FINAL TENTATIVE DRAFTS

of

RULES OF PROCEDURE

submitted by

THE ADVISORY COMMITTEE ON RULES OF PROCEDURE

of the

SUPREME COURT OF IOWA

PART ONE

COMMENCEMENT OF ACTION
APPELLATE PROCEDURE
PRE-TRIAL PROCEDURE

CONTENTS

Procedure, and at that time recommended to the Court that the drafts be submitted to the entire bar of the State so that the Committee and the Court could have the benefit of the best thought of the bar on the merit of the Committee's suggestions. The Court has seen fit to release the drafts in the form submitted and the attitude of the Court on these drafts, now before you, is carefully stated in the letter of the Chief Justice accompanying this submission.

In reading these drafts three important considerations should be kept in mind. In the first place they are "tentative" drafts. That is, they may or may not represent the final recommendations of the Committee. No doubt, as the result of the bar's study of these tentative drafts, the Committee will receive many valuable suggestions and it will want to profit from these suggestions in preparing the final drafts of any rules submitted to the Court.

In the second place, it should be remembered that the three groups of rules now presented represent only the results of a portion of the Committee's study which is still continuing. Rules dealing with other phases of our adjective law will be released from time to time in tentative form. Because of the necessary inter-relation of procedural rules, it will undoubtedly be necessary to suggest rules and make changes that will harmonize and complete the rules finally submitted. An attempt in these drafts has been made to note instances where supplementary rules will be needed,

but as the Committee's work progresses other such instances will undoubtedly occur, which are not now recognized. Thus, these drafts are submitted, not as parts of a completely developed code of procedure, but as tentative suggestions which the Committee feels have merit and represent an improvement over our present procedure.

This suggests the final very important consideration that should be in everyone's mind as he studies these tentative drafts: the very earnest desire of the Committee that the rules as finally recommended to the Court be the expression of the consensus of the bar as to the best procedure for making as efficient as possible the administration of justice in the courts of our state. It is for this reason, and only this reason, that these drafts are submitted at this time. The Advisory Committee has no other motive than to enlist in this important work the invaluable help and cooperation of the entire bar, and all suggestions and criticisms, made to individual members of the Committee or sent to the office of the Committee's Reporter, 1101 Fleming Building, Des Moines, will be most gratefully received.

Sincerely yours,

Wayne L. Cook
Chairman

WGC:H

REPORTER'S NOTE

on the

Final Tentative Drafts of Rules on Commencement of Action, Appellate Procedure and Pre-Trial Procedure

The final tentative drafts of the rules dealing with Commencement of Action, Appellate Procedure and Pre-Trial Procedure are submitted in a format that should facilitate study and careful consideration. It will be observed that blank pages have been provided for notes, and it is the hope of the Committee that members of the bar will, as they read the rules, make note of suggested changes and then send to the Committee the suggestions that occur as a result of such study. Subsequent submissions of tentative drafts will be in a similar format and may be conveniently bound with this draft.

Since the drafts are tentative, no attempt has been made by the Committee to develop a final plan of numbering. It should also be noted that in some instances the rules as submitted imply the necessity for supplementary rules. These will be submitted at a later date; and it is believed that each instance of this kind has been indicated. The Committee's notes and comments on the rules are published in order to indicate the rationale of the rules, but neither the comments, nor any other statements by the Committee as to the effect of the rules, can have any greater force than the reasons that may be adduced to support them.

P. B. D.

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Des Moines, Iowa

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved October 25, 1941)

I.

COMMENCEMENT OF ACTION AND INITIAL PROCESS IN THE DISTRICT COURT

RULE 1. COMMENCEMENT OF ACTION

Except for the purpose of determining whether an action has been commenced within the time limited by law, a civil action in a district court is commenced:

(a) By filing a petition with the clerk of the court; or

(b) By serving the defendant with an original notice.

For the purpose of determining whether an action has been commenced within the time limited by law, service of the original notice upon the defendant or the delivery of the same to the sheriff of the county in which the action is brought, with the intent that it be served immediately which intent shall be presumed unless the contrary appears, shall be deemed a commencement of the action.

Comment: Under the Federal Rules, an action is commenced by filing of complaint. The rules in Arizona, Texas and Oregon make similar provision. Under Iowa Code Sec. 11055 an action is commenced by service of notice, except that for the purpose of the statute of limitations, an action may be commenced by delivery of the notice to the sheriff for service. Code Section 11012. The Minnesota and South Dakota statutes likewise make the service of summons, rather than the filing of complaint, determine the

commencement of the action. There appear to be advantages in providing for commencement of the action either by filing of petition or by the service of notice. This alternative definition of commencement of action has been adopted under the Colorado Rules. Under rules following the pattern of the Federal Rules, an action cannot be commenced without the preparation and filing of a formal petition or complaint. The proposed rule preserves this method, but provides an alternative method long followed in the Iowa practice, of commencing actions by service of notice in advance of the filing of the petition The following are suggested as advantages from retention of this alternative:

(a) Frequently the prompt service of original notice is necessary where defendant is temporarily within the state and available for immediate service. To await the preparation and filing of a petition might in some cases result in loss of personal jurisdiction over the defendant. As a practical proposition, this might be an added disadvantage to attorneys located some distance from the county seat.

(b) To require the filing of the petition in all cases might impose an unnecessary hardship upon the defendant, and frequently prevent amicable settlements of litigation. In certain types of cases neither the plaintiff nor the defendant might want the petition filed. Settlements made upon the service of the original notice and in advance, and without the necessity, of filing petition are a commendable method of expediting the determination of civil controversies. There is nothing inherently objectionable in notifying the defendant of plaintiff's intention to bring a lawsuit. If simulation of process or other abuses exist, methods can be found to deal with them, but it should not be necessary to deprive the plaintiff of the right, at his option and where he may find it necessary or advisable, to commence his action by service of notice in advance of the filing of a petition.

RULE 2. ISSUANCE, CONTENTS AND SERVICE OF NOTICE

A. The original notice shall be directed to the defendant, be signed by the plaintiff or his attorney, state the name and address of the plaintiff's attorney, if signed by attorney, otherwise, the plaintiff's address. The notice shall inform the defendant that a petition is, or on or before the date named therein will be, filed in the office of the

clerk of the court wherein action is brought, naming it and naming also the city or town and county in which such court will be held, shall state the time within which he must appear in said court and that unless he does so, his default will be entered, and judgment or decree will be rendered against him for the relief demanded in the petition. A copy of the petition may be attached to the notice, but if the notice be served without a copy of the petiton or by publication, the notice shall also state in general terms the cause or causes of the action, and if it is for money, the amount thereof.

