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PRETRIAL CONFERENCE IN FLORIDA

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It has recently been said that "More has been accomplished in this country in the last quarter-century to improve the administration of justice than in the preceding 250 years."[1] Such innovations as notice pleading, discovery depositions, judicial notice by the courts of one state of the laws of a sister state,[2] liberality in the use of business records as evidence, pretrial conference and many others, have been adopted as a result of public demand that the legal profession keep abreast of other fields, where so many timesaving devices have contributed to make our civilization what it is today. If legal procedure as it is known today is to survive, judges and lawyers alike must accept these changes in the spirit which has brought about their enactment and must conduct themselves so as to give these reforms their full and genuine effect. Otherwise, further encroachments by outsiders are sure to take place, resulting in economic distress for many members of the profession.[3]

UNDERLYING ATTITUDE AND BACKGROUND

The present subject affords an opportunity to discuss the necessity for a change in attitude of the lawyer toward methods to be employed in the prosecution of a lawsuit. If pretrial procedure, as well as the other innovations which have been adopted, is to be successful, counsel for the litigants must adopt toward it an attitude of fair and open mindedness.

[1]Vanderbilt, *The Pretrial Conference—An Efficacious Step for Improving the Administration of Justice in the Trial Courts,* Case and Comment, Jan.-Feb. 1951, p. 18.

[2]Florida recently adopted the Uniform Judicial Notice of Foreign Law Act, FLA. STAT. §92.031 (1949); see Legis., 3 U. OF FLA. L. REV. 94 (1950).

[3]It is a matter of public discussion that "prospective litigants 'would rather take a licking' than face up to long drawn out litigation." See *Behind the Front Page,* Miami Herald, March 5, 1951, p. 6A, col. 3.

In the past a lawsuit was considered a game of wits. The public not only acquiesced in this consideration but actually encouraged it. But now public attitude is altered, and it becomes the obligation of the lawyer to make such adjustments as will satisfy the present public demand.

For many years a term of court was a social event in the community. Courtyards were filled with mules and wagons, picnic parties and large groups of citizens enjoying a festive occasion. The courtroom was crowded with spectators. In those days people found their diversion and entertainment either in the church or at the courthouse. In so far as a lawsuit was concerned, the only ones interested in the justice of the cause were the poor litigants. Their interests, however, frequently were sacrificed in order to entertain the spectators. The dramatic and sensational could be developed best by conducting forensic battle on the basis of guerilla warfare, with both sides firing from ambush.

Today such tactics, like the horse-and-buggy doctor, belong to another era. The picture-show and the radio have emptied the courtrooms. The public is no longer interested in a lawsuit as a source of entertainment. It demands results without fanfare and delay. The time has come when the legal profession must accept a lawsuit as "an orderly, even if adversary, search for truth and justice."[4] Pretrial conference, where habitually employed, has been found to contribute much to this end.

In the space of a single article it is impossible to present the background in law or to trace the development and growing popularity with both bench and bar of this important device. The literature on this subject includes one recent book,[5] which is both thorough and scholarly and is strongly recommended, and numerous articles.[6]

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[4]Ackerson, *Pretrial Conferences and Calendar Control: The Keys to Effective Work in the Trial Courts*, 4 RUTGERS L. REV. 381, 382 (1950).

[5]NIMS, PRE-TRIAL (1950), reviewed in this issue. This valuable work, jointly sponsored by the Committee on Pre-Trial Procedure of the Judicial Conference of the United States and the Council of the Section of Judicial Administration of the American Bar Association, is published by Baker, Voorhis and Co., Inc., New York. It contains an exhaustive bibliography at pp. 309-319.

[6]The reader is referred especially to Fee, *Justice in Search of a Handmaiden*, 2 U. OF FLA. L. REV. 175 (1949); Laws, *Pre-Trial Procedure—A Modern Method of Improving Trials of Law Suits*, 25 N.Y.U.L. REV. 16 (1950). Both of these authors are outstanding federal judges, with years of pretrial experience. See also Brand, *"Mighty Oaks" — Pretrial*, 26 J. AM. JUD. SOC'Y 36 (1942); Fisher, *Pre-Trial Conference and its By-Products*, [1950] U. OF ILL. L. FORUM 206.

