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HOW TO DO PRE-TRIAL IN STATE COURTS

VERNON G. BENTLEY*

As you have heard I am a State Trial Judge, and I would guess the reason I am here is that Wyoming is one of the latest states to adopt and operate under rules which are substantially the Federal Rules of Civil Procedure. We adopted these rules in Wyoming on December 1, 1957, after some years of agitation for them by the Bar and what seemed to be a reluctance on the part of the Supreme Court to promulgate the rules under authority granted to the Court by a legislative act in 1947. I think it is fair to say that most of the lawyers and Trial Judges in Wyoming did not have too much of an idea what the rules were about and we have been busy trying to operate under them since that date.

Our University of Wyoming Law School scheduled a symposium on the new Wyoming Rules of Civil Procedure in early January of 1958. A good proportion of the bench and bar attended. We had the privilege of hearing Judge Murrah, Judge Charles E. Clark, members of the Wyoming faculty, and attorneys with experience in practice under the rules from Denver. The University of Wyoming Law Journal contained these proceedings verbatim and was distributed to all lawyers in the state. Later that spring the Wyoming Judges met in Annual Conference and had the advice and counsel of Judge Murrah.

As you who have gone through this same experience might expect, we floundered around considerably. After all, when you have to basically change the way you have practiced law for many years it is not surprising to have some of the lawyers say things about the practice under the rules that remind us a little of Bob Hope when he said he would probably quit the human race if they would only give him back his entry fee.

The difficulty we find ourselves in is because the changes we have made are fundamental and require changing of habits long held and practiced. We, as lawyers, in Wyoming had developed a pretty good way of life under the code pleading system. We could file a case and sit on it for a long time. We knew the other fellow wasn't likely to answer our petition, because we probably hadn't found out or pleaded the facts. We knew he would file a motion to make more definite and certain which wouldn't come up for a while so we could talk with our witnesses and look over those records or reports the client would bring up at some later date. If it happened we did have most of the facts the other fellow probably would file a demurrer anyway and that would give us time to whip the matter into shape later. Also, many of our cases involved insurance com-

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panies and they probably would settle the matter before trial anyway. So, we coasted along, made a pretty good living, and were pretty happy.

Then, we woke up to find we had the Federal Rules. Things were changed. Someone filed a complaint against our client and we had to file an answer within 20 days, and not on the third Saturday after the second Monday. Worse than that, the complaint didn't tell us much except that they wanted to see us in Court. Worse than that, the complaint seemed to conform to the forms adopted by the Supreme Court and the Judge had already let us know a Motion to Make More Definite and Certain probably wouldn't do us any good. We were told to discover.

Now, discovery is a wonderful thing, the key to the whole new procedure, but it is not as easy as it sounds when you haven't done it. But we have had a real interesting time. The Judges, as I say, didn't know much more than the lawyers, but we immediately had to start refereeing angry sparring matches over what had to be disclosed and what did not. This necessitated a fundamental decision on the part of the Trial Judge and it is the decision that must be made and enforced by the Trial Judge if the rules, including pre-trial, are to work successfully. That decision is whether the parties must fully disclose the facts at all stages of the procedure or not. You might say that such a statement over simplifies matters, but I don't think so. The decided cases in this field seem to be somewhat of a hodge-podge. Our Wyoming lawyers have been able to find cases which are good authority to sustain or overrule any objection or request made to the Court. Why is this so? I think it is so because we are in the midst of a revolutionary type change and different Courts have resisted, or hurried the change as their basic feeling toward the change would indicate. It seems to me they might have put a postscript at the end of their decisions saying either "P.S. We like the idea of the rules" or "P.S. We don't like the idea of the rules."

We have no definite idea what our Wyoming Supreme Court will hold when some of these matters come before them, but a good indication was given in a recent decision in a case decided July 28, 1959, *Barber v. State Highway Commission*, when Justice Parker delivering the opinion of the Court made a statement that: "However, under the Wyoming Rules of Civil Procedure, the bar and bench of this state are dedicated to a full and fair disclosure of all the facts in a case at or prior to the time of trial with no withholding of certain matters to be used as secret weapons."

Our Wyoming Pre-Trial Rule is Federal Rule 16 with the added provision that pre-trial will be mandatory upon request of any party. Wyoming District Judges went a step further in the spring of 1958 when we adopted a form of order for pre-trial hearing under the general authority of Rule 83 which contemplates local rules to supplement the general rules for regulation of local practice. This rule is significant because it provides

generally that pre-trial is premature until discovery is exhausted. This local rule is intended to save the time of the attorneys and the Court at pre-trial just as Rule 16 is intended to save everyones time at trial.

