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PRE-TRIAL IN COLORADO IN WORDS AND AT WORK

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Rule 16, the pre-trial conference rule of the Colorado Rules of Civil Procedure, provides:

> In any action, the court may in its discretion direct the attorney 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 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 master 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 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. 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.

This rule, as well as the other Colorado Rules of Civil Procedure, was adopted January 6, 1941, to be effective April 6, 1941. The Colorado pre-trial rule is the same as Rule 16 of the Rules of Civil Procedure for the Districts Courts of the United States adopted in 1938.

From 1938 to 1941, Philip S. Van Cise and his committees sacrificed themselves with the hope that rules of civil procedure might be adopted for courts of record in Colorado, following insofar as practicable the Federal Rules of 1938. It was their hope that a Colorado lawyer would be as much at home in the courts of the United States as in those of the state of Colorado.

Percy S. Morris's scholarly address on "Pre-Trial Procedure: Formulating Issues—Rule 16,"[1] gives a complete statement of the

[1] COLO. STAT. ANN., vol. 1, Appendix D, page 463 (1935).

history of, and the reasons for adopting this rule. He summarizes the history as follows:

> The history of pre-trial procedure is interesting. Before the adoption of the federal rule, it had proved exceedingly helpful in state courts in Detroit and Boston in promoting the settlement of cases without trial, the shortening of the time of the court, the jury, the litigants and the witnesses in the actual trial, the saving of time to the attorneys, both in the preparation for trial and in the trial itself, and relieving congestion in the trial calendars.

Two prophetic statements from this address should be used to evaluate the success of pre-trial procedure in Colorado courts. These statements are:

> This rule prescribes an innovation in our practice which, if put into effect by the judges and wisely administered by them, will prove to be one of the most beneficial changes in procedure made by the rules.
>
> The attorney for either side may suggest to the court the advisability of calling a conference, but, even if such suggestion is made, it is still in the discretion of the judge as to whether he should call it. Practical experience has shown that, if the practice is to be effective, it should not be left to the attorneys to suggest or request the conference, but that it should be called by the judge on his own initiative.

PRE-TRIAL IN THE FEDERAL COURT

With the 1938 adoption of the pre-trial rule, Judge J. Foster Symes of the United States District Court for the District of Colorado vigorously applied pre-trial procedure to every claim. In words, the trial court's Rule 6 was adopted. It reads:

> All cases at issue shall be set for pre-trial and for trial on the merits at times to be designated by the court. Reasonable notice of the time and place of the setting for pre-trial and for trial on the merits shall be given by the clerk of the court by mail to counsel of record or to the parties.

Judge Symes and his clerk initiated the placing of all cases on the pre-trial docket. Every case had to be pre-tried, and after every pre-trial, the court entered a pre-trial order. It was Judge Symes's opinion that a pre-trial was as important as a trial. All exhibits were marked and either admitted or excluded. Obscure or disputed points of law were ordered briefed so as to be ruled upon after the pre-trial conference and before trial. A full statement of each side's position was heard by the court. Where proper discovery foundation had been laid, a full disclosure of all facts was ordered at the pre-trial conference. The words of the pre-trial rule, in short, were made to work in the Federal court. As a result, a judgment was entered on some claims at the pre-trial. On a larger number of claims, the full disclosure prompted settlement soon after the pre-trial. On claims that went to trial, the attorneys were better prepared. The trial ran smoothly. It was more under-

standable to both the court and the jury and took much less time. The even tempo of the trial was not delayed for identification of exhibits and rulings on their admissibility, nor for recesses for arguments on points of law.

