Case Western Reserve Law Review

Volume 7 | Issue 4 Article 7

1956

A Survey of Ohio Pre-Trial Practices and Achievements

Walter Probert

interest of the lawyer in that it reduces his appearances in court, to his resulting financial disadvantage. But that contention will not stand close scrutiny, since most lawyers agree that a busy lawyer is of more financial value to himself and to his firm while he is engaged in his office than he is in court.

Be that as it may, self-interest laid aside, the interest of the client requires the lawyer to do everything feasible to minimize the cost of litigation for his client. Both the lawyer and the profession gain immeasurably in the increase of public confidence in the administration of justice.

Pre-trial is not a panacea for all ills. It is not a cure-all or a complete answer to all of the problems incident to litigation. But it is a practicable, workable method of improving the operation of the courts, as it has amply demonstrated wherever it has been given an adequate trial.

A Survey of Ohio Pre-trial Practices and Achievements

Walter Probert

IN ORDER to assess the future of pre-trial in Ohio, we need to know something of the present. To aid in drawing the state graph, a survey of Ohio Common Pleas trial judges was begun in November, 1955. Each of these judges[1] was sent a one page questionnaire containing eight short questions. Responses came from about sixty per cent of the judges, including at least one from each of the multiple judge counties. A second postcard questionnaire containing three short questions was sent to the non-responding judges in the one-judge counties. A third round of postcard questionnaires was sent to the still silent judges. Only seven counties then remained unheard from. To these judges was sent the one question: "Do you have a system of pre-trial in your court?" In the end, only two counties had failed to respond.

Admittedly more questions might have been asked.[2] Hindsight revealed some ambiguities. But the essential purpose of the survey was achieved: a determination of the extent of pre-trial practice in Ohio, the actual function of pre-trial and its relative success or lack of success.

[1] From a list of Ohio Common Pleas judges compiled by Ted W. Brown, Secretary of State of Ohio.

[2] Yet simplicity was the only guarantee of any favorable number of responses.

EXTENT OF PRE-TRIAL PRACTICE

The following table contains an alphabetical listing of the eighty-eight counties in Ohio. Following the name of each county is an indication of the number of judges in the county. Where appropriate, a succeeding "yes" indicates that pre-trial seems to be held as a matter of course, "no" that pre-trial is not used at all.[3] In some instances elaborating remarks appear, particularly where pre-trial is an occasional practice in the county.

County	*No. of Judges*	*Use of Pre-Trial*
Adams	1	No
Allen	1	Yes, but not mandatory
Ashland	1	No
Ashtabula	1	No; attempts settlements
Athens	1	Yes
Auglaize	1	No response
Belmont	2	Yes
Brown	1	Yes
Butler	2	Yes
Carroll	1	Yes
Champaign	1	Yes
Clark	1	No
Clermont	1	No
Clinton	1	"Not formally"
Columbiana	1	Yes
Coshocton	1	Yes
Crawford	1	Yes
Cuyahoga	15	Yes
Darke	1	Occasionally
Defiance	1	No
Delaware	1	Yes
Erie	1	No; attempts settlements
Fairfield	1	No
Fayette	1	Sometimes
Franklin	7	Yes
Fulton	1	Yes
Gallia	1	No
Geauga	1	Yes
Greene	1	Yes
Guernsey	1	Yes
Hamilton	10	Yes, but only on request
Hancock	1	Yes
Hardin	1	Yes
Harrison	1	Yes
Henry	1	Yes
Highland	1	No
Hocking	1	Yes
Holmes	1	Yes
Huron	1	Yes
Jackson	1	Yes
Jefferson	2	Yes
Knox	1	No
Lake	1	Yes
Lawrence	1	No
Licking	1	Yes
Logan	1	No
Lorain	2	Yes
Lucas	5	Yes
Madison	1	Yes
Mahoning	4	Yes; optional with judge
Marion	1	Yes
Medina	1	No
Meigs	1	Yes
Mercer	1	Yes, but only on request
Miami	1	Yes
Monroe	1	No
Montgomery	5	Yes, on request
Morgan	1	Yes
Morrow	1	Yes
Muskingum	1	Yes
Noble	1	Seldom
Ottawa	1	Yes
Paulding	1	Yes, at least when requested
Perry	1	Yes
Pickaway	1	Yes
Pike	1	Yes
Portage	1	Yes
Preble	1	Rarely
Putnam	1	On request
Richland	1	Occasionally

[3] This does not bar the possibility of an occasional informal conference in the judge's chambers.

