(3) For the purpose of obtaining a tactical advantage such as forcing the other party to call a witness from whom other evidence can be extracted or who will bring discredit upon the party calling him.

(4) The party, or his legal adviser, does not know enough about the issue either because the information is not available or through lack of investigation.

(5) Sheer obstruction.

Clearly a number of these reasons are not acceptable and, to a large extent, the fact that issues are contested for unacceptable reasons must be attributed to a reluctance on the part of the bench to act positively. While the bench is more effective if patient and forceful than if intemperate, in this area it may be necessary for there to be either a few draconian orders or great persistence to enforce acknowledgement that proof of matters about which there is no dispute cannot be allowed to prolong, and increase the cost of, proceedings generally and the trial in particular.

I recommend that there should be greater use of the procedures provided by section 82 of the Supreme Court Act, 1970.

D. Pre-trial Conference

In New South Wales, an attempt is made, at a directions hearing or callover, to define and limit the issues in an action, to estimate its hearing time and to ascertain dates convenient for counsel and witnesses for the hearing. In certain cases, before the directions hearing or callover, the parties complete a schedule which is intended to isolate the factual issues.

In London, the matter is dealt with by summons for directions[69] which I felt worked more efficiently than our system. In the United States, the procedure varies. A typical procedure is set out above.[70]

When I was in Denver, the Denver District Court was considering proposed rules which were aimed at avoiding a formal pre-trial conference y requiring the counsel to meet informally at least six weeks before the trial to:

(a) exchange and number all proposed exhibits;

(b) exchange a list of witnesses;

(c) prepare jury instructions (this is a matter of some importance in the United States, although rarely treated as a formal step in our procedure);

(d) conduct good faith settlement negotiations;

(e) explore matters which can be agreed.

The parties are then required to file a trial data certificate dealing with undisputed facts, disputed issues of fact, points of law, witnesses, exhibits, special damages, settlement negotiations and matters relating to the trial. The rules provide for sanctions for failure to comply with them, as well as the awarding of expenses, including attorneys' fees, against the party in default or his attorney. This is an interesting example of the growth in the United States of the use of party and party costs.

Behind every system of pre-trial conference or procedure is the objective, described to me by the framers of the proposed Denver District Court rules as utopian, of cases being fully prepared well before the trial date. It is said, and the view is held in New South Wales, that if cases were to be so prepared there would be more settlements generally and less settlements at the door of the court. I accept the view expressed to me in England that you cannot prevent settlements at the door of the court. There are factors, other than the state of preparedness of the lawyers, which operate on settlements.

It seems to me inefficient and tedious to prepare a case for trial twice. I prefer to deal with the problem of court door settlements of, say personal injury cases, not by requiring preparation for trial some six weeks before hearing but by use of a master calendar listing system with a sufficiently large volume of cases to enable use to be made of the statistical rate of settlement. To create a sufficient volume, it may be necessary to sit judges from other divisions in the particular division for say one month, or to use Recorders. This type of allocation of judicial resources can clearly be better handled by a single court using modern administrative methods.

I take the view that, with cases involving simple issues and a short hearing time, there is need for no more pre-trial conference than the present New South Wales District Court callover. In more complex cases, there is a benefit in a more detailed pre-trial conference. This was the experience in California where pre-trial conferences in other than complex cases were discontinued when it was found that they doubled costs. In California judges are elected. It was suggested to me that the federal judges, who are not, can afford to make themselves unpopular with the lawyers who appear before them and insist that things be done.

In complex cases I consider that there is a very real benefit in the judge sitting down with the parties, or on his bench if he prefers, and having a full pre-trial conference. There is not the scope which exists in the United States for making findings on the facts, that is giving summary judgment on a particular issue, as the judge would not have available the depositions of the witnesses although he would have the agreed bundle.[71] But he has power to order admissions and to direct methods of proof.

I recommend that in complex cases the judge should hold a pre-trial conference four to six weeks before the hearing.

E. Settlement Conference

The formal settlement conference is something which I encountered only in the United States. I discussed it with a great number of lawyers. Opinions differed as to whether it is effective as a general procedure. Most opinions were that some judges are more effective than others in its use, which, trite though it may seem, is really the key to the use of the procedure.