B. In case of service by publication, the notice shall state the date on or before which defendant must appear, which date shall be not less than twenty days after the day of the last publication of the original notice.

C. By Whom Served. The original notice may be served by any person over the age of twenty-one (21) years not a party or the attorney for a party to the action.

D. Return of Service and Fees. If service is made within the state by a sheriff or his deputy within his own or an adjoining or contiguous county, or by township, city or town peace officer within such township, city or town, the truth of the return is proved by the signature of the sheriff, his deputy or other such peace officer, and the court shall take judicial notice thereof. If made without the state or by one within the state not such a peace officer, the return must be proved by

the affidavit of the person making the service. If served in the State of Iowa by a person other than such peace officer acting within the territories above defined, or in another state by a person other than a sheriff or other peace officer, no fees or mileage shall be allowed therefor.

Comment: A. Unlike the Federal Rules, it is proposed in this rule that the original notice be issued by the plaintiff or his attorney rather than by the clerk of the court. The advantage of requiring the address of plaintiff or his attorney will be readily apparent. A similar requirement is made for the address of the defendant or his attorney under Rule 10 governing appearances.

Attaching a copy of the petition is made optional with the plaintiff. Where a copy is not attached, the provisions of Code Sec. 11055 have been largely retained as to the contents of the notice. Attaching of the petition to the notice is made optional, rather than mandatory as under the Federal Rules, in order to avoid the necessity of furnishing numerous copies of the petition where there are many defendants, and where the petitions, as in actions to quiet title, foreclosures, and partition suits, are necessarily long. The Minnesota and South Dakota statutes do not require that a copy of the complaint be attached to the summons, but provide rather cumbersome procedure for subsequent service of the complaint upon the defendant appearing or demanding such copies. We believe that Rule 9, infra, provides a more practical method for furnishing copies of the petiton.

Code Sec. 11055 requires that the notice state the "place" where the court will convene. This has given rise to the question as to what is a sufficient designation of the "place" as suggested in Ransom v. Meller, 216 Iowa 197, 248 N. W. 361. Under the proposed rule it will be sufficient to name the court, and the city or town and county where it will be held.

C. Under the present Iowa statute an original notice can be served by a child of any age. The prevailing tendency in court rules and statutes in other states has been to fix an age limit, either indirectly by requiring special appointment of the server, or directly, by fixing a specific age limit, varying from eighteen to twenty-one years.

D. Service by officers other than the sheriff is frequently a great convenience and economy where the defendant is some distance from the county

seat. Service by a township, city or town peace officer is made an official service, provable without affidavit.

RULE 3. ORIGINAL NOTICE. PERSONAL SERVICE

Personal service of the original notice shall be made by any one of the following methods:

(a) Upon an individual other than a minor under eighteen years of age or incompetent person, either by delivering a copy of the original notice to him personally or by leaving a copy thereof at his dwelling house or usual place of abode with some person eighteen years or more of age then residing therein, or by taking an acknowledgment of the service endorsed thereon, dated and signed by such defendant.

(b) Upon a minor under eighteen years of age by delivering a copy of the original notice to his father, mother, or the guardian, either of his person or property, but if there be none of these persons within the state, then to the person having care or control over him, or with whom he resides or in whose service he is employed. When he is eighteen years of age or more, service on him shall be sufficient.

(c) Upon any patient confined in any hospital for the insane or county home by any of the following methods:

(1) By the delivering by the superintendent or assistant superintendent of such hospital or steward of such county home, of a copy of the original notice to the defendant, and if such service is made

upon a patient confined in such hospital in this state, the certificate of the superintendant or assistant superintendant thereof shall be proof of such service, but if made outside of this state or by the steward of a county home, the return must be proved by the affidavit of the person making the service.

(2) The superintendent of any state hospital for the insane or steward of a county home shall, if within this state, and may, if without the state, acknowledge service of original notice for any defendant confined in such state hospital for the insane or county home, whenever in his opinion direct service on the defendant would injuriously affect such defendant, which fact shall be stated in the acknowledgment of service.

(d) Upon a defendant who has been judicially declared to be of unsound mind and who is not confined in any state hospital for the insane or county home, by delivering a copy of the original notice to him and to the guardian either of his person or property, and if he have none, or if the guardian institutes the action, then to his spouse, or the person having the care or custody of him or with whom he lives.

(e) Upon any patient in the State University of Iowa Hospital or the psychopathic ward of said Hospital, or upon a patient or inmate of any institution in charge of the Iowa Board of Control or of the United States, by the delivering to the defendant by the person in charge of the institution in which he is an inmate, of a copy of the original notice. The certificate of the person in charge of such institution

making such service shall be proof thereof.

(f) In any civil action or proceeding for damages to person or property growing or arising out of the use and operation of a motor vehicle in this state on the public highways thereof by a person who is a non-resident of this state, original notice may be served, and proceedings shall be had, as provided in the 1939 Code of Iowa Sec. 5038.01 to 5038.14, both inclusive.

(g) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the original notice to an officer, a managing or general agent, including, in the case of a partnership, a general partner, to any of the last known or acting officers of such corporation, or to any agent authorized by appointment or by law to receive service of original notice. The method herein provided for service upon corporations is not exclusive and such corporations may also be served with original notice in any other manner provided by statute in force at the time of such service.

(h) Upon a city or town, by delivering a copy of the original notice to the mayor or clerk.

(i) Upon a county, by delivering a copy of the original notice to the chairman of the board of supervisors or county auditor.

(j) Upon a school district or independent district, by delivering a copy of the original notice to the president or secretary.

(k) When an individual, partnership or other unincorporated association, which is subject to suit under a common name, has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of that office or agency, such service to be made by delivering a copy of the original notice to such agent or clerk.

Comment: (a) The requirement of Code Sec. 11060 for reading of the original notice, or offer to read it, has not been retained, delivery of copy of the notice being the method almost universally followed in other jurisdictions. This statute provides for substituted service by leaving a copy with "member of his family" over fourteen years of age. The Federal Rule provides for substituted service by delivery of notice to "some person of suitable age and discretion." The Federal Rule is not sufficiently definite in a matter involving jurisdiction. A definite age provision eliminates this uncertainty. There has been some criticism of the policy of entrusting an original notice to a child of fourteen, and accordingly the age limit has been raised to eighteen years, and a similar change has been made where the service is made upon a minor defendant. The cumbersome provision of the present statute which requires a showing that defendant cannot be found in the county or that personal service cannot be made because of sickness or other disability, has been eliminated. No such preliminary condition for substituted service is found in the rules of other states.

