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Pre-Trial Conference in Common Pleas Courts in Pennsylvania

PRE-TRIAL CONFERENCE IN COMMON PLEAS COURTS OF PENNSYLVANIA

BY MORRIS L. SHAFER *

THIS brief article is a report on the extent and nature of the use of the pre-trial conference in the common pleas courts of Pennsylvania, more particularly in those common pleas not included in the metropolitan districts of Philadelphia and Allegheny Counties. From the assembled facts certain conclusions are drawn and brief recommendations or suggestions offered. It is not intended to be a study of the pre-trial conference in all its possible uses nor a review of its historic development. The extent of its current use and acceptance should provide some evidence of its possibilities, degree of desirability and effectiveness.

While details of the development of pre-trial have been excluded from this survey, brief notice is given of its origin and spread. It had a precursor in England in a proceeding known as "summons for direction".[1] Even the manner of joining issue through oral pleadings at common law can be seen in its ancestory.[2] In any event, May, 1928, is usually considered the starting point for modern pre-trial in the United States. At that time it was introduced in the Circuit Court of Wayne County, Michigan.[3] Its long and arduous trail is illustrated by the fact that it was not until last year that Michigan adopted it on a state-wide compulsory basis.[4] It was then only the third state to have adopted it on a state-wide compulsory basis.[5] Following its use in Wayne County, the Superior Court of Boston, Massachusetts, established a similar device. In both courts success in speeding the work of the courts was reported.[6] Cleveland and Los Angeles followed. In September, 1938, after considerable study, Rule 16 of the Federal Rules of Procedure made pre-trial available in the federal system.[7]

While the federal rules make pre-trial a matter of the court's discretion, the Pennsylvania rule, otherwise essentially the same as Federal Rule 16, specifically added, "or on motion of any party", thus enabling either counsel to avail himself of the device. Attention is given later to the number of judicial districts in Pennsylvania which have supplemented Pa. R. C. P. 212 with local rules,

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* Dean, Dickinson School of Law.

[1] HOLTZOFF, *Report of the Committee to the Judicial Conference*, etc., 1 F.R.D. 759 (1941).

[2] NIMS, PRE-TRIAL (1951). For reference to similar proceedings in other countries, DOBIE, *Use of Pre-trial Practice in Rural Districts*, 1 F.R.D. 361 (1941).

[3] 16 F.R.D. 5, 136 (1933); 21 J. AM. JUD. SOC'Y. 5, 160.

[4] Michigan Pre-trial Conference Rule 35, Sec. 4, 5, 6, adopted April, 1958, effective, July, 1958, as amended, June 11, 1958.

[5] 44 A.B.A.J. 10 (1958).

[6] 17 F.R.D. 4, 140 (1933).

[7] Pre-trial procedure; 28 U.S.C.A. § 16.

some of which include a requirement for use of pretrial. These rules vary from brief to comprehensive statements. Some of their characteristics are given special attention below.

Relatively slow adoption of pre-trial still appears to be the situation throughout the country.[8] This appears true in both the state and federal courts. However, where either court system, state or federal, requires the use of the conference, it appears that the other court system in the same area tends to follow thereafter. For example, relatively broad rules requiring pre-trial in the Allegheny Common Pleas Court are matched by specific and detailed rules in the United States District Court for the Western District of Pennsylvania.[9] In both, sanctions are provided to enforce the requirements which have been established.

Although the pre-trial conference has been defined in simple terms,[10] any discussion of its nature with members of the bench and bar emphasizes a wide variation in its use and the emphasis placed upon it in different jurisdictions. This is true in spite of the fact that it has been available in the federal courts since 1938 and in Pennsylvania common pleas courts since 1939.[11] Possibly there is virtue in the adaptability of any device to meet varying needs. Hence, in this survey interest rests not alone upon the number of districts using it but also upon its character.

This study is directed toward pre-trial as authorized under Rule 212 and supplementary local rules. The initial problem was finding a means for obtaining the required information. A staff of investigators to visit each district to observe pre-trial practice was impractical, both financially and time-wise. Philadelphia and Allegheny Counties, being the first and fifth districts, have local rules supplementing Pa. R. C. P. 212.[12] The use of pre-trial in these courts has already been given attention.[13] It was the remaining fifty-seven judicial districts which presented the problem.

