
James G. France

Recommended Citation
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol7/iss1/3

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AKRON LAW REVIEW

ORDER IN THE COURTS REVISITED:


JAMES G. FRANCE*

INTRODUCTION

Early in 1969, under a grant from the Knight Foundation, measurement of delay in litigation in six northeastern Ohio counties was undertaken by a study group from University of Akron School of Law. A year later the group reported its findings as to delay in the civil jury, criminal and appellate fields in a 200-page report: Order In The Courts.1

The report, moderately publicized, had little impact on bench and bar for reasons that were then not fully appreciated but are now apparent. The first and major reason was that the report did not purport to show where delay, as such, existed, for there was then no useful data

* B.A., Brown University; L.L.B., Yale University; Professor of Law, University of Akron School of Law; formerly Judge, Court of Appeals of Ohio, Seventh Appellate District.


An introductory chapter to the report indicated long time spans as to individual cases in some counties, aggregating four years through the appellate stage in unemployment compensation cases, and a few criminal cases from other counties in Ohio in which the appellate process occupied even more time. Recent cases within the six-county area have now eclipsed them in lengthy time spans. The tort jury case delay record, at least in the six-county area, is now being established by Harvilla v. Trainor, #22476, Medina County, in which an original petition for personal injury was filed September 16, 1966, with trial in June, 1973, and appeals to follow. Its companion case, Motorists Mutual Insurance Co. v. Trainor and Harvilla, a declaratory judgment action, lasted from February 24, 1967, to March 18, 1973. See 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973). Its criminal case counterpart in time span, State of Ohio v. Marion Jones, #6151 Portage County, concerned a post-conviction remedy proceeding from a 1963 conviction. The defendant's petition to vacate was filed October 24, 1970. After one trip to the Court of Appeals, the trial court ordered sentence vacated and a rearraignment on February 22, 1973. The case is once more in the Court of Appeals (June, 1973) without decision.

An extremely stale Ohio case was Rothfuss v. Hamilton Masonic Temple Co., 34 Ohio St.2d 176,.... N.E.2d ....... (1973), a property owner's nuisance negligence claim. The accident happened May 5, 1959; petition for recovery was filed in cases #79245 and #79246 on April 17, 1961. Trial was had March 26, 1969, in Butler County. The Supreme Court of Ohio affirmed the jury award of modest damages on May 30, 1973, after one previous trip in which the court remanded the case to the Court of Appeals on a point of practice. 27 Ohio St. 2d 131, 271 N.E.2d 801 (1971).
on how long it should take any of the civil cases involved in the study to be resolved or terminated. The study could show only how long it took each of the six different common pleas courts, with widely varying population loads, with differing internal organization, age and experience of judges and amount of staff support, to dispose of groups of similarly selected tort jury, criminal and miscellaneous non-domestic relations cases. The time taken by the most expeditious court in each group of cases and for each stage in case processing was regarded as the reasonably attainable goal, and delay was reckoned as the excess time taken by the other five courts involved in the study.\textsuperscript{2}

This rather crude means of calculation was dictated by complete lack of data of the time formerly taken in the leading county for disposition of tort or other jury eligible cases, the experience of counties elsewhere in Ohio, and by a complete lack of standards set for the process. The only basis for prediction of disposition times lay in the Calendar Status Studies published by the Institute of Judicial Administration which included two of the six counties studied.\textsuperscript{3} But the latter studies were concerned only with the time taken from the date the cases reached pleading issue or trial readiness to the date of trial of those cases actually tried.\textsuperscript{4} They neglected that portion of the total time span which was expended from date of filing to date of issue in those cases which they measured. Furthermore, the study ignored the entire time from filing to disposition of all cases disposed of by default judgment, dismissal, settlement and summary judgment, modes of disposition which together constitute more than 60 per cent of the case termination in tort cases in almost all courts.\textsuperscript{5}

In the three years since publication of the original time lapse study, most of the missing guideposts have been added. In each of the counties previously studied, other samplings have been taken at two-year or more frequent intervals so that variations in the time span from year to year could be determined. The record in each county now consists of samples,\textsuperscript{2} ORDER IN THE COURTS, supra note 1, at 13, 14.

\textsuperscript{3} Only Cuyahoga County (Cleveland) and Summit County (Akron) were considered eligible for inclusion in the Calendar Status Studies, by reason of minimum population requirements. See INTRODUCTION TO CALENDAR STATUS STUDIES, Institute of Judicial Administration, 1969.

\textsuperscript{4} The time used was the average time for those cases selected by the local Clerk of Courts or assignment commissioner according to sampling formula suggested by the Institute of Judicial Administration [hereinafter cited as IJA].

\textsuperscript{5} The 60 per cent figure is conservative. In New Jersey the trial rate was only 23 per cent. M. ROSENBERG, THE PRETRIAL AND EFFECTIVE JUSTICE 22, (1964). In South Carolina the trial rate varied from 10 to 32 per cent. The Judicial System of South Carolina, Project Office Draft, IJA, 1971. In Tennessee the rate varied from six to 20 per cent. Appendix to Final Report, The Judicial System of Tennessee, IJA, 14-18, 1971. In most of the other counties studied independently the trial rate did not exceed 20 per cent.
selected on the same basis as the original ones, for each of the years 1968, 1970 and 1972, in addition to the year 1966 previously studied. In addition the so-called leadership or target county, Portage, has been examined back to the year 1961 as a further check to see if its 1966 case record was, in fact, a target record or the best that might be expected in terms of expedition, with results shown in the modified comparison graph, Table I. The search and plotting of elapsed times has also been extended to survey seven other counties, primarily metropolitan, included in the comparison for at least some of the years involved.6

But more extensive comparisons are available from samples of tort jury filings taken, on the same basis as the original samples, from substantial areas of six other states, four in connection with studies of state court systems or jury utilization studies conducted by the Institute of Judicial Administration7 and two others independently by the author.8 Other published studies by the Institute for Court Management, particularly that for Wayne County (Detroit) Michigan,9 have yielded comparable data. Also, a rough correspondence formula for the use of the Calendar Status Studies has been devised so that the progress of case processing can be shown for major centers in nearly all the 50 states.10

Since the method used in the Order In The Courts study, which concentrated on time for disposition primarily of the median case in point of elapsed time, left something to be desired in showing the rate of progress of disposition of the whole sample of cases, a new method of showing that rate has been devised. This new method is to show the entire disposition of the case samples as a single line on a graph, of which time in months is the abscissa and completion of each 10 per cent of the case sample, on a cumulative basis, is the ordinate. Thus, the various progress lines from county to county, and in the same county from year

6 Original ORDERS IN THE COURTS COUNTIES were: Cuyahoga, Summit, Stark, Mahoning, Trumbull, and Portage. Data gathered for the filing year 1968 from Hamilton, Franklin, Montgomery, Medina, Clark, and Greene counties was also used for purposes of comparison with similar counties in other states and for constructing composite graph line. See France, The Williamsburg Consensus: Some Errors and Omissions, 14 WM. & MARY L. REV. 1, 25-28 (1973) [hereinafter cited as 14 WM. & MARY L. REV.].

7 States in which these studies occurred were South Carolina, Tennessee, Louisiana and New Jersey. Some of the Ohio courts, as well as Pennsylvania ones, were surveyed in connection with jury utilization studies of U.S. District Courts in or near the county seats of the counties in question.

8 All studies in Florida, and most of those in Pennsylvania, were conducted independently.

9 See Analysis of the Civil Calendaring Procedures of the Third Judicial Circuit Court, Wayne County, Michigan, The Institute for Court Management, 31 Table V, 1971.

10 The graphing, based on such formula, is approximate as based on months required for disposition of 50 and 67 per cent of cases only. Characteristics of the graph line, based on the type of calendar control practiced for that community, must be ascertained. See France supra note 6, at 38.
TORT CASE DISPOSITIONS PORTAGE COUNTY OHIO — BY YEARS
Production time for each year averaged to point of production fall off

MONTHS OF PENDENCY

YEAR OF FILING

AVERAGE MONTHLY PRODUCTION

1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972

10%
20%
30%
40%
50%
60%
70%
80%
90%

2
4
6
8
10
12
14
16
18
20
22
24
26
28
30
32
34

MONTHS OF PENDENCY

AVERAGE MONTHLY PRODUCTION

1961 7.7%
1962 6.6%
1964 5.2%
1965 4.6%
1966 4.0%
1967 2.8%
1970 2.6% incomplete
1971 3.0% incomplete
to year, can be compared either by overlay, by successive recordings on a chronologically arranged time basis, or even collected as a composite of groups of counties for comparison with other such groups. Such composite comparison graphs can be used to aid in analysis of the success or failure of systems of structure, organization and management in a particular county or state. For instance, Table II illustrates the Ohio record for the filing year 1968 against six other states, primarily for the year 1969.

