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# PRE-TRIAL PRACTICE IN VIRGINIA

## GORDON CUMMING MURRAY

### INTRODUCTION

On February 1, 1950, the New Rules of Civil Procedure came into operation in the Commonwealth of Virginia. It is the purpose of this article to examine what effects, if any, Rule 4:1, the Pre-Trial rule, has had in Virginia during the past few years. At the request of the Honorable Harold R. Medina, during his term as Chairman of the Judicial Section of the American Bar Association, the writer has attempted to determine to what extent this rule has been employed throughout the state. Has pre-trial procedure materially aided in the administration of justice?

Much of the following material has been obtained through letters received from trial court judges, attorneys, and other parties who have shown an interest in the subject matter. In many instances, personal interviews have been utilized with trial judges and attorneys to discuss the various problems which have arisen with the emergence of pre-trial procedure in Virginia. The writer has also attended various pre-trial conferences. It is sincerely hoped that this article will aid in some small way to further the cause of pre-trial procedure in Virginia.

### WHY PRE-TRIAL PROCEDURE?

"Since every lawsuit ultimately comes to an end, why not help the parties to reach that end by amiable businesslike arrangements? Settled the case will be, if not by agreement, then by imposition through judicial pronouncement, leaving one and not infrequently both parties dissatisfied, disgruntled and with respect for judicial process considerably shaken."<sup>1</sup>

These words spoken by Judge Harry M. Fisher of the Circuit Court of Cook County, Illinois, eloquently bring out the justification for the advent of pre-trial procedure in our Federal Courts and many of our state courts. There has been widespread recognition on the part of both bench and bar prior to the promulgation of this procedural reform that trials were often not based on the merits of the case, but rather upon the adroit strategy of counsel. Frequently counsel on the day set for trial arrived at court not certain as to what the issue or issues might be. There was always that

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1. Letter from Judge Harry M. Fisher to Mr. Harry D. Nims, "Some Comments On the Relation of Pre-Trial To the Rules of Evidence," 5 Vanderbilt L. Rev. 581 (1952).

further uncertainty that certain issues of either law or fact might suddenly arise for which counsel was not prepared. In effect then, the attorneys have, unaided by the court, entirely determined the procedure to be utilized up to the time of the actual trial.<sup>2</sup>

This situation results—the complaint gives a one-sided and frequently exaggerated picture. The defendant's answer quite naturally assumes the same form. Add to this the fact that not infrequently in the ensuing rush there has been no time to verify the statements of the clients and witnesses and an utter travesty of our courts as a vehicle of justice occurs. During the trial, the issues as determined by the pleadings are often discovered to be frivolous and immaterial, and the trial judge finds himself in the distasteful position of a referee or an umpire attempting to unravel a maze of conflicting information often not germane to the real issue.<sup>3</sup>

Thus the trial has become a game of ambush with attorneys on both sides dedicated to the proposition that trial is to be based on strategy and not on the merits. Although many an attorney has won his reputation by artful courtroom maneuvers, justice has not prevailed for all the parties and the legal profession has suffered legitimate criticism.

Is it no wonder that laymen may hold such a low view of our judicial processes? As Mr. Harry D. Nims stated in a recent law review article:

“The unfortunate effect on laymen, litigants, witnesses and jurymen of the atmosphere which often prevails in a court room during a trial, can hardly be exaggerated. The impressions gained there are responsible for much of the criticism of our courts; and these impressions are based largely on the use and abuse of the rules of evidence. Not infrequently, feelings closely akin to disgust are aroused in the minds of observers when they see obviously earnest . . . honest, and sincere witnesses prevented by objections and motions based on rules of evidence from telling their story and from making what they believe, and most laymen would consider, to be an honest, helpful contribution to the solution of the problem.”<sup>4</sup>

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2. "Pre-Trial Is Readily Adapted to Rural Counties," 26 Am. Jud. Soc. 108 (1942).

