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I. INTRODUCTION

Since their adoption in 1938, the Federal Rules of Civil Procedure have undergone several changes and will undoubtedly undergo more as attempts are made to facilitate further the resolution of legal controversies.[1] Prior to the general adoption of any new change, however, local rules of the individual Federal District Courts may give to a new concept its initial trial. When any rule, or group of similar rules, begins to appear in several District Court Rules, it indicates that such a testing is taking place and a new procedural device is either being accepted or rejected. One such trend, if four isolated rules can be called a trend, is the use of a mandatory conference between opposing counsel without the judge prior to the pre-trial conference. It is this pre-pre-trial conference, with its attending ramifications, which is the subject of this comment. A brief historical development will be followed by a few criticisms based upon the presently adopted Federal Rules and a United States Supreme Court decision.

Rule 16 of the Federal Rules of Civil Procedure gives to the district courts the discretionary power to ". . . direct the attorneys to appear before it for a conference."[2] These words indicate that such conferences would be conducted before the judge, either in court or in his chambers, and this seems to be the general rule.[3] The advantage of the presence of the judge is in fact emphasized by Nims when he notes the public stigma which attaches to any

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[1] For past and proposed changes see generally, Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vanderbilt L. Rev. 521 (1954); Judge Charles E. Clark, Clarifying Amendments to the Federal Rules, 14 Ohio St. L. Rev. 241; Armstrong, The Use of Pre-Trial and Discovery Rules, 43 A.B.A.J. 693 (1957).

[2] Fed. R. Civ. P. 16.

[3] See generally 53 Am. Jur.; Trial, § 11; 35 C.J.S., Federal Courts, § 136b(2); Nims, Pre-Trial, Chap. II; see also Judge John W. Delehant, The Pre-Trial Conference in Practical Employment, 28 Neb. L. Rev. 1, at 18 (1948).

display of friendship and cooperation between opposing counsel unless the respected and impartial judge is present.[4] As could be expected, with over sixty Federal District Courts having promulgated local rules, and with almost fifty of these making at least some reference to the pre-trial conference, the great majority contemplate that all required conferences will be in the presence of the pre-trial judge. However, there are exceptions.[5]

II. THE FOUR RULES

As early as 1939,[6] the Western and Eastern Districts of Arkansas, after providing for pre-trial conferences upon request of counsel, stated further that, "Attorneys are required to expedite trial conferences by conference with other counsel in the case, and entering into stipulations without the presence of the court, to simplify and expedite trials and presentation of proof so far as possible."[7] Effective July 1, 1951, in the District Court for the Southern District of New York was a rule requiring that the notice of the pre-trial conference should inform the counsel of the necessity of preparing memorandums containing specified information, and providing further that the "notice shall request the attorneys in preperation for the pre-trial conference to discuss with each other the matters listed therein."[8]

[4] Nims, Pre-Trial 196.

[5] State courts have also adopted compulsory or voluntary pre-pre-trial conferences. For example, the New Jersey Superior Court Civil Practice Rule 4:29-3 provides that: "the attorneys shall confer before the date assigned for the pre-trial conference to reach agreement on as many matters as possible. Each attorney shall prepare and submit to the court at the pre-trial conference a memorandum statement of the matters agreed upon and of the factual and legal contentions to be made on behalf of clients as respects to issues remaining in dispute. . . ." The New Jersey Supreme Court, on September 1, 1954, requested that this memorandum follow certain prescribed rules. 2 Waltzenger, New Jersey Practice Pocketpart 74 (Rev. ed. 1956). See also Note 10, infra.

[6] While 1939 is noted as the first year in which the federal rules made mention of a pre-pre-trial conference without the presence of the judge, as early as 1931, seven years before the adoption of the Federal Rules, the Report of the Special Committee on the Jury System of the Nebraska State Bar Association, after proposing the use of interrogatories, further proposed "that counsel for both parties, thereupon, be required jointly to prepare from the pleadings and the answers to interrogatories a statement of the case which shall contain (a) A statement of admitted facts, (b) A statement of controverted facts, (c) A statement of the law involved." 11 Neb. L. Bull. 36 (1931).

[7] Ct. Rules, W. D. and E. D. Arkansas (1939), Rule 4, reinacted in substance in March 1949 as Rule 3, 2 Fed. R. Serv. 780.

[8] Ct. Rules, S. D. New York (1951), Rule 15(b), 16 Fed. R. Serv. 904.

In July of 1956, the Western District of Louisiana embodied in its court rules detailed steps which necessitated counsel cooperation at conference to be held prior to the pre-trial conference before the judge.[9] The attorneys are required to exchange names and addresses of witnesses, together with a *short summary of the nature of their expected testimony.* Further exchanges include medical reports, and all documents or exhibits, including photographs, maps, or plats intended to be offered at trial. During this pre-pre-trial conference, counsel must ascertain the admitted facts, non-contested facts, and facts to be litigated, and file a memorandum of law concerning any anticipated unusual legal questions. Finally the opposing counsel are required to execute *jointly* a "Pre-trial Stipulation" embodying the results of these prior meetings.