In the New York Supreme Court, the parties are called before a panel of three judges and asked why the case cannot be settled. If it still does not settle, it is fixed for hearing the next day or at least within the next week. In Denver, where the court has an individual calendar system, a test scheme of sending cases to another judge for a “no holds barred” settlement conference has produced good results. On the other hand, a mandatory settlement conference scheme introduced in California in 1975, produced, in its first six months, fewer settlements than before.

The trial judge in the United States has power to review a verdict. That is, if the jury brings back a verdict with which he disagrees, he has power to substitute a verdict in its place. Where the trial judge conducts the settlement conference, some judges inform the parties that if a verdict outside a particular range is returned, he will alter it. This practice was the subject of criticism, which leads to another role of the settlement conference. If a lawyer cannot convince his client to accept a settlement, he arranges a settlement conference at which the judge’s attitude is hoped to be persuasive.

In relation to the judge’s attitude, in most States, a party can make a peremptory motion for one change of judge, that is, to veto a particular judge for that case. Sometimes it has to be done on cause but the cause is easily made out. In addition, if a lawyer has lodged a complaint about a judge he never has to appear before that judge again.

There are problems where the trial judge holds the settlement conference, which occurs in most federal courts, and the case is not to be heard with a jury.

The opinion which I found most persuasive was that of a court administrator who said that whatever is saved in trial time is lost in pre-trial time. The procedure does not speed things up or dispose of more cases. I do not recommend that such a procedure be instituted in New South Wales.

F. Juries

In the United States, litigants have a right to a jury in criminal cases and in what would have been common law cases as opposed to equity cases. The right, if that is really the appropriate term, operates in a much smaller area in New South Wales.

The abolition or retention of juries is often an emotional issue, a reflection of community views on the one hand and of allegations of inefficiency on the other. I have referred[72] to the moves in the United States to eliminate inefficiency by modern technology. The size of the problem in the Unites States is illustrated by the estimate given to me that a small percentage reduction injury panels would save $US50,000,000 a year.

The reflection of community attitudes can be very apparent. A stockbroker suing a client, or a newspaper defending a defamation action, is left in no doubt as to the response of the community. A doctor who had not harmed his patient will not be convicted of illegal abortion by a jury. In the area of damages for personal injuries, juries have not followed the massive verdicts awarded by some judges. Personally, I consider this reflection of community attitudes to be important.

The ability of the jury to express the attitudes and prejudices of its members in its verdict, particularly in a racially mixed country, is significant. I have referred to the demise of the jury in South Africa.[73] The composition of juries in New York has been affected by the change in population. It is in this context that the examination of prospective jurors in the United States must be considered. An important element of such examination is to ensure that the juror will accept the judge's rulings as to law, even if his personal inclination is to find otherwise.

Although it is said that jury trials take longer, an impression of mine was expressed by an American judge. A jury trial need not take longer if properly prepared. On the other hand, if a judge sits alone, he has to give detailed findings of fact which takes time. A jury cannot reserve its decision.

In Los Angeles, and no doubt elsewhere, prospective jurors are given a juror's handbook. I feel sure that something of this nature would be of assistance to New South Wales jurors and that there are other aids which jurors would appreciate.

From my observation of the jury system at work during my investigation, and from the comments made to me, I am happy with the operation of that system in New South Wales, bearing in mind the balancing of different interests which is involved. I make no recommendation for change.

G. Small Claims

There is a basic social evaluation involved in any investigation of this subject. Should society bear the cost of determining where a small loss should fall? Is the loss of $5, the cost of a cab-fare or a carton of cigarettes, really an injury which the law should protect? If there is persistent cheating of consumers, or of anyone for that matter, is not the criminal law better able to deal with the situation?

A distinguished American judge felt that consumer complaints should be dealt with by the public sector rather than by the private sector. The consumer should be reimbursed by the State which should pursue the defaulting merchant. Such a step involves no great advance in principle on the rationale of a National Compensation Scheme. And it may be that the cost to the community of such a scheme would be less than the provision of courts or other tribunals. I have not seen any figures, but the cost to have, say a Master, sit for an hour must be in the order of $100. In California it costs the court $1,500 for a hearing day.

If the community accepts that it should provide a tribunal for the resolution of small claims, a decision must be made as to whether that tribunal should be within the existing court structure or should be separate. In England, the Lord Chancellor said to the Council of County Court Judges in 1972:[74]

> ... a review of County Court Procedure to make it more adaptable to situations where litigants wished to conduct their own cases, and perhaps later by extending once again the jurisdiction of registrars ... [is] a far more practicable approach and a far more economic use of skilled manpower and court accommodation

than to man and staff a new range of courts to do part (but not all) the work which County Courts already do very well.

