Pretrial Practice in State Condemnation Cases for Highway Purposes

MICAH H. NAFTALIN, Legal Assistant, Right-of-Way Research Branch, Highway and Land Administration Division, Bureau of Public Roads*

Pretrial procedure as discussed here denotes a strictly judicial proceeding held before a judge after the initial pleadings in a condemnation action have been served. Its purpose is to settle on or stipulate to all possible areas of agreement in advance so as to streamline the conduct of the trial. This paper traces the development of the use of the pretrial procedure, first in ordinary civil actions and later in connection with condemnation actions.

Arguments for and against the use of the pretrial procedure in condemnation actions are advanced, the former including increased efficiency of the courts, reduction of expense and delay; acceleration of trials; elimination of unnecessary attendance or long waits of witnesses; more effective pleadings; the promotion of settlements; and many others. Criticism of the practice centers mainly around the contention that there is little merit in its use where the only issues are the amount of land taken and its value. Others feel that since the practice results in few settlements, it is a waste of time, energy and money.

Finally, certain general principles for effective use of pretrial practice are discussed, including the desirability of making the procedure mandatory, and the need for informality and for adequate discovery techniques.

● PRETRIAL procedure in civil litigation is the child of the overburdened court calendar. Combined with modern discovery techniques, by which opposing counsel are required to disclose to their opposite number the salient features of their case, it becomes the focal point of the procedural reforms taking place today in our courts. Samuel Johnson once wrote, "Those who discourse on matters of procedures are not only dull, but are the cause of dullness in others."[1] Believing in the truism that justice delayed becomes injustice, the author will have to risk the appellation "dullard" and trust that the reader can resist the other half of Johnson's prophesy.

Procedural reforms in general, including pretrial, are concerned with the efficient and effective administration of justice. When a landowner is paid just compensation for the property taken, he has obtained justice. The author would not presume to define the concept of justice — a term fraught with philosophical and metaphysical overtones — but submits that the quantum of justice is reduced in direct proportion to the amount of delay introduced into the judicial system. In other words, the landowner who is compensated in three months is more justly treated than the one who has to wait three years.

Human nature is such that next to his family, the things closest to a man's heart are his picketbook and his property. The relatively free use of his money and property is a right which he properly associates with liberty. Government impinges on the lives of its citizens most when it takes their money for taxes or their property for the public welfare, convenience, or necessity. While the familiarity of taxes may breed a certain

*Present affiliation: Attorney, Office of the General Counsel, Housing and Home Finance Agency

1/ Burnes, "Reform of Civil Procedure in England," 65 Comm. L. J. 14, January 1960.

amount of contempt, knowledge of its inevitability usually tempers the shock of the annual W-2 form. Condemnation, however, is not inevitable. It undoubtedly plays little, if any, part in the contemplation of the majority of persons. When it comes, it comes as a shock.

The shock of condemnation must be tempered by speedy and competently administered justice. Undue delay in settling disputes may cause injustice just as an inequitable result. It is fair to say that the appearance of justice is almost as important as the result. It is not enough that ultimately a litigant's rights are settled; he must feel that he has been dealt with fairly and expeditiously.

> Delay, the ever present evil in all litigation, is especially evident in suits to condemn land. Such delay is expensive and may work positive hardships on the public and the condemner. It is equally burdensome to the landowner, who loses many of the valuable incidents of ownership during the prolonged pendency of the condemnation proceedings.2/

Recent trends toward seeking arbitration as a means of settling disputes reflects the growing disenchantment with the experiences of cost and delay in the courts. Clearly then, early finality is essential for the accomplishment of justice.