3. John M. Abernethy, "Federal Pre-Trial And Jury Trial Procedure," A.B.A. Sec. of Legal Education, Practising Law Institute, Series 1, No. 8, May 25, 1946.

4. Harry D. Nims, *supra* note 1, at 583.

It may therefore be reasonably inferred that the methods heretofore mentioned have caused undue delay, expense, and above all injustice in many cases. It is a well known fact that in many jurisdictions the congested docket with an ensuing waiting period of many months and in many cases years has become the rule rather than the exception. When one realizes the extreme hardship that goes along with this delay, it presents an intolerable situation—one certainly that no American should be proud of. A recent issue of *Life Magazine*<sup>5</sup> vividly portrayed this problem in a series of pictures, showing injured and crippled waiting for their cases to come up for trial. It is obvious that there has been and is today an imperative need for reform in the procedures used in many of our courts.

### THE REFORM MOVEMENT—THE GROWTH OF PRE-TRIAL

In 1929, the first real seeds of reform were sown in Detroit, Michigan.<sup>6</sup> Under the direction of Chief Judge Ira W. Jayne and his Associate Judges of the Third Judicial Circuit of Michigan, there was started the systematic use of preliminary conferences of cases awaiting trial. Judge Jayne was hoping that this experiment might relieve some of the congestion of his docket and at the same time cure many evils of court trials. The results obtained were gratifying indeed. The Detroit jurists witnessed a reduction of court calendars, great savings in both time and expense, and the tremendous satisfaction of seeing many cases settled as a direct result of the pre-trial conferences.

Hoping to find a way to facilitate the disposition of court business, judges came from other states to observe the Detroit experiment at first hand. A successful method having been found, varying pre-trial procedures came into operation in other states as time went by. Further, the Advisory Committee appointed by the United States Supreme Court in drafting the Federal Rules of Civil Procedure provided for Pre-Trial Procedure by Rule Number 16. Subsequently Congress approved the proposed draft and pre-trial went into operation in our Federal Courts. Therefore, the emergence of this new procedural reform has not been confined to any one geographical area in the United States.

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5. "Legal Log Jam in Chicago," *Life*, November 10, 1952, pp. 127-133.  
6. Harry D. Nims, "Pre-Trial," p. 3 (1950).

By rule of the Supreme Court of Appeals pre-trial procedure has been made a part of the law of Virginia as follows:

**"RULE 4:1 [PRE-TRIAL CONFERENCE] WHEN HELD\_\_\_\_\_ OBJECT\_\_\_\_\_ EFFECT.** In any civil case, the court of its own motion or upon timely motion of any party, may direct the attorneys for the parties to appear before it for a conference to consider:

- (a) Simplification of issues;
- (b) Amendment of pleadings, and the filing of additional pleadings;
- (c) Stipulations as to facts, documents, records, photographs, plans and like matters, which will dispense with formal proof thereof; and
- (d) Such other matters as will aid in the disposition of the case.

Upon consideration of the above matters the judge shall make an appropriate order which will control the subsequent conduct of the case unless modified before or at the trial or hearing to prevent manifest injustice."

It appears that this new procedure is not being used extensively in the rural areas of the state. On the other hand in certain urban areas, pre-trial is not only in use but has the approval of both bench and bar with excellent results being achieved.

Certain theories have been advanced as to the relative non-use in rural areas. Many county attorneys feel pre-trial compels counsel to try the same litigation twice. Other members of the bar have a strong suspicion that pre-trial amounts to a discovery proceeding in substance. As one attorney said to the writer: "At my client's expense, I hate to partake of a procedure which allows my adversary to go off on a judicially sanctioned fishing expedition."<sup>8</sup>

Another idea many attorneys share is that their clients deserve their moneys' worth. When a party finds himself in litigation it often is the only time in his life that he is in a court room. Although the issue in controversy amounts to a routine matter, to him individually it is the most important piece of litigation in the world. Hence he expects and demands his day in court.

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7. Rule of Court (Va.) 4:1 (1950).

