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Rosenberg: The Pretrial Conference and Effective Justice--A Controlled Test in Personal Injury Litigation

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THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE—A CONTROLLED TEST IN PERSONAL INJURY LITIGATION. By *Maurice Rosenberg*. New York: Columbia University Press, 1964. Pp. xi, 241. \$6.50.

In one slim and readable volume Professor Maurice Rosenberg has rendered obsolete much of the voluminous prior literature on pretrial conferences. Previous commentators have argued that pretrials save judicial manpower;¹ they have claimed that pretrials tend to shorten trials,² and that settlements arise as a by-product of pretrials even when the conferences are not designed specifically to encourage settlements.³ Professor Rosenberg has disproved all of these claims, at least as to personal injury cases.

With the cooperation of the Supreme Court of New Jersey, the Columbia University Project for Effective Justice conducted a controlled experiment designed to test the effect of pretrial conferences on personal injury cases. Professor Rosenberg directed the project; his book is a report on the project's findings. The study deals only with the New Jersey form of pretrial conference, which, unlike those of many other states, is not directly designed to foster settlements. Rather, it is primarily designed to shorten the length and improve the quality of the trial itself by such means as narrowing issues and encouraging stipulations.

Under the New Jersey rules as they existed at the time of the study, every personal injury case was required to undergo a pretrial conference,⁴ but for the purposes of the experiment a different procedure was used. About three thousand personal injury cases were studied. For roughly fifteen hundred cases (designated "A cases") the mandatory pretrial procedure was continued. In the remaining fifteen hundred cases ("B + C cases"), a pretrial was held only upon request by one or more of the parties. Out of these, about half ("C cases") had pretrials, while the other half ("B cases") had none. The subsequent history of each case was recorded and statistically analyzed.

Strictly speaking, the experiment compared a mandatory pretrial system with a system in which a pretrial was given only if one of the lawyers requested it. To compare both of these with a system provid-

1. See, e.g., ABA SPECIAL COMMITTEE ON COURT CONGESTION, TEN CURES FOR COURT CONGESTION 11 (1959); NIMS, PRE-TRIAL 64-65 (1950).

2. See, e.g., Spangenberg & Ulrich, *Pre-Trial From the Viewpoints of Two Lawyers*, 7 W. RES. L. REV. 418, 427 (1956); Thode, *The Case for the Pre-Trial Conference in Texas*, 35 TEXAS L. REV. 372, 384 (1957).

3. See, e.g., Brennan, *The Continuing Education of the Judiciary in Improved Procedures, Seminar on Practice and Procedure*, 28 F.R.D. 42, 50 (1960); Brennan, *Remarks on Pretrial*, 17 F.R.D. 479, 485 (1955).

4. N.J. Rule 4:29-1(a) (1955). As a result of the study, New Jersey changed its rules so that pretrials in automobile negligence cases are no longer mandatory. N.J. RULES 4:29-1(a).

ing for no pretrials at all would require another experiment.⁵ Nevertheless, Professor Rosenberg makes certain statements concerning pretrial conferences themselves, and does not confine his discussion to comparing a mandatory with a permissive system. He candidly acknowledges, however, that "such statements may not command the same level of reliability as the controlled test data."⁶

Briefly summarized, the principal findings were that the mandatory system resulted in a slightly higher proportion of well-trying cases, and that the mandatory system required more judges' time (total pretrial and trial time) than the permissive system, to dispose of the same number of cases. The mandatory system neither increased settlements nor shortened trials. From these findings it was inferred broadly that although pretrials do not save time, they do improve trial quality.⁷

Assuming that Professor Rosenberg's statistics are reliable—and there is every reason to believe that they are—the conclusion that the New Jersey type of pretrial conference does not save time in personal injury cases is as unassailable as it is startling, since both settlement rates and trial lengths are objective facts. The figures show that pretried cases are neither settled more frequently nor tried more expeditiously than non-pretried cases. It is theoretically possible, of course, that factors other than the existence or absence of pretrials could account for the similar trial lengths and settlement rates of the two groups, but this seems doubtful in view of the careful sampling and control techniques employed.

Professor Rosenberg's other major finding—that pretrial conferences tend to improve trial quality—is not so well supported as his finding concerning time saving. This is not to suggest that pretrials do not improve trial quality, but merely that the empirical evidence offered by the study in support of this conclusion is weak.

One is faced at the outset with the question whether trial quality can ever be measured objectively. The best way to prove that it can would be to offer evidence tending to show that different observers judge trial quality (or the factors which go to make up trial quality) the same way. However, no such evidence was offered, and that omission seriously undermines this part of the project's conclusions.