(c) (2) This section is substantially the same as Code Sec. 11068 except that express provision is made to permit the superintendent or steward outside of the state to acknowledge service. Whether or not there can be an acknowledgment of service by such superintendent outside of the state under the present statute is at least questionable.

(e) This section follows Code Sec. 11070 except that it also embraces inmates of any institution "in charge...of the United States" to provide a method of service on inmates of veterans' hospitals, and eliminates the provision of Sec 11070 for additional service on spouses, which requirement is not now made in any of the cases of service upon the inmate of a state hospital or county home.

(g) This section incorporates the essential provisions of Federal Rule 4 (d) (3) and at the same time retains some of the additional service provisions in the present Code. Code Sec. 11079 is set out separately in (k) because it covers both corporations and individuals.

The last sentence in (g) above is added to retain the benefit of numerous and varied provisions for service upon foreign corporations. These various methods of service are fixed by numerous statutes in the corporation laws. Consent to service has been filed by these corporations by reason of the legislative power to exact such consents as a condition to doing business in this state. A similar power may not rest in the court, and as the methods of service provided by these statutes and by the consents given thereunder afford a valuable method of securing jurisdiction of such corporations, the benefit of the service thereby permitted should be retained Unfortunately, there is a great lack of uniformity in the provisions relating to such service on these various corporations, the statutes providing for service upon the Secretary of State, Commissioner of Insurance, Chairman of Iowa State Commerce Commission and head of the Motor Vehicle Department. The exact procedure to be followed varies in the different instances. If this Committee should undertake to make any change in the procedure of thus serving foreign corporations, amendments would be required in a large number of the corporation statutes. For all of the reasons suggested, the Committee feels that a general retention of whatever manner of service is provided by statute is advisable.

RULE 4. ORIGINAL NOTICE. SERVICE BY PUBLICATION

A. Service of original notice may be made by publication, when an affidavit is filed that personal service cannot be made on the defendant within this state, in any of the following cases:

1. In actions brought for the recovery of real property, or an estate or interest therein.

2. In an action for the partition of real or personal property.

3. In an action for the sale of real property under a mortgage, lien, or other incumbrance or charge.

4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where in such cases any or all of the defendants reside out of this state and the real property is within it.

5. In actions brought against a non-resident of this state, or a foreign corporation, having in the state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way.

6. In actions which relate to or the subject of which is real or personal property in this State, when any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state or a foreign corporation.

7. In all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with like intent.

8. Where the action is for a divorce, or for a change or modification of a decree of divorce, if the defendant is a non-resident of the state, or his residence is unknown.

9. Where the action is an action to quiet title to real estate if the defendant is a non-resident of the state, or his residence is unknown.

10. Where the action is for the annulment of an illegal marriage, if the defendant is a non-resident of the state, or his residence is unknown.

11. In actions or proceedings by an executor, administrator, or guardian to sell or mortgage the real property belonging to the estate of a decedent, or to a ward, as the case may be.

B. Notice to Unknown Defendants. Where an unknown person is made defendant, the original notice shall contain, in addition to the matters required under Rule 2 A, a description of the property involved in the action, the claim of the plaintiff thereto and the relief demanded. Such notice shall be entitled in the name of the plaintiff against the unknown claimants of the property.

C. Method of Publication. The publication must be of the original notice required for the commencement of actions, once each week for three consecutive weeks, after the filing of the petition, in some newspaper of general circulation in the county where the petition is filed, selected by the plaintiff or his attorney.

D. Service Complete - Proof. When the foregoing provisions have been complied with, the defendants so notified shall be required to appear as if personally served on the day of the last publication, proof thereof being made by the affidavit of the publisher or any employee of the newspaper, and filed before default is taken.

E. Actual Service. Actual Service of the original notice within

or without the state supersedes the necessity of publication.

RULE 5. NOTICE OF NO PERSONAL CLAIM

The plaintiff may state in the original notice that no personal judgment is asked against any defendant, naming him, and if such defendant unreasonably defends he shall pay the costs occasioned thereby.

RULE 6. SERVICE ON SUNDAY

Original notice shall not be served on Sunday unless the plaintiff, his agent, or attorney makes oath thereon that personal service will not be possible unless then made, and a notice so endorsed shall be served as on a secular day.

RULE 7. EXEMPTION TO MEMBERS OF GENERAL ASSEMBLY

No member of the General Assembly shall be held to appear or answer in any civil action in any court while such General Assembly is in session.

RULE 8. COMPUTATION OF TIME

In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday or on a legal holiday, in either of which cases, the time prescribed shall be extended so as to include the whole of the next succeeding day which is not a Sunday or

legal holiday. For the purpose of these rules the following days only shall be deemed legal holidays: the first day of January, the twelfth day of February, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, the twenty-fifth day of December, the day of general election, and any day proclaimed or designated by the Governor of this State or by the President of the United States as a day of thanksgiving.

RULE 9. FILING PETITION AND COPY[1]

A. If the petition has not been filed at the time original notice is served, it must be filed within ten days thereafter, and if it is not so filed, the defendant may have the case docketed by filing his copy of the original notice with the clerk, and may have the case dismissed without notice, and at plaintiff's cost.

B. At the time of filing the petition, the plaintiff shall file with the same one copy thereof for the use of the defendant, unless copy of petition was attached to original notice served upon all defendants. The copy so filed shall be forwarded by the clerk to defendant whose appearance is first entered or his attorney if the appearance is by attorney, unless return of service is then on file with the clerk showing that copy of petition has already been served upon such defendant. If appearance is made for additional defendants, the clerk shall notify plaintiff or his attorney thereof, and thereupon, if a copy of the petition has not al-

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[1]See Comment: Rule 2.

ready been served upon said defendants, the plaintiff shall file with the clerk one additional copy for each of such additional defendants, but when the same attorney appears for more than one defendant, only one copy need be filed for the same attorney.

RULE 10. APPEARANCE BY DEFENDANT. DEFAULT FOR FAILURE TO APPEAR

Except when served by publication only, the defendant shall appear within twenty days after the day the original notice is served on him in all cases where:

(a) a copy of the petition is attached to the original notice; or

(b) where the petition is on file when the notice is served and the notice so states.