The method used in taking the case samples was not, as others have suggested, based on a statistically sound random sample and thus does not result in calculations free from all statistical bias. Since the tort case study involved, originally northeast Ohio, later other states, some data from small counties, and the desire for a limited time frame in the filings, sampling was not possible. Rather, all or nearly all cases in the tort category had to be used; only obvious "companion" cases of related plaintiffs against the same defendant and obvious property damage subrogation claims were excluded to insure that the small number (32 to 38) of cases used did not extend over more than a three-months' filing period. In the larger communities, where sampling was possible, a rudimentary randomness was achieved by taking every second or every third case, thus limiting the time spread in filing dates to a two- or three-week period. In an effort to achieve a closer approach to a true random sample, a key number consisting of the last three digits of a docket number was used in all counties surveyed. This effort created an undesirable time spread between the counties studied, with four of the counties' calculations based on April filings and the other two on fall filing dates. Since there is a discernible difference in progress of cases filed at different seasons of the year, some additional inaccuracy

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12 This method was used in Cleveland and Columbus, Ohio, and in New Orleans, Louisiana. In Philadelphia and Pittsburgh, where ten and four appearance dockets are used simultaneously for recording successive filings, samples from two dockets in the former and one in the latter community satisfied the need for randomness of selection.

13 ORDER IN THE COURTS, supra note 1, at 17.

14 Two sets of samples for Portage County were taken for each of the years 1970 and 1972, one in the spring, the other in the fall. In both cases it was found that fall filings showed earlier dispositions for at least the first 40 per cent of terminations. Thereafter the progress lines of spring and fall samples tended to coincide. The 1966 filings on which ORDER IN THE COURTS findings were based took fall filings in Trumbull and Portage counties and spring filings in all other counties.

Statistics quoting any percentage of case dispositions other than those shown in ORDER IN THE COURTS are based upon field searches of the respective courts, made at one- and two-year intervals, and progress graphs constructed therefrom. The search results and graphs remain unpublished and can be found in the field file folders maintained by the author in the files of the AKRON LAW REVIEW.
TABLE II*
COMPARATIVE TIME LAPSE FOR TORT LITIGATION—SEVEN STATES
AVERAGE OF DISPOSITION TIMES—VARIABLES COUNTIES
(Measured from Filing to Disposition)

MONTHS OF PENDENCY

<table>
<thead>
<tr>
<th>Months of Pendency from Filing to Disposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Note: Calculations based on data from Calendar Status Studies.</td>
</tr>
</tbody>
</table>

*Basis of Comparison
- Tennessee: Seven counties measured
- Ohio: Twelve counties measured
- Louisiana: Eight parishes measured
- South Carolina: Nine counties measured
- New Jersey: Five counties measured; three calculated
- Pennsylvania: Five counties measured; three calculated
- Florida: Six counties measured; two calculated

*Reprinted by permission, 14 WM. & MARY L. REV. at 15.
may have developed in the original Knight Foundation report. Therefore, all case samples taken henceforth were based on filings entered shortly after April 1st of each year.

The problem of lack of standards, in tort jury cases at least, has been solved. A standard has been set for Ohio by the Rules of Superintendence adopted by the Supreme Court, and binding on each common pleas court of the state, so that it can be determined how each county is measuring up to the externally set standard. It may be questioned whether that standard—24 months for the disposition of personal injury cases—is a realistic one or whether it is too broad axe, ignoring the special problems of some counties, or whether it is too rigid in setting only one time standard for the disposition of the totality of the cases, rather than setting staggered times for disposition of increasing percentages of the whole case load. But in any event, the Ohio common pleas courts now do have an externally imposed goal to meet and progress toward that goal can be shown for each county in the state.

In terms of the foregoing improvements of measurement and display techniques and the existence of an external standard, it should now be possible to show several important points. First, whether the original survey was reasonably accurate in indicating that the seven-month period taken by Portage County for its median time in disposing of jury eligible cases was the optimum time for disposition of tort jury cases. Second, which counties have, since the filing year 1966, improved their case processing time and whether or not they have maintained such improvement. Third, the extent to which the structural and administrative changes, as well as imposition of standards, by the Rules of Superintendence, have improved the time span for disposition of tort jury cases in the six-county area.

**OPTIMUM DISPOSITION TIME**

The original optimum disposition time for tort jury cases in the *Order in the Courts* study was set at 30 weeks, or seven months. This was the time taken by the Portage County Court to dispose of its median case, that is, the case in the middle of the group of cases arranged in

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15 29 Ohio St. 2d. XLV (1972). Stated effective date is September 30, 1971, antedating release of the text of The Rules in 44 Ohio Bar 1289, October 25, 1971, and presenting a problem in retrospectivity of application. The most frequently mentioned date for compliance with particular rules is January 1, 1972.

16 The Rules themselves do not impose a particular time requirement for civil cases as does Rule 8(B) for criminal cases. Rule 5 refers to the period of time specified by (reporting) Form A, and Form A, published with the Rules, imposes a "norm" of twenty-four months for personal injury cases.

17 The time of the median case for all types of dispositions was actually shown as 28 weeks or six and a half months from filing to disposition. *Order in the Courts*, supra note 1, at 35.
ascending order of the time taken for their disposition, from the 1966 case samples. But some of the detail of the Knight Foundation report indicated that, even for that year, there were weaknesses in case handling. Summit, Mahoning, Stark, Trumbull, even Cuyahoga counties showed a few cases more quickly disposed of than the best of the Portage times, and the median time for disposition in a few modes of termination, such as defaults and dismissals, was less in both Trumbull and Cuyahoga counties. As samples were extended backward in time, it became apparent that the overall Portage County disposition record had deteriorated seriously from 1961, its best year. In that year, while the disposition time for the median case was only a few weeks less, the overall performance record was a disposition of 97 per cent of all cases in 12½ months, or an average monthly disposition rate of 7.7 per cent against 90 per cent dispositions in slightly more than 20 months, or 4.6 per cent per month in the 1966 sample.

The Knight Foundation report suggested that the Portage record was the best then available in northeastern Ohio because that county was the least populated of those studied and the relative absence of some metropolitan problems gave it some special advantage. But as comparable samples were taken and measured in other states, it became apparent that the Portage performance, however superior it may have been to the other Ohio counties studied, was not only inferior to that of similarly situated counties, such as Sullivan County, Tennessee, and Calcasieu and Rapides parishes, Louisiana, but it was distinctly poorer than the record achieved in such population centers as Jacksonville and Orlando.

18 Observed median time for settled cases was 25 weeks, for dismissed cases 36 weeks, and for tried cases 56 weeks. \( \text{Id.} \) at 33.
19 \( \text{Id.} \) at 33-34 (Tables).
20 \( \text{Id.} \).
21 See Table I following text at p. 8 ante.
22 See chart, Appendix to Final Report, The Judicial System of Tennessee, \( \text{IJA, pt. 2} \) at 5, 1971. Tort jury dispositions in Circuit Court in Sullivan County showed the median case disposed of in five months, 70 per cent in seven months and 85 per cent in 11 months. See note 14, supra.
23 In Calcasieu Parish (Lake Charles) 58 per cent of cases were disposed of within eight months, 70 per cent in 10 months and 91 per cent in 15 months. In Rapides Parish (Alexandria) 40 per cent of the cases were disposed of within five months and 65 per cent within eight months. Thereafter, production fell off sharply. The 70 per cent disposition level was not reached until 20 months elapsed time from filing. See note 14, supra.
Florida, 24 Memphis, Nashville, Knoxville and Chattanooga, Tennessee, 25 and possibly Scranton, Pennsylvania. 26

The first lesson for the Order in the Courts survey was one that had been freely predicted at the outset of the survey leading to the report. The declared goal of matching the time span of the most expeditious of six northeastern Ohio counties was a narrow and parochial as well as an unrealistic one. The goal should, of course, be set at the performance of the most expeditious court operating under the same or similar conditions of population ratio to judges, or case load to judges, and for northeastern Ohio the target times should have been those achieved by Jacksonville, Florida, Chattanooga, Tennessee, or Kingsport-Bristol, Tennessee, not those of Kent-Ravenna, Ohio.

DISPOSITIONAL PROGRESS 1966-68

The Knight report, while published in 1970, dealt with dispositions of cases filed in the year 1966. For that period there was no doubt of the relative superiority of the Portage County performances despite occasional instances of its falling below the record of other counties in some phases of the case processing, and despite its decline in efficiency from earlier years. The performance comparison is best demonstrated by the progress lines of the various counties shown in Table III. Medina County was later substituted for Stark County in the comparisons because of some hostility by the Stark County judges to the idea of performance comparisons and because disabling illness of one of the Stark judges was, for later years in the ongoing study, a decided disadvantage to the Stark County court. On the comparative graph, the six counties are shown from left to right in order of their 1966 recorded relative performance.

24 The Jacksonville (Duvall County) performance was almost incredible! Forty-five per cent of dispositions were within three months, 52 per cent in four months, 73 per cent in five months and 90 per cent in seven months for the 1969 filing year. The 1970 filing year performance was somewhat less spectacular. In Orange County (Orlando) the time spans were measured only for the 1970 filing year and showed 45 per cent dispositions in eight months, 60 per cent in nine months, 82 per cent in a year and 97 per cent in 18 months. See note 14, supra.

