THE PRE-TRIAL CONFERENCE IN IOWA

At 7 DRAKE LAW REVIEW 3, published in December, 1957, the comments of a distinguished panel composed of members of the Iowa Bar were presented concerning the new discovery rules. This article concludes their analysis with a discussion of the pre-trial conference in Iowa as it has been affected by the adoption of the new discovery rules.

These comments have been published as a service to the Iowa State Bar Association in the belief that all the members of the Iowa Bar will benefit by having them available to use in interpreting the effect of the new discovery rules on the pre-trial conference.

THE EDITORS.

MR. LEWIS: To bridge the gap between our discussion of discovery procedure and the pre-trial conference, I will ask Mr. Ingersoll to give his views on the sequence in which discovery procedure and the pre-trial conference should be used.

MR. INGERSOLL: It was generally the view of the Committee that pre-trial will be most effective if the pre-trial conference is held after the discovery depositions have been taken and the requests for admissions have been made. It is only at that point that the cautious or reluctant lawyer will be willing to make admissions or concessions as far as the record is concerned. I am sure that every lawyer has a lurking fear of the pre-trial conference because he is afraid that he will admit something that his adversary didn't know or couldn't prove.

The use of discovery makes the pre-trial conference work. If you have examined the Iowa Rules with reference to the pre-trial conference, you will find that they are as they were prior to July 4, 1957. They are very complete and are substantially the same as the Federal Rules, which are working very well.

I do not know what the experience has been throughout the state, but I have had many expressions of opinion that the pre-trial conference wasn't working in Iowa, and, in the opinion of the Committee at least, it was not working because there was no power to implement it. When a lawyer would go into the pre-trial conference, he did not know how much his adversary knew about his case, and he would therefore be reluctant to admit any fact that he thought his adversary would have to prove or might not be able to prove. With the existence of discovery, every lawyer has to evaluate his case on the basis that his adversary will be able to find out the basic facts, and there will be a tendency on the part of the lawyer to make the necessary concessions and to progress a pre-trial conference to the point where it is useful.

It was the view of the Committee that the proper sequence would be that a party would ask those written interrogatories he intended to ask, would take what discovery depositions he intended to take, would make his request for admissions, and then upon coming to the pre-trial conference, he would be in a position to stipulate many of the facts that really weren't controverted. The result would be an effective pre-trial conference.

The Committee was also aware of the problem in Iowa that, due to the existence of several counties in one district, the situation could often arise where the judge who participated in the pre-trial conference would be unavailable at the time of the trial. That led to this question: Must the judge who holds the pre-trial conference try the case? To eliminate this problem, Iowa Rules 135 to 138 were changed in only one particular. Rule 138 was changed to provide—and it may not have made any real difference in the meaning—that the court shall make an order, instead of an entry, reciting any action taken. Perhaps there is no difference between an order and an entry, but I don't know just what the word "entry" means in the judicial proceedings. You make an entry upon the calendar or an entry upon the books, but it just doesn't seem to have the same significance that a court order has. If a judge makes a full and complete order, that judge does not necessarily have to try the case because the order made after the pre-trial conference is a part of the record in the case and another judge could then try the case.

The pre-trial rule of course also provides for two different types of situations. One, that the court may fix a pre-trial calendar at the beginning of the term or at some other appropriate time, or that in a particular case, the court or either party may demand a pre-trial conference. But, in any case, of course, there would not be a pre-trial conference until after issue is joined.

MR. WILMARTH: I think the judge's time may be wasted somewhat if the attorneys haven't completed such discovery as they want to take prior to the pre-trial conference. Certainly if they want to take oral depositions of the parties, or if they want to serve interrogatories, they ought to have done it ahead of the pre-trial conference. In the federal courts in Iowa many matters are often left to the pre-trial conference. However, in these cases there are attorneys frequently involved who are trying cases all the time and with wide trial experience. They know that discovery exists and that they are subject to discovery; the result is that when they get to the pre-trial conference there isn't going to be any argument about admitting the non-controversial matters.