8. Throughout the remainder of the article, the writer has quoted various Judges and attorneys. In certain cases, to avoid embarrassment to the parties, there shall be no mention of name. In other instances where it is apparent that no possible harm could result the name shall be used.

Other lawyers have commented that if any admissions are made prior to the time of trial they may seriously prejudice the client's position, and the protection of the client far exceeds such elements as the saving of time, expense, etc. Undoubtedly in the minds of many members of the legal profession there is simply a reticence to try something new. Perhaps the analogy that "you can't teach an old dog new tricks" is another way of stating the problem.

It is interesting to note that in many of the letters received by the writer, attorneys in all parts of the state stated unequivocally that judges in their particular circuits were to blame for pre-trial's comparative non-use. On the other hand, various trial judges have written to say that the local attorneys are the real culprits. Quoting a judge in the western part of the state:

"I have used pre-trial conference to a limited extent only, because the attitude of the local bar has not been cooperative towards the pre-trial conference, and I have hesitated to force pre-trial conference . . . unless the same is requested by counsel. The success of pre-trial conference depends largely upon the attitude of the Bar towards it."

Along the same vein, certain judges take the position that they have no authority to compel conferences under the present rule. Certain lawyers and a few judges who have wholeheartedly endorsed the use of pre-trial declare that they are in favor of amending the present rule. They desire to see mandatory pre-trial instead of the existing permissive rule. Naturally, this suggestion has its vigorous opponents, with one faction declaring that they are in favor of keeping the rule as it now stands, while a limited few express the sentiment of the gentleman from Suffolk who stated:

"Abolish it—much ado about nothing."

Regardless of the reasons advanced, however, neither judges nor attorneys in rural areas have generally shown any desire to place cases on the pre-trial calendar. Certainly not until both sides realize the advantages that may be gained by such a hearing will pre-trial be effective. One Judge wrote that in his circuit, the number of attorneys who placed cases on the pre-trial calendar for a preliminary hearing was so negligible, that setting aside one day for these conferences was not in his opinion justified.

## PRE-TRIAL IN THE CITIES

While pre-trial has found little or no acceptance as a mode of procedure in the rural areas of Virginia, it is indeed interesting to note the progress it has made in the urban areas of the state. In certain communities, the most notable being Arlington, pre-trial is not only in use, but has the overwhelming approval of both bench and bar. Under the very able direction of the Honorable Walter T. McCarthy, Judge of the Circuit Court of Arlington County, pre-trial has been employed in every case on the docket.<sup>9</sup>

An area which previously used pre-trial to great advantage was the Seventh Judicial Circuit, under the Honorable Kennon C. Whittle. Since Judge Whittle's advancement to the Supreme Bench, Judge John D. Hooker who succeeded him, has enthusiastically continued pre-trial. He reports that its use results in accomplishments of the greatest consequence.<sup>10</sup>

In the city of Richmond the results so far have been highly encouraging. Here there are six trial courts of record, four of which have common law jurisdiction. At the present time, in one of the courts pre-trial constitutes a regular practice with excellent results obtained. In the other three courts possessing common law jurisdiction, pre-trial is being used when time will allow. In Judge Brockenbrough Lamb's Court, the Chancery Court of the City of Richmond, pre-trial conferences are held in a great many contested equity cases. Judge Lamb has stated that in practically all cases, beneficial results have been obtained by use of pre-trial.<sup>11</sup>

Bristol, Charlottesville, Alexandria, and Petersburg are communities where the practice is now being used, although it should not be inferred that in these centers pre-trial has as yet become a standard practice. These cities, however, appear to be using pre-trial more and more as time goes by.

In other urban areas such as Norfolk, Newport News, Roanoke, Fredericksburg and Suffolk, pre-trial is in comparative non-

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9. Statement made to writer during the interview held with Judge McCarthy.