The form for this rule came from the Western District of Oklahoma and Judge Stephen S. Chandler by way of Judge Murrah. With antecedents like that you would think it would be accepted without question, but I am sorry to say that it wasn't. In fact the question at the next ensuing State Bar Meeting was on a motion the effect of which was to censure the District Judges for moving too fast and I think it would have passed if one of the Judges hadn't gotten up and said, "You can't do that to us." They didn't, but the trial courts got the impression that the bar thought we were too quickly changing their way of doing business by requiring full disclosure and full use of discovery before pre-trial. Since that time we have worked along together, and I believe we are making good progress in living with and making the rules work effectively in the expeditious disposition of lawsuits.

With this background may I turn to the specific matter of "How a Judge thinks pre-trial should be done in State Courts." Of necessity my discussion will have reference to Wyoming Courts and our experience under the pre-trial rule and the local rule I have described. This approach should be a valid one because I feel certain we are fairly typical of State Courts.

First, we have a primary question of whether there should be pre-trial in every case. The pre-trial order I have described was agreed to by the Wyoming District Judges in annual conference. Some counsel argue that many cases are too small to pre-try because of expense by reason of the time involved. They have particular reference to automobile intersection type accident cases and insist that they can and will pre-try these cases themselves. We agree that this is proper and in fact we certainly do not object if counsel appear with pre-trial completed. This often occurs in such cases.

Our rule next provides that all cases will be placed on a pre-trial docket and pre-tried on a date fixed by the Court with reasonable notice of the time and place of such pre-trial to be given by the Clerk by mail to counsel of record. The time of pre-trial is a troublesome problem for all involved. In reading the literature in this field it appears there are many different systems used. Some Courts have a preliminary pre-trial just after issue and a full dress pre-trial shortly before trial. Some have a pre-trial immediately before trial, and some several weeks before trial. I think the rule should not be rigid—that the Court should vary the rule with the type of case and try to determine and meet the convenience of counsel. This sometimes is difficult because some counsel feel it is never convenient to face the music, but we have tried to be flexible in setting

pre-trial. We have come around to the thought that the pre-trial should be several weeks before the case will be actually tried, at a time when counsel knows he should be prepared because it looks like he will have to try the case anyway.

Our pre-trial order next provides that counsel who will actually try the case appear for the pre-trial. This is a must if the procedure is to be effective. I have wasted many hours with local counsel in pre-trial only to have co-counsel from out of town object strenuously to everything agreed upon and try to reopen every concession made by his local representative. Of course, the Court is difficult about this. As a matter of fact our Judges have decided there should be no pre-trial without counsel who will actually try the case, and I now continue the matter if they are not present.

Our order says that: "The attorney who will actually conduct the trial is required to appear before the Court for a conference to consider the matters which may assure justice and expedite the disposition of the action. To obtain this purpose with a minimum of time and effort each attorney should become thoroughly familiar with his case before pre-trial."

"Prior to pre-trial, attorneys should:"

Here follows a list of things we believe should be done prior to pre-trial if it is to be effective, and here is the strength of what we are trying to do. The first of these things to be done before pre-trial is:

"(1) Complete all discovery." We believe it is not possible to have a good pre-trial unless discovery is completed. Under the code the theory was that we informed each other what the case was about in formal pleading of the facts. Under the rules we are not required to do this. The suggested and accepted forms have been characterized as "notice pleadings" and they aren't much more than that in our jurisdiction. I have had several attorneys suggest we go to trial on such pleadings without discovery and pre-trial, and on reading the pleadings I certainly didn't know what the case was about, and they wouldn't really know from what they had pleaded. The only way attorneys can determine the facts successfully and properly is by use of discovery. It is a wonderful tool. You can really find out what the opposite party thinks the facts are and you can tie them down to what their story is in specific detail, much more specifically than was likely under the code. You can find out specifically what documentary evidence he has and make him show it to you. You can find out whether he disputes your documentary evidence or is willing to admit it. In short, by proper use of discovery you should be able to find out exactly what the case is all about from the witnesses and you must do so since you will not be able to tie the opposite party down by a formal detailed pleading of facts as you were able to do under the code.

It is extremely important to complete discovery before pre-trial since you are not ready to simplify issues or arrange an orderly and efficient

trial if you do not. If discovery is postponed until after pre-trial such discovery might change your claim or defense and you might be in difficulty because you didn't have full knowledge of what the case was about at the proper time.