As of April 1957, the Southern District of California[10] effected a rule providing that:

> Not later than 40 days in advance of pre-trial conference, the attorneys for the parties appearing in the case shall hold at least one meeting at a mutually convenient time and place for the purpose of formulating a proposed pre-trial order. . . . Each attorney shall then exhibit to opposing counsel all documents . . . intended to be offered at the trial . . . each photograph, map, drawing and the like shall bear on the face or the reverse side thereof a concise legend stating the relevant matters of fact as to what is claimed to be fairly depicted thereby, and as of what date. Each attorney shall also make known to opposing counsel his contentions regarding the applicable facts and law.[11]

Under section (j) of this rule, the plaintiff must then prepare a pre-trial conference order for filing with the clerk, this order to be "approved as to form and as to substance by the attorneys for all parties appearing in the case. . . ."

III. GENERAL EVALUATION

An accurate evaluation of the pre-pre-trial conference will be possible only after prolonged experience with the new procedures

[9] Ct. Rules, W. D. Louisiana (1956), Instructions to Attorneys in Pre-trial Proceedings, following Rule 13, 24 Fed. R. Serv. 931.

[10] It is interesting to note that on September 9, 1956 the Judicial Council of California amended its "Rules for the Superior Courts" (33 Cal.2d at p. 1) in what would appear to be a forerunner to the adoption of the Southern District of California Rules in 1957. Rule 8.2 of the "Rules of the Superior Courts" provides that counsel "shall confer before the date assigned for this [pre-trial] conference to reach agreement on as many matters as possible. They shall prepare jointly, or each shall prepare, and submit to the pre-trial judge, at or before the conference, a written statement of the matters agreed upon."

[11] S. D. California Rule 9(d), 24 Fed. R. Serv. 914.

established by these recent mandates. As with the pre-trial conference, workability of the pre-pre-trial conference will depend upon the proper education of the bar and bench to its methods and upon a time of trial and error. However, a few comments might be appropriate.

Insofar as the pre-trial conference is deemed advisable to eliminate some of the confusion and uncertainty at the trial,[12] so too the pre-pre-trial conference should tend to simplify[13] the presentation to the pre-trial judge. If the formula prescribed by these rules is followed faithfully, many matters which the pre-trial order settles can be disposed of without any cost of time or money to the court. Presumably counsel, upon an early understanding of his opponent's position, will be able to present his own case in a more intelligent manner, more realistically discuss settlement,[14] or more readily recognize the inherent weakness in his own position. All of this takes place with the possibility of the opposing attorneys being more candid than when they are in the presence of the court or jury

[12] See Sunderland, The Theory and Practice of Pre-trial Procedure, 36 Mich. L. Rev. 215, 21 J. of Am. Jud. Soc. 125 (1937); Judge John W. Delehant, The Pre-trial Conference in Practical Employment, 28 Neb. L. Rev. 1 (1948); Dow, The Pre-trial Conference, 41 Ky. L. J. 363 (1952); and see generally Nims, Pre-Trial.

[13] Some will undoubtedly question whether the pre-pre-trial conference does simplify the proceedings, especially in so far as the attorneys are concerned. Judge John W. Delehant questions the practice of a judge who requires counsel to submit pre-trial briefs upon the law and facts, noting that such practice places a burden upon the counsel and the judge which will rarely be adequately repaid (supra, note 12 at 18). By implication, these comments could apply to the rules in question.

[14] Several comments about settlements are appropriate. Undoubtedly settlements do occur in the vast majority of cases. This indicates that counsel usually do confer and by and large can discuss the case on a reasonable basis. Settlements are probably desirable as a more expeditious means of settling legal controversies, especially in view of the crowded dockets. In so far as some fear the pre-trial conference is being used by the judge to force a particular settlement, the pre-pre-trial conference, being without the judge, lacks this possibility. Also, where plaintiff's counsel may think the defendant should broach the subject of settlement, while defendant thinks it is plaintiff's duty, or where either or both think that bringing up the subject of settlement indicates weakness, the pre-pre-trial conference could resolve these difficulties by making a discussion of settlement mandatory and requiring the memorandum to state that settlement was discussed but was impossible at the time. Note also how, by the end of this conference, both counsel have a very adequate picture of the case and may best serve their client by settling. On settlement at pre-trial see Nims, Pre-Trial, p. 62 et seq. See also Mott v. City of Flora, 7 Fed.R. Serv. 16.27, Case 1; 3 F.R.D. 232 (E.D. Ill. 1943).

who may use frank disclosures to the detriment of the person making them. This possibility of even greater candor is undoubtedly a striking asset if, that is, the bar accepts the pre-pre-trial at face value.