It is difficult to lay down an exact formula for the conduct of a pretrial conference, because so much depends upon the particular circumstances of each case, the personalities, skill and talents of the judge and the lawyers, the preparation of counsel, their disposition toward cooperation, and many other factors. An effective technique can be developed neither by merely reading articles or books nor by listening to a lecture on the subject. It is best to observe a pretrial conference in operation. To this end, bar associations in many parts of the country have presented model pretrial conferences to conventions and assemblies of lawyers.[7] Finally, nothing can take the place of knowledge gained through trial and error in actual participation in the pretrial consideration of one's own cases.

PRIMARY PURPOSES

The present rule in Florida providing for a pretrial conference is:[8]

"After all issues are settled the court may of its own motion or shall on motion of either party to the cause direct and require the attorneys for the parties to appear before it for conference to consider and determine:

(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) Such other matters as may aid in the disposition of the action.

"The court shall make an order reciting 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 limiting the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court

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[7]The Florida Bar offered such a presentation at its 1951 Annual Convention; see 25 FLA. L. J. 171 (1951). For detailed scripts used elsewhere, see *Demonstrations of the Pretrial Conference,* with Judges Donnelly, Holtzoff and Laws presiding, 11 F.R.D. 3-43 (1951).

[8]FLA. C.L.R. 16, FLA. EQ. R. 77.

shall establish by rule a pre-trial calendar on which such actions may be placed for trial or consideration."

It will be observed that the holding of a pretrial conference is no longer optional with a judge. If he is not disposed to call the conference himself, either party may demand one and neither the judge nor the other party has any choice in the matter.

Some difference of opinion exists regarding the real purpose of the pretrial conference. Two schools of thought have developed in this connection. One group lays stress upon the simplification of the issues, while another accords greater importance to effectuation of a settlement at the pretrial conference. This latter group points out that every lawsuit at some stage or other ends in a settlement. It observes that actually the jury verdict is neither more nor less than a settlement of the disputes between the parties. It argues that the sooner settlement can be effected, the better for the litigants, the lawyers and society as a whole.[9] This is good argument. Nevertheless, the spirit of the rule seems to indicate that the true purpose of the pretrial conference is to simplify the issues. The possibility of settlement should not be overlooked, by any means, and every effort within the limits of judicial decorum should be made to bring the parties together if possible. At this stage, however, the judge must use care that he does not show undue zeal in influencing the result; otherwise he will soon bring about distrust and suspicion of his handling of such matters.

Notice Pleading and Discovery

It is important to note that an order must be entered, reciting the action taken at the pretrial conference, and that it "shall control the subsequent course of the action."[10] Thus the pleadings, which formerly performed this function, are relegated to the minor position which they really should occupy in legal controversies. The old system collapsed because it attached too much importance to the written pleadings; they were given a greater responsibility than they could possibly bear. Under the former practice their object was to apprise the opposite party of everything to be presented at the trial, to the end that he would not be taken by surprise. Even with the liberality of a bill of particulars this was impossible. Technicalities sprang up

[9]See Fisher, *supra* note 6, at 206.

[10]See note 8 *supra.*

and were adopted to protect a party against surprise. The application of such technicalities resulted in many miscarriages of justice. Litigants were sent from the courtroom confused and lacking confidence in the system when the trial ended abruptly because of a variance between the allegata and the probata. Many judges felt dissatisfaction when called upon to direct a verdict merely because an attorney adopted one form of action and another was found appropriate at the trial. Such a situation should, and would, have been corrected at pretrial conference, and a ridiculous ending would thus have been avoided.

Today the function of the pleadings has been taken over by no less than three separate steps in the progress of the cause: (1) the pleadings; (2) the discovery processes; and (3) the pretrial conference. Formerly the pleadings were considered a most important phase of the litigation, but under the present practice they are possibly the least important.