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[8] 42 AM. JUD. SOC'Y. 3, 99 (1958) quoting Mr. Justice Brennan, of the United States Supreme Court, "I'm dead set against the present federal rule which allows the judge the opinion of whether or not to hold a pre-trial conference." Further, "The trouble with the rule is that too few judges are paying any attention to it." Discussion held at the Third Circuit Judicial Conferences in 1957 and 1958 indicated a wide variety of applications of pre-trial in the same circuit.

[9] *Pre-Trial Order,* U. S. Dist. Court for Western Dist. of Pa., dated May 15, 1958, as applied to F. E. L. A., Negligence, Admiralty and Jones Act cases.

[10] "Pre-trial is a colloquial name for one or more conferences held prior to the trial of a case pending in a court, attended by a judge of the court, by counsel for the interested parties and occasionally by the litigants themselves." Nims, *Pre-trial in the United States,* 25 CANADIAN BAR REVIEW, 697 (1947).

[11] Pa. R.C.P. 212; also Rule 2313, mandatory use of pre-trial in interpleader actions; also Rule 1044 as amended Sept. 1, 1958. See also GOODRICH-AMRAM § 2255 (d)-2.

[12] Philadelphia Common Pleas Court Rules 212 (1), (2), (3); Allegheny Rules of Court of Common Pleas 25, 25A, 26, 26A, 26B.

[13] Propper, *Pre-trial Comes to Philadelphia,* 20 SHINGLE 2, 34; Nims, *op. cit. supra* note 10 710. The latter describes earlier success in Pittsburgh. Also, McNaugher, *Pre-trial Court at Pittsburgh,* 6 U. of Pitts. L. Rev. 5 (1939).

A questionnaire, short enough so as not to overburden the judicial officer to whom it would be sent, yet requesting answers giving sufficient factual information to measure use and degree of acceptance, was the means used. To the questions stated was added an opportunity for comment, an item which brought much additional and meaningful information.

Copies of the questionnaire were sent to the president judge of the court of common pleas in every judicial district except Philadelphia, Allegheny and one other district where the post of president judge was vacant. The returns, though made over a two month period, were very informative, particularly the attached comments. A number of replies included explanatory details, spelling out items of practice and reciting experiences.[14] This substantial cooperation, including requests for a report on final results, seemed to indicate sincere interest and a high degree of reliability as to basic information, a portion of which was necessarily purely subjective in nature.

In response to the questionnaires sent to fifty-six out of the fifty-nine districts in the Commonwealth, fifty-one answers were received. Not all replies contained answers to all questions. Some answered by letter rather than by way of the questionnaire. This was understandable since there was a clear desire to be specific where other than normal procedure was followed. These letters, together with liberal comments on the questionnaires, helped explain special usage, as well as any unusual approach or plan. All of these answers made the returns more understandable.

The results sought were not an exact measurement, since that obviously was impossible, but an overview of extent of use, type and nature of application, and prevailing attitude toward the pre-trial device.

The form of the questionnaire was as follows:

1. Does your Judicial District have a local pre-trial rule supplementing Pa. RCP 212? Yes ( ) No ( )

2. Is a pre-trial conference *required* in civil cases in your jurisdiction? Yes ( ) No ( )

3. If the answer to 2 above is in the negative could you estimate the percentage of civil cases in which pre-trial is used? .....%

4. How long prior to trial is the pre-trial conference held? .....

5. How would you characterize the attitude of the bar in your district toward pre-trial conference? Favorable ( ) Unfavorable ( )

[14] A number of the replies contained letters detailing present practice or proposed plans for extending pre-trial usage. Others added more or less detailed comments under question 6 of the questionnaire.

6. Is the question of settlement raised as a matter of course in the pre-trial conference? Yes ( ) No ( )

7. Do you desire to add any personal comment concerning pre-trial, either as to its value, its apparent results or otherwise?