In New Zealand, the Small Claims Tribunals recently introduced will be divisions of Magistrates' Courts.[75]

There is a view that the speedy processing of small claims helps debt collectors and that the consumer feels oppressed. I suggest that that stigma will be avoided if debt collecting is confined to a separate default registry. It must be noted that debt collecting is, with few exceptions, excluded from the jurisdiction of the New Zealand Small Claims Tribunals.[76]

In systems providing voluntary submission of small claims to informal arbitration, the trader has been criticized for refusing to submit, the suggestion being that he has no defence. On the other hand, a trader with a genuine defence could expect to receive a more impartial hearing before the courts and he may wish to take advantage of the normal procedures available to him there.

Whatever tribunal is used to determine small claims, clear information should be available to the public, preferably by way of a short handbook, explaining the workings of the tribunal and how a member of the public brings a claim before it.

H. Arbitration

This section is concerned, not with arbitration of disputes under building contracts, insurance policies and suchlike, but with reference of actions, generally small personal injury actions, already before the court for determination by an arbitrator, usually a practising lawyer.

The Los Angeles Attorneys' Special Arbitration Plan commenced in 1971. It has handled some 800 cases and it is estimated that it has saved in the order of $10,000,000 in court time. The original limit of recovery was $7,500, it is now $15,000 and it is suggested that it be increased to $25,000.

The plan is sponsored by the association of defence lawyers and the association of plaintiffs' lawyers. The arbitrators are lawyer volunteers who sit for one morning and one evening each year. The hearings take place at the courthouse.

Arbitration can be sought at any time after filing suit and the average time between the initiation of arbitration and a decision is 35 days compared with a wait of some years for a court trial.

A comprehensive review has been made of arbitration plans in the United States.[77]

The Los Angeles County Superior Court also has a Personal Injury Short Cause Programme. Cases come under this programme if the parties waive a jury and agree to trial by one of a panel of judges. There are rules simplifying the introduction of evidence. It is said that the trial time is reduced from three days to three hours.

My impression is that the congestion of personal injury cases in the New South Wales District Court is not such as to require use of an arbitration plan. We do not have juries in motor vehicle cases, the great proportion of that category, and we do not have the discovery procedures common in the United States, which the arbitration plans are partly designed to avoid. But note should be taken of an important aspect of such plans. That is the basic premise that these cases should be brought on for trial as swiftly and as simply as possible.

If congestion of trial time for personal injury cases does become a problem, I suggest that consideration be given to the introduction of an assessment procedure along the lines suggested by Mr. R. M. Porter, the General Manager of the Government Insurance Office of New South Wales, at a seminar conducted by the Law Reform Commission in October, 1973. The procedure suggested was that each party submit all relevant material on the issue of damages to a court assessor so that he may assess the quantum of damages. If a party does not accept the figure and wishes to litigate the issue, he may do so but he suffers a penalty if he does not improve his position. Interestingly enough, under the Wayne County, Detroit, Mediation Programme, if a party rejects the mediator's decision and does not improve his position at the trial by at least 10 per cent, he pays the other party's costs of the trial.

I. Personal Injury Litigation

In 1968, when the N.S.W. Law Reform Commission was drafting the Bill for the Supreme Court Act, 1970, and the rules thereunder, I submitted certain proposals to the Commission relating to pleading in actions for damages for personal injury. The Commission informed me, with great courtesy, that it was not prepared to give effect to my proposals because they would be a major innovation and because they would involve the prescribing of forms. I have raised these proposals with various bodies on several occasions since with no effect. Nothing daunted, I put them forward again in an expanded form.

I recommend above[78] that certain categories of the court's business be treated separately. In my opinion, actions for damages for personal injury arising from motor vehicle accidents and industrial accidents, come before the courts in such a volume, and involve such issues of fact and law, as to make those actions amenable to be dealt with separately from other actions and in a way which will increase the efficiency of the courts. There is neither magic nor anything new in so treating a category of actions. As Bullen and Leake have said of the common *indebitatus* counts: "simple contracts, express or implied, resulting in mere debts, are of so frequent occurrence as causes of action, that certain concise forms of counts have been devised for suing upon them."[79] More recently particular forms of pleading and procedure have been adopted for matrimonial causes.