The success of pre-trial in the Federal courts is due not only to the wording of the rule and its application in court, but especially to the institutes and demonstrations sponsored by the Federal judges and the bar. After ten years of pre-trial in the Federal District Court for Colorado and a continuing educational program, pre-trial, it can be said, is successfully at work in the Federal court. At least 75 per cent of all attorneys appearing in the Federal trial court are fully ready for the pre-trial conference. The remaining 25 per cent include some who seldom appear in the Federal court and the newly admitted attorneys. However, even those in this group are usually prepared for the pre-trial conference on their second case.[2]

PRE-TRIAL IN THE COLORADO DISTRICT COURTS

Rule 83 of the Colorado Rules of Civil Procedure specifically authorizes trial courts to adopt rules. Only four of the fifteen state judicial district courts have taken advantage of this power and implemented the pre-trial Rule 16 with a rule of court. The four judicial districts with court rules on pre-trial are the Second (Denver), the Fourth (Colorado Springs), the Eighth (Boulder, Fort Collins, and Greeley), and the Tenth (Pueblo). The pre-trial court rules are of two types, permissive and mandatory. The rule in the second judicial district is mandatory. "The judge . . . shall hold a pre-trial conference . . . . Each judge shall keep a pre-trial calendar upon which each case in his division shall be set for pre-trial conference".[3] No case is to be set on the trial docket until a pre-trial conference has been conducted. A similar mandatory rule of court is found in the fourth judicial district.[4]

A permissive rule of court is found in the eighth judicial district. "Pre-trial conferences may be had after a case is at issue as the court directs, either upon motion or suggestion by either party upon notice, or upon the court's own motion."[5] There is no pre-trial calendar. The same is true in the tenth judicial district.[6]

Statistics on pre-trial at work in the state district courts are not available. Some day we hope Colorado will have an administrative office for the state courts. This office would keep the statistics and books necessary to determine whether the state constitutional

[2] The "Annual Report of the Director of the Administrative Office of the United States Courts" gives accurate and interesting figures on how pre-trial has helped to insure prompt justice in the Federal courts. *See* also, "A Panel Discussion of the Practical Operation of the Colorado and Federal Rules of Civil Procedure Concerning Depositions and Discovery and Pre-Trial Procedure", 21 Rocky Mt. L. Rev. 38 (1948).

[3] Rule XI, Rules of Court, 2nd Jud. Dist.

[4] Rule IV, Rules of Court, 4th Jud. Dist.

[5] Rule VIII, Rules of Court, 8th Jud. Dist.

[6] Article I, Rule 19, Rules of Court, 10th Jud. Dist.

requirement [7] of a speedy remedy for every injury and administration of justice without delay, is being given to the people.

In the absence of statistics, experienced opinion must be relied on. However, before considering estimates, the importance of the pre-trial conference must not be misunderstood. The pre-trial conference is an important procedure, but it should never, in practice, be isolated from the fullest use of deposition and discovery (Rules 26 to 37, both inclusive) and summary judgment (Rule 56). Pre-trial is not a substitute for timely use of discovery procedures. The pre-trial conference should be the climax which brings these procedures into focus. The January 23, 1950, decision in *Duffy v. Gross* [8] illustrates this point. In December, 1945, there was a two-car intersection accident in Pueblo. A damage claim was the result. The defendants did not file a motion for a bill of particulars, nor did they use any other means to get a particular statement of the alleged negligence. The case was at issue on September 13, 1947 and was set for trial to the jury on Monday, October 20, 1947. On October 20, 1947, the defendants obtained a continuance to October 27, 1947. Finally on October 27, 1947, the defendants asked for a pre-trial conference. This request was granted and set for 2 o'clock p. m. that same day. At the conference the defendants finally asked plaintiff for a statement of the acts of negligence on which the plaintiff was proposing to rely. Plaintiff's objection was sustained, and it was not until the plaintiff's opening statement at the beginning of a four day trial that the defendants learned of plaintiff's position. The defendants lost and assigned as error on appeal the trial court's refusal to order the disclosure at the pre-trial conference. The Supreme Court affirmed. In its first opinion on pre-trial, it said:

> . . . From all of these circumstances, we do not see wherein the defendants were prejudiced by the ruling of the trial court in the pre-trial conference. Further discussion of the failure of the court to compel plaintiffs to disclose the specific acts of negligence upon which they relied, and which is the real basis of this assignment of error, it not necessary other than to say that the pre-trial conference rule is designed to expedite trials when certain facts may be admitted and the necessity of proof thereof obviated. The proper courtesy of the profession enables this to be done, usually in a few moments at the beginning of a trial, without pre-trial conference. Usually, obvious facts are admitted, but we see nothing in the rule that is compulsory as to the disclosure of the details of the issues to be made by the pleadings. As to whether or not a pre-trial conference is to be called, rests entirely in the discretion of the trial court and that discretion abides throughout the procedure.[9]

The purposes and flexible uses of the pre-trial are broader than the normal courtesy of the profession which enables certain

[7] COLO. CONST. Art. II, § 6.
[8] Duffy v. Gross, ... Colo. ....., 214 P. 2d 498 (1950), 1949-50 Advance Sheet 198 (No. 14 dated Jan. 28).
[9] *Ibid.*

facts to be admitted and strict proof to be obviated. This case illustrates a failure of the defendants to use any of the discovery facilities provided for under the rules, and then in a belated conference trying to use pre-trial in place of discovery. The pre-trial conference, to be effective, must be before the trial and, in most cases, not on the day of the trial.

RULE GAINING IN FAVOR AMONG JUDGES AND LAWYERS

A sampling of the opinions of various Colorado district court judges has yielded a variety of attitudes toward the pre-trial conference. Some judges do not conduct pre-trial conferences. The reasons for this disregard of Rule 16 are varied. Some judges, on the motion of attorneys, permit them to be held, but with a belief that they have no value. Some judges insist on the use of a pre-trial conference, but their explanation of their use often reveals a misapplication of the nature of the pre-trial contemplated by the rule. This latter group includes the judges who telescope the pre-trial conference into the actual trial itself as well as those who label as a pre-trial conference, the meetings of the attorneys in person, or even by telephone or by letter, and the stipulation of facts on issues that result from such meetings. An increasing majority of judges, however, require pre-trial in all cases and are studying and exploring its flexibility in order to obtain its maximum advantages.

Among lawyers, pre-trial is receiving greater, though not unanimous, acceptance. Probably the most controversial factor in the consideration of pre-trial is its relation to the extra-judicial settlement of pending litigation. By its very name and nature, the pre-trial is not, and should not be regarded, as an instrument for the judicial coercion of the settlement of claims. It is true that many settlements follow as a result of pre-trial conference. However, these settlements are merely by-products of the pre-trial procedure the same as settlements which result from a sharply contested trial. The purpose of the pre-trial conference is to prepare for trial. In fact, when trial is improbable, there is ordinarily no occasion or purpose for a pre-trial conference. Some lawyers are adverse to the pre-trial procedure because, they allege, it forces them to show their hand. Such an attitude in the Colorado trial courts of today is quite unrealistic. It mistakes the real function of the pre-trial rule, and what is worse, it ignores the fact that the rules for discovery are set up to give the opportunity to explore the opponent's case.

No statistics or newspaper comment on pre-trial in areas outside of Denver have been found. The *Rocky Mountain News,* in January and February of this year, focused attention upon the jammed docket in the civil division of the Denver district court. The reporters conceded that the pre-trial system had been helpful,

but urged that at least two additional judges were necessary.[10]

How helpful pre-trial has been in the Denver district court is best brought out by some figures obtained through the courtesy of the clerk of that court, J. B. Goodman, Jr. Most judges have conceded the use of discovery procedure and pre-trial for contract claims. They have been reluctant, however, to accept pre-trial for damages cases which bulk large on every docket. Therefore, a sample was made of some automobile damage cases filed and tried in 1940, 1942, and 1948.[11]

Those cases filed in 1940 took an average of 2.79 days for trial. Only 21 per cent of them were tried to the court. After the new rules and pre-trial became effective, an improvement was noted. The trial time for cases filed in 1942 was only 1.5 days. This was a saving of 1.29 days per case tried. 45 per cent of all of the cases tried were tried to the court, compared to 21 per cent of the cases under the code. The trial time for cases filed in 1948 was also only 1.5 days. Of the total number of damage cases filed in 1948 that were tried, 40 per cent of them were tried to the court.