10. Letter to writer from Judge John D. Hooker, Jan. 10, 1953.

11. Letter to writer from Judge Brockenbrough Lamb, Jan. 6, 1953.

use today. Why? Of the various reasons stated, foremost on the list appears to be the plain fact that pre-trial is new. As one attorney in West Point described the situation:

“Many of our judges and attorneys do not understand pre-trial practice. There being no moving force to put it into operation, this lack of understanding gives rise to a reluctance to put it into actual everyday use. Time will tend to cure this and then pre-trial’s really great potentialities will be evident.”<sup>12</sup>

## THE ACTUAL OPERATION OF PRE-TRIAL PROCEDURE

In carrying out Rule 4:1, the trial courts of Virginia have the inherent power to set up their own procedures. Each individual court has the freedom to provide such flexible rules as will suit its own needs.<sup>13</sup> Thus those procedures adopted by a trial court in Richmond will not necessarily be the same as used by a court in Danville or Bristol. This flexibility of operation should prove beneficial in providing a wider use for pre-trial. For lawyers of a given area, working with the judge, can set out those procedures which best suit them to the agreement of all parties. Therefore in describing the steps of an actual pre-trial conference, the writer wishes to state that the subsequent material is only representative of one court, although it is known that other trial courts follow a similar procedure. With the leave of the Honorable Walter T. McCarthy, the writer has borrowed heavily from the procedures employed by the Circuit Court of Arlington County.<sup>14</sup> The reasons for selecting this particular court are not purely accidental. Rather it is here that pre-trial has found its most thorough and systematic use in the State of Virginia.

## THE NOTICE OF CONFERENCE GIVEN

Initially, the county clerk sends out to the various attorneys notices of pre-trial conferences by postal cards at the rate of ten

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12. Letter to writer from Mr. David Nelson Sutton, Sutton & Causey, West Point, Va. Jan. 3rd, 1953.

13. *Burkes, Pleading and Practice*, § 259 (4th ed. 1952).

14. The author sat in on several pre-trial conferences at the Circuit Court of Arlington County and is deeply grateful to Judge McCarthy for his kindness in this matter. Much of the material describing the actual operation of a pre-trial conference comes from personal observation in conjunction with a Manual On Pre-Trial Conference written by Judge McCarthy.

cards per day. Starting on the Monday two weeks before the beginning of the court term, the clerk continues to dispatch the cards until all the notices have been sent or until the Friday preceding the opening of the term. The purpose of the notice is to inform counsel of his case number, the title of the case, and the place, date, and hour of the meeting. At the Arlington court the hearings are begun at 10:00 A.M. on the first day of the term of court. Each conference lasts approximately half an hour, although some cases will last longer. Judge McCarthy has found, however, that the above schedule is generally maintained without any great inconvenience to the parties.

### **WHERE THE CONFERENCE IS HELD**

The conference is then held in the judge's chambers. It is friendly and informal in nature with the attorneys seated in a semi-circle around the judge's desk. Smoking is allowed and only the judge and counsel are present at the hearing. It has been strongly suggested that clients not be present at the conference, for experience has shown that counsel are more prone to talk freely and frankly when the clients are absent. A stenographer is not present in the judge's chambers during the conduct of the proceedings. Although in many courts, conferences do have one present to take down any dictation that is necessary, at the Arlington court the judge writes upon a memorandum form the necessary information required. A copy of this memorandum may be found on page 174 of this article.

### **PRELIMINARY QUESTIONS**

Initially the conference disposes of any preliminary questions such as motions to strike, demurrers, bills of particulars, or any dilatory pleas. This action is taken when it appears that no formal hearing is required. If a formal hearing is required, the date for such a hearing is set and the conference is ended. Judge McCarthy has stated that his court is quick to encourage counsel on either side to make arrangements for such a hearing prior to the time set for the pre-trial conference.

### **STATING THE ISSUES**

The court then requests the counsel for the plaintiff and then the counsel for the defendant to state the issues involved in the case.

At this stage of the proceedings, there is much give-and-take between the parties with a resulting simplification of the issue or issues involved.