The term "pretrial conference" is ambiguous in that it means different things in different professional areas. Certain qualifications, therefore, must be noted so as to limit the scope of this discussion. Appraisers, highway engineers, right-of-way agents, and attorneys often use the pretrial conference individually or in concert as an informal means of developing information and correlating their respective approaches or disciplines. Representatives of the landowner and the condemning authority often meet in settlement conferences, sometimes referred to as pretrial conferences. These and other types of conference are, it is true, pretrial; that is, held in advance of trial. Pretrial, as used here, however, denotes a strictly judicial proceeding held before a judge after the initial pleadings have been served, the purpose of which is to settle on or stipulate to all possible areas of agreement in advance so as to streamline the conduct of the trial. Judge Alfred P. Murrah of the 10th Federal circuit, who, as chairman of the Pre-Trial Committee of the Judicial Conference of the United States is one of the nation's pre-eminent authorities on the use of pretrial practice, has defined the pretrial procedure as the "common sense method of sifting the issues and reducing the delays and expense of trials so that a suit will go to trial only on questions as to which there is an honest dispute of fact or law."[3]

By way of further qualification, a distinction must be made between pretrial procedure and the various discovery procedures. Basic to the effectiveness of pretrial is the requirement that the attorneys know their cases thoroughly so as to be in a position to limit issues and dispense with irrelevant evidentiary material. The new discovery techniques permit the attorney to gather his material and analyze his case with fears of surprise cut to a minimum. These techniques provide for fair disclosure of the opponent's case by means of exchanging interrogatories and depositions. Such disclosure is subject only to the limitations of privilege against disclosing confidential communications, the attorney's working papers, and of general tests of relevancy. The question of admissibility is ordinarily not a valid objection to making disclosure.[4]

Armed with such information, the attorney is then able to evaluate the relative strength of his own case in light of the apparent merits of his opponent's position. It stands to reason therefore, that pretrial, if it is to accomplish its purpose, is premature until the discovery process is exhausted.

Finally, a few more words might well be spent on the subject of settlement conferences. These conferences are often confused with pretrial, but are in fact, more a part of the

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2/ Wasserman, "Procedure in Eminent Domain," 11 Mercer L. Rev. 245, 263, Spring 1960; see footnoted studies showing the time required to acquire land by condemnation in New York and Chicago, averaging well over a year.

3/ Murrah, "Pre-Trial Procedure, A Statement of its Essentials," 14 F.R.D. 417 (1954). This paper was prepared for the benefit of newly appointed U.S. District Judges.

4/ Davidson, "The Art of Pre-Trial Discovery," 47 Ill. Bar J. 919, July 1959.

negotiating process than the judicial. Many highway people equate the two and consider that only to the extent that settlements may be reached are pretrials worthwhile. As will be seen, there is some overlap in the objectives of the two types of conference. The prime purpose of pretrial however, is to aid and expedite judicial administration, and not merely to achieve settlements.

DEVELOPMENT OF PRETRIAL PROCEDURE

Use of the pretrial conference is not a new procedure. It appeared in England under the name "summons for directions" as early as 1883.[5] The first viable procedure in the United States was established as early as 1929 by the Wayne County (Detroit, Mich.) Circuit Court on its own initiative, without the aid of legislation.[6] The Detroit court's success in clearing its calendar has by now become legendary.

In 1938, the procedure was incorporated into the Federal Rules of Civil Procedure, (28 U.S.C. 2072) making its use discretionary with the court. Rule 16 provides as follows:

> Rule 16. Pre-Trial Procedure; Formulating Issues
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> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
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> (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.
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> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

The example set by the Federal Rules has been followed in approximately 40 states, most of which have literally adopted these rules either in whole or in part. A few states have made distinct changes. Michigan and California, for example, have made the use of pretrial mandatory rather than discretionary. Wyoming has made its use mandatory at the request of either side.

In 1951 pretrial procedure was made applicable to Federal condemnation cases under rule 71a, Federal Rules of Civil Procedure. Inasmuch as its use is discretionary with the judge, however, the extent of use varies not only from circuit to circuit but within each circuit from district to district. By 1952, although the statutes of at least five states had empowered the state courts to make use of this procedure, there was little indication of actual use.[7]

5/ Burnes, "Reform of Civil Procedure in England," 65 Comm. L. J. 14, January 1960. (This procedure was instituted by the 1883 revision of the Rules of the Supreme Court of Judicature.)

6/ Sutherland, "The Theory and Practice of Pre-Trial Procedure," 36 Mich. L. Rev. 215, 224-25 (1937).

7/ See Municipal Law Service Letter, Committee Reports Supplement, American Bar Association, Section of Municipal Law, November 1952, p. 2.