25 Memphis (Shelby County) on its 1969 tort filings showed 50 per cent dispositions in six months and 78 per cent in 16 months. Nashville (Davidson County) showed 50 per cent dispositions in seven months and 80 per cent in a year. Chattanooga (Hamilton County) showed 50 per cent dispositions in less than six months and 90 per cent in 10 months. The graph of its performance relative to other local courts is shown in Table III, 14 Wm. & Mary L. Rev. at 18. The Knoxville (Knox County) performance is shown in graph form for comparison in Table IV, at page 16. All charted performances are shown in Appendix to Final Report, The Judicial System of Tennessee, IJA, 1971.

26 The Scranton (Lackawanna County) record is computed from average time to trial as reported in the 1969 Calendar Status Studies and is suspect as being markedly less than for other Pennsylvania counties. The local court administrator did not report information to the IJA studies in 1971 and 1972.
COMPARATIVE PERFORMANCE, SIX OHIO COUNTIES, TORT CASE DISPOSITIONS FILING YEAR 1066 — PORTAGE COUNTY, 1961, SHOWN FOR COMPARISON

Each heavy vertical line represents a two month period from start of a particular county's performance line.
Nevertheless, when the continuing study for later years was made, the 1968 case samples showed Summit County, not Portage, in leadership position. Between 1966 and 1968 the Summit performance improved tremendously. In the latter year, half the Summit tort cases were completed within nine months, 60 per cent within a year and 90 per cent within two years. By comparison, Portage took 11 months to complete half its cases and 16 months for 60 per cent dispositions (see Table IV). After that level was reached, the Portage production fell off sharply, with very little progress shown in completing the last 20 per cent of cases. Mahoning County also experienced a decline in effectiveness, but it was somewhat more modest than that in Portage and noticeable primarily, like Portage's, in the very late stages of disposition, affecting the final 20 per cent of the sample. Medina's record was, like Summit's, vastly improved, although its 1966 record was so poor that even a vast improvement did not bring it in close touch with the three leaders in dispositions. Of the remaining counties, the Cuyahoga performance declined slightly and that of Trumbull quite sharply. The relative record for that year is shown in Table IV.

Downstate, in the few counties compared on the basis of 1966 and 1968 performance, the results varied much the same way. Franklin (Columbus) improved measurably over its 1966 performance in the early stages of processing, but began to lag in its dispositions once the median case in point of time span had been reached. Hamilton's (Cincinnati) 1968 performance was much less impressive than its 1966 performance had been. It is thus somewhat unfortunate that the filing year of 1968 rather than 1966 was selected as the basis for a composite progress line of the 12 Ohio counties compared with the composite progress lines of representative counties in other states based primarily on their 1969 filing year record. For the Ohio courts showed up very poorly in the comparison, ranking below five of the six other states in time required to dispose of their median jury cases. It was not until comparisons of the time required to dispose of 80 per cent of the cases are shown that the Ohio courts ranked as high as a poor third (see Table II), and this was only because, in two of the other states, there are no means available to do the elementary housecleaning of disposing of the 30 per cent of cases filed without any intention of trying or otherwise disposing of them.
COMPARATIVE PERFORMANCE, SIX COUNTIES IN TORT CASE DISPOSITION
FILING YEAR 1968
KNOX COUNTY, TENNESSEE, 1969, SHOWN FOR COMPARISON

PERCENTAGE OF CASES IN SAMPLE DISPOSED OF

EACH VERTICAL LINE REPRESENTS A TWO MONTH PERIOD FROM THE
START POINT OF EACH COUNTY'S PROGRESS LINE
1970 THE DISASTER YEAR

Poor as the 1968 filing year performance record for the six counties in northeastern Ohio and six other downstate counties was, the 1970 record was far worse. Summit County slipped badly, from a time span of nine months to dispose of its median case, to a low of 15 months. Portage slipped further, from 14 months to 17 months for its median disposition. Mahoning County fell, yet only from 12 to 13 months for its median disposition. Trumbull County went from 24 to 31 months, Cuyahoga from 23 to 26 months. Medina County, the added starter in the comparisons, increased the time span for disposition of its median case from 21 months to 29 months. The record from downstate counties also showed considerable slippage from the 1966 and 1968 standard of performance. Hamilton County (Cincinnati) which had achieved 50 per cent dispositions in 13 months in 1966 and 15 months to achieve the same level in 1968, had not even achieved that level of disposition 20 months after the filing date of its 1970 sample. Montgomery County (Dayton) which had disposed of half of its tort filings in 19 months in 1968, took nearly 22 months to achieve the same level in 1970. Similarly, Clark County (Springfield), which had disposed of its median case in slightly over two years in its 1968 filings, had not even disposed of 40 per cent of them in the same time span from the 1970 filing list. Tiny
Harrison County (Cadiz) which disposed of its median 1968 case in 13 months, took nearly twice as long to reach the same level of disposition in its 1970 filings. Only in Franklin County (Columbus) and Columbiana County (Lisbon) was the 1968 record of approximately 24 months for disposition of the median case maintained for the 1970 filings.

Only a few scattered samples were taken for the filing year 1971, with mixed results. Portage County dispositions were again down, with a new local record of 19 months required for disposition of the median case. Mahoning County slipped, also to 19 months for its median case disposition. Summit County made up part of the loss in the disaster year, reaching 10 months for its median disposition. In Trumbull and Medina counties the performance on 1971 filed cases was roughly equal to that on the 1968 ones. But Cuyahoga's performance, after a slow start, exceeded all previous performances after the first year of pendency of the 1971 samples was reached.

In addition to civil cases the filing year 1970 was also a disaster year for the criminal process. In four of five counties the time span from indictment or arraignment to date of trial or plea of guilty increased markedly between 1967, the survey year, and 1970. This decline was particularly marked in Portage County, where the Kent State

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38 The median case in Harrison was reached in slightly less than 24 months, but the list of cases recorded was extremely short—12 cases covering all filings from April through September, 1970. See note 14, supra.

39 The complete record of Franklin County filings to April, 1972, is shown in Table III, 14 WM. & MARY L. REV. at 34.

40 The Columbiana County record was actually better for 1970 filings after the median case was reached. Seventy per cent dispositions were recorded within 25 months as against 38 months for the same level of dispositions for the 1968 filings. The number of cases used in both years was small (less than 20) and extended over a three-month period. See note 14, supra.

41 In both cases, the time at which the median case was reached extended through 1972 into 1973. For the relative Portage record, see Table I in text at p. 8.

42 The Summit County performance was still slightly short of its 1968 filing year performance during the balance of 1971 and most of 1972, but it did overtake the 1968 case record at the 80 per cent disposition level, at 20 months of pendency, during the early part of 1973. The systems change discussed infra, p. 9, undoubtedly had some effect on this later performance. See note 14, supra.

43 During the years 1971 and 1972, the progress of the 1971 sample was slower than that of the former year. It was not until 1973 that the median case was reached at 21 months for Medina and 24 months for Trumbull County. See note 14, supra. The systems change, see note 42, undoubtedly affected these performances also.

44 The median case for 1971 samples was reached in 17 months, but in the fall of 1972, after a jump in production which coincided with the effect of the Rules of Superintendence (September 30, 1971). See note 14, supra.
University shootings and subsequent special grand jury activities acted as a whipping boy to explain away all deficiencies. In Summit County it was also marked, but without any visible scapegoat. This was also true in Cuyahoga County. In Stark County, where the previous standard had been a high one, the decline was so small as to be scarcely noticeable. Finally, in Mahoning County there was actually some improvement in time span.

The decline in efficiency, as measured by plotting the disposition of individual tort jury and criminal cases, was not actually observed until late 1971 and early 1972, and was not published until late 1972. Accordingly, there could be no considered analysis of the reasons for it until after that time. But there were other indicators, not as accurate, but indicating a trend, available earlier, as soon as the year-end statistics published by the Administrative Director of the Ohio Courts were released.

One indicator is the relationship between the number of pending cases at the end of the year and the number of cases disposed of in that year. The quotient of pending cases, or backlog divided by average monthly dispositions, is sometimes referred to as “statistical delay,” or the number of months it would theoretically take to reach the last pending case, if all cases were disposed of in order of filing. For civil cases, on a statewide basis, this figure rose from 15.6 months in 1969 to 15.8

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45 This cry was so loud that the year 1969, rather than 1970, was selected as the comparison year. In 1967, 53 per cent of criminal cases went from indictment to trial or plea in four weeks, and 69 per cent in nine weeks. By 1969, it took seven weeks to bring the median case to trial or plea, and 24 weeks for 67 per cent of them. The calculated time of the median case, measured from arrest to sentence, was nearly 53 weeks, as against 42 weeks in 1967. Portage County, with a continuingly high number of cases pending which results from unapprehended defendants, always shows a much longer calculated than measured delay. See ORDER IN THE COURTS, supra note 1, at 101.

46 The calculated time span of the median case from arrest to sentence increased from 29 weeks in 1967 to 35.88 weeks in 1970. The time from indictment to trial for the median case increased from six weeks in 1967 to 10 weeks in 1970. See note 14, supra.