## THE MATTER OF PLEADINGS

The Court then turns its attention to the pleadings. Quoting Judge McCarthy as to this matter :

“Sometimes counsel appear with amendments and unless the motion to amend appears to need an extended discussion, it is settled then. Not infrequently a discussion of the issues reveals a deficiency in the pleadings. In such a case counsel will be given a definite time within which to amend. However, amendments are often made immediately. It has even occurred that the issues can be framed entirely by the order and the pleadings fully superseded.”<sup>15</sup>

## AGREEMENT AS TO STIPULATION

Next the court inquires of counsel whether any agreement may be reached as to the stipulation of certain facts. Many attorneys feel that pre-trial serves its greatest purpose at this stage of the proceedings. Quoting from a letter received from an attorney in Bristol referring to this point :

“Probably the greatest saving of time and expeditions of trials can be effected by pre-trial conference in stipulations as to undisputed evidence. I have had stipulations arise where there was a difference of opinion as to the admissibility of evidence. We (the counsel of both litigants) have submitted the matter for settlement to the court and have saved a great amount of time in so doing.”<sup>16</sup>

The question may be asked, suppose counsel are reticent to admit the obvious? Although Judge McCarthy takes particular caution not to force stipulations, if no agreement can be reached then the conference may be continued so that counsel may take depositions under Section 8-304 of the Code of Virginia. Further, should interrogatories be required then under Section 8-320, or for the production of documents, Section 8-324 may be utilized.

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15. The Honorable Walter T. McCarthy, Judge of The Circuit Court of Arlington County, Va., *Manual On Pre-Trial Conference*, as part of an outline of lecture given to the Committee On Continuing Legal Education of the Amer. Law Institute, p. 4, Feb., 1951.

16. Letter to author from Mr. George M. Warren, Warren & Warren, Bristol, Va. Jan. 3rd, 1953.

## OTHER MATTERS

Now any controverted points of law are discussed. If the parties agree, the Judge will make a ruling at this time, otherwise a ruling will only be indicated. Also brought out are any miscellaneous matters which are pertinent to the case. Should any unusual questions be raised, they will be taken under advisement by the judge pending the date of the trial.

Upon the completion of the foregoing the case is set for trial. Briefly the method of trial is discussed as to whether there is to be a jury, whether the litigation will be referred to a commissioner, or whether the case will be tried by the court. In conjunction with this matter, the date for the trial is set taking into consideration such elements as :

- (a) the length of time required to try the case.
- (b) the amount of litigation already scheduled by the court, and
- (c) the mutual convenience of both court and counsel concerning other responsibilities.

Judge McCarthy prefers to select a date anytime from approximately the third week to the sixth week of the court term. In this way the actual trial is not too far removed from the pre-trial hearing.

## THE POSSIBILITY OF SETTLEMENT

It is now that the judge asks counsel whether settlement of the case is possible. Again quoting Judge McCarthy as he talks to the attorneys present :

“I can use this time you are taking on my docket and I know you can also. If you are going to settle this case how about doing it now?”<sup>17</sup>

In explaining the reason for this statement he adds :

“While the question may not produce immediate results it does break the ice and starts talk which frequently ends in settlement. Unless there is some interest shown in this suggestion it is dropped. No effort is made to force a settlement.”<sup>18</sup>

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17. *Id.* at 5.

18. *Id.* at 6, 7.

## THE ORDER

An order can now be prepared following the completion of the conference which is mailed to the attorneys. In substance it covers the issues and stipulations agreed upon and it is this material that is read to the jury. Retracing our steps for a minute, it might be wise to ask what an attorney is requested to bring to the pre-trial conference. The following list was used by the Honorable Kennon C. Whittle while he was presiding Judge of the Seventh Judicial Circuit:

- (a) all exhibits which the attorneys intended to introduce in the case.
- (b) Any additional pleadings which they intended to file.
- (c) A written statement of the facts which they could agree to.
- (d) The names and addresses of all the witnesses they intended to call.
- (e) a written list of authorities upon which they intended to rely.<sup>19</sup>

It will be noted that Judge Whittle's list does not request anything except that information which any attorney would normally have available to try a law suit.