During the past decade, an ever increasing number of states have provided for pretrial procedures in condemnation cases. Today, at least 22 states actually use the practice to some extent.[8] In all except California, Michigan and Wyoming, the practice is discretionary. In close to one-half of the states, the procedure is limited in use to certain areas, usually large cities — in Georgia, Michigan, and Pennsylvania, for instance, use of pretrial is confined largely to Atlanta, Detroit, Philadelphia and Pittsburgh.

PROS AND CONS OF PRETRIAL PRACTICE

Although little has been written regarding the use of the practice in condemnation cases specifically, there is certainly an abundance of enthusiasm for the general use of the pretrial conference. In fact, most authorities agree that pretrial has proved itself successful and lack of its adoption represents a distinct lag. Most often-mentioned benefits include increased efficiency of the courts; reduction of expense and delay; acceleration of trials; elimination of unnecessary attendance or long waits of witnesses; more effective pleadings because the case is thoroughly prepared at an earlier than normal date; less likelihood of the judge being reversed because he will be better informed about the case in advance; and the greater chance of settlement in advance of trial, particularly inasmuch as pretrial compels the attorney to look at his small cases, as well as the big ones, in advance. (This last advantage is considered debatable by some state highway officials whose experience has been that pretrials did not tend to stimulate settlements.)

Judge Irving Kaufman has discussed the dramatic expedition of judicial administration in New York resulting from the adoption of pretrial practice, referred to there as Part I procedure. On June 30, 1955, there was a backlog of 5,630 civil cases pending, with another 1,599 cases to be added during the next 12 months. "In a nine month period, every single one of the total 7,229 cases on our civil calendars was called for a hearing in its respective Part I, and largely as a result of this new screening procedure, 5,429 cases were terminated, eliminating a backlog representing over eight years of court time."[9] Prior to the instigation of this procedure, Judge Kaufman noted, parties waited from 2 to 3½ years after they were ready for trial before their cases were finally heard. The new procedure has brought the calendar virtually current.

One of the most impressive and comprehensive analyses of pretrial procedure can be found in the seminar on protracted cases for United States Judges recently held at the Stanford University Law School. Many members of both the bench and bar took part in this seminar, a number of whom presented formal papers on the subject.[10]

In the report of this seminar, it was noted that where pleadings properly framed their issues in clear and concise language, there would be little necessity for pretrial, at least for the purpose of clarifying issues. The trouble comes, however, when lawyers weave argument into their pleadings, thus requiring their opponents to deny the allegations en toto, with the result that issues become obscure if not totally concealed. The effect of this is to afford the opponent the opportunity of putting on an impressive witness just to prove the point.[11] This is known as the "too long" type of pleading, the issues from which can certainly be simplified in pretrial.

At the other extreme is the "too short" or "notice" type pleadings under the Federal Rules. Where this type of pleading is encountered, pretrial becomes helpful again, but this time, to help identify the inherent issues. Other advantages to the trial lawyer which were noted are: (a) the lawyer would have a better opportunity to find out what proof he would need at trial; and (b) issues of law as well as fact might be defined.[11]

8/ California, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Washington, and West Virginia.

9/ Kaufman, "Calendar Decongestion in the Southern District of New York," 40 Journal of Am. Jud. Soc. 70, June 1956.

10/ Proceedings of the Seminar on Protracted Cases for United States Judges, 23 F.R.D. 319, 408 et seq. (1959).

11/ Id. at 342, "Advantages to a Trial Lawyer of a Pre-Trial Conference."

It should be observed in passing, that the seminar, while considering the protracted case generally, did have occasion to treat of the condemnation case specifically. Among the 20 resolutions passed was the recommendation that "Pre-trial can be successfully used in condemnation cases."[12] Certainly, the more complicated the problem, the more valuable is the procedure.

In addition to numerous authorities and studies, returns to a questionnaire submitted to legal officials involved in highway condemnation in the several states and other outstanding members of the bar all combine to indicate an overwhelming consensus of opinion that the pretrial conference, resulting in a pretrial order, greatly benefits the condemnation process.[13] The most frequently mentioned advantages include the reduction of issues at trial, elimination of procedural and evidentiary stumbling blocks, prevention of admission of extraneous and prejudicial evidence, expedition of court calendars, saving of trial time, and the promotion of settlements. One reporter noted that the practice was of great value in determining difficult evidentiary questions before trial so that the court will be educated to the problems before it has to rule and the parties can better prepare for trial. The consensus of opinion was clearly in favor of the procedure as a means of improving the administration of justice.