47 The count for comparison in Cuyahoga County was taken in the year 1968, based on Table IX, of the studies of Lewis Katz, Justice Is the Crime. In 1967, it took nine weeks for the median case to reach trial or plea from indictment, in 1968, 14 weeks. In 1967, 70 per cent of cases reached plea or trial in 25 weeks. By 1968, it took 30 weeks to reach the same level. The calculated median time from arrest to sentence in 1967 was 32 weeks; by 1970, it was 44.72 weeks. See note 14, supra.

48 For the first 65 per cent of dispositions, the time span actually was shorter—nine weeks in 1970 against 10 weeks in 1967. It was only in the disposition of the final 20 per cent of cases that excessive processing times were involved. See note 14, supra.

49 This improvement consisted of shortening the time span by two or three weeks at almost every 10 percentile of dispositions up to the 80 per cent level which was reached during 1970 in six months. Thereafter, as in Stark County, dispositions dropped off seriously. See note 14, supra.

50 The calculated measurements, or statistical delay, as the term is used in ORDER IN THE COURTS, and notes 45-47 supra, is from arrest, not from indictment, to final disposition, or sentence, not the date of trial or plea.
months in 1970, not alarming but bothersome, since most dispositions in tort jury cases are in the second and third years after filing. But for criminal cases, the statistical delay rose from 5.88 months in 1969 to 6.72 months in 1970, 14 per cent in a single year.

By reference to the backlog growth figures for the entire state, the increases were truly alarming. The civil case backlog, which had grown by only approximately 500 cases in 1969, increased by 5,600 cases in 1970, and the criminal backlog, which had also grown in 1969 by only 500 cases, was suddenly increased by 2,700 more in 1970. The danger signals were there.

What caused the disaster is by no means clear. Perhaps it was the increase in both civil and criminal filings for that year, much greater than previous annual increases. Perhaps it was a sudden increase in the number of criminal cases in which trial was demanded, primarily induced by recent changes in the personnel of the Supreme Court, which appeared to make it somewhat more responsive to the claims of constitutional right by criminal defendants. Perhaps on the civil side it was the initial difficulties of Ohio's judges and lawyers in coping with the requirements of Ohio's then new federalized Rules of Criminal Procedure. The posturings of plaintiffs' negligence counsel and insurance defense counsel

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51 The calculated time span for the median personal injury or tort jury case is based on all civil cases (excluding domestic relations cases) pending at the end of the year, divided by average monthly dispositions of all such civil cases disposed of. Data, unlike that for criminal cases, is from the statistics of the year following the filing year. See note 14, supra.

52 The six-county area calculated time for the median case from arrest to sentence was 8.52 months or 36.92 weeks. Time of the individual counties (in weeks) was as follows: Cuyahoga 44.72, Summit 35.88, Stark 13.52, Mahoning 30.68, Trumbull 22.88, Portage 26.92. See note 14, supra.

53 Ohio Courts, 1970 Annual, Administrative Director, Supreme Court of Ohio.

54 The total filings in civil and criminal cases (disregarding domestic relations) amounted to 59,538 cases in 1968, 61,088 in 1969. In 1970 the figure jumped to 70,843. Even after a two-year lapse, the year 1972 produced only an increase to 76,419. See note 14, supra.

55 Justice Zimmerman, who had written original opinion in State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 470 (1936), rejecting the exclusionary rule for Ohio and who later wrote opinion in State v. Beck, 175 Ohio St. 73, 191 N.E.2d 825 (1963), again rejecting it in the face of Mapp v. Ohio, 367 U.S. 643 (1961), died in June of 1969. Chief Justice Taft, who confirmed Ohio's opposition to the exclusionary rule by opinions in State v. Mapp, 170 Ohio St. 427, 165 N.E.2d 387 (1960), and State v. O'Connor, 6 Ohio St.2d 169, 217 N.E.2d 685 (1966), and whose opinion in State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), virtually emasculated the state's liberal post-conviction remedy statute, died in March, 1970. His successor, the present Chief Justice, was immobilized as a result of serious heart attack six weeks later, while attending a Sixth Circuit Conference in Gatlinburg, Tennessee, thus depriving the Court of months of effective leadership in a new direction, during the early period of effectiveness of the new Ohio Rules of Civil Procedure.

56 The Rules became effective July 1, 1970.
in fighting or preparing to fight the introduction of no-fault insurance might conceivably have had something to do with it.

But whatever the cause and whatever the danger signals heeded, the Ohio Supreme Court, under the leadership of Chief Justice O'Neill, acted to redress the situation. On September 30, 1971, it adopted Rules of Superintendence^57 designed to enforce faster disposition of both civil and criminal cases, but especially the latter, in the common pleas courts of the state, effective January 1, 1972.

**STRUCTURE AND METHOD CHANGES PRODUCED BY THE RULES OF SUPERINTENDENCE**

While the Rules of Superintendence consisted of 13 numbered commands to the common pleas judges of the state, reinforced by a 55-page implementation manual issued by the Ohio Legal Center and five detailed prescribed reporting forms, the main elements of the changes produced were three. First, criminal divisions of the court where they existed (primarily in the metropolitan counties) were abolished, although the domestic relations divisions were continued; all non-domestic civil and all criminal cases in the common pleas courts were required to be assigned at their inception equally among all general duty judges who were made responsible for their progress until terminated. Second, the duty of reporting on intake and disposition cases was transferred from the clerks and court administrators to each individual judge, with an administrative judge in all multi-judge courts required to submit an inclusive or composite report from the reports of the individual judges in his court. Third, the cases were categorized by type more fully than had previously been the case. "Norms" were set forth for pendency of various categories of cases, that for personal injury cases being 24 months. As to any classification of case, the judges were required to dismiss for want of prosecution all cases in which no activity had occurred for six months, except those cases awaiting assignment for trial.^58

There were, initially, two matters which could give rise to confusion as outlined in the rules and the incorporated forms. One was a provision, explained in the implementation manual, and carried on the form itself, which counted among the cases "terminated" during any given period, those transferred to another court or to another judge of the same court.^59 Of course, it seemed fair for a judge to strike off the list of pending cases assigned to him one for which he was no longer responsible, but to consider the case as one terminated is rather questionable even for

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^57 44 Ohio Bar 1289 (1971).
^58 Rule 7, Rules of Superintendence.
^59 Form A, carrying this subdivision of terminations and definition of accessions, had not been changed as of June, 1973.
that judge. Consequently, when all cases transferred to other judges of the same court are listed in the composite report for that court as terminations of the court, the accuracy of the court is seriously diminished. Apparently, the separate judges were supposed to assume that any cases transferred to them were to be counted as a new filing, but the original language of the reporting form A failed to convey that idea. It asked for only two sets of numbers as to accessions to the docket of each judge: “Cases assigned to me and pending on the first day of the period”; and “Cases filed and assigned to me during this period, including reactivated criminal cases.”

At some later time, the judges were apparently instructed to count the transferred case as a new case in their hands, but how long the practice went on of not counting them is unknown, and how much this double counting of filings, when it did occur, disturbed the ratio of pending to truly terminated cases is likewise undetermined. In any event, the volume produced by transfers of this sort is not inconsiderable. In Summit County, in the short month of February, 1973, more than 30 per cent of all “terminations” were accomplished by transfers to another judge or court.

The other confusion was created by the use of the term “norm.” Does this mean the maximum time any case in a given category is to be permitted to remain pending without suitable explanation? Plain English would not appear to indicate that anything further was meant than that this was the normal time a case of that category should be expected to remain pending and that no special effort should be made to expedite it before that time. But considering the wide range of time spans encountered in personal injury or tort cases, it is difficult to conceive of the “norm” as anything but a median time or an average time; in either case, pendency of up to three and a half years for some cases might be considered within normal limits. Both Superintendence Rule 5 and Form A for reporting of the judges use the term without explanation, and the implementation manual, which goes to great lengths to explain the meaning of median, mean and mode, is strangely silent on the meaning of the term “norm.”

Based on experience elsewhere, three general effects on case processing could be expected from the imposition of the Rules of Superintendence. The first of these was induced by distributing all civil and criminal cases among the judges and then applying different time “norms” to criminal, personal injury and general civil cases. To the extent that criminal cases were taking longer than the six-month “norm” allowed for them (prior research had demonstrated that the bulk of them did not),
pressure was on each judge to attack his assigned criminal cases as an order of first priority, letting the general civil and personal injury cases pile up, if necessary, in order to make the criminal calendar "current." Second priority, with a one-year "norm," went to the general civil cases, contract and equity. The third and lowest priority was assigned to personal injury cases with a 24-month "norm." The logical inference was that in case of choice to be exercised, the general civil calendar would be reduced to a one-year pendency before the personal injury, or tort jury, cases became an item of real concern. This effect can be labeled "criminal case preference."