The present rules of pleading require the pleader to state no more in his complaint than a bare cause of action, giving his adversary only such particulars as will enable him to frame a reply.[11] Bills of particulars are no longer used. If the complaint sufficiently identifies a particular legal cause of action, so that the defendant can select the transaction which the plaintiff has in mind and from that make a decision as to his defenses, it is sufficient, and adequately supports a plea of res judicata if defendant is sued a second time for the same transaction. This is all that is expected of the complaint under modern practice.

This form of pleading has been referred to as "notice" pleading, because its function is to do no more than notify defendant of the particular action brought against him.[12] Other particulars necessary to protect a party against surprise at the trial are properly disclosed by the discovery processes and by oral statements of counsel openly and fairly made at pretrial conference.

At the beginning of the conference the judge calls upon the attorneys to make a statement of the issues in dispute similar to that which would be made as an opening statement to the jury. The oral statements are next boiled down and embodied in the pretrial order,

[11]Even under the new Florida Common Law Rules a cause of action must be stated, as distinct from a mere grievance, Messana v. Maule Industries, Inc., 50 So.2d 874 (Fla. 1951).

[12]Blume, *Theory of Pleading—A Survey Including the Federal Rules*, 47 MICH. L. REV. 297 (1949).

which becomes the chart for the conduct of the trial. The pleadings are thus merged in the order, have now served their purpose, and to a great extent may be ignored from here on. Under the new rules they are playing backstage to the pretrial conference, inasmuch as the latter obviates the necessity of indulging in technicalities to protect the parties against surprise.

If the statements of counsel disclose that the sole issue between the parties is one of law, the court can enter judgment forthwith, thereby terminating the litigation. Under the old practice this stage could not be reached until one of the parties could make a motion during the trial for a directed verdict. Of course, if questions of fact are involved, they should be clearly and succinctly identified in the pretrial order and left for the jury's decision.[13]

Closely related to the pleadings is the new discovery procedure, by which a party has ample opportunity to examine the adversary, his witnesses, and the documents and physical objects under his control, as well as to learn of many details incident to the litigation which formerly were left undisclosed until the very day of the trial. After the suit has been conducted through the three steps just mentioned, it is difficult to see how surprise at the trial can occur. A variance between allegata and probata is hardly possible, and the abrupt conclusion of a trial because of such an anomaly should now be at an end.

Types of Issues Readily Settled Before Trial

The issues presented by the pleadings are by no means the only items to be simplified at the pretrial conference. There are many things which might bring about dispute at the trial and thus unnecessarily prolong it, and which may nevertheless be easily disposed of and eliminated from further controversy at the conference.[14] Among these are the number of peremptory challenges to be exercised by the parties; the number of expert witnesses to be used; whether the jury is to be questioned by the court or by counsel; whether the parties are covered by insurance, and the name of any insurance company involved; whether the members of the jury are to be questioned about their interests in insurance companies; whether maps, photographs,

[13]*E.g.*, Scalise v. Florida Commercial Trailer Corp., 52 So.2d 115 (Fla. 1951); Bruce's Juices v. American Can Co., 155 Fla. 877, 22 So.2d 461 (1944); Hillsborough County v. Sutton, 150 Fla. 601, 8 So.2d 401 (1942).

[14]An agenda of no less than 35 matters is used in the Fifteenth Circuit. It has been set forth at length in Nims, Pre-Trial 15, 16 (1950).

sketches, diagrams, X-ray films, bills and statements, correspondence, contracts and receipts, and other exhibits are to be admitted; whether city ordinances and foreign laws are material and undisputed; whether depositions are to be used and whether there are any technical objections to be made thereto; whether a view of the scene is in order; whether mortality tables and annuity tables are pertinent; whether deed or mortgage records or other public documents are required, and whether abstracts of title may be used in lieu thereof; whether certified copies of public records or court files in other actions, in view of the expense attendant upon their use, are essential; whether the cause of personal injuries or death in wrongful death actions is disputed; whether a physical examination of a person or physical objects is in order; whether witnesses are to be placed under the rule; whether medical testimony can be agreed upon or, alternatively, at what stage of the trial a busy doctor is to be brought to the courthouse; and, finally, whether there are any possibilities of settlement.