In addition to the above-mentioned seminar's resolution and similar recommendations of other published reports,[14] cases can be selected practically at random to illustrate the need for using such procedure on a broader base. Issues of fact, for example, as to ownership or legal description of property to be acquired often arise needlessly at trial;[15] and legal issues at trial can also be anticipated. One highway case has been reported in which 12 major issues of law were anticipated in pretrial stipulations with the result that in the course of a four-month trial, only one major legal issue arose.[16]

There have been relatively few criticisms of the pretrial procedure as applied to civil cases in general, although some doubts have been expressed as to its efficacy for all kinds of cases. In any event, the procedure is less widely applied to condemnation cases than to civil cases generally in spite of the fact that its advantages (see Appendix A).

The most common concern is that there may be little merit to using the procedure where the only issues are the amount of land taken and its value. Even these reservations are usually dispelled by the introduction into the case of such special issues as boundary disputes, necessity for taking or validity of the public purpose, fixture problems, or other special problems relating to valuation.

Another common concern is the question of settlements. It has been suggested that pretrial procedure encourages taking the case on to trial because the landowner has already incurred pretrial costs and attorney's fees. There are some who still feel that achieving settlement is the prime purpose of the pretrial. Of this group, there are those who feel strongly that, based on their experience, pretrial conferences lead to few settlements, are an added hearing for which they must prepare, and are therefore a waste of time, energy, and money.

Finally, to the extent that the issues often devolve to mere questions of amount and value of property, there are those who contend that issues are not sufficiently complex to warrant the added time required. This has been considered especially true where

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12/ Id. at 615, Resolution 9b. See also at 408-411.

13/ Report of Committee on Condemnation and Condemnation Procedures, 1960 Municipal Law Section, American Bar Association, Part II, Pretrial Practice in State Condemnation Cases.

14/ Panel discussion statement of George W. McGurn, "Problems of Land Acquisition for Express Highways," American Bridge, Tunnel and Turnpike Assoc., Proceedings, 1957 at p. 79; Judge Carter, "Pre-Trial in Condemnation Cases, A New Approach," J Am Jud Soc 40:78, (O-D "56).

15/ State v. Rigby, 324 S.W.2d 941 (1959).

16/ 23 F.R.D. 409, which discusses United States v. 70 acres of land, 164 F. Supp. 451 (1959).

the issues are formulated at the regular preliminary hearing before condemnation commissioners. On this point it is interesting to observe that in slightly less than one-half of the states, commissioners, referees, or boards of appraisers are used, but there appears to be little correlation between this group and the slightly less than one-half which use pretrial techniques. In other words, pretrial has been used effectively even in states which use condemnation commissioners or viewers.

MECHANICS OF PROCEDURE

Turning now from general considerations of history, development, and purpose of pretrial conferences to an analysis of the mechanics of the procedure in condemnation cases, certain general principles for effective use may be seen.

Principles of Use

It is virtually axiomatic that the most important principles governing effective pretrial procedure are that its use be mandatory and the conference be informal. Nearly one-half of the Federal districts ignore Rule 16, even when parties request its use, because the rule makes its use discretionary.[17] On the state level, approximately three-quarters of the courts operate under similar provisions. If it is agreed that the pretrial conference is desirable, the only solution to this aspect of the problem is to make such procedure compulsory. This is not as drastic a solution as it might seem when one considers that the amount of participation required in a pretrial conference will vary widely with the degree of complexity of the case. Many judges have indicated that an average pretrial conference should take less than ½ hour if entered into with proper preparation.