The second general effect was induced by the requirements of Rule 7 for a file review quarterly, although weakened by the provision that the duty can be delegated by the judge. All cases were to be reviewed, presumably in a variable time with three months as a maximum. Here it would be expected, at the outset, that some civil cases in which default had occurred, or in which service of process had not been made, would show up as the cases were examined in the file review by the judge at the time of mass assignment of the cases to him. As such cases were detected, pressure could be applied to attorneys for the plaintiffs to terminate them by default hearing and judgment or by voluntary dismissal as the case might be. Such an effect, called the inventory effect, had been noted in many preceding changeovers from master calendar control to the individual judges' docket system, notably by some federal courts and in Franklin County (Columbus) Ohio in 1971. As a device to boost terminations among relatively current cases, it would presumably have unequal effects in counties which were already on individual docket systems, such as Mahoning and Trumbull, and those which had to change systems, such as Cuyahoga and Summit. How long this inventory effect would persist was not really known.

A third effect, related somewhat to the second, was what might be referred to as the "housecleaning effect," induced also by Rule 7, requiring dismissal of inactive cases after six months of inactivity and by Rule 5, requiring the reporting with a clear threat of the military "reply by endorsement" as to cases which exceeded the norm. The effect of the combination of these rules in disposing of old personal injury cases is one

62 There are two other categories of civil cases, both small in number: Workman's Compensation, with a norm of one year for disposition, and Appropriation (eminent domain) with a norm of six months.
63 No norm is set for domestic relations cases, but courts having a separate domestic relations division are required to report the age of their median terminated contested and uncontested cases.
64 Dismissal of cases. Each judge of a court of common pleas shall review or cause to be reviewed quarterly all cases assigned to him... Rule 7. Rules of Superintendence, 7.
65 See comparison graph in 14 Wm. & Mary L. Rev. at 34.
which might not be measured by time in process studies of samples of relatively current cases because, initially at least, it would affect only the old cases on the docket, beginning with the oldest and longest forgotten case, once churned up in the process of the initial assignment or discovered by a successor judge. But such an effect would be reflected more in the recapitulation of total filings and terminations of each judge as reported to the Chief Justice and duly recorded in the state's operating statistics.

**Changes in Disposition Time Produced by the Rules**

Four methods of testing the effects of the Rules of Superintendence on the time span of tort jury (and criminal) cases have been developed and used. Since the Rules had been in effect only a little more than 16 months at the time of preparation of this article, it was obvious that the full-scale method of tracing the progress of samples drawn from post-April filings of the tort jury cases would not result in a long enough observation period for showing fully developed results and conclusions. Therefore, other methods had to be implemented. The first of these methods available was to measure the continuing progress of disposition of cases filed in 1970, and of some cases in 1971, to see if there was any pronounced change in the disposition rate vis-à-vis dispositions of earlier years on earlier samples of the same age. A pronounced change in disposition rate after January 1, 1972, could also be detected on the same samples. A second method was to be guided by interim reports of the Chief Justice as to successes gained. Another was to take new, 1972, samples on the former basis, for both tort jury and criminal cases, but to change the sample date from April to January in order to permit a longer observation time of the case disposition process. In making this change, in time of the sample drawing, some slight difference in known early disposition rates had to be accepted. Finally, and of chief reliance because of the known previous relationship between "statistical delay" and the time span of the median case in disposition time, the Annual Report of the Administrative Director was relied upon to furnish its usual accurate statistics on the number of cases of each class pending at the end of the year and total terminations for the year, from which the statistical delay and hence the median time span could be computed.66 These results could then be used to check against the observed results.

**Progress on Older Cases**

The first and most convenient means of checking the progress of the 1970-1971 case samples was in the disposition rate change after the imposition of the Rules. This was done not only in the six-county area, but in other downstate counties, primarily the metropolitan ones, where continuing studies were being made of tort case disposition times. In

66 See Order in the Courts, supra note 1, at 35, 36, 101.
most, but not all, of the counties observed, there was a marked jump in disposition rate for approximately a month's time, either just before or just after the Rules became effective, followed by a relapse to the former progress rate attributable to cases of that age group as established in former years. The jump was not entirely unexpected and was ascribed to "inventory effect" as the judges reviewed the files assigned to them. This same jump had occurred in Franklin County a year earlier when it changed from master calendar to individual judges' docket system but was not repeated in 1972. It was considerably less pronounced in Mahoning and Trumbull counties where the individual judges' docket had been in effect for many years prior to the imposition of the Rules. In downstate counties, the study of relative disposition rate was pursued for only four months, but in the six-county area, it continued for an additional year. The additional year of observation produced no indication of any permanent change in rate of disposition of these cases from the rate established in former years. In some counties in the Order in the Courts study area, the progress rate actually declined, but on the composite comparative graph shown later in this article, the 1971 samples, after an initial surge of activity, almost exactly paralleled the progress lines from the 1968 and 1970 cases, and were somewhat lower in pitch, and therefore slower in progress rate than those from 1966.

The results of this study, limited in time as to the downstate counties, were not surprising. Predictably, there was some inventory effect, but it was both stronger for a short time and of more limited duration than expected. In general, it confirmed the expectation that the long range thrust of the Rules would be on expediting the process of the criminal cases, rather than the tort jury ones, but no sample of criminal cases then existed to confirm the other portion of this expectation.

The Chief Justice's Reports and Predictions

In former years, monthly rough checks on the progress of the courts in disposing of cases, in terms of comparison of numbers of cases filed and numbers terminated, had been supplied by monthly reports of the Administrative Director of the Courts. While this was sometimes jokingly referred to as "playing the numbers" game, and had of itself no direct relationship to speed of disposition, it did furnish some check to see if cases were being temporarily stalled or expedited in various counties of the state. But during the year 1972, the publication of this data for the common pleas courts was suspended and the only source of statistical data was in the progress reports issued by the Chief Justice of the

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67 ORDER IN THE COURTS, supra note 1, at 33.
state. These reports began in mid-May, 1972, and continued through the fall of that year. They were concerned with the progress of individual judges, not of courts as a whole, and then only with the number of cases that particular judge disposed of, without relation to the number filed and assigned to him or the number filed, assigned to, and disposed of by his colleagues on the same bench. This was, of course, good exhortive tactics, stressing one of the features of the individual judges' docket system: a spirit of friendly competition engendered among judges to see which could exceed the other in numbers of dispositions alone. Special commendations were issued to judges who showed disposition of more than a prescribed number of cases during each of the first three quarters of the year.

One weakness of such emphasis on terminations alone, apart from the fact that no distinction was made as to types, court, age, or disposition of cases, was that it was only one-half of the "numbers game" terminations. There was no indication of how the terminations related to filings and, consequently, a judge commended for number of terminations could actually be losing or gaining ground in terms of his backlog of number of pending cases awaiting disposition.69 Reports of individual courts, such as Cuyahoga County, published in local newspapers, did supply some of the additional answers. Thus, individual dispositions for the first six months of 1972, ranging from 568 cases by two judges to 226 for another, were reported, together with the information that the Cuyahoga County Court, as a whole, had disposed of more than 10,500 cases in six months, while 8,400 new ones were being filed, for a backlog reduction of 2,100 cases.70

Beginning in the early part of 1973, as the final yearly reports of the judges, and particularly the administrative judges of the metropolitan courts, were received in Columbus and tabulated, the thrust of the Chief Justice's reports did change. Delivered generally by press releases and speeches at service clubs and local bar associations, they began to emphasize the excess of terminations over filings or backlog reduction by whole courts rather than by individual judges. The theme now was that the excess of terminations or backlog reduction consisted of more than 9,000 cases for the state as a whole and 3,700 cases in Cuyahoga County alone. This latter figure would, of course, accord with the one previously given out by the Cuyahoga County Court noted above, although since it was less than double that of the first six months, reduction there was some indication that the inventory effect had worn off and that housecleaning was becoming more difficult. Shortly thereafter, the administrative judge

69 See experience of Clark and Marion counties, as noted by the Chief Justice, 46 Ohio Bar at 763 (1973).
70 Cleveland Plain Dealer, July 31, 1972, at 11A.
of Cuyahoga County released the court’s year-end figures.\textsuperscript{71} They showed a backlog reduction, not of 3,700 cases, but of only 2,652, an indication that housecleaning was getting even more difficult. But both of these individual court reports did give some clue to the type of activity their judges engaged in by reporting the beginning and ending pendency or backlog figures for the year, which showed the 2,652 cases as a net difference. Unfortunately, the beginning backlog figure for 1972 did not tally with the backlog figure reported to the Administrative Director for his 1971 Summary as an end of the year figure; his newspaper report showed 2,256 more cases pending than had been previously reported.\textsuperscript{72} Thus, all but about 400 cases involved in the backlog reduction were those “discovered” in the inventory process. Assuming that such cases actually existed and were not mere phantoms, it was clear that they were of a type that all concerned had previously considered disposed of, and that little effort was required to terminate them of record. In addition, such cases were obviously of the housecleaning type, that is old, long-forgotten cases whose disposition would have no effect whatsoever on the time span of the mass of the tort jury cases filed within currently measured periods, except as they might affect the duration of the “average” case of that type. In a Law Day speech at Cleveland,\textsuperscript{73} the Chief Justice adopted the slight change in Cuyahoga County figures, repeated his previous claim of statewide case reduction of 9,600 cases and predicted, as he had before, that all dockets would be current in terms of the norm times for various types of cases by Labor Day, 1973.