At some point in the proceedings, counsel should be called upon to exchange the names of witnesses. If jurors are to be questioned by the court, counsel should be asked to present any special questions that they want propounded.

It may also prove helpful at this time to discuss any novel questions which might arise upon some particular phase of the evidence or damages, as well as special charges to be requested or given. The court is frequently able to express its views regarding such matters and thereby eliminate extended argument during the trial.

At the close of the conference, of course, if settlement seems impossible, the date of trial should be set.

Types of Proceedings in Which Pretrial Conference Is Most Effective

A great majority of the actions now before the law side of our courts are automobile cases. Only a jury can settle dispute as to what brought two automobiles into collision at a street intersection. Therefore, it is hardly possible that determination of such action can depend solely upon a question of law. Nevertheless, pretrial conference has proved most helpful in bringing the parties quickly to the real dispute. Agreement should be promptly reached regarding the ownership and operation of the automobiles in question. City ordinances, or foreign law if the accident occurred in another state, are considered. Hospital records, doctors' bills, and the like are received, with questions of

liability alone reserved for the jury. When claim is made for damage to a motor vehicle, repair bills, estimates of repairs, rental value, and other facts going to establish the measure of damages can often be settled. Frequently the parties are able to agree upon the amount of diminution in value of the damaged vehicle, so that the jury is faced merely with the problem of deciding who was at fault in causing the accident and the extent of claimant's injuries, if any. As a result, a personal injury action can be tried in about half the time formerly required.

Litigation frequently arises over claims by real estate brokers for commissions. At pretrial conference the true nature of the dispute can be determined at once from an informal discussion of the transaction. Often the issue is whether the broker procured some particular sale. Listings and other contracts can normally be filed without much dispute; and the ability and willingness of a prospective purchaser to buy, and similar questions, should be discussed with a view to eliminating all items not in substantial or plausible controversy.

Suits on open account, under the old practice, caused a great deal of trouble, when in fact they should be made quite simple. The difficulty grew out of the technicalities surrounding the introduction of shop books and business records into evidence. Pretrial conference avoids all of this difficulty. Shop books, ledger sheets, mercantile accounts, and the like should be received upon an informal explanation of their origin. The customer's objections to the whole account or some particular item may be stated. By informal discussion, the real dispute, if bona fide, is revealed; and it alone is submitted to the jury.

An action of ejectment is ideally suited for disposition at pretrial conference, because frequently the basic issue is one of law. If adverse possession constitutes the real dispute between the parties, the record title can easily be stated in the pretrial order without bringing into court great stacks of certified copies of public records or other documents. Frequently the judge can take an abstract of title, produced at the time by counsel, and from it dictate into the pretrial order the complete chain of title, thereby eliminating the expense of procuring certified copies of public records.

Replevin actions are brought in many instances by those holding retain-title contracts. At pretrial conference this contract is promptly received in evidence, and the court loses no time in determining precisely the defendant's reason for denying that he owes the balance alleged due. The parties are usually able to agree upon such questions as the value of the property involved.

In litigation over building contracts, the contracts themselves and the specifications may be received and informally discussed; and the contractor's books of accounts, invoices, time-books and the like are presented for examination. Often a settlement can be effected as soon as the parties have been able to examine the contractor's records and accounts with subcontractors, materialmen and laborers.

Many other types of contract actions present solely questions of law and can be determined on the spot.

Pretrial conference may also prove helpful after grant of a new trial or reversal of a judgment by the Supreme Court. The parties can be brought once again before the trial court; and if it appears that no substantial difference in the evidence can be shown or that no additional evidence is at hand to change the result the court can promptly and finally dispose of the case. Whenever liability is fixed by Supreme Court reversal, the parties may well reach prompt agreement upon an appropriate measure of damages.