I recommend that actions for damages for personal injuries arising from motor vehicle accidents and industrial accidents, be treated by the court in the following way. After the completion of the pleadings, to which I refer in the next paragraph the parties should exchange all expert and medical reports, hospital and wage records, details of out-of-pocket expenses and affidavits by witnesses to the accident. The action should be placed in the court's master list. I favour a directions hearing on the English system but that is a matter of detail.

The matters which should be disclosed by the pleadings in such personal injury actions are of limited number and can be enumerated. They are the identity of the parties (also, I suggest, any insurers), details of the accident, the allegations of negligence relied on, any regulation or statute the breach of which is relied on, the injuries, disabilities and economic loss alleged. Similarly the defence and any cross claim. As the rules and forms which I earlier proposed are with the Commission, I shall not set them out in this report.

FOOTNOTES

63. 4 Moore's *Federal Practice* 26.02.

64. Heading I pp. 68-69.

65. p. 22.

66. See p. 34.

67. p. 32.

68. p. 31.

69. See p. 22.

70. p. 33.

71. See p. 23

72. p. 48.

73. p. 8.

74. Speech delivered in October 1972.

75. p. 28-29.

76. Small Claim Tribunals Act 1976 (N.Z.), s. 10.

77. John G. Fall, "The Role of Arbitration in the Judicial Process" (1973) *Report of the Judicial Council of California,* p. 31.

78. p. 42.

79. *Precedents of Pleading* (3rd ed., 1868), p. 35.

CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND NEW ZEALAND

Summary of Recommendations

The trial courts of New South Wales should be merged to form one court.

A number of barristers and solicitors should be appointed recorders to serve as judges for four weeks each year.

If a court or a judge reserves its or his decision, it or he must fix a date upon which the decision will be given.

Where categories of business of a court, by reason of volume or common features, are amenable to being dealt with in a particular way, those categories should be recognized and treated accordingly.

The system of mentioning matters in the Commercial List of the Supreme Court should be discontinued.

Part 27 of the Supreme Court Rules should be amended so that the deposition of a witness may be taken on videotape and that videotape admitted in evidence.

The carriage of criminal prosecutions at the instance of the State of New South Wales should be controlled by one body headed by, for example, a Director of Public Prosecutions.

The present committal procedure operating in New South Wales should be abolished and a new procedure, specified in detail in the paragraph, should be adopted.

Each complex criminal case should be allocated to a particular judge at an early stage.

A default procedure should be instituted in respect of petty offenders.

In criminal proceedings there should be time limits for the commencement of trial, or for committal. If the limits are exceeded, the defendant should be discharged.

A pleading should commence by stating the cause of action or defence upon which the party relies.

Subject to the power of the court to grant an extension, any civil action the trial of which has not commenced within five years of the date of the filing of the initiating process should stand dismissed.

The existing pre-trial discovery procedure in New South Wales should be retained.

There should be a greater use of the procedures provided by section 82 of the Supreme Court Act, 1970.

In a complex case the judge should hold a pre-trial conference four to six weeks before the hearing.

Actions for damages for personal injury arising from motor vehicle accidents should be treated by the courts separately from those arising from industrial accidents.

CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND NEW ZEALAND

Appendix A - Person Rendering Assistance to the Author

SOUTH AFRICA

Johannesburg

Supreme Court:

Mr Justice Cillie Ñ the Judge President of the Transvaal.

Members of the Bar:

Mr G. Alexander, S.C.

Mr Mark Hannon

Solicitors:

Mr S. W. Van der Merwe - President of the Law Society and members of its Council.

Mr David Goss

Pretoria

University of South Africa:

Professor C. R. Snyman

ENGLAND

London

High Court of Justice:

The Hon. Mr Justice Donaldson

Master I. H. Jacob

Master John Ritchie

Members of the Bar:

Mr Richard Yorke, Q.C.