Unfortunately, from studying figures quoted as the reduction of total composite backlog, with unknown quantities of civil and criminal cases making up the mix, it still could not be determined whether a greater portion of the reduction was in civil or criminal cases.\textsuperscript{74} Still less could it be determined how this was affecting the time in progress of the current cases, since many of the cases so terminated might be out of the mainstream of litigation, waiting for termination by notice and a journal entry, as in a typical housecleaning of old, forgotten cases. To clear up this particular point, it was necessary to resort to the time-lapse measurement device, this time on 1972 filings.

\textsuperscript{71} Cleveland Plain Dealer, March 1, 1973.
\textsuperscript{72} See Ohio Courts, 1971 Summary, 10, 14, showing total of 19,735 civil and criminal cases pending at the close of 1971. Pendency reported by the administrative judge at the opening of 1972 was 22,081 cases. \textit{Id.}
\textsuperscript{73} \textit{Supra}, note 71 at 14A.
\textsuperscript{74} This was clarified in the State of the Judiciary Message delivered May 16, 1973, but not reported until May 28, 1973, \textit{46 Ohio Bar 755} (1973).
Measurement of 1972 Filings

For measurement of the 1972 case progress, it was necessary to take samples of 1972 filings untainted by contact with the old system. But it was manifestly impractical to take April and May case filings for measurement in the tort jury field since, in the smaller counties, some filings would be measured from June, 1972, only, too short a period of time to elapse until May, 1973, when results had to be tabulated. Decision was, therefore, made to take a January sample, stretching back into early December, 1971, in the smaller counties, to permit maximum observation time. In three of the counties, observation continued to March, 1973, with the remainder running until May. Since the shift in date would give the 1972 samples the advantage of slightly faster seasonal movement, it was felt that there could be no complaint that the Rules system was being compared under any but the most favorable conditions.

As to the tort jury cases, the dispositions in Summit County were significantly less for the 1972 cases than for the 1971 and 1968 cases, although some improvement over 1970 was shown. In Mahoning County, the 1972 filing year record was distinctly poorer in producing dispositions than that of 1971, 1970 or 1968. In Trumbull County, the dispositions were approximately equal to those of the 1971 filing year sample, but substantially below the rate on 1970 and 1968 cases. In Cuyahoga County, the 1972 rate was superior to both the 1968 and 1970 rate, approximately equal to the 1966 and 1971 rates and somewhat below the 1965 rate. In Portage County, the simplified comparison chart shown in Table I demonstrates that the 1972 rate, while slightly above the 1970 and 1971 achievement, was distinctly inferior to that of all prior years, and that progress under the Rules had merely redressed the decline from the disaster year of 1970, without restoring tort dispositions to their relatively good rate of 1966 and 1968 or the excellence of 1961 and 1962. A composite comparative line graph covering progress in the years 1966 through 1972 in disposition rate is shown in Table V for the six counties and indicates that what has been said concerning Portage County progress, or lack of it, is generally true for the entire Order In The Courts area.

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75 See note 14, supra.

76 Comparison graphs of Summit County showed its dispositions at every 10 percentile of cases disposed taking approximately one month longer than for 1966 and two months longer than for 1971. See note 14, supra.

77 At the end of one year of pendency only 18 per cent of Mahoning's 1972 tort jury cases had been disposed of. In 1971, 28 per cent had been terminated and in 1966, 1968 and 1970 nearly half of the filings for those years had been disposed within the same period. See note 14, supra.

78 Trumbull's disposition period at the end of a year of pendency in 1972 filings was 16 per cent, as was 1971's. In 1968 and 1970 dispositions over the same period of time were over 20 per cent and in 1966 they stood at 42 per cent. See note 14, supra.

79 Cuyahoga's dispositions at the end of a year of pendency varied from 22 to 30 per cent in all years surveyed. See note 14, supra.
Furthermore, the reporting on progress of tort jury cases, which conformed to at least half of the prediction of greater criminal case expedition during the early period of the operation of the Rules, furnished no indication whatever that the other half of the prediction, greater celerity in disposition of criminal cases, was occurring. To measure this, it was necessary to resume a study which had been virtually abandoned after 1970. Although criminal case processing studies had occurred in two counties, Summit and Cuyahoga, in both cases it was for the purpose of checking similarity of results with those of other studies.\textsuperscript{80} Again, it seemed desirable to abandon the April indictments as a 1972 test sample and go to January indictments to allow more time for observed progress. In three of the counties,\textsuperscript{81} the observed time span had been from date of indictment to trial in addition to that from date of arrest to final disposition in both the \textit{Order In The Courts} study and in the later cross checks of other studies. Accordingly, these dates were used for the 1972 study. In the remaining two counties,\textsuperscript{82} a departure was made, conformable to the measurement standard introduced by the Rules, which emphasized the time span from arraignment to trial. The result was that the measurements of the five counties as to time span in the criminal process was not the same, and they could not be compared exactly with each other horizontally. They could only be compared vertically on a before and after basis.

The measurement showed that Stark, Mahoning and even Portage counties had shortened their time spans tremendously at every level of the various levels of disposition.\textsuperscript{83} In Cuyahoga County, the time taken for disposing of the first 40 per cent of cases was somewhat longer than that for 1967 and 1968, but far shorter than for the disaster year 1970.\textsuperscript{84}

\textsuperscript{80} In mid-1972 the Urban Center, University of Akron, conducted a Criminal Case Proceeding Study which measured, among other things, time spans for an enlarged sample of 1970 cases. The results were virtually identical with those plotted on a much smaller sample of the same year, by the author. A more massive study was made of the Cuyahoga County 1968 criminal case processing by Professor Lewis Katz for his book, \textit{Justice Is The Crime} (1972). Table IX in the Appendix thereof yielded figures from which a disposition of line graph measuring time from arraignment to trial could be plotted as a check on the \textit{ORDER IN THE COURTS} 1967 figures.

\textsuperscript{81} Cuyahoga, Summit and Portage. See note 14, supra.

\textsuperscript{82} Stark and Mahoning. See note 14, supra.

\textsuperscript{83} While Stark County reached its median case in point of time in seven and a half weeks from arraignment as against less than seven weeks in 1970, it had reached trial or plea in 80 per cent of its cases in less than 15 weeks and disposed of all cases in the sample in 20 weeks, or four and a half months. Mahoning County showed a median time for plea or trial at five weeks from arraignment against nine weeks in 1970 and 13 weeks in 1967. It reached 80 per cent dispositions in 10 weeks. Portage County, whose cases were measured from time of indictment, rather than from arraignment, increasing the time per case by a week and a half, reached its median case in slightly more than five weeks, 80 per cent dispositions in 10 weeks and 95 per cent in 23 weeks or slightly more than five months. See note 14, supra.

\textsuperscript{84} \textit{Supra}, note 78.
Thereafter, the Cuyahoga County criminal disposition rate improved rapidly in comparison to all prior years and at the 90 per cent disposition level, the cases were being tried within 34 weeks or eight months—better than in all previous years. Only in Summit County was there no improvement shown in this stage of the criminal process, either over 1967 or 1970. Summit had shown some improvement in the whole time span from arrest to disposition, but most progress was made in shortening the time span at the grand jury level. Of course, this could not be shown as indicating an improvement occasioned by the Rules in the time span from arraignment to trial.

Thus the time span of this vital part of the criminal process emphasized in the Rules, by the measurement devices used before, did show a marked improvement over the 1970 low point in case processing and, in a majority of the counties, showed improvement even over the 1967 dispositions. It was noteworthy that both Stark and Portage counties registered improvement in this portion of the criminal process since, even in 1967, their median cases had taken only eight and six weeks respectively from arraignment to trial or plea and, in both cases, the average times for all cases to reach trial had been 11 weeks. Thus both counties were well within the “norm” allowances even before the Rules were adopted and both bettered their records after adoption. Because this article is concerned primarily with the tort jury or personal injury rather than with criminal cases, no year-to-year graphs of performance are shown as to the latter, but Table VI indicates that even in the total time span from arrest to sentence, which encompasses a much longer period of time than that from arraignment to trial, the median cases in four of the counties were being disposed of in far shorter than the “norm” allowance.