The basic figures, those concerned with the existence of a local rule and the required use of pre-trial, were drawn from the first two questions. The results were as follows:

Total number of districts reporting	51
Districts with local rule	17
Districts without local rule	34
Districts with local rule requiring pre-trial	11
Districts with local rule but not requiring pre-trial	6
Districts without local rule but requiring pre-trial	13
Districts without local rule and not requiring pre-trial	21

The answers to questions 1 and 2 become more meaningful as they are considered in relation to each other. It would be logical to expect that the existence of a local rule supplementing Pa. R. C. P. 212 would indicate a substantial interest in pre-trial. The returns also show a trend in that direction since 11 out of 17 (or 64.7%) of the districts having adopted a local rule make pre-trial a requirement, while only 13 out of 34 (or 38.2%) of the districts without a local rule require such conference. In these calculations the mere existence of a requirement for pre-trial was not considered in the same category as the existence of a local rule supplementing Supreme Court rule 212.

Several of the replies from districts having a local pre-trial rule were accompanied by a copy of that rule. While these rules differed in many ways they generally included items which did one or more of the following: (1) established details for pre-trial procedure, (2) provided for a pre-trial calendar, (3) specifically required a court order or memorandum, (4) spelled out the material to be submitted by counsel, and (5) provided for the application of sanctions where either or both parties failed to meet requirements of the rules. In some there was also a provision that trial counsel must appear at pre-trial. One district established a procedure for pre-trying seven cases each day. The submission of all exhibits was also a requirement in at least one district.

The mere fact that pre-trial is not a requirement does not necessarily preclude substantial use. Therefore, there was a need for determining the extent

of use in districts in which a pre-trial requirement was not in force. Question 3 was inserted to obtain this information. Among the six districts which have local supplementary rules, but no enforced requirement of pre-trial, actual usage was reported as varying from five per cent as the lowest usage to its application in one-third of the cases, as the most extensive use. However, further comments contained in these questionnaires indicated some further but not readily measurable use. For example, one district in this classification has made pre-trial compulsory for cases which have repeatedly appeared on the trial list, that is, five times or more. The current status in this district is described as being increasingly favorable to pre-trial with a wider voluntary use.

The largest group of districts reporting, twenty-one districts without local rules and not requiring pre-trial, reported usage on a percentage of cases tried, as follows:

Percentage of cases in which pre-trial is used	*Number of Districts*
No answer given	5
Pre-trial not used	2
½ of 1%	1
3%	1
5%	1
10%	2
20%	1
25%	2
33⅓%	2
50%	1
65%	1
75%	1
80%	1

Assuming little or no use in the five districts which did not answer this question, out of the fifty-one districts answering this questionnaire, approximately one-fifth use pre-trial in five per cent of the cases tried, or less. Mean usage for the group, without any supplementary rule and not requiring pre-trial, falls in the ten per cent bracket. If we include within the group the six districts with a local rule not requiring pre-trial, mean usage would still fall within the ten per cent bracket. Therefore, although approximately 47 per cent of the total number of districts reporting require pre-trial, the balance or approximately 53 per cent show a relatively low mean usage.

These results are given added meaning when viewed in relation to the comments of many of the replies. As might be expected, districts where pre-trial

is not required but substantial use is indicated report value and satisfaction with the conference device. In other geographical areas, where percentage of use is low, expressed sentiment falls into two classifications, one reporting a growing usage, the other pointing to considerable opposition, except for very limited purposes. For example, ". . . pre-trial conferences accomplish nothing impartially except that which well intentioned trial lawyers in our courts are doing without such conferences—stipulation as to evidence which cannot be successfully contradicted and relating to what are material issues, and the like." In many of these districts it appears clear that pre-trial is considered essentially as a device for obtaining settlement before trial. With this limited purpose, it is not surprising that some judges and trial lawyers oppose it.

There is also evidence that a certain amount of the resistance to pre-trial grows out of the general apathy which a portion of the bar holds for a device which has not been used before (at least not locally). For example, one district which has had a local rule for many years, but no enforced requirement, reports that the bar does not oppose pre-trial; it simply does not use it—possibly because it is not well understood. Similar expressions of lack of active support from trial counsel are to be found among the comments of other areas. Additional information relative to this attitude is found in the responses to question 6, below.