## THE BENEFITS CREATED BY PRE-TRIAL

What benefits have been accomplished from the use of Pre-Trial Procedure during the past few years in the Commonwealth? To ascertain the answer to this problem a questionnaire was sent to several hundred attorneys and the majority of the trial judges in the state. Among others, the following question was asked:

If Pre-Trial Conference has been used in your area, has it aided materially in achieving any of the following objectives?

- (a) simplification of the issues.            yes ( ) no ( )
- (b) the discussion of and possible disposal of preliminary questions.    yes ( ) no ( )
- (c) the amendment of pleadings.        yes ( ) no ( )
- (d) stipulations as to undisputed evidence thereby dispensing with formal proof.                            yes ( ) no ( )

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19. The Honorable Kennon C. Whittle, Judge of The Supreme Court of Appeals, from letter sent to attorneys practicing in the Seventh Judicial Circuit, Feb. 1, 1950, p. 4.

- (e) the limitation of expert testimony to be produced by each side.      yes ( ) no ( )
- (f) the possibility of settlement of the case.                                      yes ( ) no ( )
- (g) any other matters which are not listed as above.                              yes ( ) no ( )

It will be noted that the above question is broader in scope than Rule 4:1 which does not make mention of either Section (e) the limitation of expert testimony to be produced by each side, or Section (f) the possibility of settlement of the case. From the answers received, the following conclusions have been drawn concerning the above listed categories in the order listed.

(a) *Simplification of the issues*—In approximately seven out of every eight cases, lawyers stated that when pre-trial in their circuit had been used, it had resulted in a simplification of the issues. Many answers specified that this category had eliminated to a large extent what has been popularly called “sham issues” with the ensuing trial limited to such issues of law and fact as were necessary to a fair trial of the case. Certainly this constitutes an improvement over the trial by ambush methods previously discussed.

(b) *The discussion of and possible disposal of preliminary questions*—In more than nine out of ten answers received as to this category, judges and attorneys alike agreed that pre-trial had materially aided in the disposition of preliminary matters. Such matters as jurisdiction, venue, and method of trial appear to be the main headings under this category that were settled.

(c) *The amendment of pleadings*—The response to this particular item was more divided with approximately three out of every four answers specifying that in their experience pre-trial had aided in the amendment of pleadings. It was interesting to note that those answers which specified that pre-trial had not been of benefit as to this category, came from those circuits where pre-trial is rarely used. Where pre-trial has gained wide use, the amendment of pleadings is regarded as of major importance and takes a substantial part of the time allotted. The outstanding feature in the minds of many judges and attorneys as to this provision were the results accomplished. Because of pre-trial, lawyers often checked with each other prior to the conference date as to the nature of the pleadings to be filed. In this manner much delay and expense was

averted with benefit to all concerned. Not infrequently it was also found that where amendments were necessary they could be made immediately at the conference. Therefore experience has shown that the time consuming function of amending pleadings can be substantially cured where pre-trial is adopted.

(d) *Stipulations as to undisputed evidence thereby dispensing with formal proof.*—This category appears to have best accomplished those objectives hoped for by the Committee. With rare exceptions, in those circuits or corporations which have used pre-trial, even though to a limited extent, substantial benefits have been achieved as a result of the parties agreeing to the stipulation of facts, documents, photographs, records, etc. A typical example of this would be the run of the mill personal injury case. Doctor bills and hospital expenses are stipulated at pre-trial and the attorneys happily find themselves free from the necessity of proving the various amounts in court.

Further, consider a death by wrongful act case. The plaintiff's attorney may now stipulate that the deceased died as a result of an accident, thus dispensing with a veritable parade of doctors and their time consuming medical testimony. Also consider the benefits to be gained by counsel agreeing at pre-trial as to the authenticity of photographs, plats, etc. They are sufficiently marked and once in court, counsel are not faced with the laborious task of laying a foundation to get the photographs or other material in evidence. These are but a few of the myriad of instances where stipulations wisely agreed to at pre-trial can remove much of the dilatory nature of present day trials. The time saved by this function as to jurors and others connected with the litigation can not be exaggerated.