Correlative to the mandatory use of the practice is, of course, the mandatory appearance of counsel for each side. Such appearance seems to be required in most states, although in some instances, in the absence of a legal representative, the landowner may appear himself. Judge Murrah has indicated that it is indispensable that the attorneys who are actually going to try the case be present with full authority to stipulate.[18]

One of the primary goals for a satisfactory and effective conference is informality. Good faith and serious efforts to reach agreements are expected of both sides, but formality is not conducive to the give and take necessary for the task. Illustrative of this is the criticism often directed at the New Jersey practice of holding pretrials in open court. It has been alleged that the very purpose of the conference has been frustrated because the formality tends to discourage free and open discussion. In response to this complaint, the New Jersey Bar Association has recommended that pretrials be held in chambers.

The vices of total informality might be checked by having the same judge try as well as pre-try. By this procedure, it is likely that he would exercise more influence over the parties in procuring agreement, and perhaps even settlement. The danger of prejudgment has been expressed as a justification for dividing the tasks between two judges, but on balance, the alternative of using the same judge seems preferable.

As has been previously noted, disclosure is the key to an effective pretrial conference. Without adequate discovery techniques there would be few advantages to recommend the procedure. The states vary in the degrees to which disclosure may be compelled. General discovery techniques are available to those states which follow the Federal Rules. Some states compel disclosure by both parties of the outer limits of their appraisal testimony; some require discovery of the names of expert witnesses. There are, however, a few states, notably Georgia, West Virginia, and New York, which do not compel disclosure at all but rather leave the parties to the discovery techniques available to them at trial. It is significant that all three of these states make only limited use of pretrial techniques in condemnation actions.

17/ Seminar, op. cit. at 334, Clark, "What Remedies for Refusal of a Pre-trial Conference?"

18/ 14 F.R.D. at 421.

Underlying the resistance to pretrial disclosure are various "trial tactics" considerations. Use of various surprise gambits and the fear of "tipping one's hand" make the trial attorney resist, or at least hesitate. It would seem, however, that few interests could be jeopardized by compelling the same degree of disclosure as would be subsequently enforced under the litigation discovery procedures. The gains realized in expediting the administration of justice would more than compensate for slight inconveniences to trial preparation. Obviously, preparation time saved is like money in a trial lawyer's pocket. Limiting triable issues will inevitably save his time.

This is not to suggest that the dike is to be opened and that all matters are to be indiscriminately disclosed. Many limitations are necessary and must be imposed. Privileged material, the attorney's work product, and the like, would naturally be protected, as would be obviously inadmissible and prejudicial evidence. Actually, the pretrial in this last respect, would facilitate the interests of both parties by serving as a screening device to prevent the admission before the jury of such evidence as maps and photographs for example, which, though accurate, might prejudicially alert the jury to such noncompensable factors as circuity of travel.

It is most useful, therefore, to analyze the scope and type of information which should be disclosed for pretrial purposes. The areas of legitimate inquiry include matters relevant to the extent and nature of the property taken, its valuation, and, of course, questions of procedure. As a general proposition, it may safely be said that as many issues as possible should be amicably settled so as to reduce the number of triable issues to the minimum. The more trial time saved the more economical is the litigation for all concerned.

Issues most likely to arise regarding the extent and nature of the condemned property are the legal description of the land and its improvements, and questions of ownership such as leasehold rights, easements, mortgages and other liens, access and slope rights, and other easements. Deeds and leases are clearly susceptible of stipulation so as to save formal proof on these usually cut and dried matters. Stipulations are also in order to settle the accuracy of an inexhaustible array of exhibits and documents. A partial list would include the accuracy of plats, right-of-way maps, surveys, and photographs, all of which tend to establish the legal description of the land taken and the extent of area remaining.

In addition to most of the run-of-the-mill documentary evidence, a great deal of testimony may be disposed of at pretrial. This will normally be directed toward appraisal or valuation evidence. In a recent Florida case,[19] real estate experts and former city officials stipulated as to present and former uses to which the condemned property could be put. Other evidence such as maps, plats, charts, and applicable restrictive zoning laws were also stipulated. In a North Dakota case,[20] the parties also agreed that the condemnation was for a valid highway purpose and further stipulated into the record that a deposit had been made. On this last point, it was further stipulated that no evidence would be introduced which would disclose to the jury the amount of that deposit. This is a good example of using the pretrial technique to anticipate trial pitfalls and prevent serious, if not reversible, errors.