MR. DAVIS: I think the outline that Mr. Ingersoll has suggested is probably the ideal, but as a practical proposition, if you have the pre-trial conference first you can save yourself a lot of work in the preparation of requests for admissions and interrogatories and perhaps even in the taking of discovery depositions.

As you go through these federal court pre-trial proceedings almost always the noncontroversial things are admitted without hesitancy. Of course, Mr. Ingersoll and I don't agree on this, but if you're going to get any information at the pre-trial conference, why follow the other procedure first, creating more time-consuming work and more expense to your client, when you can accomplish the same thing at the pre-trial conference? Now unquestionably your approach to the matter should vary depending upon your adversary. You may know from prior experience that your adversary in this particular case doesn't care to admit much. In that type of situation, you would accomplish more by your interrogatories and admissions first. But, on the other hand, if your adversary is a fellow that you have dealt with before and you know that he is going to concede things that you can prove anyway, and that you will do likewise, then I like to use the pre-trial conference first and the other procedures afterwards.

MR. GIBSON: The thing that bothers me the most about the use of discovery techniques is that most of these matters probably would be taken care of at the pre-trial conference without going through the paper work and its submission to the other side. I suppose that the true answer is that this is something the lawyers will have to work out for themselves by calling up and saying, "Will you admit that such and such a document is genuine?" And, "Can we take care of that at the pre-trial conference, or do you want me to submit it to you in advance?"

MR. LEWIS: What position should a judge take with reference to discussion of settlement at the pre-trial conference?

MR. DAVIS: I want to clearly, emphatically, and forcibly express my objection to any settlement discussion at a pre-trial conference. It is not done in the federal courts to my knowledge, and I do not favor an attempt by the court in trying to get lawyers together on a settlement at a pre-trial conference. I think that the Bar has been fearful that a pre-trial conference simply becomes a place to try to negotiate a settlement with the judge being the arbiter. I would be unhappy if that became the practice in the Iowa pre-trial procedure.

MR. WILMARTH: It has occurred to me that there is probably a temptation on the part of the judges in the urban centers to get into settlement discussions because the attorneys have met for the first time and don't know each other. The judge thinks, "Well, if I can just stimulate a little discussion between these strangers maybe they would reach a settlement and relieve me of this trial." That isn't true in Iowa, of course. Attorneys do know each other, and if they want to talk settlement they will talk settlement. The pre-trial rules say nothing about settlement discussion, as you know. All of us, I think, are fearful of the idea of the courts putting pressure, as it were, on attorneys to try to get them to settle.

JUDGE PRALL: I would also like to say that I do not believe a discussion of settlement should be initiated by the judge at a pre-trial conference, or perhaps even discussed. I am of the opinion that it is a matter that should be taken up between attorneys.

MR. LEWIS: What pressures can a judge put on the parties to make them stipulate to some minor but necessary element, that has to be and can be proved by going to trouble and expense?

JUDGE PRALL: I don't believe the judge, as a neutral person, should put any pressure on the parties beyond pointing out that the disputed facts can be obtained by use of the discovery process. If one side isn't willing to admit some matter, his adversary's recourse is to prove it.

MR. DAVIS: I don't think it is quite accurate to use the word "pressure". I don't think that is the way the federal judges have done it. They point out the alternatives that are available if you do not wish to make a concession, for example with a hospital bill, the futility of calling a hospital administrator a hundred miles to establish the accuracy of the bill and the expense to him. It hasn't been a pressure in the sense of any punitive attitude on the part of the court. It has been, as I have observed it, merely an explanation of the futility of not being willing to concede that which can be readily established and which is not controversial; for example, such things as medical bills, automobile repair bills, and documents which are clearly either right or wrong. I think that once it is realized that there is an alternative method of getting the information, you might as well save the time and expense when the request is made.

