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Federal Procedure- Pre-Trail Disclosures- Sanctions Available to Enforce Pre-Trial Orders

John M. Price
University of Michigan Law School

FEDERAL PROCEDURE — PRE-TRIAL DISCLOSURES — SANCTIONS AVAILABLE TO ENFORCE PRE-TRIAL ORDERS—Petitioner, plaintiff in an action in federal district court, was ordered under Federal Rule 16[1] to submit pre-trial statements setting out the facts of the case, his damages, his witnesses and exhibits, and his legal theories of recovery. His counsel filed statements which were adjudged insufficient, and a pre-trial order was entered precluding petitioner from offering at trial any testimony by witnesses other than himself and his wife, or any evidence concerning liability in negligence or breach of warranty, and limiting his exhibits and evidence of damages. On petition for mandamus to set aside the preclusion order, *held*, granted, one judge dissenting in part. Since Rule 16 authorizes the issuance of an order setting forth only those points on which the parties have willingly reached agreement, the information requested could not be compelled, and the preclusion order exceeded the judge's authority.[2] *Padovani v. Bruchhausen*, 293 F.2d 546 (2d Cir. 1961).

1 "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; . . . (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; . . . (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 the trial to prevent manifest injustice." FED. R. CIV. P. 16.

2 The court also held that the directions issued by the pre-trial judge were too in-

Of the several devices which may be used to gather information between the pleading and trial stages in the federal courts, the pre-trial conference has gained perhaps the widest recognition[3] and is regularly used, particularly in protracted litigation.[4] The purpose and function of the pre-trial hearing is to define and simplify the issues between the parties and to ascertain the facts which relate to these issues, in this way lessening the chance of surprise at the trial and the risk of judicial error.[5] However, since neither this often-stated purpose nor rule 16 itself provides the pre-trial judge with an adequate outline of his powers and duties the rule is sometimes misused[6] in an attempt to clear up backlogs of docketed cases, or is used with less than its full effectiveness. The problem is to define, without over-restricting the judge's discretion, what information may be required of the parties, and what sanctions are available to insure compliance.[7]

Some courts and writers advocate limiting the amount of information required from the parties at pre-trial to little more than a statement of the relevant facts.[8] There is a fear among adherents of this policy that because trials seldom go as counsel expect,[9] any more extensive requirement would be likely to abridge the rights of the parties at trial.[10] They insist

definite, and in this the dissenting judge concurred. The dissent found fault with alleged indications in the majority decision that a court may not issue a preclusion order upon failure of a party to comply with directions, and that the facts in issue and legal theories relied upon may not be ascertained prior to trial.

3 See, *e.g.*, 3 MOORE, FEDERAL PRACTICE ¶ 16.06 (2d ed. 1948).

4 For an indication of the problems peculiar to protracted litigation and suggested pre-trial procedures for this class of cases, see ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS 25 (1955) (proposed amendment to rule 16); McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950); *Proceedings of the Seminar on Protracted Cases*, 23 F.R.D. 319 (1959); *Report: Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62 (1953).

5 Cherney v. Holmes, 185 F.2d 718, 721 (7th Cir. 1950); American Oil Co. v. Pennsylvania Petroleum Prods. Co., 23 F.R.D. 680, 682 (D.R.I. 1959); Laws, *Plan for Pre-Trial Procedure Under New Rules in District of Columbia*, 25 A.B.A.J. 855 (1939); *Success of Pretrial Hearing Demonstrated*, 21 J. AM. JUD. SOC'Y 160 (1938).

6 FED. R. CIV. P. 16(6), *supra* note 1, is sometimes taken as a license to force a settlement.

7 Contrary to the indication of the court in the principal case, the pre-trial judge has the power to compel certain admissions from the parties. The use of rule 16 is discretionary, but to say that a court, having decided upon pre-trial proceedings, cannot compel the parties to follow the directives of a pre-trial judge would render the rule nugatory. The courts' complete acceptance of the power of the pre-trial judge to invoke sanctions for failure to follow directives is based on the premise that the judge may compel the parties to participate in the proceedings.