Question 4, raising the subject of the time of pre-trial, was included to determine nature of use. Not all districts reporting answered this question, but the following results were had:

Period prior to trial when conference held	*Number of Districts*
No pre-trial	2
No set time	3
Immediately prior to trial	3
1 to 5 days prior to trial	1
1 week prior to trial	6
10 days prior to trial	1
1 week to 10 days	2
1 to 2 weeks	5
10 days to 2 weeks	2
2 weeks	12
2 to 3 weeks	1
3 weeks to one month	1
1 month	7
3 to 5 weeks	1
When case is at issue	1

Even though some of the reported periods were consolidated, there is still a substantial amount of overlapping. Of the forty-eight districts which answered this question, substantially more than one-half fall within the one to two week period. The extremes would be immediately prior to trial, which presumably would be after assignment had determined the trial judge, or as soon as the case is at issue—the latter being used in some federal courts.

That too early a conference period often results in counsel being poorly prepared is implicit in one report and may be inferred from others. Conversely, the question may be raised as to whether a very brief period between pre-trial and trial may not result in the loss of some pre-trial values? This survey did not raise any inquiry concerning a requirement that discovery procedures be completed prior to trial.[15]

A substantial number of replies referred to the attitude of the local bar as an incident of controlling importance. It was a recognition of the existence of this factor that lead to the inclusion of question 5. While it is clear that any answer to this inquiry must be subjective, the evaluation made is that of the principal judicial officer, who is in an excellent position to assess the situation. The results were tabulated as follows:

Attitude of Bar	*Number of Districts*
Favorable to pre-trial	41
Unfavorable to pre-trial	4
Neutral or divided	2
No answer	4

These figures might be further refined according to use of pre-trial. The eleven districts having a local rule and requiring pre-trial all reported the bar favorable. The six districts having a local rule but not requiring pre-trial reported the bar as favoring pre-trial in four instances, unfavorable in one, and divided in attitude in another.

Among the districts without local supplementary rules (continuing that classification as some degree of measurement of attention to pre-trial) the thirteen districts which require pre-trial all reported the attitude of the bar as favorable to its use, one as "very favorable". A surprisingly large number of districts without a local rule and no requirement of pre-trial, fifteen out of twenty-one, described the attitude of the bar as favorable; the remaining six

[15] SEMINAR, *Proceedings Prior to Trial,* 20 F.R.D. 523 (1957) discusses discovery related to pre-trial.

included three who described the bar attitude as unfavorable, one as neutral, and two who did not answer.

Although question 6 was directed toward a determination of the use of pre-trial to achieve settlements, it was not intended to emphasize that purpose, nor to designate it as a primary function. Rather, it was included because of a tendency to refer to this purpose in all discussions of pre-trial, and to the variations in the approach to settlement.[16] Discussions of pre-trial and its use to achieve settlement invariably arouse judicial fear of accusations of pressure tactics.

Again the responses to this question were first considered according to the prior classification of districts, as having local rules or requiring pre-trial. Out of the eleven districts having a local rule and requiring pre-trial, ten reported that the question of settlement is raised as a matter of course. The remaining district reported that settlement was raised only according to the nature of the case at hand. Among the six districts with a local rule, but not requiring pre-trial, only two raised settlement as a matter of course. To further pursue the matter of usage, bar reaction, and settlement, the twenty-one districts with neither a local rule nor a pre-trial requirement were classified as to the reaction of the respective bar groups. Fifteen of these groups favored pre-trial and six were opposed. In ten of the fifteen districts favorably inclined, settlement was raised as a matter of course when pre-trial was used. In only two of the other six districts is settlement so raised when a conference is held.

One further approach was made to the results of the returns. It was an investigation of relationships between pre-trial usage and the size of the districts reporting. Pre-trial started in metropolitan areas, largely because of court congestion.[17] Therefore, a survey of usage within Pennsylvania should include some attention to the relationship between usage and size of district.

Attention has already been given to a required use in Philadelphia and Pittsburgh, the two largest metropolitan areas of the state. However, there are substantial differences among the other fifty-seven judicial districts so far as population is concerned. Total figures for judicial districts, estimated by the State Planning Board in the year 1956, show populations ranging from a low of 16,700 (in round figures) to more than 500,000[18] (excluding two districts, Philadelphia and Allegheny).

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[16] NIMS, PRE-TRIAL (1951), 133-134. See also, Franciullo v. B. G. & S. Theatre Corp., 297 Mass. 44 8 N.E. 2d 174, 178 (1937) as an early case containing reference to settlement. Pa. R.C.P. 212 contains no specific reference to settlement.

[17] HOLTZOFF, *op. cit. supra* note 1.