When served by publication only, the defendant shall appear on or before the date fixed in the notice as published, which date shall be not less than twenty days after the day of the last publication of said original notice. In all other cases the defendant shall appear within thirty days after the day such notice is served.

If the defendant does not so appear he shall be in default, but if he does so appear, he shall have five additional days beyond the time above provided within which to answer or plead to plaintiff's petition, which time to plead shall not be extended by ex parte order.

RULE 11. METHOD OF APPEARANCE

The method of appearance may be:

A. By delivering to the clerk of the court a memorandum in writing to the effect that the defendant appears, stating the name and address of defendant's attorney, if appearance is by attorney, otherwise the defendant's address, the same to be signed either by the defendant in person or his attorney, dated and filed in the case:

B. By entering an appearance in the appearance docket or by announcing to the court an appearance which shall be entered of record, any appearance so entered to show likewise the name and address of defendant's attorney, if appearance is by attorney, otherwise the defendant's address;

C. By taking part either personally or by attorney in the trial of the case.

D. Special Appearance. Any defendant may appear specially for the sole purpose of attacking the jurisdiction of the court. Such appearance shall be in writing filed with the clerk and stating the grounds thereof, and shall limit the party to jurisdictional matters only. If such special appearance is overruled, the defendant may plead to the merits without waiving the error, if any.

RULE 12. LIMITED TO DISTRICT COURTS

The provisions of Rules 1-12 shall apply only to actions in the district courts of this state unless otherwise provided.

Comment: The rules governing commencement of actions are by this rule limited to regulating procedure in the district courts. If the Committee has time to consider procedure in other courts, then a revision of this rule will be submitted.

It should be carefully noted that no rules are now submitted dealing with terms of court. Of course, it is obvious that such rules will have to be drafted if the rules regulating commencemnt of actions are adopted and the Committee will submit such rules.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved October 25, 1941)

II.

APPELLATE PROCEDURE

RULE 1. WHAT MAY BE APPEALED

A. All final judgments and decisions of courts of record may be appealed to the Supreme Court, except as herein provided.

B. No interlocutory ruling or decision may be appealed except as herein provided until after trial on the merits, but error in such ruling or decision is not waived by pleading over or proceeding to trial on the merits. After final judgment such ruling or decision may be assigned as error where shown to have substantially affected the rights of the party complaining; provided, however, that upon the application of any party aggrieved by an adverse interlocutory ruling or decision, including parties appearing specially whose objections to jurisdiction have been overruled, the Supreme Court or the Chief Justice may, on notice and hearing, as found in Rule 10 B of these rules, grant an appeal upon finding that the substantial rights of the parties are involved and that such ruling or decision will materially affect the final decision and that a determination of the correctness of the interlocutory ruling or decision before

the trial on the merits will better serve the interests of justice. If such appeal is granted it may be upon terms of advancing the appeal for prompt submission; and the Supreme Court or the Chief Justice shall stay further proceedings in the trial court and may require bond.

C. No appeal shall be taken in any cause in which the amount in controversy as shown by the pleadings does not exceed $300.00 unless the trial judge shall, during the term in which the judgment or order is entered, certify that the cause is one in which an appeal should be allowed. Such limitation shall not affect the right of appeal in an action in which an interest in real estate is involved; nor shall the right of appeal be affected by the remission of any part of the verdict or judgment.

Comment: A, B. The purpose of Sections A and B of the rule is to limit the use of interlocutory appeals as a means of unnecessarily delaying the orderly trial of actions. It will be noted that the rule simply provides rulings on interlocutory matters will not ordinarily be subject to appeal; that the trial of the case on the merits will proceed after the objection to the ruling has been made and that the objection will not be lost or waived by proceeding with the trial. In the exceptional case where the interlocutory ruling may be one materially affecting the substantial rights of the parties the Supreme Court may, upon application by the party aggrieved, stay the action and grant an appeal.

It should be noted that the rule specifically covers the question of appeals on rulings on objections to jurisdiction made on special appearances. As in the case of rulings on other interlocutory orders, an appeal on an order overruling objections to jurisdiction will be permitted only where a determination of the question before the trial on the merits will be more convenient.

The Committee is persuaded to recommend the rule, not only be-

cause it will lead to orderly, expeditious and uninterrupted trials, but also because under the present practice no very substantial right is safeguarded by the growing practice of interrupting trials and engaging the time of the Supreme Court on these matters. It should be recalled that in criminal cases, where life itself may be at stake, appeal is permitted only from final judgment. (See Code, 1939, Section 13995)

C. Section C of the rule increases the present statutory requirement of $100 as the amount in controversy before an appeal can be taken to $300.

Statutes Affected: Sections A and B, Code Sections 12823, 12824, 12825. Section C, Code Section 12833.

RULE 2. FINDINGS OF FACT

A. Evidence in actions cognizable in equity shall be presented on appeal to the Supreme Court, which shall try such cases de novo, but the Supreme Court shall not set aside findings of fact by the trial court unless clearly erroneous and shall give due regard to the opportunity of the trial court to observe the demeanor and judge the credibility of the witnesses.

B. In all other cases the Supreme Court shall constitute a court for the correction of errors at law, and in jury-waived cases findings of fact by the trial court shall have the effect of a special verdict.

Comment: A, B. Rules A and B do not, in the opinion of the Committee, make any change in the scope of review now permitted to the Supreme Court. The rules, of course, contemplate that separate findings of fact shall be mandatory in all actions tried upon the facts without a jury and a rule to require separate findings of fact will be submitted later.

Statutes Affected: Code Sections 11433 and 11435.

RULE 3. HOW APPEALS PERFECTED

A. Appeals from any court of record to the Supreme Court shall be taken within thirty (30) days from the entering of the decree, judgment or order appealed from, and not thereafter, unless a motion for new trial is filed, in which event the time for taking such appeal is extended for thirty (30) days after the ruling on such motion.

B. The appeal is taken and perfected by filing notice in writing with the clerk of the court wherein the proceedings were had.

C. The notice of appeal shall specify the parties taking the appeal and shall designate the decree, judgment or order, or part thereof appealed from.

D. Notification of the filing of the notice of appeal shall be given by the clerk by mailing forthwith a copy thereof to the attorneys of record for the parties to the decree, judgment or order appealed from, other than those taking the appeal. If any party entitled to notice has no attorney of record, notice shall be mailed to him at his last known address. Failure of the clerk to mail notices as required by this rule shall not affect the validity of the appeal.