In general, legitimate areas of inquiry regarding valuation evidence include the discovery of income and carrying charges of the condemned property; determining comparable sales and limiting them as to vicinity, time, and number; agreement on the highest and best use to which the property might be put, which issue is fundamental to subsequently ascertaining the fair market value; agreeing to the application of zoning regulations including setbacks, use, etc.; the availability and extent of utility services; and stipulating to the date of taking or date of valuation.

All of the above-metioned elements are procedural, also, in the sense that their disposition at pretrial is designed to facilitate a speedy and more orderly trial. Ordinarily, stipulations relating to documents will go to their authenticity, thus dispensing with requirements of formal proof and subject only to questions of relevancy at the trial. Often, however, the parties will stipulate to their admissibility as well. Areas of

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19/ Board of Com'rs of State Inst. v. Tallahassee B. & T. Co., 108 So.2d 74 (1959).

20/ Kuecks v. Cowell, 97 N.W.2d 849 (1959).

probable agreement on purely procedural matters will include stipulations of the number of expert witnesses to be allowed; the order of proof where different parties have an interest in the same parcel; and, perhaps, the date of trial.

These considerations have dealt primarily with issues of a factual nature. It should be remembered that another large area of pretrial concern is the narrowing or simplifying of legal issues.[21] Examples can be found in which all questions of fact have been settled at pretrial leaving nothing left to try but certain legal points by the court, thus dispensing with a costly jury trial. In one North Carolina case,[22] as a result of effective pretrial stipulations, the pretrial order submitted to the jury nothing but the single issue of the value of an owner's land, with even the value of improvements excluded.

CHARACTER OF THE PRETRIAL ORDER – ITS FORM AND EFFECT

If no settlement can be reached, the pretrial conference generally results in a document or order embodying the agreements of the parties (often referred to as agreements). This document may take various forms in the several states, ranging from a mere informal gentleman's agreement to a formal pretrial memorandum or order, drawn jointly by counsel and the court. Sample forms for a pretrial procedure tailored to the condemnation case may be found in Appendices B and C.

Other forms, such as an "order framing issue" lie somewhere in between these two extremes. Such an order may represent an accord as to the issues to be tried before the jury. In other cases the order may be drawn like a trial court's "findings of fact and conclusions of law." In addition to one or other of these forms, or by itself, an order "in Limine"; that is, an order preliminary to trial, settling questions of service, necessity for taking, sufficiency of the petition and occasionally, the date of trial, may be used.

In some instances the courts have formulated rules for pretrial conferences, acting under which both sides present pretrial statements to the court, arguments are heard, and the court enters a minute (or order) containing the stipulations resulting from the conference, with each side receiving a copy.

The efficacy of the entire pretrial procedure is, of course, influenced by the capacity of the pretrial order to bind the parties. In some states, however, the order is not considered binding in any respect. In others, the order is binding to the extent that issues not raised at the pretrial hearing are considered waived by the parties, and the conduct of the trial must be consistent with the order. In at least one state, the attorney may refuse to be bound and then demand a formal court order overruling him, thus providing him with a basis for appeal. Those states following the Federal Rule consider the parties bound unless some manifest injustice would result, but rulings on admissibility of evidence are reserved until trial. Briefs on legal points might easily result from the pretrial conference in such a case. It seems obvious that the liability to be bound by the order is an essential element for effective pretrial procedure.

In the over-all sense, a good faith, cooperative bargaining spirit is an essential element of an effective conference. Where such an element is not present the use of sanctions must be relied on to compel the cooperation of one or both parties. In this connection, the sanction which is inherent in the relationship of counsel to judge is probably sufficient where the pretrial judge has authority to dictate the pretrial terms, and especially where the same judge will ultimately try the case as well. According to one authority, "the most effective sanction to be applied toward settlement of a case would be the authority of the pretrial judge to advance the case for immediate trial in the face of an unreasonable position by either party."[23]

CONCLUSION

The preponderance of opinion among those who work in the area of eminent domain and condemnation is that pretrial procedure is highly efficacious and that much more

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21/ Boucher, "Why Can't We Stipulate," Right of Way, April 1960, p. 52.

