 445.
THE COURTS AND THE PUBLIC

The role of the judge in these quasi-judicial proceedings needs further inquiry. He is in his court by virtue of a public mandate or an appointive one. To it come parties of interest who cannot resolve their problems privately. Once that recourse is decided upon, the public at large has an interest. The pleadings are public, as are the courts in which they are lodged. Does the judge have the right to permit his office and himself to undergo a sudden metamorphosis, whereby he becomes, instead, a referee and his court a private bargaining table, all based on the proposition that this method is faster, or more efficient?

One of the least publicized but more important objectives of pre-trials, particularly in personal injury litigation where settlements occur in three out of four cases,9 is secrecy. Defense lawyers representing insurance companies enjoy a double advantage: the saving of time and expense in settling cases through the office of the juridical intermediary without trial, and the exacting of a promise from the pre-trying judge of silence regarding the amount of the settlement. Any discussion of this hard fact is conspicuously absent in the literature on pre-trial. Many attorneys will not enter into settlement discussions unless and until the participating judge agrees on secrecy. (The reason for attempting secrecy appears to originate in a belief among insurers that public knowledge of tort judgments spoils juries, lends a predisposition among the public to more lawsuits, and creates difficulty in settlement because of widespread feeling in plaintiffs that their case deserves a larger consideration.)

Yet take a pre-trial group, where settlement fails, and place them in the open courtroom for trial and all the world may know of their business. Thus does the strange duality in the courts arise: a court conducting secret pre-trials (and reaching secret settlements) on the one hand, and open trials on the other. To argue, as defense lawyers often do, that the civil business among litigants in a court is no business of the public is a contradiction in terms. By extension, at what point would the public interest, or claim of interest, arise? By the arbitrary designation of a bar or a bench? They do not have such powers, impliedly or in fact. The point is, of course, that the public’s interest arises a priori, and that such interest is necessary to the very existence of the court. It cannot cease at any point in the administration of jus-

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9 ibid, p. 450.
tice. Indeed, where in all of this is the traditional court of law, which by constitutional exhortation, shall be open?

This is not meant to say that opposing counsel may not settle their differences privately at any point along the line of litigation. The secrecy-aspect is stressed only in reference to a court's participation in a pre-trial and where the court becomes the instrumentality of settlement. Viewed in its most generous light, the practice of judges in suppressing results of pre-trials gives rise to a serious question of the legality of such acts, the rationale for which is expeditious justice. The public, it can be argued, may wonder where secrecy, once begun in the courts, may lead, and where it may end.

THE COURT AND THE LITIGANT

The extent to which judges go in effecting dispositions of cases in pre-trial is reflected in Mr. Wessel's paper, where he says: "One of the most important aspects of the pre-trial conference is the exploration of settlement possibilities. Indeed, most lawyers conceive of settlement as the only purpose of pretrial. The Southern District of New York has recognized this by eliminating pre-trial in personal injury and death actions . . . and setting up a separate Settlement Calendar for them. . . . There is also something more to a settlement discussion when the court takes part in it. When a little pressure is needed, the court often supplies it; and when the plaintiff has an inflated idea of the value of a mediocre case, the court can gently deflate it, and with far more effect than when defendant's counsel attempts the same thing." 10

Mr. Wessel believes that "in so doing, the court is not departing from its office in the slightest. It is merely exercising the mandate of the Rule to 'aid in the disposition of the action.' The pretrial is a 'natural' for settlement opportunities if the case is one which can be settled." 11

If pre-trial does reduce the status of a judge to that of an "impartial referee," as Mr. Nims puts it, 12 why use judges at all in pre-trial conferences? Although only a notion, referees could participate under those same broad powers which the courts are now invoking, ex officio, to require litigants' appearances at pre-trial conferences and, moreover, to force them to participate in

10 op cit, p. 63.
11 ibid.
12 op cit.
the conference.\textsuperscript{13} While the use of referees is generally frowned upon by the judiciary, by the same token, the adequacy of all judges in a court becoming pre-tryers is questionable, since many do not make competent pre-tryers, either by temperament, willingness or prejudice. The indiscriminate assignment of judges to pre-trial could lead to results detrimental to litigants, should the judge in the informality of the proceedings use his authority to coerce a settlement.

Like the adoption of a precocious youngster, whose future is unpredictable, a pre-trial leaves open many vital issues, only a small portion of which have been touched upon here. Embraced it may be by many jurisdictions in the land, including the Federal courts.\textsuperscript{14} Yet we have no assurance that some forms of it are, in practice, constitutionally sound. Nor is there a body among the bar or bench that is prepared to come forward and define its every relationship to the courts. How can this occur when members of a single bench disagree as to its use and refuse to participate as pre-tryers?\textsuperscript{15}

\textbf{Effectiveness of Pre-Trial}

The second question posed earlier arises, provided we have first decided that pre-trial is a legally sufficient means of improving our courts and has been surrounded with the same or comparable safeguards which our courts have heretofore known. What, then, may we expect of pre-trial?

Putting it to use in a court and leaving all else in \textit{status quo} may well bear the analogy of replacing the shoes on a coach horse with roller skates. The horse and its buggy are still with us; the roller skates become an anachronism, if not a hazard.

Perhaps the most celebrated instance of judicial reform is New Jersey's. Dockets there are current, according to the report of Chief Justice Vanderbilt.\textsuperscript{16} But, "in curing court congestion in

\textsuperscript{13} 172 F. (2d) 241, 243. "The spirit of a pre-trial procedure is not only to call the parties together and ask them to stipulate as to all matters concerning which there can be no dispute, but to compel them to stipulate and agree .... The court has a right to compel the parties to do this. ...." (Emphasis added.)