Not all of the claims filed in 1942 and 1948 and later tried were pre-tried. As late as 1948, only 27 out of 60 cases had a pre-trial conference. Pre-trial was waived in 19 cases, and in 14 cases there was neither pre-trial nor waiver. However 11 of these 14 cases were one-day trials to the court. An outstanding value of pre-trial has been the reduction in the number of cases which have been actually tried either to the court or to the jury. Long experienced district court officials in Denver expressed the opinion that the exchange of information contemplated by the discovery procedures and pre-trial conferences had substantially reduced the need for trials. Statistics to verify or refute this opinion are not available.

FREQUENT FAILURE TO ENTER PRE-TRIAL ORDER

Rule 16 provides, "The court shall make an order which recites the action taken at the conference . . . ." In many of the cases studied no pre-trial order was made by the court. The absence of the pre-trial order is a great loss to the court and to counsel. Pre-trial orders are not entered and mailed to counsel for the same reason that there is not an adequate number of judges. Money has not been made available to provide the additional stenographic help. However, in many of the files are found the handwritten notes of the judges on the pre-trial conference. In some cases these have been adequate.

The absence of undue delays in the administration of justice, wherein there is provided speedy remedy for every injury, has always been a yearning of civilized man. This yearning is firmly intrenched in the Colorado constitution. The people of the State

[10] Rocky Mountain News, Feb. 8, 1950, p. 22.
[11] No case filed, but not tried, was included in any sample.

of Colorado look to the judges to be wise and prompt administrators. Percy Morris voiced the prophesy back in 1941 that if the pre-trial conference were put into effect by the judges and wisely administered by them, it would prove to be one of the most beneficial changes under our law.[12] Prompt justice is a constant challenge to, and a primary responsibility of, our judges. The pre-trial is now a well-proved, modern instrument. It is a flexible instrument that is adaptable to the constant variation of the human element in litigation. While the pre-trial conference rule has been adopted in the Colorado Rules of Civil Procedure, our trial courts, for the most part, have not implemented the pre-trial conference rule with trial court rules making pre-trial mandatory and establishing pre-trial calendars. Even where trial courts have adopted an implementing pre-trial rule, the judges' warm and enthusiastic use of the pre-trial conference has been lacking. This lack is, in part, due to the judges' not having had an opportunity to see the benefits to the people and the judiciary when the pre-trial is warmly and wisely used.

For the future, it can be hoped that more of our trial courts will adopt a mandatory implementing pre-trial rule and a pre-trial calendar. Let us hope that in 1960 it can be reported that, during the past decade, attorneys fully and ingeniously used discovery procedures, and that the judges insured a speedy remedy for every injury by use of the pre-trial conference.

A COMMENT ON PRE-TRIAL PROCEDURE

HON. J. FOSTER SYMES
Judge, U. S. District Court for the District of Colo. (Ret.)

Pre-trial has now been a part of the reform procedure in the Federal courts long enough to demonstrate that it is a great success when properly used. True, this section of the new rules is indefinite as to methods. Practice simply leaves that up to the judge. Success or failure, therefore, is strictly up to the court and the members of the bar who use it. I have been an advocate of it from the first time it was suggested before the Rules were adopted. It will not succeed unless the court is sympathetic with the new procedure, insists upon its use and insists further, that the bar take it seriously.

In a good many courts, especially in the state courts, it is a voluntary matter whether the case is "pre-trialed" or not. Where used by a sympathetic court and bar, there is no question of its advantages in saving time and effectuating justice. Every case in the Federal District Court in Colorado is "pre-trialed" as a matter of course, and the bar is now educated to take it seriously and prepare for it the same as they do for the trial of the case itself.

Recently, Judge Phillips, in speaking to the bar on the success

[12] *Supra*, note 1.