IV. RELATIONSHIP WITH OTHER FEDERAL RULES

Certain procedures attended to the use of the pre-pre-trial conference as envisioned by the local rules mentioned above have a close relationship with the present Federal Rules. Rule 26(b) of the Federal Rules provides for the disclosure of the names and location of persons having knowledge of relevant facts and for information as to the existence, description, nature, custody, condition, and location of any book, document, or other tangible thing of relevant nature.[15] The rule of the Western District of Louisiana,[16] requiring the exchange of the names of all expected witnesses at the trial, concerns the names of persons whose identity would often already be known through Rule 26(b) since such persons would obviously have knowledge of relevant facts. However, there are indications that Rule 26(b) does not permit the discovery of which persons will be used at trial.[17] One reason given for this is that the decision to use a particular witness is part of the attorney's work product. Another reason is that counsel are not able to so limit themselves until they have completed the discovery process. These arguments do not apply to the pre-pre-trial conference since by this time discovery will be mostly completed and the final resolution of the controversy begun.

Rule 34 provides for a compulsory inspection of all documents and the like upon showing of cause.[18] The local rule of the Southern District of California requires the exhibition of all such items when it is contemplated that such will be offered at trial.[19] While Rule 34 provides for this by motion, there is a requirement that there be a showing of good cause. Conceivably the mere fact that the displayed item will be offered into evidence at the trial is suffi-

[15] Fed. R. Civ. P. 26(b).

[16] Supra, note 7.

[17] See 4 Moore's Federal Practice § 26.19, p. 1077 (1950) and cases cited therein. The authors, however, disagree with the majority who would not allow this practice. They cite cases holding both ways. See also 2 Barron and Holtzoff, Federal Practice and Procedure § 650 (1950); and note 32 Neb. 495 (1953).

[18] Fed. R. Civ. P. 34.

[19] Supra, note 11.

cient to be considered as a showing of good cause. To this extent then, this procedure is at least akin to the Federal Rules.

The pre-trial conference order, pre-trial stipulation or other form of memorandum which results from the pre-pre-trial conference is to some degree merely the forced use of Federal Rule 36[20] insofar as many of the inclusions would be the proper subject of a request for admissions. But the memoranda would go further in that the same matters enumerated in Federal Rule 16[21] would also be included, but the court would not as yet have added its own approval.

It should be noted, however, that the pre-pre-trial conference, despite its many close relationships with the other Federal Rules, is in no way intended as a replacement for them. Its value as one of the steps in solving legal controversies can be demonstrated by putting it into the chronology of the steps to be taken. First, the pleadings in concise, clear language take note of the existence of a controversy, give general notice thereof to the court and the parties, and place rather broad limitations upon the course of future action.[22] Next, through the use of the various discovery techniques,[23] counsel ferret out all kinds of information from many sources to determine everything which possibly could have even a remote bearing upon the subject of the controversy.[24] While counsel at this time will know very much about the case and can thus discuss it fairly intelligently, their knowledge will oftentimes be

[20] Fed. R. Civ. P. 36 which provides for admissions of facts and genuineness of documents.

[21] Rule 16 lists the following matters to be considered:
(1) The simplification of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
(6) Such other matters as may aid in the disposition of the action.

[22] 1 Moore's Federal Practice, 438-451; 1 Barron and Holtzoff, Federal Practice and Procedure, § 451.

[23] Fed. R. Civ. P. 26 to 37. See 2 Moore's Federal Practice 2441-2445; 2 Barron and Holtzoff, Federal Practice and Procedure, § 641.

[24] This assumes conscientious counsel and a sufficient amount involved to warrant such procedures. Since this article concerns Federal courts only, larger amounts will usually be involved.

somewhat cumbersome and unwieldy.[25] A conference before the judge at this time would reflect this overly broad picture.

Logically then, a conference or series of conferences between counsel could, with the interchanges contemplated by the local rules in question, cut down and streamline the presentation to the pre-trial judge. The judge, being thus better informed, can determine the adequacy of the pre-pre-trial conference, take any further steps he considers necessary to fulfill the present purposes of a pre-trial conference, and add his sanction to a pre-trial order which will then govern the course of the trial;[26] a trial centered upon actual controversies and resulting in a speedier, fairer, and more economical trial. From this analysis it can be seen that some of the functions of the pre-trial hearing are, if not eliminated, at least somewhat modified. If the writings turned in under the rules in question indicate counsel have in fact exhausted all possibilities of facilitating the trial, the court can merely approve the conference results and set the case for trial. But even when this is not possible, the court, being thus better informed, can center its attention on these matters which it feels should be dealt with further.