22/ De Bruhl v. State Highway Department, 102 S.E.2d 229 (1958).

23/ English, "A Year of Pre-Trial Settlement Conferences," XL Chi Bar Rec. 343, May 1959.

could be done to integrate it into the condemnation process. Inasmuch as it is likely that more condemnation proceedings are instituted for highway purposes than all others combined, it is clear that pretrial should rank high as a subject of concern to highway officials.

Informality is particularly desirable and a spirit of mutual cooperation among both litigants and court is a necessity. Uncooperativeness is easily met by court dictated stipulations and orders. Although authenticity of documents and qualification of witnesses may be stipulated at pretrial, admissibility of evidence should ordinarily be reserved for ruling at trial.

With respect to those reservations which were noted, it seems fair to say first, that although settlements are of great importance, the possibility of achieving them represents but one of the many advantages which may be derived from an effective program of pretrial conferences. Second, even where the issues are quite uncomplicated, great benefit may still be derived from settling questions of sufficiency of evidence, regularity of petition and service, limiting issues to eliminate fear of surprise, etc. These elements may all be prepared in memorandum form for the court's signature and filing for record.

Commenting on the widening use of pretrial, the words of Judge Kincaid, chairman of the Pre-Trial Committee, Section of Judicial Administration, American Bar Association, provide a fitting close to these remarks:

> While of tremendous assistance in reducing the backlong of cases in courts with congested calendars, its beneficial use is not limited to jurisdictions faced with such conditions. Litigants, witnesses, jurors, lawyers and, last but far from least, the taxpayers who pay the costs of operating our courts, are entitled to the benefits accruing from this efficient, businesslike approach to their litigation. When the layman hears of the aims, objectives and methods of pre-trial, it appeals to his common sense as a progressive means of simplifying and bettering the administration of justice.24/

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Appendix A

USE OF PRETRIAL CONFERENCE PROCEDURE*

STATE	PRETRIAL AUTHORIZED			EXTENT USED IN CONDEMNATION**					COMMENTS
	Mandatory	Discretionary	Follows FRCivP	Used	Not Used	Mandatory	Discretionary	Limited	
Alabama		1/			X				
Alaska		2/							
Arizona		X	X						
Arkansas		X	X						
California	X			X		X			
Colorado		X	X						
Connecticut		2/							
Delaware		X	X	X			X		
Florida		X	X	X			X		
Georgia		3/		X				X	Limited mostly to Atlanta.
Hawaii		X	X	X			X		
Idaho		2/							
Illinois		X	X	X			X		
Indiana		X	X						
Iowa		X	X						
Kansas		X	X	X				X	
Kentucky		X	X						
Louisiana		X	X						

*The author originally prepared this table for inclusion in REPORT OF COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURES, 1960, Municipal Law Section, American Bar Association, Part II, "Pretrial Practice in State Condemnation Cases," at page 154.

**These columns are based on replies from 26 States to a questionnaire sent to members of the bar and legal officials involved in highway condemnation throughout the country.

Appendix "A" (continued)

STATE	PRETRIAL AUTHORIZED			EXTENT USED IN CONDEMNATION					COMMENTS
	Manda-tory	Discre-tion-ary	Follows FRCivP	Used	Not used	Manda-tory	Discre-tion-ary	Lim-ited	
Maine		X	X						
Maryland		X	X						
Massachusetts		X	X						
Michigan	X			X				X	Limited to Detroit.
Minnesota		X	X	X			X		
Mississippi		1/			X				
Missouri		X	X	X			X		
Montana	X			X			X		
Nebraska		X							
Nevada		X	X	X			X		
New Hampshire		2/							
New Jersey		X	X	X				X	Not applicable to pretrial except by leave of court.
New Mexico		X	X						
New York		X		X				X	
North Carolina		X	X						
North Dakota		X	X	X			X		
Ohio		1/			X				
Oklahoma		X	X	X				X	Only a few courts use it.
Oregon		1/			X				
Pennsylvania		X	X	X				X	Limited to Philadelphia and Pittsburgh.
Rhode Island		X	X						
South Carolina		1/		X				X	No established procedure; question of request.

