ADAPTABILITY OF PRE-TRIAL TO THE LESS POPULATED COUNTIES

O. W. WHITNEY, JR.*

Pre-trial procedure is ideally adapted to the practice in small counties. That there are many reasons for this must be obvious to those who have had the opportunity to participate in the use of this procedure in the courts of these areas.

Actually, even upon the adoption of this type of procedure there are reasons to make its inception easier in these less populated areas because there is a relatively small number of attorneys practicing before the local courts. All of them usually participate in local bar activities and are readily available for discussion of the adoption of this procedure and any changes therein which experience proves advisable.

Then, too, the attroneys and the court have the opportunity of more personal contact and discussion about the requirements of the local pre-trial practice and are in an ideal position to cooperate fully so that the best ultimate results may be obtained from pre-trial.

The courts and attorneys in the less populated counties are often able to save time and expense by stipulating and agreeing on many more matters than might be possible in large cities. In many instances this is true not only because the opposing attorneys are personally acquainted but they are very often equally well acquainted with some of the witnesses who are to be called to testify. In view of this, they are often willing to stipulate as to what some witness would testify or, in some instances, even agree that certain experts may serve as mutual witnesses for both sides.

Instances in which this latter situation exists are those in which an appraisal of real or personal property is needed for accounting cases, divorce cases, negligence cases, and so forth. Attorneys often agree upon the selection of one or more experts for this purpose. In some cases, it may be agreed that such experts will file an appraisal of an automobile, household goods, real estate, and so forth and that the written appraisal so filed shall be accepted by the court as the agreed value of the assets involved.

Further, by reason of the personal acquaintance existing among the members of the smaller local bars, the question of compromise and settlement of cases can be handled in a more expeditious manner. The attorneys are in a position to accept the word of each other on the basis of past dealings, and much can be accomplished in an open, frank discussion with attorneys who are not required "to deal at arm's length."

Inasmuch as there is no uniform pre-trial practice in Ohio, experience has proven that it is advantageous to adopt a local pre-trial rule

* Judge, Court of Common Pleas, Delaware County, Ohio.

which sets forth in detail the procedure to be followed. When the rule is specific and covers all phases of the case which will be considered at the conference, the attorneys are fully advised as to their pre-trial preparation and they, their clients, and the courts save time and expense and often arrive at a settlement of the case which would be impossible without following this detailed procedure.

Our local rule requires counsel or some other representative at the conference to be fully authorized to act on behalf of his client in connection with the several matters which are set forth in the rule.

At the outset of the pre-trial conference, counsel for the parties are asked to briefly state their case, the issues, and questions of law which are involved.

If there are any amendments to the pleadings or any supplementary pleadings or interlocutory motions, counsel is expected to present them in writing at the conference. Otherwise, it is assumed that the case will come on for trial on the pleadings as they exist at the time of pre-trial, except insofar as the court may permit further amendments in the furtherance of justice.

At the pre-trial, counsel is expected to produce all items of expense and special damages, together with the exhibits to substantiate the same, as well as any and all other exhibits which are expected to be offered in evidence. This, of course, makes possible a stipulation regarding these items and avoids the formalities of proof in connection therewith.

The smaller counties have an opportunity in connection with this item of exhibits to save both counsel and the court's time for, in many instances, counsel are able to obtain possession of documents for pre-trial use which might not be as readily available in the metropolitan counties. Where the members of the bar are personally acquainted with the bankers, photographers, doctors and hospital authorities, they are often able to produce documents, photographs, x-rays, hospital records, and so forth at pre-trial by merely signing a personal receipt for the custodian thereof.

In our county it has been possible to arrange with the local hospital for the production of their records at pre-trial by having the patient execute a consent and waiver for the hospital and then having the attorney for the patient receipt for the exhibits.

In practice, this procedure meets with the hearty approval of the doctors and hospital attaches because it results in a saving of their time. Rarely is it now necessary for their technicians, record librarians and other custodians to appear in court for the sole purpose of identifying records.

Another advantage gained by this procedure is that the x-rays and other exhibits are readily made available for examination by the opposing party's expert witnesses before time for trial.

Our pre-trial rule also requires counsel to advise regarding requests for medical examinations, the taking of depositions, the number of expert

witnesses, the use of special verdicts and the estimated time required for trial. It is usually possible for the attorneys to agree upon all of these matters and appointments are generally made immediately for the medical examinations and the taking of depositions rather than waiting until the cases have been assigned for trial.

After discussing any other matters which may be pertinent as an aid to the disposition of the case, the possibility of settlement is explored. Settlement often results immediately but, on occasions, settlement cannot be fully explored until the medical examinations have been completed and depositions taken.

Experience has proven that much more is accomplished at pre-trial if the parties and attorneys understand that settlement is not the sole or prime purpose of this procedure. When it is made clear that the court is not using pre-trial for the sole purpose of forcing settlements, a much freer, more cooperative attitude is evidenced by everyone concerned. Actually, this approach results in more settlements than does an atmosphere in which both sides feel that the only purpose of the conference is to subject them to a virtual forced settlement.

Settlement discussion is usually conducted in the presence of everyone involved, for, under our rule, parties are required to be present at pre-trial if requested by the court. It often proves helpful, during the course of the conference, to have the parties and their respective counsel confer separately with the court in order that a full, frank discussion of each side of the case may be had with each party and his counsel.

If settlement is not effected at the pre-trial because of the necessity to take depositions or conduct medical examinations, cases may then be reassigned for a second pre-trial conference after those matters have been taken care of.

At the conclusion of the pre-trial a journal entry is prepared which becomes a part of the record in the case. This pre-trial order controls the subsequent course of the action except insofar as it may be later modified at trial to prevent manifest injustice.

It is generally conceded that most of the criticism of our courts and the legal profession arises from delays, expense, and the existence of technicalities in our legal procedure. Effective pre-trial results in clearing the "straw man" issues from a case which so often result from the filing of voluminous petitions and general denials; it helps define the real issues. It avoids many needless technicalities, delays and expense.

Admitting that pre-trial, like all procedural devices, has some imperfections inherent in any human endeavor, it does produce many long needed changes in the administration of our judicial system. Naturally, any procedure which accomplishes this meets with the approval of nearly all litigants and lawyers as well as others connected with our administration of justice.