QUESTION FROM THE FLOOR: If the judge presses you so strongly to stipulate some matter that it becomes prejudicial, what remedy would there be?

MR. INGERSOLL: If you have laid the ground work to prove such bias as would entitle you to have the judge disqualify himself and have a change of venue, you should do so. You just have to make your record before or during the pre-trial conference.

QUESTIONER: Would it be raised on appeal to the Supreme Court?

MR. WILMARTH: If a judge uses pressure against you during the trial of the case in front of the jury, it's appealable, and it is also appealable if it occurs in a pre-trial conference. You can request to have a court reporter present to make the conference a part of the record.

JUDGE PRALL: Either side may request a court reporter and in that case the entire conference is reported. I think that is a hindrance in some ways, particularly where you are just having an informal conference. But, on the other hand, the Rules provide that the court shall make an order reciting any action taken at

the conference. If the court in its order stated that the attorneys agreed on certain things, and one of the attorneys disagrees, he is in a much better position if the pre-trial conference is reported.

QUESTIONER: The attorney has the right as soon as the order is entered to file exceptions. If he didn't file exceptions would that go on the record and bind him?

JUDGE PRALL. I would think so. I think he would be under some compulsion to make a record or file an exception of some kind.

MR. INGERSOLL: There have been cases in the federal courts where counsel has come in and made some showing of a circumstance which should relieve his client from the effect of the pre-trial order. It would be my personal view, at least, that if you had such a situation and an order that was manifestly untrue, you would make an exception to it and move to set it aside or modify and correct it. This would be a part of the record in the case.

MR. LEWIS: What remedies are available to encourage the admission of nondisputed facts at a pre-trial conference?

MR. INGERSOLL: You have to start out with the proposition that the rules will not work if the lawyers and the judges don't want them to work. We have to assume that this isn't going to happen.

If you had a situation where the adverse counsel had been recalcitrant in his willingness to stipulate certain matters, you would know this in advance and you wouldn't bring the matter up at the pre-trial conference. The matter would come up in the form of a request for an admission, and if he would not make the admission, you would have to proceed from there. If it did come up in the pre-trial conference and the opposing counsel said "I won't admit anything; you must prove everything", he would then perhaps be exhibiting the element that is referred to in Rule 134(c), lack of good faith, which would enable you to recover the reasonable expenses incurred in making the proof, including attorneys fees.

So the recalcitrance at the pre-trial conference may at least be persuasive evidence of the lack of good faith when you ultimately prove the point. As I have said before, it is very difficult to draw rules that will cause every member of the Bar to behave in a certain pattern, an idealistic pattern, and that couldn't be done. But the attempt was to provide that if manifest bad faith was exhibited in refusing to admit, then the punishment for that—you may call it punishment—was to award the other party compensation, including attorneys fees, for proving what the other party refuses to admit in bad faith.

QUESTION FROM THE FLOOR: In such a situation, regardless of whether your side won or lost the case, would you still

be entitled to the reasonable expenses and attorney fees, in case of bad faith?

MR. WILMARTH: Assuming there was bad faith I would think the results of the case wouldn't matter.

QUESTIONER: Do you make your request for the order to tax the costs and attorney fees before the trial is over?

MR. WILMARTH: I wouldn't think so. I would assume you would have to wait until the trial is over.

JUDGE PRALL: I think it would be like any other motion to re-tax the costs, which you file in the case after it is all over.

QUESTION FROM THE FLOOR: Is there anything to prevent you from having a preliminary hearing on a point which you feel your opponent refuses to admit in bad faith so that it will be disposed of by trial time?

MR. WILMARTH: I wouldn't think so. If an attorney says he won't admit the point, it may turn out to be a sharply disputed issue in the trial of the case. Prior to that time the court couldn't anticipate whether he intended to dispute it or not. The court may suspect him to be in bad faith but I think the attorney could give a reasonable ground why he didn't want to make an admission or why his opponent should bring proof so that he could cross-examine.