Mr Robert Alexander

Solicitors:

Mr P. Baylis

Mr B. Hollingsworth

Mr C. R. L. James

Mr A. R. L. Mirams

Mr M. H. Sheldon

Mr R. E. Walker

Lord Chancellor's Office:

Mr Richard White

Mr H. D. New

Scotland Yard:

Detective Superintendent George

Detective Inspector Doweswell

Detective Inspector Stewart

Detective Sergeant Monk

Birmingham

University of Birmingham:

Professor G. J. Borrie

Mr John Baldwin

SCOTLAND

Edinburgh

High Court:

The Hon. Lord Thomson

Scottish Courts Administration:

Sheriff R. D. Ireland, Q.C.

The Crown Office:

Mr Douglas Allen

Advocates:

Mr James Mackay, Q.C.

Mr J. A. D. Hope

Solicitors:

Mr Ian B. Inglis

NEW ZEALAND

Supreme Court:

Mr Justice D. S. Beattie

Barristers & Solicitors:

Mr Colin Clere

Mr James Larsen (Crown Prosecutor)

UNITED STATES OF AMERICA

NEW YORK

United States District Court:

Judge Jack B. Weinstein

Judge Dudley Bonsal

Judge Meanor

New York Supreme Court:

Judge Richard J. Bartlett (State Administrative Judge)

Judge Thomas C. Chimera

District Attorney's Office:

District Attorney Robert Morganthau

Mr David Worgan

Attorneys:

Mr Richard Barth

Mr T. Capon

Mrs E. Reiss

Mr P. Reiss

Lord Hacking

Mr Cyrus Vance

Mr Hugh A. Chapin

Mr Richard Nolan

Mr Whitney North Seymour

Mr Blair Fenterstock

Mr John Monkton

Mr Ralph L. McAfee

Mr Jack Guzetti

Mr B. Wruble

Mr William G. Mulligan

Institute of Judicial Administration:

Mr Paul Nijelski

WASHINGTON D.C.

District Court:

Judge John J. Sirica

Federal Judicial Center:

Judge Walter E. Hoffman

Miss Alice L. O'Donnell

Attorneys:

Mr Edward A. McDermott

Mr David E. McGiffert

Mr Curtis E. Von Kahn (member, ABA Commission on Standards of Judicial Administration)

MICHIGAN

Detroit

United States District Court:

Judge Charles W. Joiner

Court of Common Pleas:

Mr Tom Poole

Michigan State Court Administration:

Mr Lester Blagg

Attorneys:

Mr Robert E. Baker

Mr David Owen

Mr Allan L. Ronquillo

COLORADO

Denver

United States District Court:

Judge Richard Match

Magistrate Royce Sickler

Colorado Court of Appeal:

Judge Van Cise

Colorado Supreme Court:

Judge Charles Goldberg

District Attorney's Office:

District Attorney Dale Tooley

Judge Moore (formerly Chief Justice)

Mr Raymond Dean Jones

Attorneys:

Mr Jerry Conover

Mr James R. Miller

Mr Martin Shore

National Center for State Courts:

Mr E. McConnell

Institute of Court Management:

Professor Harry O. Lawson (State Judicial Administrator)

TEXAS

Dallas

Attorneys:

Mr Don Davis

Mr Cecil Magee

CALIFORNIA

San Francisco

United States District Court:

Judge Charles Renfrew

Judge R. H. Schenacke

California Superior Court:

Judge Ira A. Brown Jnr.

Judge Lynch

Judge Claude Perasso

Judicial Council of California:

Mr Ralph N. Kleps (Administrative Director of the Courts)

Attorneys:

Mr John Clark

Mr Guy O. Korhblum

Mr Richard J. MacLaury

Mr Joseph Martin

Mr Thomas G. Ottenweller

Mr Martin Quinn

Mr Joseph W. Rogers Jnr.

Sacramento

McGeorge College of Law:

Professor Glenn Shellhaus

Los Angeles

United States Court of Appeal:

Judge Shirley M. Hufstedler

United States District Court:

Judge Manuel L. Real

Attorney General's Office:

Attorney General Eville J. Younger

Mr S. Clark Moore

Superior Court:

Mr Frank S. Zolin (Executive Officer)

District Attorney's Office:

Mr Gilbert Garcetti

Attorneys:

Mr William C. Brown

Mr David Destino

Mr Marcus Mattson

Mr Charles L. Rogers

Mr G. William Shea

Mr Fredric J. Zepp

CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND NEW ZEALAND

Appendix B - Federal Rules Of Civil Procedure For The United States District Courts