8 See, *e.g.*, Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 48 (1957).

9 See FRANK, COURTS ON TRIAL 87 (1949).

10 See James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473, 1481 (1958). There has been some concern that, because of the finality accorded pre-trial orders, facts or legal theories which take on importance only after pre-trial will be denied airing at trial. But courts will generally amend orders prior to trial

that pre-trial is merely a form of pleading and that, therefore, only the facts of the case should be considered—the responsibility being upon the trial court alone to determine relevant legal theories.[11] This distrust of pre-trial proceedings has led a majority of courts to hold also that a party is not required to disclose his witnesses prior to trial lest he be damaged by his failure to anticipate witnesses he may want to call.[12] If the pre-trial is actually to expedite the trial of the case, however, mere statements of agreed facts seem inadequate to meet this objective, and other courts uphold the requirement of a full and complete disclosure of all legal and fact issues which the parties intend to raise at trial,[13] with the exception of issues which may involve privileged or impeaching matter.[14] Some courts, moreover, require the parties to list the names and addresses of their prospective witnesses. This would seem to be the better rule,[15] since it would tend to narrow the areas of inquiry and argument with regard to those witnesses at trial. This would not only shorten trial time, but would increase the likelihood of a just outcome by reducing trial by battle of counsel, a major objective of the Federal Rules.[16]

if motion is made to enter evidence not known at the time of pre-trial conference, and issues not indicated at pre-trial may even be entered at trial if necessary to prevent "manifest injustice." See Annot., 22 A.L.R.2d 599 (1952).

11 The majority opinion in the principal case apparently takes this restricted view of pre-trial.

12 4 MOORE, FEDERAL PRACTICE ¶ 26.19, at 1077-81 (2d ed. 1950).

13 However, it has been stated that if a pre-trial is to make a determination of all relevant issues without impinging on the rights of the parties at trial, these issues should be considered one by one, with the judge exploring both sides of each issue, determining both the plaintiff's claim and the defendant's response before moving on. Quite often at pre-trial the defendant will attempt to postpone any disclosure of his own position until all of the details of the plaintiff's case have been revealed. This is not "limiting the issues," but actually approaches trial procedure, where the plaintiff must state a case before the defendant goes forward, and, as stated in the principal case, almost inevitably leads to some "sacrifice of the court's natural position of strict neutrality among litigants." McDowell, *Pretrial Procedures; Pretrial v. Procedure*, 4 ANTITRUST BULL. 675, 681 (1959).

In order that pre-trial actually assist the trial on the merits, results must be reached as quickly as possible. Yet in the principal case, proceedings preparatory to the conference itself, in which plaintiff was required to submit lengthy written statements, took well over a year. Submission of memoranda by the parties prior to pre-trial conference has been found to be of great value, but when it becomes evident that such ancillary requests are hindering rather than speeding the conference, the judge should abandon the inquiry or, in the case of an uncooperative counsel, invoke appropriate sanctions.

14 Walker v. West Coast Fast Freight, Inc., 233 F.2d 939, 941 (9th Cir. 1956); Bogatay v. Montour R.R., 177 F. Supp. 269, 270 (W.D. Pa. 1959); Montgomery Ward & Co. v. Northern Pac. Terminal Co., 17 F.R.D. 52, 55 (D. Ore. 1954); Burton v. Weyerhaeuser Timber Co., 1 F.R.D. 571, 572 (D. Ore. 1941); 3 MOORE, *op. cit. supra* note 3, ¶ 16.08.

15 See 4 MOORE, *op. cit. supra* note 12, ¶ 26.19. Some provision should be made, however, to allow testimony by a bona fide after-acquired witness.

16 See, *e.g.*, *In re* Barnett, 124 F.2d 1005, 1010 (2d Cir. 1942); and Laws, *Pre-Trial —Its Purposes and Potentialities*, 21 GEO. WASH. L. REV. 1, 5 (1952) in which it is argued that without pre-trial there is surprise and confusion at trial, giving a great advantage

In order that the pre-trial conference be effective, the judge must have some means of enforcing his orders. There are three sanctions commonly used: the judge may enter a dismissal with prejudice which bars the offending party from the trial court and allows him only an appeal; he may preclude a party from offering specified evidence or legal theories at trial;[17] or he may fine the offender. There has been uniform acceptance of the district courts' power to use the first two sanctions, but there is marked divergence as to the scope of their application. There are indications that the circuits which have limited the information required of the parties will also keep a tight rein on the discretion exercised by the pre-trial judge, approving a preclusion order only when absolutely necessary to a just and efficient disposition of the case, and allowing a dismissal only when a party has shown an extraordinary disregard for the judge's authority.[18] On the other hand, other circuits have been quite liberal in allowing the district courts to dismiss complaints and issue preclusion orders when pre-trial directives are not followed.[19] No court, however, has as yet defined limits to guide the pre-trial judge in his determination of whether to issue a preclusion order or whether to enter a dismissal. The third sanction, the imposition of a fine, has been approved by some courts[20] and legal writers,[21] but has not often been used by pre-trial judges. Since the judge may fine either the party or counsel, this sanction has the obvious advantage of penalizing the disobedient party without detracting from his case at trial. It would seem that such a sanction should have been used in the principal case, and indeed, since so often counsel is at fault rather than the litigant himself, imposition of a fine would be effective and proper in most instances of non-compliance with pre-trial directions and would further achieve the Federal Rules' goal of shielding clients from the consequences of counsel's delinquencies.