Appendix "A" (continued)

STATE	PRETRIAL AUTHORIZED			EXTENT USED IN CONDEMNATION					COMMENTS
	Manda-tory	Discre-tion-ary	Follows FRCivP	Used	Not used	Manda-tory	Discre-tion-ary	Lim-ited	
South Dakota		1/		X			X		
Tennessee		2/							
Texas		X	X	X			X		
Utah		X	X						
Vermont		X	X						
Virginia		X	X						
Washington		X	X	X			X		
West Virginia		X	X	X				X	
Wisconsin		X	X						
Wyoming	X		X						Mandatory at request of either counsel.
Dist. of Col.									
Puerto Rico		X	X						
TOTAL	3	36	34	22	4	1	12	9	

Footnotes

1/ No statutory authority.
2/ No information available.
3/ Not generally used.

Appendix B

SAMPLE PRETRIAL CONFERENCE NOTICE

IN THE _____ COURT OF THE STATE OF

_____ IN AND FOR THE COUNTY OF

_____.

State Highway Department)
Plaintiff)
)
vs.) Court No. _____
)
John Doe, Defendant)

THE ATTORNEYS OF RECORD IN THE ABOVE ENTITLED CAUSE ARE HEREBY NOTIFIED

That the Honorable _____, Judge of the Court, has this day entered an order:

1) That this case be placed on calendar for pretrial conference on the ____ day of _____, 196_, at _____;

2) That each party be represented by the attorney who expects to conduct the actual trial, or by co-counsel, with full knowledge of the case, and with full authority to bind such party by stipulation, make disclosure of facts, and waive requirements for formal proof of documents, exhibits, extent and nature of expert testimony, etc.;

3) That each counsel prepare in writing, in advance of the pretrial conference, a brief and concise factual statement of the contentions including specification of all damage claims, consequential, severance, special and general, and all claims of benefits, special uses, etc.;

4) That each counsel, in addition, prepare in writing and in advance of the pretrial conference, a statement of the stipulations to which he can reasonably expect the opposing side to agree, including date of taking, legal description of parcels involved, names and number of expert witnesses, etc.;

5) Counsel are directed to produce for examination and discussion, at the pretrial conference, all exhibits which they intend to offer in evidence at the trial, including photographs, right-of-way maps, etc.;

6) That following the pretrial, the case will be set for trial on its merits.

DATED at _____, _____, this ____ day of _____, 196_.

_____
Judge of the _____ Court.

Appendix C *

PRETRIAL PROCEDURE RECOMMENDED BY DISTRICT COURT
FOR HENNEPIN COUNTY, MINNESOTA

The following matters will be taken up and counsel will be expected to be prepared with reference thereto.

1. Stipulation as to the date of taking, legal description of the parcels involved, description and extent of area taken and the area remaining in each case.

2. All maps, pictures and exhibits of the parties to be marked and agreement of counsel obtained as to their admission but reserving particular objections when agreement is not possible.

3. Names of expert witnesses of all parties; the court will limit the number of experts, to expedite the trial.

4. In cases involving different respondents having interest in same parcel, determine the order of proof.

5. Stipulate as to zoning codes applicable, including setback, use, et cetera.

6. Definite establishment of grade of highway and all service or access roads.

7. Width of right-of-way.

8. Exact width of roads.

9. Width of pavement.

10. Number of roads, including service or access roads, width of grade.

11. Direction of travel which will be permitted on all roads.

12. Exact position of all main and all service or access roads.

13. Exact position of ditches.

14. Exact depth, width and slope of ditches.

15. Exact position and size of all culverts and bridges.

*This material was graciously supplied by Mr. Paul A. Skjervold, Deputy Attorney General, and Edward J. Parker, Special Assistant Attorney General, State of Minnesota, for inclusion in REPORT OF COMMITTEE ON CONDEMNATION AND CONDEMNATION PROCEDURES, 1960, Municipal Law Section, American Bar Association, Part II, "Pretrial Practice in State Condemnation Cases," at page 157.

Appendix "C" (continued)

16. Number, size and exact position of clover-leafs, overpasses and underpasses.

17. Exact position of slope easement and rates of slope.

18. Any other information the trial court deems pertinent.