Comment: A. Among the many suggestions which the Committee has received there was substantial unanimity in regard to the necessity for shortening the time (120 days) permitted litigants to determine whether or not to appeal. Section A of the rule therefore reduces this time to 30 days.

D. The rule also materially simplifies the method of serving the notice of appeal by requiring only a notice to be filed with the clerk of the district court, who is charged with mailing it at once to the

attorneys of record in the case. Failure of the clerk does not affect the validity of the appeal.

Statutes Affected: Code Sections 12837, 12838, 12840.

RULE 4. SUPERSEDEAS

A. No proceedings under a judgment or order shall be stayed by an appeal unless the appellant executes a bond with sureties to be filed with and approved by the clerk of the court in which the judgment or order was rendered, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal; and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render, or order to be rendered by the trial court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal.

B. When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order.

C. If the clerk of the trial court refuses to approve the bond or requires an excessive penalty or unjust or improper conditions, the appellant may apply to the court or judge thereof who shall fix the amount and conditions of the bond and approve the same. Pending the

application, the judge may recall and stay all proceedings under the order or judgment appealed from until the decision of the application.

D. If the judgment or order appealed from is for the payment of money, the penalty of the bond shall be at least one and one-fourth ($1\frac{1}{4}$) times the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than $300.00.

E. If the Supreme Court shall affirm the judgment appealed from, it may, if the appellee moves therefor, render judgment against the appellant and his sureties on the appeal bond, for the amount of the judgment, damages and costs, or may remand the cause to the trial court for determination of the damages and costs.

Comment: The rule follows the present Code sections on supersedeas bonds. The following changes may be noted. In Section D the penalty is reduced from "twice the amount" to "one and one-fourth times the amount" and the minimum penalty is fixed at $300 instead of $100.

Statutes Affected: Code Sections 12858 ff.

RULE 5. THE RECORD ON APPEAL

A. Promptly after an appeal to the Supreme Court is taken, appellant shall prepare in duplicate a typewritten abstract of so much of the evidence and proceedings at the trial as is material to the appeal. Both copies shall be filed in the office of the clerk of the trial court,

and the clerk shall forthwith notify the attorneys of record for appellees of such filing. The reporter's transcript shall be filed at the same time.

B. Within ten (10) days after such filing any other party to the appeal may in like manner file an amendment containing corrections, substitutions or additional matter he desires to have added to or substituted for any portions of appellant's abstract.

C. All or any part of the testimony of witnesses may be stated in condensed or narrative form, but parts of testimony considered by any party to the appeal to be of particular importance may be by such party stated or substituted in question and answer form. And any party dissatisfied with the narrative statement of any part of the testimony may require that such part of the testimony be substituted in question and answer form for the narrative statement.

D. If appellant does not abstract all of the evidence and proceedings contained in the transcript, depositions and exhibits, he shall file with his abstract, and as a part thereof, a concise statement of all the points on which he intends to rely on the appeal, and shall be limited thereto.

E. At the expiration of ten (10) days from the filing of appellant's abstract, unless the parties otherwise agree in writing, or unless time is enlarged by the trial court, either party shall be entitled, on not less than three (3) days' written notice, to present the abstract proposed by appellant and all corrections and substitutions or additional matter

proposed by any party to the appeal to the judge before whom the case was tried, who shall settle any differences to the end that the abstract of the evidence and proceedings at the trial conform to the truth and be in form as provided in these rules.[1] The trial court shall then append to the appellant's proposed abstract an order allowing the same, with the additional matter and substitutions proposed by any other party, and corrections allowed by the court, in conformity with this rule.

F. The abstract so allowed shall constitute the Record of the evidence and other proceedings upon which the cause shall be submitted upon appeal, and shall be printed by the appellant.

G. Formal parts of all exhibits, and more than one (1) copy of any document, shall be omitted, which rule shall apply where documents appear as exhibits to pleadings. Documents shall be abridged by omitting irrelevant and formal portions.

H. For any additions of irrelevant matter, or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the Supreme Court may withhold or impose costs as the circumstances of the case may require. The clerk of the trial court shall, at the request of any party aggrieved, certify to the Supreme Court, the reporter's transcript, depositions, exhibits, the abstract proposed by appellant and amendments, additions

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[1]The contingency of death, retirement or disability of the judge before whom the case was tried will be provided against elsewhere by a general rule applicable to this and similar situations.

or substitutions proposed by any other party to the appeal in the trial court.

I. Instead of proceeding in accordance with the foregoing provisions of this rule, the parties may by written stipulation filed with the clerk of the trial court, agree to the correctness of any abstract prepared by any party to the appeal, and the trial court shall in such case certify that the abstract has been so agreed upon and is the Record on appeal of the evidence and proceedings at the trial.

J. If anything material to either party is omitted from the Record on appeal by error or accident, or is misstated therein, the parties by stipulation or the trial court, either before or after the Record is transmitted to the Supreme Court, or the Supreme Court, on a proper suggestion, or its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that further proceedings be had and a supplemental Record be prepared and allowed in the trial court.

K. Abstracts and the printed Record shall contain a brief index of their contents. The pleadings shall be indicated therein in the order of their filing.

Comment: Five principal procedures for preparing the record on appeal have been used in various jurisdictions: 1. Bill of Exceptions. 2. Judge-made record. 3. Record made by direction of the parties. 4. Clerk-made record. 5. Record made by parties and the court. The present Iowa system is based on the plan of a "party-made" record, but is curiously inefficient in that it permits the record on appeal to

come to the Supreme Court as a jigsaw puzzle with the burden of fitting together the various pieces being placed on that court. The Committee, therefore, has drawn a rule that will permit the record to be settled in the trial court and under the supervision of the judge who tried the case which is the fifth procedure mentioned above.

In practice the procedure would be very simple. The appellant and appellee would work together in preparing and designating portions of the transcript to be presented. If they could not agree then within ten days after the appellant's abstract had been filed, either party on three days' written notice could lay the matter before the judge who heard the case, and he would settle any differences. It should be noted that the rule does not authorize the judge to exclude from the record thus settled any evidence a party to the appeal asks to include; nor may the judge insist on a narrative form of statement against the request of either party for a record showing material portions of the evidence in ~~custom~~ question and answer form. It perhaps should be noted that Section D of the rule requires the appellant to make a concise non-technical statement of the points on which he will rely on appeal if he does not abstract all the evidence and proceedings contained in the transcript. This serves, of course, to notify the other parties as to what parts of the transcript will be germane to the appeal the appellant intends to make and permits them to make an informed selection of the additional parts of the transcript they will submit in resistance. Of course, if the appellant abstracts all the evidence and proceedings the opposite parties have no need of such a statement of points.