Even if it is assumed that the trial quality can be measured objectively, it must still be asked whether the method used in the proj-

5. The test program originally designed by the project would have compared a mandatory pretrial system with a system having no pretrials. It is possible that such an experiment, by arbitrarily treating certain litigants differently from others, might raise serious constitutional questions. Probably for this reason, the Supreme Court of New Jersey modified the proposed test design so that those not mandatorily pretried could request pretrials. See p. 17.

6. P. 28.

7. P. 150 n.4; see also p. 50.

ect was wholly reliable. Trial quality was rated by lawyers and judges *who knew whether the case had been pretried*; it is entirely possible that their subjective decisions as to trial quality were influenced by their own preconceptions concerning the value of pretrials. Even if this happened in only some of the cases, the figures tending to show that pretrials improved trial quality would be untrustworthy. It is probably impossible to arrange a large-scale experiment in which the quality of trials would be measured by observers who did not know whether any particular case had been pretried. Nevertheless, the fact that the evidence is the best obtainable does not make it convincing.

Even if one is willing to accept the project's figures at face value, still another hurdle must be overcome: do they justify the conclusion that pretrials improve trial quality? The project's figures, gathered from questionnaires filled out by the judges and counsel who participated in the cases, are as follows:⁸

	Mandatorily Pretried A	Voluntarily Not Pretried B	Voluntarily Pretried C	All Voluntary Cases (B + C)
Both sides well prepared	85%	85%	81%	84%
Theories clearly brought out	94%	92%	88%	90%
Issues emerged clearly	91%	88%	88%	88%
Evidence not offered on extra- neous or undisputed issues	82%	73%	81%	77%
Cumulative evidence not offered	82%	80%	79%	79%
Evidence on essential issues not omitted	83%	77%	66%	73%

One may agree with the author's conclusion that a mandatory pretrial system (column A) produces a slightly better proportion of "good" trials than a voluntary pretrial system (column B + C), but the further conclusion that pretrials improve trial quality is at least open to debate. A comparison of the cases voluntarily not pretried (column B) with those voluntarily pretried (column C) seems to suggest that if a case is voluntarily given a pretrial its chance for a good trial is lessened. Thus, as indicated in the table, a higher proportion of the non-pretried cases than of the voluntarily pretried cases were well prepared, brought their theories out clearly, avoided cumulative evidence, and avoided omitting essential evidence.

The anomalous finding that non-pretried cases were better tried than voluntarily pretried cases cannot be explained by assuming that

8. Based on Tables 1, 2, 3, and 5 at pp. 34, 35, 37, and 38.

they were less difficult to try well. Professor Rosenberg considered and rejected this possibility. In fact, the conclusion that pretrials did not shorten trials is based at least in part on a rejection of this possibility.⁹

The study was confined to personal injury cases "because their volume and nature made them the largest question mark in the pretrial picture . . . [and] in order to keep out unknown factors that might confuse the findings or make the results ambiguous."¹⁰ Pretrials are probably of greater value in less routine types of cases. For example, it may be that the issues in personal injury cases usually cannot be narrowed significantly.

Like most procedural studies, this one views efficiency primarily from the judges' viewpoint, and does not attempt to measure the time burden which pretrials place on lawyers. Although the average pretrial takes only twenty minutes of the judge's time, it takes far more time for the lawyers. In addition to the time consumed in preparing for the pretrial, untold hours are spent by lawyers warming courtroom benches, waiting for their turn. It will not do to dismiss these wasted man-hours as a burden which the legal profession can well shoulder, because the burden is ultimately shifted to the public. Defendants' lawyers customarily charge insurance companies seventy-five dollars per pretrial; this added expense is eventually reflected in higher insurance rates. Plaintiffs' attorneys, on the other hand, must consider the added time and expense of a pretrial when they fix fees, settle cases, and refuse marginal cases as too expensive to litigate. Does the added burden which pretrials place on lawyers and their clients tend to improve the quality of trials while reducing the quality of justice by making it more expensive? Unfortunately, that question was beyond the scope of the study.

Professor Rosenberg's experiment is the first and only one in which the effect of a legal rule of procedure has been treated in a rigorously conducted, statistically significant experiment involving actual cases. His findings of fact are clearly separated from his interpretations of those findings; he grinds no pro- or anti-pretrial ax. The statistical significance of each fact and figure is presented along with the finding, and the reader is free to draw his own conclusions. For these reasons it is indisputable that *The Pretrial Conference and Effective Justice* is both an invaluable addition to the literature on pretrial conferences and a trail-blazing venture in empirical legal research. The book's treatment of the effect of pretrials on trial quality shows that controlled experiments in the law are fraught with

9. P. 53; see also pp. 50, 150 n.4.

10. P. 17.

difficulties and pitfalls, but its finding concerning the supposed time-saving features of pretrials demonstrates that when the pitfalls are avoided, such experiments are well worth the effort.

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