(e) *The limitation of expert testimony to be produced by each side.*—In well over one half of the letters received it was stated that in their areas this particular phase of pre-trial had not been used. On the other hand certain circuits reported a utilization of Section (e) but that such use was comparatively rare. As previously discussed, this particular phase of pre-trial is not expressly mentioned in Rule 4:1. By implication, however, it must be noted that Section (d) of Rule 4:1 states that the court of its own motion may consider "such other matters as will aid in the disposition of the case." Therefore those trial courts which employ the rule to limit expert

testimony are simply following similar procedures expressly stated in other state pre-trial statutes and Rule 16 of the Federal Rules of Civil Procedure.

(f) *The possibility of settlement of the case.*—Of all the above listed categories, this one drew the largest response. In those areas using pre-trial, settlements have resulted, and it must be emphasized that these have occurred in no one particular geographical section of the state. Certainly of all the problems connected with pre-trial conference in Virginia, the question of settlement has undoubtedly given rise to more heated discussion than any other. Why? Many judges and attorneys feel that invoking pre-trial conference in order to effect a settlement is grossly wrong in principle. It is apparent, however, that many of those same judges who strenuously object to the use of pre-trial as a mode of forcing settlement of a case, often guide attorneys to a consideration of factors which should make it advantageous for them to do so. We do know that in Virginia, in those courts which have given pre-trial a fair test, settlements have resulted. Beyond question it is always embarrassing for one attorney to suggest settlement to the other. The reason for this is obvious. The implication of settlement conveys the idea that the party making the suggestion lacks confidence in his case. When, however, in the regular course of a pre-trial hearing the suggestion of settlement is made by the presiding judge the main reason for this embarrassment disappears. It is reasonable to conclude that any discussion of settlement constitutes a very delicate matter. In Virginia we have not chosen to make settlement the primary purpose for pre-trial as is the case in certain state courts, but rather one of the many features to be considered, if at all. Where settlements do occur at the conferences or as a direct result of the conferences, it is quite often due to the fact that pre-trial has disclosed to both sides the relative strength and weakness in their several positions. It would appear then that Virginia has refused in this instance to put the cart in front of the horse, by insisting that the question of settlement play a secondary role.

#### **OTHER BENEFITS RESULTING FROM PRE-TRIAL**

How do attorneys fare under pre-trial? As previously mentioned, with the simplification of issues, preparation for the trial is concerned only with those matters which will be necessary for the litigation. In many instances, this will eliminate the costly pro-

curement of unnecessary witnesses, some of whom would have to travel great distances to reach the court. Pre-trial has also proved to be an effective device to prevent continuances or other legal road-blocks which have been imposed merely to cause delay.

With the narrowing of issues and an elimination of various collateral matters, the juror is in a better position to understand the case. Certainly any procedure which will strengthen the jury system and help the jurors arrive at their verdict is to be heartily commended. What about our judges, has pre-trial increased their work? In certain areas of the State, Norfolk is an example in point, the excuse for not using pre-trial is that a congested docket makes the employment of this procedure impossible. It is argued should the practice be adopted to any substantial degree, it would take up that much more time.

The evidence as to this matter is highly contradictory, not only in jurisdictions outside the state, but also within the Commonwealth of Virginia. *It has been shown beyond question that where pre-trial has been employed, the time for trying the cases in court has been cut down to such an extent as to compensate for the time taken out for pre-trial.* Quoting from a letter recently received from the Honorable Kennon C. Whittle, Judge of the Supreme Court of Appeals, describing the conditions prevailing in the Seventh Judicial Circuit when he was presiding over that circuit:

"I have used this procedure informally for some time, and I could not have tried the contested cases in my court had not pre-trial been employed. The Seventh Judicial Circuit is a large circuit, having a population of one hundred and fifty odd thousand, with one judge, and we tried more than one thousand contested cases a year. Anyone can see that it would have been impossible to have disposed of these cases without this modern method of procedure."<sup>20</sup>

The Honorable John D. Hooker, present Judge of the Seventh Judicial Circuit has stated:

"The Pre-Trial Conference is a very positive and definite step forward in our Judicial Procedure. The Judge who does not use it is penalizing himself."<sup>21</sup>

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20. From letter received by author, Jan. 6, 1953.