The rule, then, is submitted as a simple method of preparing a single, coherent, intelligible, easily used record of the case as tried. Probably every lawyer will concede that under the present system a considerable percentage of appellants' abstracts are unfair. An amendment simply added by the appellee does not cure this and is unsatisfactory because it places the burden on the Supreme Court of trying to piece together the appellants' and appellees' versions of the record in order to ascertain what the true record is. The rule provides for one "Record" settled by the trial judge whose interest is paramount in seeing the case go up on a record that reflects the true state of the facts.

Source: The rule is an adaptation of Federal Rule 75. One difference should be noted and that is the burden of printing the settled Record is placed on the appellant rather than on the clerk.

Statutes Affected: Code Sections 12845 ff.

RULE 6. FILING AND DOCKETING

A. The appellants shall, within ninety (90) days from filing notice of appeal, unless more time is granted on application to and hearing by the trial court, file the printed Record, together with copies for each party not appealing, with the clerk of the trial court, who shall mail a copy thereof to each of the other parties to the decree, judgment or order, or their attorneys of record, the same as herein provided for the giving of notice of appeal. The clerk of the trial court shall forthwith mail to the clerk of the Supreme Court one (1) copy of the Record, to be known as the "Service copy," with certificate of filing and mailing endorsed thereon.

B. The appellant, at the same time as he files the Record with the clerk of the trial court, shall forthwith mail seventeen (17) copies thereof to the clerk of the Supreme Court, together with a filing fee of $3.00.

C. The clerk of the Supreme Court shall docket the cause upon receipt of the filing fee and the copies of the Record. The cause shall be entitled as it was in the court below, and the party taking the appeal shall be called the appellant and all other parties appellees.

Comment: Considerable change has been made in the method of filing and serving the Record on appeal. Instead of filing what is now called the "Abstract" in the Supreme Court, the settled and printed "Record" must be filed (within ninety days from the filing of the notice of appeal) with the clerk of the trial court together with sufficient number of copies for each party not appealing. The clerk of the trial court then simply mails to the clerk of the Supreme Court the "service

copy" of the Record (with his certificate of filing and mailing endorsed on it) and at the same time mails the parties not appealing their copies. The appellant at the same time mails 17 "rule copies" of the Record to the clerk of the Supreme Court together with his filing fee.

RULE 7. THE BRIEF ON APPEAL

A. In cases both in equity and law the appellant within forty-five (45) days after the Record is filed shall file with the clerk of the trial court a sufficient number of copies of his opening Brief to provide one copy for the clerk's certification (to be called the "service copy") and one copy for each attorney of record and one copy for each appellee not represented by an attorney. The clerk shall forthwith mail the copies for appellees and attorneys of record to them as prescribed in Rule 3-D for mailing copies of the notice of appeal. The clerk shall then attach to or endorse upon the service copy of the appellant's Brief his certificate stating the fact of such mailing, the names and addresses and date of mailing and shall then return such service copy to the appellant who in turn shall deliver the service copy and seventeen (17) additional copies to the clerk of the Supreme Court. Within thirty (30) days after appellant's Brief is thus filed the appellee shall serve and file his Brief in like manner. If the appellant files a Reply Brief, such Brief shall be served and filed in like manner within fifteen (15) days after the filing of appellee's Brief.

B. The opening Brief of the appellant shall contain:

First: A Statement of the Case. The Statement of the Case

shall not exceed one page in length, and shall show the nature of the action, what the issues were, how those issues were decided, and what questions are presented by the appeal.

Second: A Statement of the Facts. The Statement of the Facts shall state in narrative form the principal material facts with references to the pages and lines of the Record which support each statement of fact. If, however, such references are fully supplied in the Argument, then they may be omitted from the Statement of Facts.

Third: A Statement of Errors relied upon for reversal when the appeal presents questions of law, and a Statement of Propositions when the appeal is triable de novo. The errors and propositions shall be separately stated and numbered in substantially the order in which they are presented in the Divisions of the Brief.

Fourth: In separately numbered Divisions:

(1) A statement of the "error or proposition relied upon," which will be discussed in that division with references to the pages and lines of the Record, sufficient to show fully the manner in which the error arose and the ruling of the trial court thereon.

(2) Separately numbered or lettered points stating concisely without argument the grounds of complaint of the ruling with citation of authorities supporting each point.

(3) The argument shall follow the statement of the brief points and authorities in each division and shall be confined to such points.

(4) Where two or more errors are relied upon which present closely related propositions of law or fact, the brief points and argument may be presented in one division.

(5) Where the error relied upon relates to the sufficiency of the evidence to sustain the ruling upon any point, the argument shall supply full references to the pages and lines of the Record unless such evidence is fully stated with such references in the Statement of Facts.

C. The Brief of appellee and appellant's Reply Brief shall follow the outline herein provided for the Opening Brief of appellant as nearly as may be without unnecessary repetition.

Comment: A. Section A of the rule provides a simpler method for serving and filing the Brief similar to that used for serving the Record. This section also removes the considerable difficulty that has resulted under the present rule where service must be had on parties to the appeal who are not represented by attorneys of record. It frequently happens that the residence of such parties is not known and a question as to the validity of the appeal may possibly be raised.

B. Section B of the rule is a restatement of the present Rule 30 of the (domestic) rules of the Supreme Court. A new requirement is made in the manner of organizing the Brief. This change should carefully be noted. It provides that the Brief shall open with a "Statement of the Case." This Statement must be limited to one page and is to include in addition to the matters now required by the first three sections of Rule 30 a concise statement of the questions involved in the appeal. It is contemplated that the Statement of the Case will assist the Supreme Court in making itself familiar with what is involved in the case before the oral argument is made. It must be clearly understood that the Statement of the Case is not to be confused with the Statement of Facts referred to in the second requirement of Section B; nor is it to be confused with the "Statement of Errors" or "Statement of Propositions" referred to in the third requirement of the rule.

A second important change is to be noted in the fourth requirement

of the rule as drafted by the Committee. It will be recalled that the present requirement of Rule 30 is that the assignment of error "shall set out so much of the record as refers thereto." This requirement has been eliminated under the new rule as being unnecessarily cumbersome and impossible to be complied with literally. Under the rule as drafted, it will be sufficient to state the error and supply references to the pages and lines of the Record unless such evidence is fully stated with such references in the Statement of Facts.