MR. LEWIS: Under the discovery rules an attorney can not be made to name the witnesses he intends to call. Does this hold true in the pre-trial conference or can the judge ask him to name the witnesses he intends to call?

MR. INGERSOLL: In order to prevent a court from attempting to control the trial of a case by a pre-trial order limiting the number of witnesses or by having each party state who their witnesses are, there was added a provision that the court shall not, under any pre-trial procedure or any other rule, require a party to list or name any of the witnesses he expects to call or to have testify at the trial. It was the intention of the Advisory Committee to make it very clear that the court could not restrict the parties in the order of presenting the witnesses or the witnesses who are to be called.

MR. LEWIS: From the judge's standpoint, how will the pre-trial conference facilitate the trial of a case?

JUDGE PRALL: It seems that the pre-trial conference is not generally used in the district courts throughout the state. Rule 136 states five things that may be taken up at a pre-trial conference. One of them is amending the pleadings. Another is agreeing to facts, records or documents so as to avoid unnecessary proof. Also, limiting the number of expert witnesses, settling any

facts of which the court is asked to take judicial notice, and any other matter which may aid, expedite or simplify the trial of any issue. I think there is a real value in the pre-trial conference from the judge's standpoint. Many times when a judge gets a petition, it is very difficult to determine what the plaintiff's theory of recovery is. At a pre-trial conference the judge could, I think, find out from the plaintiff what his theory of recovery is, and perhaps find out from the defendant whether he has an affirmative defense or what his particular defense is. This would be very helpful to the judge in preparing his instructions. I also believe that the court has the authority and power to cut off amendments. The pre-trial conference is a convenient method by which the judges and the attorneys can settle the final pleadings and cut off any future amendments. Agreement on the facts is a problem of the attorneys more than it is of the judge, and I have heard that comment from judges both as to discovery and the pre-trial conference. I think one of the things that has caused the pre-trial conference to bog down is the fear of an attorney, particularly a younger fellow, that he will admit himself out of court. Of course that is always a real danger unless you know what your case is about. However, this factor should not be so significant under the new rules which provide methods by which an opponent can obtain information if he wants it.

EDITORIAL NOTES

Supplemental Notes to Articles Previously Published

1. *The Iowa Rules of Discovery*, 7 DRAKE L. REVIEW. 3 (1957) discussed the Iowa discovery rules as amended and how they would implement the fact finding and investigation processes of a lawsuit. Special emphasis was placed in the article on the effect Rule 141(a) would have on limiting the scope of discovery.

In the recent Iowa case of *Henke v. Iowa Home Mutual Casualty Company*, ... Iowa ....., 87 N.W.2d 920 (1958), before the Court on an interlocutory appeal from litigation which involved the substantive question of an insurer's liability for a judgment exceeding policy limits, the Iowa Court made several important declarations concerning Rule 141(a) which indicate to some extent the Court's attitude toward the construction and enforcement of this new discovery rule.

The trial court had sustained the motion of the plaintiff to require the production of all letters, correspondence, reports and communications between the insurance company and the attorney defending the prior action which had resulted in the judgment exceeding the policy limits. The insurance company argued that Rule 141(a) protected it from disclosing these papers.

The Court held that Rule 141(a) did not provide any protection to the insurance company primarily because that Rule had reference to papers and writings which are related to or prepared for a currently pending action and not to papers and writings prepared during a different action at an earlier time when the parties were not adverse to each other. The Rule "applies in an action between two adverse parties whose separate counsels have each made investigations in respect to that action which they intend to use in the adversary proceeding between the two."

The Court further pointed out that even assuming the Rule to be applicable in the present case, the decision of the trial court to require production of the papers was a proper exercise in its sound discretion to determine whether the withholding of such papers "will result in an injustice or undue hardship."