In extraordinary remedies, such as habeas corpus, mandamus, quo warranto, and prohibition, pretrial conference is a great help. In this type of litigation questions of law are usually the only ones involved; and after the parties make their statements of facts the question of law is disclosed and the court is able to decide the case at once.

In chancery matters, pretrial conference has likewise proved a great success. In those circuits where masters in chancery are still used, the judge should nevertheless hold a pretrial conference and certify to the master for determination specific factual questions only. These are readily disclosed by the oral statements of counsel at the conference.

Again, suits for declaratory decrees and to quiet title on tax deeds depend in many instances on pure questions of law.

In accounting actions, involving numerous books and records, the pretrial conference saves time by eliminating the necessity of technical proof.[15] Pertinent records can be produced, explained informally and

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[15]Attention is called to FLA. EQ. R. 61: "All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party orally, or upon interrogatories, or by depositions, as the master shall direct."

The following reference is found in MCCARTHY, FLORIDA CHANCERY ACT ANNOTATIONS 154 (2d ed. 1935): "For an exposition of the practice under this section see Cushman & Denison Mfg. Co. v. Grammes (D.C. Pa.), 225 Fed. 883; Beckwith v. Malleable Iron Range Co. (D.C. Wis.), 207 Fed. 848; Coffield Motor Washer Co. v. Wayne Mfg. Co. (C.C.A. 8), 255 Fed. 558."

inspected. Copies of documents can be accepted in lieu of originals, thereby eliminating the notice to produce and similar technicalities.

In mortgage foreclosures the court learns from counsel why the mortgage is in default and whether defendant has a bona fide or plausible defense. If the mortgagor's defense is an affirmative one, the trial can commence with his assumption of his burden of going forward with his proof.

As one can readily realize, divorce cases are not always suitable

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The reason for limiting the rule to "accounting before a master" is understood when it is seen that the rule in its present form is in fact a "carry over" of a rule adopted more than a hundred years ago and then appropriate to accepted practice. The English Chancery Order of 1828 promulgated the rule: "That all parties accounting before the masters shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the master shall direct." See HENDERSON, CHANCERY PRACTICE 413 (1904).

BACON, ORDINANCES FOR THE ADMINISTRATION OF JUSTICE IN THE CHANCERY COURTS contains the following statement: "Matters of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference, nevertheless: that the cause comes first to a hearing, and, upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts to make it more ready for a hearing." See also FLETCHER, EQUITY PLEADING AND PRACTICE 1053 (1913). At p. 594 he makes this observation: "It is not erroneous, though it is bad practice, for the chancellor to take an account himself, except in simple and obvious cases, in order to save expense to litigants. In cases of a complicated character, involving matters of account between the parties, justice cannot well be done without a reference, and the chancellor ought to refer the subject to a master, to take and state the account. The practice of finally hearing, without the intervention of a master and the aid of his report, cases involving the settlement of accounts, is unsafe to litigants, and burdensome to the court, and should not be followed."

Bearing in mind the availability of modern bookkeeping methods, full and complete discovery by oral interrogation of the parties and their witnesses, inspection of an adversary's books and records, and pretrial conferences, the soundness of the policy as formerly stated is today open to dispute. References to a master frequently involve extravagant costs to litigants and tend unnecessarily to prolong final disposition of a case. Hence, in many courts today it is the practice to try all contested chancery cases before the judge. A master is seldom appointed. When a case is being tried before a chancellor and without a master, there seems no good reason why the conditions of the foregoing rule should not be invoked and the parties required to bring in their accounts at pretrial conference. At any rate, such has been the practice on occasion in the Fifteenth Circuit, with beneficial results. The rule in question is out of date and should be revised.

for final disposition at pretrial conference, because the field for admissions is necessarily limited. Pretrial conference is helpful, however, in property disputes; and admissions often serve to eliminate proof regarding both the husband's ability to support his family and the extent of the necessities of its members.