A further change in this section of the rule is effected by permitting errors in the same general class to be grouped for the purpose of argument under one division. For example, the error claimed may be admission of testimony inadmissible under the "Dead Man's Statute." This error may occur many times throughout the Record and involve the testimony of numerous witnesses. Under the rule as drafted, the error could be treated under a single division of the argument.

RULE 8. PRINTING AND COSTS

The Record and Brief shall be printed upon unruled, unglazed writing paper, with type commonly known as small pica, leaded lines, the printed pages to be four inches wide and seven inches long, with a margin of two (2) inches; headings and matter to be specially emphasized may be printed in bold face type. The lines of the Record must be numbered consecutively on each page. Cost of printing not to exceed $1.00 per page shall be certified on the instrument filed and shall be taxed by the clerk of the Supreme Court as costs in the case. Motions, applications and petitions may be typewritten.

Comment: No substantial change has been made in Rule 34.

RULE 9. SUBMISSION AND ORAL ARGUMENT

If a party desires to be heard orally, he shall so state at the

end of his Brief. A party who has not given such notice of oral argument may reply to an oral argument of the adverse party, but not otherwise. Oral argument shall not exceed three-quarters (3/4) of an hour for appellant, and one-half (1/2) hour for appellee, unless an extension of time be granted by the court before argument is commenced, or during the course of the argument, where it is apparent that more time is necessary.

Comment: In place of the present requirement for notice of oral argument (Rule 26) the Committee has provided for a simple statement of request for such argument printed at the end of the Brief.

RULE 10. WRITS AND ORDERS IN THE SUPREME COURT

A. Writs and Process. The Supreme Court shall issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction and in the furtherance of its supervisory control over all inferior judicial tribunals and officers therof throughout the state, and may enforce its mandates by fine and imprisonment and imprisonment may be continued until obeyed.

B. Orders. All applications for orders in the Supreme Court shall be in writing and shall be served upon the adverse party or his attorney of record, together with a notice that such application will come on for hearing before the Supreme Court or a Justice thereof at a time and place fixed in said notice; or, the parties may, by stipulation and by arrangement with the Court, or a Justice thereof, pro-

vide for a time and place of hearing.

C. Hearings. No orders shall be issued except upon reasonable notice and opportunity for hearing unless it be made to appear that great and irreparable loss would ensue if the matter were delayed, in which case, an order shall be entered only for the period until hearing can be had.

D. Motion to Dismiss Appeal.[2] Motion of appellee to dismiss appeal shall be in writing supported by written brief served on appellant and filed with the clerk of the Supreme Court within ten (10) days after the filing of the Record if the grounds therefor then exist. At least ten (10) days shall then expire before the submission thereof. Appellant's resistance to the motion shall be served and filed at least three days before the date of submission. The Court shall rule upon the motion before requiring the submission of the appeal. The time intervening between the service on appellant of such motion and brief and the determination thereof shall be excluded in determining the expiration of the respective periods within which the Briefs of appellant and appellee on the merits must be filed. In case appellee desires to present his motion orally he shall make request therefor in his motion, and if the Chief Justice determines the matter is of such character or importance that oral arguments are desirable he shall assign same for oral argument. The clerk shall advise each party by mail of the time fixed. If the request is denied each party shall be likewise advised.

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[2]Provisions for the mechanics of service and filing of motions and briefs will be covered by a general rule on service to be submitted later.

If the grounds for motion to dismiss the appeal arise after the Record has been filed appellee may file and serve such motion and supporting brief and the Court shall determine when and on what notice the same shall be heard and whether the submission of the appeal shall be stayed and may make any appropriate orders with respect to the time for filing briefs on the merits.

E. Remands. When a judgment is reversed for error in overruling a motion to direct a verdict or to withdraw an issue from the consideration of jury, appellee shall not be entitled to have the cause remanded for a new trial in whole or on such issue, except that if it appears from the Record that the material facts were not fully developed at the trial in which such error occurred; or, if in the opinion of the Court the ends of justice will be served thereby, a new trial may be awarded; otherwise the Supreme Court shall enter, or direct the trial court to enter, final judgment upon such issue in conformity with the decision of the Supreme Court.

F. Rehearings. No notice of intention to petition for rehearing need be given but the petition and supporting brief shall be served on appellee and filed with the clerk of the Supreme Court within thirty (30) days of the filing of the opinion, unless the Chief Justice shall, upon written application made and served upon the opposing parties, extend the time for filing and serving such petition and brief. The opposing parties shall have fifteen (15) days after the filing of the

petition and brief to file resistance thereto. Upon the submission of a petition for rehearing, the Court may modify the opinion theretofor filed, or may order resubmission.

When upon granting a petition for rehearing a resubmission of the appeal is ordered, the Court shall designate the time for filing briefs and counsel shall be entitled to argue the resubmission orally; the Court may indicate in the order for resubmission the point or points to be argued.

G. Certiorari. Where a review is sought by writ of certiorari and the Supreme Court is of the opinion that the writ does not lie because appeal is available, or where appeal is taken and the Court is of the opinion that certiorari is the proper remedy, the matter shall not be dismissed, but shall proceed as though review on proper proceedings were asked.

Comment: B, C. Sections B and C of the Rule as drafted avoid the clearly undesirable practice of issuance of orders after ex parte hearings.

D. A new rule governing motions to dismiss appeals is submitted. It should be observed that there are two parts to the rule governing two different situations.

The first situation dealt with occurs when the grounds for the motion to dismiss exist at the time the appellant files his Record. In such a case, the motion to dismiss must be filed by the appellee within ten days after the Record is filed and the rule makes it mandatory for the Supreme Court to rule upon the motion before the appeal proper is submitted.

The rule further provides that the time necessary for the disposition of the motion shall not count against the time allowed the appellant to prepare and file his Brief. For example, the appellant may

file his Record on April 15. Normally, he would have 45 days in which to prepare his Brief, which would make his Brief due on May 31. If the appellee serves a motion to dismiss on April 25 and the decision on the motion is not had until June 15, the appellant will have 35 days beyond June 15 to submit his Brief. That is, from April 15 to April 25, it is supposed the appellant would be working on his Brief. He thus has had 10 days of his 45 days. He now will have the remaining 35 from the date after the motion was decided, that is, he will get until July 20. The appellee, of course, would then have 30 days to prepare his Brief.