County	No. of Judges	Use of Pre-Trial	County	No. of Judges	Use of Pre-Trial
Ross	1	No	Trumbull	2	Yes
Sandusky	1	Yes	Tuscarawas	1	Yes
Scioto	1	No	Union	1	Yes
Seneca	1	No, but attempts settlements	Van Wert	1	Yes
			Vinton	1	No response
			Warren	1	No
Shelby	1	No	Washington	1	No
Stark	3	Yes	Wayne	1	No
Summit	5	Not on any formal basis	Williams	1	Very little
			Wood	1	Yes
			Wyandot	1	Yes

The table shows that in seventy-three of the seventy-five responding one-judge counties, forty judges indicate that a pre-trial system is used as a matter of course; twenty-two judges indicate no pre-trial system is used; while the remaining such judges indicate at least an occasional use.

All of the multiple-judge counties indicate at least an occasional use of pre-trial. In the ten counties having from two to five judges, seven counties indicate routine uses of pre-trial, and three indicate an occasional use. Franklin, third largest, and Cuyahoga, largest, use pre-trial as a matter of course, while Hamilton, second largest, uses pre-trial only upon request.

Presence of Clients in Conference[4]

In the original questionnaire, judges in counties where pre-trial is used were asked to respond to further questions. One of these questions was: "Do you require parties to be present in addition to counsel?" Sixty-eight judges responded:

Yes	*No*	*Sometimes*	*Optional*	*Total*
32	22	9	5	68

Some of the "yes" answers were qualified by an indication that such was the usual practice. Several indicated that the parties were required to be at least available, perhaps by telephone. One judge said that the "requirement" was not always met. One of the "no's" said he simply did not want the parties there.

Clarification of Issues and Pleadings

Pre-trial may be used to clarify the issues, both legal and factual. Most judges indicated an extensive examination of these matters, although several did admit that their examination of the pleadings is cursory.

In the original questionnaire the judges were asked what success they

[4] No further county by county listing will be used, in part to guarantee the anonymity promised to whatever remarks were made by the responding judges.

had in obtaining stipulations of fact and agreement on the issues. Sixty-eight responses showed:

High Success	*Good*	*Fair*	*Poor*	*Misc.*	*Total*
10	18	14	6	20	68

Judges in the miscellaneous category replied variously that agreement on issues was much easier to obtain than stipulations of fact, that such matters as repair costs and medical expenses were often agreed upon, but that more complex matters were usually left to trial. Three of these judges stated that their objective was always settlement and nothing else. Despite the variety of answers to this question, about two-thirds of the judges, those not listing their achievement as fair or poor, and those whose answers were not ambiguous, reported considerable simplification of most controversies for purposes of trial.

Settlement

Another and perhaps more controversial aspect of pre-trial is the matter of attempts by judges to obtain settlement of the case and so a termination of the litigation short of trial. The pertinent question on the original questionnaire was: "Do you engage in discussion of possible settlements?" Response:

Yes	*No*	*Qualified Response*	*Total*
48	5	16	69

The question on the supplemental postcard questionnaire was simply: "Do you attempt settlement?" Response:

Yes	*No*	*Qualified Response*	*Total*
23	–	4	27

Three of the five "no" answers to the original questionnaire indicated some success at settlement, apparently meaning that settlements occurred between pre-trial and the trial date. The qualified responses indicated in general that the settlement was in no way pushed or that settlement was regarded as an incidental matter in pre-trial. Before such judges, it appears, the initiative for settlement comes from the counsel with the result that oftentimes settlement is not discussed. Thus, the qualified response indicates an "in-between" stand.

Presence of Parties at Settlement Discussion

On the original questionnaire this question was also asked: "Are the parties present in such (settlement) discussion?"