TECHNIQUE OF PRETRIAL CONFERENCE

It seems advisable to hold the pretrial conference not later than one week, and not earlier than two weeks, before the trial. In no event may the conference be held until the pleadings are settled.[16] All discovery should be completed before the pretrial conferences. Counsel should have at least two weeks' notice of the conference, so that they will have ample opportunity to review their files, to interrogate witnesses, to confer with opposing counsel regarding matters to be admitted, and otherwise to prepare themselves to the same extent that they would for the actual trial. Notice is given counsel by mailing to each a copy of the court order calling the conference.[17] The clerk may mail it; and in any event a certificate showing the time and manner of service should be appended.

The attorney who is to conduct the trial should attend the conference; and the judge who is to preside at the trial should preside

[16]See note 8 *supra*. There is no such restriction in federal procedure; see FED. R. CIV. P. 16. The Florida practice is not detrimental, however, if counsel will bear in mind that motion for summary judgment, which may be made before the issues are settled, is an effective way to weed out claims or defenses lacking factual evidence. See FLA. C.L.R. 43, FLA. EQ. R. 40; Wigginton, *New Florida Common Law Rules*, 3 U. OF FLA. L. REV. 1, 6-7, 24 (1950).

[17]The form of order adopted in the Fifteenth Circuit follows:

"ORDER DIRECTING PRETRIAL CONFERENCE

"The Court directs the Attorneys for the parties to appear before it for a Pretrial Conference on _____ at _____ o'clock __m., at the Court House, West Palm Beach, Florida. In order that the conference may be most helpful, please be as fully informed on the facts, and as prepared on the law as you expect to be on the day of trial.

"All documentary evidence must be presented at pretrial conference. Only that presented at pretrial conference will be admitted in evidence, except for good cause. All discovery should be completed before the pretrial conference. Experience has indicated that if counsel is fully apprised of the facts, the presence at pretrial conference of the litigant is unnecessary.

"Upon failure of the attorney to attend the hearing, it shall be within the Court's discretion, sua sponte, to dismiss the suit or strike the answer, or take such action as the manifest justice of the cause requires."

at the pretrial conference.[18] Our experience has indicated that a more satisfactory result is obtained if the conference is held in the absence of a court reporter and parties litigant.[19] This assures a complete lack of self-consciousness on the part of counsel and promotes free and open discussion. If counsel wish their clients to be present, however, this is entirely permissible and is in no way in conflict with accepted practice.

The judge usually takes notes as the conference progresses and dictates the pretrial order in the presence of counsel, thereby casting the chart for the trial in final form on each point while it is fresh in the minds of all concerned. We believe this plan superior to that of having counsel meet after the conference to prepare the order, as is the practice in some courts.

An atmosphere of informality should prevail at the pretrial conference. At the outset the judge requests counsel for the plaintiff to state his factual contentions regarding liability of the defendant. He then asks counsel for the defendant to state his factual contentions as to absence of liability and also his affirmative defenses. Plaintiff's counsel may then reply to the affirmative defenses. This procedure at times proves quite informative to the defendant as well as to the court. Without pretrial conference plaintiff's position as to affirmative defenses in an action at law is seldom made known to defendant until the actual trial because the rules provide that affirmative defenses are automatically "denied or avoided" without the necessity of formal written reply.[20]

If the conference should end at this point and nothing further be accomplished, it still will have proven its value. In the first place, it compels the attorneys to center their attention on the particular case soon to be tried. Many lawyers have admitted frankly that this factor alone is most helpful to them, because it forces them before the eve of trial to correlate their material for the first time. In addition, the judge is briefed on the case. He has an opportunity to think about and go over any novel questions involved. When he steps upon the bench to try the case he knows what it is about and

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[18]In other jurisdictions, *e.g.*, the District of Columbia and Texas, the trial judge often is not the conference judge, but he at least has the benefit of the pretrial order and careful notes prepared by one of his colleagues; see NIMS, PRE-TRIAL 32, 54-55 (1950).