The second situation which the rule covers is where the grounds for the motion arise after the Record has been filed by the appellant. For example, it may be that the appeal has become moot. In such an event, the rule simply provides that the Supreme Court will determine when the motion shall be heard and whether any stay will be granted.

E. Section E of the rule is designed to eliminate the unnecessary step of remanding to the trial court a case where the Supreme Court is in a position to enter final judgment. It should be obvious that the rule as drafted will greatly expedite final determinations, and it should also be carefully noted that adequate safeguards are placed in the provision that, if it appears from the Record as presented to the Supreme Court on appeal that material facts were not developed at the trial or if for some other reason the ends of justice would be better served by remanding the case, a new trial may be awarded.

In the opinion of the Committee the rule as drafted will tend to encourage the practice now occasionally followed by the Supreme Court of entering final judgment without remand and make remanded cases the exception. An example of the entry of judgment without remand may be found in Wilson vs Findley, 223 Iowa 1281. An obvious gain in thus shifting the customary practice would be to reduce the probability of what can only accurately be termed manufactured evidence on the second trial. There would seem to be no valid reason why the plaintiff in such a case should be permitted a second trial whereas the defendant is finally bound by an affirmance.

F. Section F of the rule simplifies the procedure on the petition for rehearing and provides what hitherto has not been provided for: an oral argument at the rehearing. It is clear to the Committee that it is even more important that the Supreme Court should have the benefit of oral presentation in cases where resubmissions have been ordered than in cases of original submission.

G. Section G of the rule attempts to cure the not uncommon practice of appeals being sought both by writ of certiorari and by appeal in those cases where the appellant is uncertain as to the proper remedy.

This practice of duplicate appeals is highly inefficient and has come about only because appellants have not been clear as to which was the designated route. The rule as drafted follows the practice used in the Supreme Court of the United States in providing that the appeal shall not be dismissed because the procedure used has been designated by the wrong word of art.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved October 25, 1941)

III.

PRE-TRIAL PROCEDURE

RULE 1. PRE-TRIAL CONFERENCE; FORMULATING ISSUES

A. After the issues are made up in any action, the court may in its discretion and shall at the request of the attorney of any party to the case direct the attorneys for all the parties to appear before it for a conference to consider

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 or records which will avoid unnecessary proof;

4. The limitation of the number of expert witnesses;

5. Such other matters as may aid in the disposition of the action.

B. 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 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.

C. Any party shall have the right to have a record made by the reporter of the pre-trial conference or any part thereof.

D. 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.

E. Nothing in this rule shall either abridge or enlarge the power of the court at the pre-trial conference to make orders not agreed upon by the parties.

Committee's Notes

Purpose: The purpose of the rule is to eliminate unnecessary delays in the trial of actions by giving court and counsel an opportunity before trial to narrow the issues, get the pleadings in order, provide for stipulation of non-contested facts and ascertain the necessity and time for actual trial. It should be emphasized that the rule is not designed as a means of forcing mere arbitration or enforcing a settlement. Pre-trial conferences contemplate trial, and are designed, not to prevent the presentation of a controversy to the court, but to expedite and simplify that presentation.

Source: The rule follows in general the language of Federal Rule 16, but provides in addition specific provisions for a record of the pre-trial conference as well as a provision permitting the conference to be called at the request of any party to the case.

Citations: Konstantino v. City of Detroit, 280 Mich. 310 (1937) (Authority of trial court to establish pre-trial conferences); Fanciullo v. B. G. & S. Theatre Corp., 8 N.E. 2nd 174 (Mass. 1937), Gurman v. Stowe-

Woodward, Inc., 19 N. E. 2nd 717 (Mass. 1939) R. Dunker, Inc. v. V. Barletta Co., 18 N. E. 2nd 377 (Mass. 1938) (Effect of the pre-trial report).

Comment: Since 1932 when the pre-trial conference procedure was first used in the Circuit Court of Wayne County (Detroit) Michigan the procedure has spread to many courts throughout the country, and with the promulgation of the Federal Rules it has become common in the Federal Courts. The procedure can be found operating in one or more courts in Arizona, California, Colorado, Florida, Illinois, Ohio, Pennsylvania, South Dakota, Texas and Wisconsin. In Iowa pre-trial conferences have been successfully instituted by local rules in the 5th judicial district. The results everywhere have been extremely favorable.

The following are opinions expressed by various Federal judges who have had experience with the use of pre-trial conferences:

> "It is undoubtedly the greatest forward step in the speedy and efficient administration of justice during my experience on the bench for the bar."
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> "It is very valuable,—a time saver to both court, litigant and their counsel. I am very much in favor of it,—and it is popular with the bar of this district. Of course, once in a while counsel become wary, and nothing is accomplished, but that is decidedly the exception."
>
> "This procedure has been used extensively in this district since adoption of new rules and in my opinion has lessened the time necessary for trial of cases at least 50 per cent."
>
> "I am convinced that it (pre-trial procedure) is an extremely valuable device. Conservatively, every hour spent in pre-trial work is repaid by three hours saved subsequently, in my judgment. It is particularly useful in avoiding the use of purely formal and dispensable witnesses, and avoiding wasted time during a trial calendar. It not only saves the time of the court (including the jury), the parties, witnesses, and the lawyers, but it impresses the general public with the idea that its courts of justice are operating efficiently. Money is saved for the United States and its laws are more respected. I can not imagine a more useful combination of advantages."

The mechanics of the procedure are very simple. At some time after issue is joined the attorneys for the parties appear before a judge in an informal session of court. Amendments to the pleadings

are discussed and generally granted as of course, but are precluded thereafter unless injustice would result. Counsel then are called upon for admission of facts in order to simplify the manner of proof and eliminate uncontroverted issues. For example, in automobile tort cases counsel have been urged to stipulate such facts as that vehicle is registered, that operator was licensed, that driver was agent, that photographs are accurate, that hospital reports are correct, etc. Again in cases involving a large amount of documentary evidence, counsel may agree to the waiver or to the introduction of certain exhibits in evidence. Stipulations are generally expected on matters about which there is no controversy.

At the conclusion of the conference, the pre-trial judge dictates to the reporter a pre-trial order on which are noted the results of the conference. The report becomes part of the official file and is binding on the parties as well as the judge who hears the case. The case is then assigned to the trial calendar, and, since the case has been carefully prepared for trial, counsel and court have a fairly definite idea of how much time the trial will take. In this way it is possible to stabilize the trial docket and prevent "calendar delay."