Our Wyoming attorneys have complained that discovery is expensive. Certainly depositions are expensive. To obviate this some counsel in our state have stipulated to take depositions by sound recording without reporter's fees. We are beginning to make more efficient use of the interrogatory procedure which is not particularly costly and can be very effective when counsel discovers that the Court will certainly make the other fellow answer up properly if he tries to be evasive or hold back in his answers. It has been suggested that it is cheaper and easier to wait until pre-trial to try to get opposing counsel to stipulate without the expense or trouble of discovery. This is fine if he will stipulate. Why not contact him early in the game and find out what, if anything, he will do? When the bar decides that the Court is going to make them disclose the facts at every stage of the game they usually are willing to cooperate with each other informally in discovery to the end result of efficiency for all concerned. If you are willing to tell your story to opposite counsel in this case he will likely do the same for you the next time. The lawyers in my district have gone a long way in completely informal discovery and exchange of information to the benefit of everyone concerned.

Next our Order as to things to be done before pre-trial says:

"(2) Mark all exhibits and documents for identification and furnish copies to opposing counsel." We have had good success with this portion of the rule. Everyone realizes that much trial time can be saved by marking and receiving in evidence the documentary evidence about which there is no dispute. We have had some trouble about the requirement of marking before pre-trial and have come around to the idea of mechanical marking at pre-trial, but disclosing before pre-trial. Our order requires that copies be furnished to opposing counsel which is often not practical. We had a good discussion of this problem at a local bar meeting last week and the general thought was that the bar could arrange for exchange of information on an informal basis in most cases. If discovery has been completed and counsel is in fact ready for trial in the future this poses no problem. If counsel has not completed discovery and marshalled his evidence, pre-trial is a poor place for him to begin.

Next in our before pre-trial requirement list is:

"(3) Stipulate in writing to as many facts and issues as possible." I am frank to say that we have not yet gotten to the stage where counsel have always found it possible to stipulate to facts and issues before pre-trial, but the practice is developing as we get more experience.

If discovery is completed and counsel do know all about the case, it is

obvious that they should be able to agree on many facts and issues. It is also obvious that they can more efficiently stipulate in advance of pre-trial than at pre-trial. They will be able to more fully consider the effect of whatever they do stipulate. They will certainly save a great deal of time at pre-trial. Also, they will have proper opportunity to get their client's approval to stipulations. This can save explanations and embarrassment. It also ruins the excuse that counsel would like to stipulate but can't do so without consultation with his client. An attorney has no business at pre-trial without complete authority from his client.

The next provision in our Order reads:

"(4) Furnish opposing counsel names and addresses of all witnesses, the nature of their testimony, doctor's reports, and like instruments, and complete all other matters which may expedite both the pre-trial and the trial of this case." Here we have some real controversy. Counsel have generally been willing to furnish names of witnesses but some have held back as to the disclosure of the nature of specific facts of their testimony. These counsel insist that we have gone too far in this requirement, that to make counsel disclose witnesses and what they are going to say will ruin the art of advocacy—that it penalizes able counsel and aids the lazy counsel. The best answer we can make as Judges is that it must be so if we are to do the job we are charged to do by society—that is to efficiently dispense justice in our Courts in a timely manner. I submit that we have changed the practice of law with these rules and that we are taking away some of the surprise and strategic advantages previously had by able and hard-working counsel, but that we have done so in the name of justice and we must stand by what we have done. As Courts we are not interested in surprise or tactics as such, but are primarily interested in seeing that all of the proper and necessary evidence is presented for decision.

Later in our Order is a section marked "After Pre-trial." Here we say that if any additional exhibits or documents, or witnesses are discovered they must be disclosed at once or they will be rendered inadmissible and incompetent at the trial. We have assured counsel that we fully intend that such rule should extend to documents or to witnesses intended for rebuttal or impeachment. This causes some consternation among those who have good impeachment or rebuttal documents or witnesses, but it usually also causes them to win their cases either before, at, or shortly after pre-trial. Certainly if they have impeachment evidence that can make the lawyer look and the impeached witness look bad at trial they probably can win the case, but why not do it before trial if the evidence is really that good and convincing?