Allowing the pre-trial judge to demand a wide variety of information from the parties, with drastic sanctions available in case of non-compliance, is admittedly a grant of power which, if misused as in the principal case,

to the party with the more proficient counsel, which should not exist in an "enlightened system of justice."

17 This sanction, when carried to an extreme as in the principal case, may be just as destructive of the party's case as outright dismissal by allowing him to go to trial with such a paucity of admissible evidence that he has no possibility of obtaining judgment.

18 See, *e.g.*, Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910, 915 (2d Cir. 1959).

19 The Seventh Circuit, for instance, upheld a dismissal entered when plaintiff's counsel failed to appear at a pre-trial hearing. Link v. Wabash R.R., 291 F.2d 542 (7th Cir. 1961).

20 See Gamble v. Pope & Talbot, Inc., 191 F. Supp. 763, 765 (E.D. Pa. 1961).

21 See, *e.g.*, LAWS & STOCKMAN, PRE-TRIAL CONFERENCES 11 (Judicial Administration Monographs, Series A, No. 4, 1941).

can prejudice a party's case. Nevertheless, something more than the power to require the "unforced" statement of facts recommended in the principal case[22] can be given without impairing the trial on the merits. A set of flexible rules should be formulated, perhaps by the Supreme Court in its supervisory capacity, which would both define the judge's duty and set a limit on his power under rule 16.[23] The judge should probably be required in all cases to have the parties submit a statement of the facts to be relied upon at trial, and a list of prospective witnesses and exhibits. As a general limitation, the attorney work-product theory[24] and foreseeability problems probably dictate that the judge should not be granted the power to require the parties to indicate which witnesses and exhibits are intended to establish particular facts, or the way in which established facts are intended to support particular legal theories. However, he should have a good deal of freedom to request intermediate information. Although the taking of actual testimony should be left to the trial court, the pre-trial judge might request the parties to indicate the general nature of the evidence to be given by the witnesses listed. The listing would allow the adverse party to take depositions and inquire into the qualifications of expert witnesses; the indication of their connection with the case would be of value when a large number of witnesses was anticipated, and could be of use to the judge in limiting the number of expert witnesses.[25] Similarly, requiring the parties to list exhibits would further insure that each party will be forewarned as to what his adversary will proffer, and should the judge feel that furnishing copies at pre-trial would expedite the subsequent trial, he could request their submission, provided the request is reasonable.[26] Such a request would be particularly appropriate in protracted litigation where there is usually a large amount of documentary material which could be condensed, made a part of the pre-trial order, and read directly into the trial record. In order to prevent a return to "code pleading," probably the judge should have no power to require the parties to list their legal theories. In the few cases in which it is not obvious that there is a legal theory to support a party's claim or defense, opposing counsel can force a declaration of the relevant theory by moving for summary judgment.

There should also be guide lines to aid the judge in his selection of sanctions. The general requirement should be that the judge determine

22 Principal case at 550.

23 See also Christenson, *When Is a Pre-Trial Conference a "Pre-Trial Conference"?*, 23 F.R.D. 129 (1959) listing thirteen points which the author believes are "minimum components" of an effective pre-trial conference.

24 See Hickman v. Taylor, 329 U.S. 495 (1947).

25 FED. R. CIV. P. 16(4).

26 See Syracuse Broadcasting Corp. v. Newhouse, 295 F.2d 269 (2d Cir. 1961), reversing a pre-trial order for the production of an unreasonable number of exhibits.

whether counsel or the party himself is at fault, perhaps presuming that when the failure concerns the facts of the case the fault lies with the party, and that a delinquency in listing legal theories, if required, is attributable to counsel. Dismissal or preclusion should be ordered only when the fault lies with the party, and probably the dismissal order should be reserved for failures to list facts sufficient to support the claim. Obviously these restrictions on pre-trial orders and sanctions will deprive the pre-trial judge of some of his discretion. Nevertheless, setting up a framework of powers and duties within which the pre-trial judge should function would help to ensure more speedy, just and efficient disposition of civil suits in the federal courts.

John M. Price