21. Letter received from the Honorable John D. Hooker, Judge of the Seventh Judicial Circuit, Jan. 10, 1953.

## **PROBLEMS CONCERNING PRE-TRIAL**

One of the leading factors in large measure which determines the success or failure of pre-trial in any area is the role which the presiding judge plays. The effectiveness of the proceedings is bound to be influenced to some degree by the judge's personality. As one judge stated to the writer :

“Without losing the respect of the local bar, I insist upon informal conferences. It is my experience that much more can be accomplished when counsel are at ease.”

It is not to be implied, however, that judges should attempt to win any popularity contests, for rarely is ability determined by popularity. Rather through the methods of fairness, efficiency, and above all the intelligent use of the procedures at hand can pre-trial be effective. Therefore where the judge has shown an attitude of cooperation coupled with patience, it should follow that pre-trial will be utilized to a greater extent as time elapses. Where this new device is not employed, the judges should use their initiative in providing for conferences. This is certainly true until the lawyers feel at home with the procedure, for it is unlikely that they will take the initiative. The past several years have shown this to be the case.

### **SHOULD PRE-TRIAL BE MANDATORY?**

With a few dissents, the overwhelming reaction to this question is no. Why? Judges and attorneys by and large share the view that with such a new procedure it is much wiser to allow bench and bar to feel their way. To force pre-trial suddenly upon them might do more harm than good and perhaps defeat some of the basic aims for which pre-trial is meant.

### **IS PRE-TRIAL MORE ADAPTED TO CERTAIN TYPES OF CASES THAN OTHERS?**

It might be asked whether pre-trial has been more successful in dealing with one type of case over another. The answers received as to this point are in sharp conflict. It is suggested that Virginia has not had enough experience with the procedure to formulate any particular case breakdown at this time. Along this line, however, Federal Judges have indicated that pre-trial has been extremely helpful in negligence, contract, condemnation, wage and

hour, and insurance cases.<sup>22</sup> Perhaps the most unusual experience that has been met in connection with this problem in Virginia is the use of pre-trial in criminal cases. Although Rule 4:1 refers only to Civil cases, a few trial courts have used pre-trial in their criminal work. This is adequate proof of the procedure's flexibility.

## CONCLUSION

Where Pre-Trial Procedure has been used in Virginia, a saving in both time and expense has been effected to the benefit of not only bench and bar, but most important to that "often as not forgotten man—the client." It is encouraging to note that with the passage of time its use is increasing. To insure that increase, however, it is strongly urged that the bench and bar be educated to pre-trial's great potentialities.

The first three years of pre-trial in Virginia is in a great many respects typical of the usual experience with new procedures. Problems are created, and tentative solutions to these problems are found. With the cooperation of both judges and lawyers the improvement of the administration of justice in Virginia is assured.

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22. Shafroth, *Pre-Trial Techniques of Federal Judges*, 28 *Am. Jud. Soc.* 39, 41, 42, (1944).



Correspondence \_\_\_\_\_

Cause of death \_\_\_\_\_

Depositions \_\_\_\_\_

Miscellaneous \_\_\_\_\_

(6) Limitations of Witness \_\_\_\_\_

(7) Depositions \_\_\_\_\_

(8) Trial Brief \_\_\_\_\_

(9) Method of Trial \_\_\_\_\_

(10) Estimate of Time \_\_\_\_\_

(11) Date of Trial \_\_\_\_\_

(12) Possibility of Settlement \_\_\_\_\_