Our Order next cautions that attorneys should not request information or admissions at pre-trial which prior thereto can be obtained by discovery procedure or by simple request, and next that attorneys should previously discuss the possibility of settlement. Settlement, of course, is

one of the fine by-products of the pre-trial system. Since the adoption of the rules we have had many settlements in Wyoming because of the use of pre-trial and discovery procedures. Our requirements of discovery and preparation before pre-trial have caused attorneys who never did really look at their small cases until a day or two before trial to have a look at them. One big reason they failed to look at many of them was that they were small insurance cases which they felt relatively sure would be settled without trial. They still are settled without trial but because of the system of calling them up for consideration at pre-trial, they are getting settled earlier with a savings to all. Many lawyers are expert procrastinators under the guise of being busy. The setting of pre-trial builds a fire under them and they get the matter either settled or prepared earlier than usual.

Now, we get to pre-trial. We hold pre-trial under conditions set by the individual Judge. To date, each Judge has set the physical stage as he sees fit and there is no particular uniformity in our State. We all agree that the setting must be informal. We smoke, take off coats, and do talk freely. Sometimes we hold the conference in chambers, often in the court room, and we have been known to hold portions of the meeting in the hallway and the clerk's office. I have my reporter keep a running account of what goes on so that we can refresh our memory if a question as to what we have done should arise. We do, of course, make a pre-trial order as required by the basic Rule 16. I dictate it at the end of the conference or as the conference goes along and it is prepared, signed, and mailed to the attorneys after the conference.

Our formal Order for Pre-trial which I have been describing is simple in its direction for the conduct of the actual pre-trial. It presumes the work has been done. It says, "At pre-trial, attorneys should: (1) Fully advise the Court of all facts and legal issues involved, including details of all evidence to be presented; (2) Present all questions of law. The Court will then fix a definite trial time as convenient as possible for counsel."

I would not for a minute have you believe we are as efficient as all this implies. We are still fighting against non-acceptance by many of the bar of the fundamental changes the rules have brought about. They are dragging their feet and they show up at pre-trial without having complied with the requirements of getting the matter in hand before pre-trial, but the interesting fact is that one by one they have the exhilarating experience of winning a good case by virtue of the procedure and they suddenly become converts. I have in mind a big airplane case last year in which there were many counsel, a big claim, and much interest. We came on for pre-trial. The defendant with permission and over heated objection amended to plead assumption of risk. Plaintiff insisted on knowing who could testify to facts to substantiate the new defense theory. The Court directed that the witness and his probable testimony be disclosed. The plaintiff interviewed the witness and then dismissed the claim. A week's jury time and

much trouble was saved. The attorney who won is now all for the rules and pre-trial.

As I have said, we meet, and the Court checks to see what counsel have done in conformance with our order. Sometimes they have practically concluded arrangements for trial as anticipated and it is merely a matter of double checking with them, setting forth the agreed and disputed issues of fact and law, the marking and receiving in evidence of exhibits, and the setting of the matter for trial. Usually, however, the Court has to drag out the facts by questions. In our Court the usual sequence is to have each side informally explain its claim or defense and then try to boil the matter down by agreement. The attitude of the Court is and must be that no attempt will be made to keep any party from having a full day in Court and any claim or defense advanced by counsel will be heard. We are starting to use such aids as the pre-trial check list suggested by Mr. Duke Duvall of the Oklahoma City Bar to be certain we will not omit important matters from the pre-trial order. This list was circulated to the Judges in Wyoming by Federal District Judge Ewing T. Kerr who sits in on all our Judicial Conferences.

We have gotten past the stage where we have any substantial trouble over exhibits. All counsel seem to agree that exhibits should be marked and actually received in evidence without the necessity of foundation. We have come a long way in preparation of charts to aid in setting the scene for automobile cases and in the preparation of agreed summaries of evidence in contract and accounting cases.

In our order we do include a recitation of the exhibits, and a list of the witnesses and the nature of their expected testimony. We conclude with a date certain for trial.

The Court naturally inquires as to the possibility of settlement. Pre-trial is a logical time to talk of settlement, but it is often a subject fraught with possible difficulty for the Judge. If the Court suggests a claim might be without sufficient merit or that a defense might not stand up, counsel often feel that the matter has been pre-judged without proper trial. Every Judge certainly tries to reserve ultimate and final opinion until all of the evidence is in and argument concluded at the trial of the case. I often suggest to one or the other of the parties that they might be wise to dispose of the matter as best they can at the time of pre-trial because of the apparent weakness of their case. Often it works.

In summary let me say that I think the most important thing I have talked about is the necessity of completion of discovery before pre-trial and the doing of routine work by counsel before formal pre-trial hearing. This can and will be done when counsel decide that they must disclose the evidence and do so at the proper time.