[19]On this, too, the practice varies; see NIMS, PRE-TRIAL 85 (1950).

[20]FLA. C.L.R. 9(e). Note, however, that FLA. EQ. R. 37, which is the corresponding rule in chancery, prescribes a "reply" to a "counterclaim with a prayer for affirmative relief."

has had a chance to prepare himself on any unusual questions of law which may be presented to him. If difficult points are disclosed by the oral statements of the attorneys, he can request counsel to prepare and have available at the trial memoranda of law on these matters. Not infrequently a second pretrial conference proves helpful; and accordingly the first one should if possible be so scheduled as to leave opportunity for a second one if it becomes necessary.[21]

After counsel have made their statements, the pleadings are reviewed to see whether amendments are indicated, and if so these are made forthwith. If plaintiff has used the wrong form of action, the correct one may be substituted. Superfluous defenses are dropped. If a defense as finally pleaded is deficient in any essential element, it may be stricken and a default entered against the defendant.[22]

The parties are next called upon to present all documentary evidence to be used at the trial. Copies may be used instead of originals after they have been inspected. The court proceeds through the agenda previously mentioned; and all that transpires may be preserved for the trial by memorandum contained in the pretrial order.

We have found that the average case can be fully covered in ap-

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[21]The difference in the methods of setting law and chancery cases for trial may result in a lack of uniformity in the practice of holding pretrial conferences in the two types of cases.

On the law side of the court, cases ready for trial are placed upon a trial docket, and given a trial date, at the time the docket is "called" in open court, namely, on the Tuesday preceding the first day of the following term. It is customary in the Fifteenth Circuit to set at that time an equal number of cases for Monday and Tuesday of each week in which trials are to take place; and an effort is made to set a number sufficient to occupy the time of the court for the entire week. Pretrial conferences in all cases thus set for trial in any one week are held on the Monday preceding the trial week by the judge who is to go back on the bench and preside at the trials. One judge sits at jury trials for a week while the other attends to matters in chambers. Notice is sent to counsel two weeks in advance, and the conferences are scheduled throughout the day on the hour and half-hour, thereby allowing 30 minutes for each pretrial conference. This practice is faulty in that a second pretrial conference, if needed, is difficult to hold within the short space of time remaining before the trial date previously fixed.

Chancery cases are set for trial, when at issue, upon special order on motion of either party and due notice. This practice makes a pretrial conference possible before setting the case for trial. Upon hearing the motion, and with counsel for all parties present, the court may then call a pretrial conference and not set the trial date until the conference takes place, thereby leaving opportunity for as many conferences as seem profitable.

[22]Pennsylvania R.R. v. Greco, 157 Fla. 337, 25 So.2d 809 (1946).

proximately thirty minutes, although the element of time in each necessarily varies with its complexity.

Question often arises regarding the procedure to be followed in the event that counsel fail to cooperate or to make full disclosure of their cases. Difficulty in this respect is most often encountered with attorneys unacquainted with pretrial practice. After attending a few conferences, however, they begin to understand the underlying principles, and almost universally become enthusiastic and cooperative. They soon realize that the benefits in avoiding hazards and pitfalls through pretrial conference are mutual, and they then become eager to make the conference a success.

At this point, too, the task of the judge is a delicate one. With two opposing lawyers, the judge is often confronted with the spirit of a game. Victory for each is frequently a matter of pride. Moreover, the lawyer's naturally combative nature makes him enjoy a conflict in which wit is matched against wit. The judge's problem is to change the emotional atmosphere of chambers from that of an arena to that of a park bench, or a club room where men sit and tell each other stories. Thus is brought into play their mutual good will and their natural impulse to share in the accomplishment of a worthwhile enterprise. The game is forgotten and a new goal — cooperative endeavor — becomes the chief objective.