V. DEPOSITIONS AND DISCOVERY

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods: Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery: Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the exis-tence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of sub-division (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under sub-division (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a

statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (1) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further dis-covery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) *(C) of* this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert i reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under Subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders: Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being seated be opened only by order of the court; (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a) (4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery: Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses: A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty reasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable mat-ters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty reasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

CONSULTANTS PAPER 4 (1978) - STUDIES IN COMPARATIVE CIVIL AND CRIMINAL PROCEDURE: VOLUME 1 - COURT PROCEDURE IN THE UNITED KINGDOM, UNITED STATES, SOUTH AFRICA AND NEW ZEALAND

Appendix C - Suggestions For Preparation Of Pre-Trial Order

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Unless Otherwise Ordered, Counsel for Plaintiff shall prepare the Pre-Trial Order

Listed below are matters ordinarily included in a Pre-Trial Order. For convenience of Court and counsel, it is suggested that the FOLLOWING SEQUENCE BE USED in the preparation of the Pre-Trial Order in those cases where it is feasible to do so, WITH EACH OF THE ITEMS LISTED BELOW CAPITALIZED AS A HEADING:

1. DATE AND APPEARANCES

Date of the Pre-Trial Conference and appearances for the parties.

2. JURISDICTION

Admitted or denied. If admitted, state the basis of jurisdiction; if denied, here insert the Court's Order for determination of the jurisdictional questions.

3. AMENDMENTS TO PLEADINGS

If none requested, insert "none"; if any are offered, set forth Court's ruling relative to same.

4. PRELIMINARY MOTIONS REMAINING TO BE DETERMINED

If there are no preliminary motions to be decided, it is sufficient to state "none"; otherwise here set forth Court's Order as to disposi-tion.

5. (A) GENERAL NATURE OF THE CLAIMS OF THE PARTIES

(1) Plaintiff claims: (Set out brief summary without detail.)

(2) Defendant claims: (Set out brief summary without detail.)

(3) All other parties claims: (Same type of statement where third parties are involved.)

(B) UNCONTROVERTED FACTS

The following facts are established by admissions in the pleadings or by stipulations of counsel at the Pre-Trial Conference: (set out uncontroverted facts.)

6. ISSUES OF FACT AND LAW

(A) CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are: (set out)

(B) CONTESTED ISSUES OF LAW: The contested issues of law in addition to those implicit in the foregoing issues of fact, are: (set out) OR: There were no special issues of law reserved other than those implicit in the foregoing issues of fact.

7. WITNESSES

(A) In the absence of reasonable notice to opposing counsel to the contrary, plaintiff will call, or will have available at the trial: (list) Plaintiff may call: (list)

(B) In the absence of reasonable notice to opposing counsel to the contrary, defendant will call, or will have available at the trial: (list) Defendant may call: (list)

(C) In the absence of reasonable notice to opposing counsel to the contrary, _____ will call, or _____ may call: (list) (use for third parties, if any.)

(D) In the event other witnesses are to be called at the trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least - days prior to trial.

8. EXHIBITS

There were identified and offered the following:

(A) Plaintiffs Exhibits: (list exhibits by number.)

(B) Defendant's Exhibits: (list exhibits by letter.)

(C) Exhibits of Other Parties, if involved: Except as otherwise indicated, the authenticity of received exhibits has been stipulated but they have been received subject to objections, if any, by the opposing party at the trial as to their relevancy and materiality. If other exhibits are to be offered and their necessity reasonably can be anticipated, they will be submitted to opposing counsel at least _____ days prior to the trial. (Note any exceptions or special provisions.)

Scotland. Committee on Criminal Procedure. *Criminal Appeals in Scotland* (first report). Presented to Parliament August 1972. Edinburgh, H.M.S.O. *Cmnd. 5038.*

Criminal Procedure in Scotland (second report). Chairman Lord Thomson. Presented to Parliament Oct. 1975. Edinburgh, H.M.S.O. *Cmnd. 6218.*

Scotland. Crown Office. *Prosecution of crime in Scotland.*

Scottish Law Commission. *The Legal System of Scotland, 1975.*

South Africa. *Commission of Inquiry into Criminal Procedure and Evidence Report.* Pretoria, Government Printer.

South Australia. *Criminal Law and Penal Methods Reform Committee.* Third report, court procedure and evidence. July, 1975.

U.S. Judicial Conference. *Duties which might be assigned to United States Magistrates.* March 1975.