The evidence from measurement of the five Order In The Courts counties thus indicates what would have been assumed at the outset. While there had been only a modest increase in the effectiveness of the courts in handling tort jury cases (the time spans in that field had not by the close of 1972 even regained the less than desirable 1968 performance

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85 The measurement in Cuyahoga County, running like Portage’s from indictment, showed the median case reaching trial or plea in 18 weeks, against nine weeks in 1967 and 15 weeks in 1968, but it reached 80 per cent dispositions of its 1972 sample in 27 weeks or slightly more than six months as compared to 33 weeks for the 1967 cases and 38 weeks for those measured by Katz in the 1968 filings. See note 14, supra.
86 The 1972 Summit County record was actually from one week to one month better than the 1970 record at all percentiles. It was close to the better 1967 record, reaching the median case at six weeks, but it did not reach the 80 per cent dispositions mark until 23 weeks had passed and did not reach 90 per cent dispositions in less than 36 weeks, or more than eight months after indictment. See note 14, supra.
87 See note 14, supra.
88 Trumbull County was omitted from the later criminal case measurements.
THE CRIMINAL PROCESS — TIME LAPSE FROM ARREST TO CONVICTION (SENTENCE)
Five Ohio Counties — 1972 Indictments

SIX MONTHS

STARK
PORTAGE
MAHONING
CUYAHOGA

NINE MONTHS

PORTAGE
MAHONING
CUYAHOGA

ONE YEAR

Each vertical line represents one month from start of each county's progress line.
levels), there had been, in the handling of criminal cases, a marked improvement in efficiency and a pronounced lowering of time spans from the low point of 1970 and even some gains over the years 1967 and 1968.

**Measurement by Annual Statistics**

The 1972 Annual Summary as issued by the Administrative Director of the Courts in April, 1973, and distributed in May, shortly after the Chief Justice's accounting in the Cleveland Law Day address, appeared on its face to be a complete record of the activity of the courts for the year, as it had for the past 12 years. But despite the fact that it was a computerized printout, where most of its predecessors had been the result of laborious hand work, there were missing features which had been standard in previous summaries. There were totals for all cases filed, in each of the new categories established by the Rules, but there were no totals for the dispositions or terminations. The latter had to be determined from adding the subtotals showing various modes of disposition which seemed to correspond to the modes of termination called for on reporting Form A. There was missing from both the criminal and personal injury case subtotals any column entitled "Cases terminated by transfer to another court or judge" which appeared to indicate that the Director appreciated that such intra-court transfers were not terminations at all and should be disregarded. In the criminal case subtotals the columns corresponding to Form A's "termination by reason of pretrial" and "by unavailability of accused for trial" were missing. But this did not seem of great concern, since criminal pretrial is not an established practice in Ohio. And finally the few cases in which a criminal defendant, after arraignment, "skipped bail" were not terminations at all, but postponements of accountability, which could easily be shown by a deduction from the "cases filed" category.

But it was the content of the 1972 Summary which was the great disappointment. When all subtotals of terminations were added in the criminal and personal injuries classifications and subtracted from the filings in those classifications there was a reduction of backlog shown, to be sure, but the reduction was of only a little more than 2,300 cases, not the 9,600 reported by the Chief Justice. The backlog reduction

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89 See note 67, supra.
90 Some of the 1970 Summary was computer printout, as was the 1971 Summary.
91 The categories for the general division consisted of criminal (measured from arraignment only), personal injury and "other civil," which included not only contract, equity and perogative writ cases, but also workman's compensation and appropriation cases for which different norms were established.
92 No calculations were performed on "other civil cases," and it was not even clear that many of the pronouncements of the Chief Justice and the administrative judge of Cuyahoga County, prior to May 16, 1973, applied to this category.
93 The Chief Justice later amended the figures downward, to 9,473 cases, specifically including the "other civil" cases. 46 Ohio Bar 755 (1973).
in these two categories for the original six-county area was of only 529 cases and for Cuyahoga there was a total reduction of only 130 cases, less than five per cent of the original 2,652 figure reported by the Chief Justice and that county’s administrative judge.\textsuperscript{94}

When these figures were separated into the parts corresponding to their classification, an even greater shock appeared. There was shown a reduction in the backlog of personal injury cases, statewide, of 3,837 cases, in the six-county area of 2,695 cases, and in Cuyahoga County alone of 2,353 cases.\textsuperscript{95} While well within the limits of the Chief Justice’s pronouncements, these figures seemed high in relation to the data produced by the time lapse studies unless the reduction in pending cases was achieved primarily by the “housecleaning” operation of removing all old and forgotten cases from the dockets, which would not affect the disposition of the relatively current cases under measurement.

But the “backlog reduction” achieved in the criminal dockets, as added from the nearly complete mode of termination subtotals and subtracted from case filings, gave rise to consternation. There was, according to the 1972 Summary, no backlog reduction whatsoever! Instead, there was a large increase in backlog, in the state by 2,597 added cases, in the six-county area by 2,503 cases and in Cuyahoga County alone, by 2,223 cases. If the components of these final figures were complete or nearly complete and said what they seemed to say, then the Rules were a complete failure in moving criminal cases. And there was no hope of achieving currency by Labor Day, 1973, or by any other Labor Day in the forseeable future. As it applied to the individual counties in which measurements had been taken, these statistical table results were at complete variance with the supposed reality of the measurement results. Only Summit County’s addition of 29 cases to its criminal backlog could be understood. That county had not improved its rather poor performance over the year 1967, but had even lost currency in that year. The Cuyahoga County figures, which purported to show that the court had disposed of only 55 per cent of the number of cases filed in 1972, were simply unbelievable, and Stark County, which had so much bettered its excellent 1967 criminal time in process rate, was charged with disposing of only 72 per cent of the number of cases filed.\textsuperscript{96}

A comparison of the relative picture of time spans of the tort jury and criminal case progress, as painted by the 1972 Summary figures, is revealing. If the quotient of year-end pendency divided by average monthly dispositions roughly approximates the time in months taken to process the median criminal case from arrest to disposition, and the

\textsuperscript{94} See note 65, supra.
\textsuperscript{95} Ohio Courts 1972 Summary, Administrative Director, Supreme Court.
\textsuperscript{96} Id.
median tort jury case of the year before from filing to disposition, then the following is the time span of the median case, both civil (1971) and criminal (1972), shown by the 1972 Annual Summary:

<table>
<thead>
<tr>
<th>Unit</th>
<th>Median Tort Case</th>
<th>Median Criminal Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>State of Ohio</td>
<td>12.1 months</td>
<td>7.32 months</td>
</tr>
<tr>
<td>Six-County Area</td>
<td>12.9 months</td>
<td>14.04 months</td>
</tr>
<tr>
<td>Cuyahoga County</td>
<td>12.96 months</td>
<td>19.8 months</td>
</tr>
<tr>
<td>Summit County</td>
<td>11.88 months</td>
<td>6.36 months</td>
</tr>
<tr>
<td>Stark County</td>
<td>14.16 months</td>
<td>9.6 months</td>
</tr>
<tr>
<td>Mahoning County</td>
<td>9.08 months</td>
<td>9.4 months</td>
</tr>
<tr>
<td>Trumbull County</td>
<td>16.8 months</td>
<td>14.4 months</td>
</tr>
<tr>
<td>Portage County</td>
<td>14.16 months</td>
<td>10.56 months</td>
</tr>
</tbody>
</table>

Not only do these comparisons seem to show that in Cuyahoga and Mahoning counties, and in the six-county area as a whole, it took longer to bring a 1972 criminal case from arrest to conviction than a 1971 tort jury case from filing to disposition, which seems absurd on its face. But also the criminal case time span, in all counties except Summit, varied widely from the results established by actual measurement, as follows:

<table>
<thead>
<tr>
<th>Unit</th>
<th>Median Case as Measured</th>
<th>Median Case as Calculated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cuyahoga County</td>
<td>32 weeks 7.5 months</td>
<td>19.8 months</td>
</tr>
<tr>
<td>Summit County</td>
<td>25 weeks 5.5 months</td>
<td>6.36 months</td>
</tr>
<tr>
<td>Stark County</td>
<td>19 weeks 4.0 months</td>
<td>9.6 months</td>
</tr>
<tr>
<td>Mahoning County</td>
<td>22 weeks 5.0 months</td>
<td>9.4 months</td>
</tr>
<tr>
<td>Trumbull County</td>
<td>16 weeks 3.75 months</td>
<td>14.4 months</td>
</tr>
<tr>
<td>Portage County</td>
<td></td>
<td>10.56 months</td>
</tr>
</tbody>
</table>

The apparently complete results from the 1972 Summary thus are at complete variance, not only with the Chief Justice's announced figures, but with the time spans, at least in criminal cases, as determined by actual measurements in the six-county area. If the Summary figures are to be accepted as final and irrevocable, then the criminal case measurements are completely useless, and the Chief Justice's predictions of criminal case currency by Labor Day, 1973, completely valueless. Both a breakdown of the latter's figures into their civil and criminal components and a determination of what, if any, significant termination figures had been omitted from the Summary seem in order.

97 As previously noted, "statistical delay" is measured for criminal cases by statistics at the end of the filing year, but for tort jury (personal injury) cases by statistics for the year after filing. Thus the personal injury case statistics for 1972 related to the 1971 filed cases rather than those for 1972.