[18] THE PENNSYLVANIA MANUAL, 1957-58, 910.

The districts were then divided into four relatively equal population groups. Group I included fourteen districts with population under 50,000. Fifteen districts fell into Group II, with population ranging from 50,000 to 99,000. Group III included ten districts with population ranging from 100,000 to 199,000. Twelve districts fell within the range of Group IV, population exceeding 200,000. It is recognized that this division is arbitrary, but even if a more nearly equal division of districts was achieved, the over-all picture would not change substantially.

Again following the classification of districts having local rules and requirements for pre-trial, the percentage of such districts in each of the four groups is as follows:

Group	*Percentage requiring pre-trial*
I	28.6
II	20.0
III	10.0
IV	25.0

If the measurement is on the basis of districts requiring pre-trial, whether or not a local rule exists, the results vary in substantial degree for the first three groups.

Group	*Percentage requiring pre-trial*
I	57.1
II	60.0
III	40.0
IV	25.0

These figures give clear and convincing evidence that the smaller and medium size districts, disregarding the existence or nonexistence of a local rule, make substantially more use of pre-trial than do the larger districts of the state. Yet, it is a common criticism that smaller, less populous districts encounter greater difficulties in the use of pre-trial because counsel and parties are frequently less centrally situated.[19]

Since the total population of a judicial district might not provide a meaningful indication of distribution of population as between urban and rural regions, the districts reporting were further examined on reported population distribution. This was accomplished by taking the comparative rural and urban populations for each judicial district as reported for the year 1950.[20] While

[19] DOBIE, *op. cit. supra* note 2 provides information on pre-trial procedure in smaller federal districts.

[20] THE PENNSYLVANIA MANUAL, 1957-58, 909.

this method of determining population distribution is open to some inexactness, the error so introduced seems hardly sufficient to lead to an improper conclusion. Noticeable factors show that some districts enjoy a relatively even distribution between rural and urban communities. At the same time population trends show increases in urban and decreases in rural communities. Some rural populations are located in regions closely linked to county seats by good highways or otherwise. Nevertheless, the statistical results provide us with an over-all picture of the nature of the respective judicial districts. The figures show a similar trend in pre-trial use to those noted in the grouping of the districts on the basis of total population.

If we classify each district as rural or urban on the basis of the nature of the majority group of the population in each district for 1950, the following results are had:

Districts requiring pre-trial		*Districts not requiring pre-trial*	
Rural	19	Rural	15
Urban	5	Urban	12
Total	24	Total	27

With thirty-four of the districts reporting falling within the rural classification, and seventeen listed as urban, pre-trial use is substantially greater percentage-wise in the rural districts.

	Percentage of districts requiring pre-trial
Rural	55.8%
Urban	29.4%

CONCLUSIONS

While the nature of this inquiry, as indicated earlier, makes exact measurement impossible, there is sufficient evidence in the statistics which have resulted to draw certain conclusions.

(1) The existence of a local rule concerning the pre-trial conference and supplementing Rule 212 is not essential for beneficial use of pre-trial. Neither does the mere existence of such rule result in wide or satisfactory use of pre-trial. However, the personal comments of reporting judges, where there is a local rule and pre-trial is a requirement, are most favorable and even enthusiastic. While the information gained from the questionnaires does not indicate the mechanics in districts which require pre-trial but do not have a supplementary rule, it would appear that informal court rules cover such matters as a brief, a calendar, submission of exhibits, and the like.

(2) With a total of twenty-four districts out of the fifty-one districts reporting requiring pre-trial in some form or other, the degree of use in Pennsylvania leaves something to be desired. If pre-trial is useful and beneficial its use should not depend on whim or caprice alone. The comments of judges from districts using the device substantially establish good success in its usage. Some examples: "I am a firm believer in a well organized pre-planned, before-trial conference." "Most valuable in time saving at trial, as to issues, exhibits, and frequently leading to settlements." "We define the issues and eliminate irrelevant matter." "It is surprising how many facts can be agreed upon."

As against these, districts which use pre-trial only in special cases or solely at the request of a party frequently report satisfaction with it when used but indicate a lack of support for greater use from the bar. Others would fall under a category wherein the attitude might be summed up as follows, ". . . pre-trial is not well understood and hence little used." Or again, ". . . our attorneys insist it is not worth the time required in many of our cases." Many districts not requiring pre-trial report increasing use.