V. THE HICKMAN CASE

There still remains a serious question about some aspects of these local rules. When the Louisiana rule[27] requires a restatement of the witnesses' expected testimony, and when the Southern California rule[28] requires a concise explanation of the facts depicted by the documents, there may be an encroachment upon the work product of the attorney. *Hickman v. Taylor*[29] represents the leading authority for restricting the discovery of witnesses' statements in-

[25] See Judge Alfred P. Murrah, Some Bugaboos in Pre-trial, 7 Van. L. Rev. 603 (1954). Judge Murrah notes that ". . . even under fact pleadings, much of the fatty tissue of a law suit survives the gamut of all recognized formal preliminary motions, and that many times the real issue in a law suit is reached only by the cumbersome method of trial and error, while the jury sits in the jury box and busy litigants and witnesses restlessly loaf in the corridors. . . . There can be no doubt of the utility of pre-trial conference as a common sense devise for securing a just, speedy, and economic disposition of litigation." Id. at 604.

[26] Rule 16 provides that ". . . such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Supra, note 2.

[27] Supra, note 9.

[28] Supra, note 11.

[29] Hickman v. Taylor, 329 U.S. 495 (1947).

cluded in the attorneys' files.[30] The vigorous disagreements during the appeal of this case point up the controversial aspects of such disclosures.[31] The Supreme Court in the *Hickman* case held that while the statements of witnesses and other memorandums, briefs, communications and other writings prepared by counsel for his own use in presenting his case are not protected by the attorney-client privilege, they are nevertheless susceptible to discovery techniques only upon a showing of special circumstances warranting this invasion of the attorney's privacy. Justice Jackson in his concurring opinion, in which he was joined by Justice Frankfurter, expressed his almost violent opinions on the subject thusly:

> I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him.

While in the *Hickman* case the court was concerned primarily with written statements already in the attorneys' files, it also considered the putting into writing of strictly oral statements. Its arguments in regard to the latter are especially applicable in evaluating the Louisiana Rule[32] in question. Few people can accurately and concisely write down what they have heard from another. The hearer's own prejudices, his pre-conceived ideas, and his own desires as to what he wants to hear, may taint his account of what he actually heard. The danger that inaccuracies will creep in may cause an attorney to find himself, not an officer of the court, but an ordinary witness in his own defense. In the case of hostile or unwilling witnesses, an attorney who is forced against his will to rely on such testimony will find it impossible as a practical matter to foretell what such a witness will say. In fact, regardless of what any witness has said in the past, it is often difficult to predict what he will say in the future.

An application of the principles of the *Hickman* case to the portion of the rule of the Southern District of California[33] requiring inclusion in the documents of a concise explanation of the facts

[30] An excellent analysis of the many problems concerning the discovery of the attorneys' work product in England, in the States and in the Federal System both before and after *Hickman* can be found in 4 Moore's Federal Practice, § 26.23 (2d ed.). For a list of cases following *Hickman*, see 5 F.R.D. 433, 459-60. See also 2 Barron and Holtzoff, Federal Practice and Procedure, § 798.

[31] See Discovery Procedure Symposium, 5 F.R.D. 403, where opposing counsel in the *Hickman* case, as well as others, were given an opportunity to air their views.

[32] Supra, note 9.

[33] Supra, note 11.

depicted thereby is more difficult. There is no problem of inaccurately restating anything; the attorney's own thoughts being the subject of the statement. However, this use of an attorney's own thoughts seems to be the underlying reason why the *Hickman* case held as it did. Perhaps this is the "demoralizing" factor of which Justice Jackson speaks. In the furtherance of justice, counsel should not be able to hide from his opponent facts and witnesses pertinent to the controversy, but on the other hand, unless there is a showing of some special cause or circumstance, his analysis of these facts and these witnesses' testimony is his own unless and until h chooses to display his wares in the courtroom.

Because of the *Hickman* case, the provisions in these rules should be limited to a requirement of disclosing the ultimate facts and evidentiary facts about which each witness will be examined. Similarly, comments about documents should be limited in the same general way. This will give an opponent sufficient knowledge to either seek contrary evidence, question the witness intelligently himself, or in some cases recognize his own disadvantage.

VI. CONCLUSION

With the limitations imposed by the *Hickman* case, the local District Court Rules considered in this comment are advisable methods of further facilitating the processes of dispensing justice. If over a period of time their use by the courts indicates that the actual results are in fact those contemplated by this comment, consideration should be given to their adoption as part of the Federal Rules.[32]

[34] For an analysis of the practical problems concerning the use of the Local Rule of the Southern District of California (supra, note 11) see the recent publication, Seminar of Procedures Prior to Trial, 20 F.R.D. 485 (1957). This seminar at the Annual Conference of the Ninth Circuit included in its earlier portions some arguments for and against the pre-pre-trial conference from the practical viewpoints of practicing attorneys, judges and law professors.