Yes	*No*	*Sometimes*	*Ambiguous*	*Total*
23	15	21	5	64

One of the judges responding "no" said he definitely did not want the parties present. Many of the "sometimes" answers indicated that the parties were rarely present in such discussions, except when requested by counsel or if the clients indicated some lack of confidence in their counsel.

Co-ordinated Settlement Discussion

Almost all of the judges responding to the original questionnaire indicated that discussion of settlement, if carried on at all, was carried on simultaneously with representatives from both sides. Some of the judges did indicate that they discussed settlement first with each side alone and then with both sides together. Six judges, however, indicated that the discussion was carried on only in separate meetings with each side, and seven judges said they sometimes followed this practice, one judge following the request of counsel on the matter.

Settlement Achievement

The next question on the original questionnaire was: "To what extent do you obtain successful settlements?" Forty-eight of the sixty-two responding judges responded with a per cent of success:

75%+[5]	*50-74%*	*25-49%*	*1-24%*[6]	*Total*
9	16	13	10	48

Five other judges indicated a "good" success; one said, "very limited"; and two indicated that they had no accurate information. The response of six other judges was ambiguous.

Attitude of Bar

The last question on the original questionnaire was: "Is the bar generally cooperative?"

Yes	*No*	*Equivocal*	*Total*
54	5	8	67

The "no's" were in general strongly worded, one judge finding the older attorneys especially uncooperative. Another said that the lawyers try to find out as much as possible about their opponents cases without divulging any information.[7] Another said that the lawyers only paid lip-ser-

[5] One judge indicated an almost 100% success, another 90%.

[6] In two cases, the result directly reflected the judge's attitude that he was against "pressuring." But one of these judges indicated that many other settlements occurred because of the groundwork laid in pre-trial.

[7] Two judges in added remarks at the end of the questionnaire sheet levelled the same criticism at counsel for insurance companies.

vice to the procedure. On the other hand, many of the "yes" answers were quite praiseworthy of the bar. Among the equivocal answers were some interesting comments, in essence: cooperative only as to settlement; need further education to prevent general lack of preparation for pre-trial conference; attorneys from foreign counties unprepared; the better lawyers are most cooperative.

Random Comments

On the original questionnaire, space was left for any additional remarks the responding judges might wish to make. The judges were promised they would not be directly quoted. Some of these comments are paraphrased below.

Favorable to pre-trial. There were many indications of satisfaction with this procedure. It seems very likely, too, that while judges who were dissatisfied would comment, many others would not. One judge from a larger county remarked that the process is a convenient filtering device for cases not prepared for trial; trial dates can be agreed upon and later requests for continuances can thus be kept to a minimum. Pre-trial is a levelling influence, pointed out another judge; the parties realize their case is not such a sure thing as they thought. And others: the judge is given a chance to prepare himself for trial; the docket is reduced; time and costs are saved. The remark of one judge perhaps sums up the attitude of many: "Pre-trial has great potentialities." Implicit here is the notion that the process is not yet in its adult stage; nurture and understanding are needed to bring it to full growth.

Unfavorable to pre-trial. The following statements are extracted from the remarks of seven judges who spoke out strongly against pre-trial. Several felt that rather than facilitating, pre-trial actually hindered the disposition of cases. For one thing, the older cases are pushed further and further back on the docket. For another, less time is spent in traditional court procedures, so that the docket is not actually eased.

Pre-trial requires agreement by counsel, and few counsel are willing to agree on much of anything until trial time, after a little "blood-letting," as one judge put it. That is when weaknesses truly appear. Besides, there is something of the face-saving psychology in clients. They don't want to withdraw once they have started the fight.

Several of the judges felt that pre-trial was slanted much too much toward settlement. Real settlement comes only from conference between counsel. In addition, clarification of issues and pleadings is the main pre-trial function, and only exceptional cases need such clarification.

One judge remarked that as a lawyer he had found pre-trial unsatisfactory and as a judge had seen nothing to change his mind. Another

judge from one of the larger counties expressed complete dissatisfaction with the process, indicating that he intended to consult with the Chief Justice of the Ohio State Supreme Court on the matter.