The rule relating to summary judgments is worthy of consideration in this regard. It provides that the court, when considering an application for summary judgment, shall ascertain "by examining the pleadings and the evidence before it and *by interrogating counsel*" what material facts are actually and in good faith controverted, and shall thereupon make an order specifying the facts that appear without substantial controversy.[23] The same procedure is permissible at pretrial conference. The court should interrogate counsel to determine what facts are actually and in good faith controverted; and whenever their answers disclose that an apparent controversy is not substantial or meritorious, or that certain defenses are not plausible and are sham, the court has the power to eliminate these issues from the case.[24]

[23]FLA. C.L.R. 43; FLA. EQ. R. 40 (italics supplied).

[24]Should the Court resolve a question when there remains in fact a genuine dispute which should go before the jury, counsel should have his objection noted in the pretrial order. At the trial he may well proffer testimony upon the subject and have it made a part of the record, so that on appeal the error of the judge will be apparent.

After the conference is over and just before dictating the order, the judge might well inquire about the progress of settlement negotiations. Sometimes it happens that an attorney hesitates to suggest compromise to his adversary, fearing that weakness in his case might be suspected. In such instances the court can be helpful by broaching the subject at this point. Even when the parties, after having previously discussed settlement, are still at odds, the court can make helpful suggestions to bring them together.

At the trial much time may be saved if, instead of the usual opening statements of counsel to the jury, the court briefly and succinctly explains the results of the pretrial conference, describing the issues agreed upon and to be tried by the jury as set forth in the pretrial order. This practice eliminates, to a great extent, the possibility of those abuses which frequently result when counsel are permitted to make advance arguments in questioning prospective jurors or overstate their evidence in opening statements to the jury.

Conclusion

The reader is urged not to become discouraged if he does not at first accomplish all that he thinks he should at pretrial conference. If progress does not extend beyond the oral statements of the attorneys, made after the pleadings have been settled, after the opposite party and his witnesses have been cross-examined by discovery depositions, and after any documents or physical objects in the adversary's possession have been examined, enough has been accomplished to justify the effort. Furthermore, this device is a constant challenge; it lends itself in the using to continual improvement. We have held many hundreds of pretrial conferences, yet the results in many have not been up to expectations.[25] After getting into the trial we discover numerous things unnecessarily consuming the time of the court and counsel and otherwise impeding the progress of the trial. These should properly have been eliminated in the pretrial conference.

It is to be remembered, too, that the pretrial order can always be "modified at the trial to prevent manifest injustice." Accordingly the order is not necessarily binding if newly discovered evidence or some unusual circumstance shows that matters disposed of at the pretrial conference should be further considered.

[25]Pretrial procedure was established in the Fifteenth Circuit in March 25, 1940, and pretrial conferences have been regularly held since that time. Currently, they are mandatory before every civil jury trial and in many non-jury actions and equity suits.

Whether in effecting settlement on the spot or laying the groundwork for one eventually made by counsel after the conference but before trial, in disposing summarily of causes governed entirely by questions of law or lacking any substantial basis in fact on one side, in eliminating waste motion at the trial, in educating the court and counsel in the subject matter of the dispute, or – most important of all – in selecting those precise factual issues which determine the outcome of the case and which must be tried, pretrial conference has already proved its worth in numerous jurisdictions throughout the United States. Its value is aptly described in the following quotation from The Honorable Henry E. Ackerson, Jr., Associate Justice of the Supreme Court of New Jersey and for twenty-three years a judge of the circuit court of that state – and his observation is typical[26] of the view entertained by the vast majority of those who have put pretrial on trial:[27]

> "In the first year under the new constitution the judges of the Law Division of the Superior Court, with one less judge available, disposed of 98% more cases than did the judges of the Circuit Court in the preceding year. Similarly, the judges of the County Courts disposed of 77% more civil suits than did the judges of the Courts of Common Pleas in the comparable period.
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> "This very substantial increase in output was due to a variety of causes but chiefly to Rule 3:16 providing for pretrial conferences in preparation for trial."

[26]See NIMS, PRE-TRIAL 75-77 (1950).

[27]Ackerson, *supra* note 4, at 381.