The question which might be raised in all of the latter cases is whether or not the reduction of pre-trial to an established, effective, orderly procedure through the supplementary rules might not result in a better understanding and wider acceptance?

(3) The attitude of the bar, as noted above, is frequently given as a cause of avoidance of pre-trial. Yet, the results obtained from the questionnaire fail to substantiate this item as a controlling factor. The results of the districts reporting on this query have shown the respective bars overwhelmingly favorable to pre-trial.

(4) The time of pre-trial presents a major problem. Since this item is closely related to the nature of the conference and its purpose, careful consideration is needed. The replies indicate that time of pre-trial varies in Pennsylvania from immediately prior to trial to the time the case is at issue; a wide choice is presented. There is disagreement among authorities as to the best time for pre-trial.[21] While the most widely accepted periods range from one to two weeks in Pennsylvania, these are certainly not exclusive.

Still another factor to be considered in determining the time for pre-trial is the problem of assignment of the judge to hear and try the case. Outside of Philadelphia and Allegheny Counties, less than half of the judicial districts have more than one judge. Hence, in these districts, except for the absence of the common pleas judge of the district at either pre-trial or trial time, no controlling

[21] NIMS, PRE-TRIAL (1951), 69. Also, SEMINAR, *op. cit. supra* note 15, 509.

problem is presented in this matter. In the case of the districts where more than a president judge is sitting, the problem of early assignment of a case to a specific judge may upset rapid and orderly trials. On the other hand, failure to have the trial judge pre-try the case may raise other objections. This problem has been met in Allegheny County by appointment of one pre-trial judge who sits for all pre-trial conferences.

(5) The items and figures presented give evidence of the fact that rural districts exceed urban districts in pre-trial use. In like fashion smaller districts have used pre-trial to a greater extent than larger districts. Therefore, the fact that the conference was first used in larger districts does not present convincing evidence that pre-trial cannot be satisfactorily adopted in smaller and rural areas with wider geographic distribution of population.

(6) Closely related to the time for holding a pre-trial conference is the matter of discovery. In Pennsylvania that relationship would probably depend upon whether a local rule might require discovery to be completed prior to the time of pre-trial. It is clear that under the Pennsylvania rules pre-trial is not a substitute for discovery.[22] In this respect the federal rules are more liberal.[23]

(7) Although only the settlement purpose of pre-trial was specifically included in the questionnaire, many of the answers indicated recognition of other functions, some being enumerated in Rule 212. These included a better comprehension of the facts and the law involved, agreement on exhibits and bills and expert witnesses.

Unfortunately, some appear to believe pre-trial use should be limited to negligence cases only. While pre-trial may be especially valuable in this area, its usefulness should certainly not be so limited. Where compulsory arbitration has been instituted the jurisdictional fact of amount involved may be determined prior to trial time, though this may be subject to consent of counsel.[24] Still another possibility, particularly in view of current interest in revision and codification of statutes on eminent domain in Pennsylvania, would be the use of pre-trial as a means of simplifying issues in such cases.[25]

Finally, an over-all purpose, which has repeatedly been given as a reason for the use of pre-trial, is to eliminate the "sporting theory" of our jurisprudential system.[26] The complaint that lawyers do not prepare cases with sufficient

[22] Peoples City Bank v. John Hancock Mut. Life Ins. Co., 353 Pa. 123, 44 A. 2d 514 (1945).
[23] State v. Dist. Court, 194 P. 2d 256, 260 (1948).
[24] See manner of handling jurisdictional fact of amount involved, Allegheny Rules of Court. 26A.
[25] CARTER, *Pre-trial in Condemnation Cases,* 40 J. AM. JUD. SOC'Y. 78, Dec. 1956.
[26] *In re* Barnett, 124 F.2d 1005, 1010 (1942).

thoroughness prior to trial may be added to the use of a minor defect to achieve victory in a case, as further reason for the use of pre-trial.

In spite of the limited nature of this survey, it is abundantly clear that there is little substantial opposition to pre-trial; that pre-trial has shown evidence of value wherever it has become a regular procedure, whether by compulsory rule or voluntary acceptance by the bar. Where it has not found such acceptance it would appear that there is need for leadership in instituting its use, perhaps by way of local supplementary rules.