Settlement. There were eight judges who, in varying degrees, expressed resentment at the use of pre-trial for settlement purposes. Several felt that judges unwisely tried to force settlement in this way; two judges from other counties expressly cited Cuyahoga County as a case in point.[8] Several judges felt that settlement was just as likely to be obtained without a formal pre-trial.

One-judge counties. Pre-trial is not suited for the small counties; the bar resents the court's intrusion. Or so thinks one judge in such a county. To the contrary, another finds as much place for it there as in the larger counties. One suggested substitute was the informal get-together: Call the lawyers, and sometimes the clients, into the judges chambers and settle cases over a cup of coffee made in the office. (Actually, even where pre-trial is formally required, the actual pre-trial may be quite informal and relaxed.)

Suggestions. Several suggestions centered around the relative timing of trial and pre-trial, the range being: hold pre-trial just before the calling of the jury; two weeks in advance of trial; determine the prospective trial date during pre-trial. One judge suggested the use of penalties to bring about compliance by attorneys, such as the giving of judgment against a "defaulting" party. Two judges suggested that what was very much needed in this state was uniformity of procedures from county to county.

CONCLUSION

Somewhere I have read that working with statistics is the art of drawing a crooked line from unproved assumptions to foregone conclusions. This survey does not even purport to be a scientific statistical study, but more a sampling of opinion. Still, I think three general conclusions may safely be drawn. First, pre-trial seems to be a permanent part of the Ohio scene. True, it is not yet universally entrenched, but who can doubt that it is here to stay? Second, the large majority of the judges who are by position the leaders in this area, not only recognize but accept, in fact actively encourage, the dual function of pre-trial, as a clarification process and as an instrument of settlement. Third, favorable results are accumulating in both of these functions.

Now, of course, there are irritating qualifications in the picture, irritating if you favor pre-trial. There are many judges who just have not

[8] Several other judges expressly commended Cuyahoga County practice and Judge Thomas.

tried to use the process in any routine fashion. There are many judges who give little more than lip-service and office space to the process. It is difficult to imagine pre-trial working in the face of a judge's bias, really working, I mean.

Furthermore, there seem to be major differences of opinion about the fundamentals of pre-trial, about the role of pre-trial as a settlement device, for instance. These differences of opinion reflect trial and error methods. The survey gives hope that actually we should be moving beyond that stage of things. A great deal of experience has been accumulated among the trial courts of the state. The next stage may well be to put the experience into words and correlate it. In other words, the time seems to have come for more uniformity in pre-trial practices in Ohio.

Of course, you cannot just force such a technique on practicing lawyers where pre-trial is not now in effect. Yet the survey shows that in most places where pre-trial is being used in Ohio, the bar is generally cooperative. I should say that wherever pre-trial is not presently being used or wherever it is not being effectively used, there are undoubtedly a sufficient number of interested persons to get the ball rolling. The call is for effective leadership, from both lawyers and judges. Anything which will advance us beyond our present "trial by combat" should be welcomed by a thinking profession. Yet I suppose such thinking can only be fostered by education: talking, writing, doing. Admittedly, individuals may even lose a little here and there in immediate interests, but that loss is far outmeasured by the ultimate gain, the ultimate gain not only to society but to the practical practitioner. Yes, the survey shows the trend and some of the possibilities. The future statistics and what they will show are ours to determine.

CONTRIBUTORS TO THE SYMPOSIUM

CARL V. WEYGANDT (Ph.B., 1912, College of Wooster; LL.B., 1918, Western Reserve University; honorary degrees from Lake Erie School of Law, Wilberforce U., Ohio Northern U., Marietta College, Cleveland-Marshall Law School, Western Reserve U.) is Chief Justice of the Supreme Court of Ohio.

WILLIAM K. THOMAS (B.A., 1932, LL.B., 1935, Ohio State University) is a Judge of the Court of Common Pleas, Cuyahoga County.

CRAIG SPANGENBERG (A.B., 1935, J.D., 1937, Michigan) is a practicing attorney in Cleveland, Ohio.

LESLIE R. ULRICH (attended Ohio State University and Western Reserve University School of Law) is a practicing Attorney in Cleveland, Ohio.

WALTER PROBERT (B.S., 1949, J.D., 1951, Oregon) is Assistant Professor of Law at Western Reserve University.