\textsuperscript{14} Rule 16, Federal Rules of Civil Procedure.

\textsuperscript{15} A poll taken by this writer among the 15 members of the Cuyahoga County (O.) Common Pleas Bench in 1955 showed at least four of the jurists refusing to accept pre-trial assignments—one because of a long-standing practice of not talking to litigants involved in any lawsuit; a second and third because they refused to be bound by pledges of secrecy concerning settlements, and the fourth because of his doubts over the legality of the procedure. All four, veteran judges, maintain their attitudes to this day.

\textsuperscript{16} The Challenge of Law Reform, p. 85.
PRE-TRIAL IN THE COURTS

New Jersey," he writes, "we have had a revolution in judicial and professional practice." 17

Judge Vanderbilt sets forth three major steps needed for reform:

1. The improvement of judicial personnel, including jurors as well as judges. This is an exceedingly crucial problem in many jurisdictions, but one that is readily capable of solution everywhere.

2. The simplification of judicial structure and of procedure, so that technicalities and surprise may be avoided, and so that procedure may become a means of achieving justice rather than an end in itself.

3. The elimination of the law's delays by modern management methods and effective leadership. Without these a judicial establishment cannot hope to function efficiently. 18

Pre-trial in that state is one of the weapons used in whipping docket congestion; but it is one of many, including, to begin with, a change in the state's constitution, the use of an administrative director, the functioning of a Chief Justice with wide powers, and the revamping of court procedure.

As one of numerous examples in contrast, the Common Pleas Court of Cuyahoga County, which instituted pre-trial in 1953, has no administrative officer or department; confers limited authority on its chief justice, who is so designated by his colleagues; requires the time and energies of its 15 members on such details as personnel, statistics, space apportionment and budget; maintains an interlocutory court for pleadings and temporary matters that often overlap the regular work of the court, and a system of assignment that does not give each judge a portion of the responsibility of the docket. While this court has endeavored to improve its structure and procedure, it must needs work within the antiquated framework established by the Legislature. Its business has grown to the proportions that it now employs 125 persons, has an annual budget in excess of one million dollars, and, in 1955, docketed 6,039 new civil cases, not including matrimonial matters. In that year, it disposed of 5,612 cases for a net loss of 427. Its total backlog has exceeded 8,000 cases, and a civil action must wait 24 to 30 months between filing and trial.

17 ibid, p. 93.
18 ibid, p. 10.
19 New Jersey Constitution, 1947, Art. V, Sec. VII.
A four-year study conducted by this court on the efficacy of pre-trial brought forth the following statistics:

<table>
<thead>
<tr>
<th>Year</th>
<th>Settled by Trial Judge</th>
<th>Pre-Trial Settlements</th>
<th>Tried to Court</th>
<th>Tried to Jury</th>
<th>Other Disposals</th>
<th>Total Disposals</th>
<th>Total Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1952**</td>
<td>713</td>
<td>447†</td>
<td>347</td>
<td>292</td>
<td>3,604</td>
<td>5,403</td>
<td>4,570</td>
</tr>
<tr>
<td>1953‡</td>
<td>497</td>
<td>443</td>
<td>279</td>
<td>195</td>
<td>3,370</td>
<td>4,774</td>
<td>5,193</td>
</tr>
<tr>
<td>1954</td>
<td>285</td>
<td>970</td>
<td>211</td>
<td>162</td>
<td>3,380</td>
<td>5,008</td>
<td>5,611</td>
</tr>
<tr>
<td>1955</td>
<td>208</td>
<td>1,795</td>
<td>205</td>
<td>169</td>
<td>3,234</td>
<td>5,611</td>
<td>6,039</td>
</tr>
</tbody>
</table>

* Includes settlements and agreed judgments and verdicts reached in interlocutory court and by the Chief Justice; foreclosure decrees and uniform support cases.

** Prior to pre-trial.

† Prior to 1953, the court assigned one judge to conduct pre-trial, which bore little if any resemblance to the formalized procedure adopted in 1953.

‡ During 1953, two judges spent a total of 10 months on pre-trial.

During 1954, six judges devoted a total of 25 months on pre-trial.

During 1955, 10 judges spent a total of 47 months on pre-trial.

It is noteworthy that the 1,795 cases settled in pre-trial during 1955 required nearly a third of the total time afforded by the bench.

Also, it can be seen that prior to formalized pre-trial, the year 1952 shows that 1,160 cases were disposed of before or during trial, and an additional 639 decided by trial, for a total of 1,799. By comparison, the year 1955 shows 2,377 cases settled (excepting column 5), so that the apparent gain over 1952 is 578 cases and is attributable to pre-trial. But, in considering those two years only, the disposals shown in column 5 fell back 370 cases, and the net gain is 209. This last figure is obliterated by the increase in filings in 1955 over 1952 of some 1,469 cases.

The court itself reached the conclusion that pre-trial was not the answer to its docket congestion problem.

Chief Justice Vanderbilt suggests that "at every point of law there must be a calm review to achieve the greatest possible individual freedom consistent with the requirements of society as a whole, and a painstaking reform of the law to eliminate outmoded technicalities and to assure the orderly preservation of human rights." 20

Pre-trial, of itself, would seem to need such a "calm review" by a responsible bar and bench, in the form of a critical evaluation going into its every relationship to the courts, the public and the administration of justice.

20 op cit, p. 184.