98 The prediction had been made in many service club and local bar association speeches and was repeated in the Cleveland Law Day speech. Cleveland Plain Dealer, May 2, 1973.
A PARTIAL RECONCILIATION OF RESULTS

The Chief Justice's figures came first. In his state of the judiciary speech at the Ohio State Bar Association meeting, Dayton, May 16, 1973, he produced a greater breakdown of docket reduction figures than had been previously announced. For the first time it became clear that the previously announced "backlog reduction" figures covered all types of cases in the general divisions of the common pleas courts, rather than merely the criminal and personal injury cases which together constituted only a little more than half of those divisions' business, and which had previously been emphasized in the speeches and reports. As to the personal injury cases, the state of the judiciary speech showed a docket reduction of 4,239 cases, well within range of the 3,837 cases shown by the Administrative Director. Indications, later confirmed, were that he treated as terminated the fewer than 500 such cases "terminated by transfer to another judge," which the Administrative Director wisely considered no terminations at all and which the computer operation had not retrieved and printed out. In addition, the "other civil" cases constituted approximately 3,000 cases of the backlog reduction, leaving only approximately a 2,400 case backlog reduction achieved in the criminal cases.

But the criminal case figures remained at great variance. The Chief Justice claimed a reduction of backlog, or excess of terminations over filings, of 2,356 cases statewide. The Summary for the same period showed an excess of filings over terminations for the same period or a backlog increase of 2,597 cases. This variance, of nearly 5,000 cases, out of less than 25,000 cases filed during 1972, was too great to be explained by elimination of the "cases transferred to another judge" alone, as in the case of the personal injury case figures. Nor did it seem likely that adding the cases represented by those who skipped bond after arraignment or whose cases were terminated as a result of pretrial would go very far toward making up the difference.

There was thus some initial suspicion that the Administrative Director's poor criminal disposition figures were a ploy to aid in insuring that the Court's proposed Rules of Criminal Procedure, pending a second time before the Ohio General Assembly, would not again be rejected, by
showing that the existing procedure system was not working well. This suspicion was dispelled when the numbers of case terminations eliminated by non-retrieval in the computer printouts of cases terminated “by unavailability of accused for trial” and “terminated by reason of pretrial” were examined. Since the data going into the computer, but not retrieved by it for printout totals, could not be examined in full, only that from the six-county study area was used, as collected and supplied by the law clerk and administrative assistant to the Chief Justice of Ohio, May, 1973. It was enough, however, to indicate how a reconciliation of the Chief Justice’s and the Administrative Director’s figures could be made. The six counties represent nearly one-third of the population of the state and slightly more than 35 per cent of its criminal case filings. The reported terminations in those six counties, in the three categories specified above, not retrieved by the computer for printouts, totalled nearly 3,500 cases, more than enough extended over the state to make the Chief Justice’s figures correct, so far as the criminal case totals were concerned. Of these 3,500 cases, only 611 were transfers to other judges and thus suspect as not representing any real reduction of backlog. The remaining 2,900 cases, it could be argued, did represent backlog reductions of one sort or another even if they were not all terminations in the sense of cases ultimately disposed of.

Of the two remaining sets of unretrieved totals, that represented by the “cases terminated by reason of pretrial” was the most numerous and varied. Portage and Mahoning counties showed no such terminations; Trumbull County showed only 22 such cases. But Cuyahoga County had 1,793 of them, Summit County 131 and Stark 111. It is apparent that the variations were caused by doubt in the minds of the reporting judges as to how to treat bargained pleas and other changes of plea on Form A. The three larger counties, along with Trumbull County, elected to treat the plea bargaining process as similar to civil pretrial and reported them accordingly; the other two shied away from the acknowledgement that plea bargaining exists and reported these bargained pleas as straight pleas of guilty. Apparently the Administrative Director also felt some qualms about acknowledging the existence of the bargained plea, so

101 The theory was that the Administrative Director’s 1972 Summary could be distributed to the General Assembly committees considering the Criminal Rules as an indication of how poorly in terms of expedition the existing statutory criminal procedure was working and how badly the courts needed this procedural tool to expedite case disposition. This theory collapsed with the publication on May 28 of the Chief Justice’s address to the state bar in which he claimed, with figures, a dramatic lowering of the criminal case backlog. Undoubtedly more judiciary committee members read the Ohio Bar than the Ohio Courts’ Summaries.

An additional, related theory was that some terminations were deliberately withheld so that they could be pumped into the statistics after July 1, 1973, to offset an expected temporary slowdown in the dispositional process as the judges familiarized themselves with the new procedures, as occurred in 1970 under the then new civil rules.
he swept these acknowledgments of its existence under the rug of non-retrieval, to the disadvantage of the record of the counties concerned.

The remaining unretrieved totals, representing 800 cases, were those declared terminated because the defendants were unavailable for trial. Under the old accounting system a case was counted as pending in common pleas court from the time it was certified for probable cause by the committing magistrate. Under the new system a criminal case was only counted as pending from the time of arraignment of the defendant after the return of indictment. If a defendant skipped bond after arraignment, his case was considered terminated subject to reinstatement if and when he was apprehended. The termination was therefore not a disposition, and should have properly been shown as a reduction in the number of cases filed and assigned to a judge, which would leave the numerical relationship of filings and dispositions unchanged. But the percentage of cases terminated by reason of unavailability in the three largest counties was greatly in excess of the percentage observed in the sampling process. Hence it was assumed that many of these "no shows" represented cases of past years on which the reporting courts were performing a "housecleaning" operation similar to that discussed hereinbefore in connection with old civil cases. A complicated formula was therefore used to separate out those cases in the three categories which were legitimate dispositions from those which were merely deductions from intake on one hand and those which were pure deductions from beginning pendency on the other. All "terminations by reason of pretrial" were allowed as terminations. Of the "transfers," up to one per cent of the number of cases filed were allowed as terminations, since they might represent changes of venue, or transfers to a minor court for ultimate disposition. The rest were added to the number pending at the end of the period. Of those "unavailable for trial," up to two per cent of the number of filings were allowed as downward adjustments of the number of cases filed. The remainder were simply shown as a deduction from the beginning inventory.

The results of this adjustment showed that Cuyahoga County still had an excess of filings over terminations for 1972, but of only 275 cases; Stark and Portage counties of 37 cases each, Trumbull of 14 cases. Summit and Mahoning counties showed an excess of terminations over filings, the former of 151 cases, the latter of 17. The six-county area as a whole showed an increase of criminal case backlog, but of only 175 cases, and since the remainder of the state had fared reasonably well in the Administrative Director's too well-trimmed figures, it can be assumed that in the state at large there was either a very small gain or a very small loss in currency of criminal cases, statistically speaking, for the year 1972.

While the two sets of statistics were at least partially reconciled, there was no resolution of the variance created in the year 1972 between
“statistical delay” and the time spans shown by sample measurement in both the tort jury and criminal field. The Chief Justice’s thesis obviously was that if more cases were terminated than filed, then all cases in the line from filing to adjudication necessarily moved faster, and the greater the excess of terminations the faster the movement. This is perhaps logical but a trifle simplistic, if no account is taken of whether or not the cases terminated are in the mainstream of cases awaiting adjudication.

Thus the “housecleaning” operations in both the tort jury and criminal fields are likely to have minimal effects on the speed of progress of cases, and probably almost no effect whatsoever during the first year of a changed operation. In theory, as the old deadwood gets cleaned out, the judges will have more time for the more current cases and can push them along faster, spurred by a constantly decreasing “norm” time which produces earlier and earlier times for which to account for continued case pendency. But this is an exceedingly long range process. The indications from the measurements are that shortening of time span has no real relation in the first year of a changed system to mere numbers of case dispositions. Positively, in the tort jury field, a massive reduction of cases pending produced only a very limited reduction of time span. Negatively, in the criminal field, a virtual standoff between filings and true dispositions was accompanied by a very noticeable decrease in time spans of active cases. The reasons for this phenomenon, as to tort jury cases, are explained here.

PROSPECTS OF IMPROVEMENT UNDER THE RULES’ SYSTEM

The choice of assigning all cases, civil and criminal, to the same group of judges and then of specifying almost absolute priority in time treatment between them, poses some problems for the most disfavored group of cases, the tort jury or personal injury group. It has already been noted that in other jurisdictions where there are separate criminal courts and judges and the more adjustable criminal divisions of multi-judge courts, such as was formerly the Ohio practice, the time lapses from filing to disposition are far more speedy in the tort judge case field. Because of the newness of the unrestricted individual judges’ docket system in Ohio, it is difficult to show this difference in time of processing by empirical studies conducted on a before and after basis.

In theory, at least, the criminal case processing should register improvement in time of disposition and the tort jury case should lose, or at least register far less shortening of its time lapses for an initial period. In one of the two counties studied in detail on a before and after basis, Summit, this has not occurred at all. The time from indictment to

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102 The “norm” time seems to be going the other way. Formerly the time limit for “other civil” cases was set by the Superintendent Rules and Form A at 12 months, but in his State of the Judiciary Message, the Chief Justice placed the new time at 18 months. 46 Ohio Bar at 756.
trial has not changed appreciably in five years, before and after the
adoption of the Rules of Superintendence, while the time span from filing
to disposition in tort cases has lengthened only slightly over the same
period of time. The rather shocking comparison of backlog statistics
during 1971 and 1972, embracing the last year of the divisioned courts
and the first year of the unlimited individual judges' docket, is, even if
the 1972 figures were properly amended, quite disturbing. If, on a
statewide basis, the common pleas courts reduced the criminal backlog
by some 2,500 cases in the last year of a divisioned court system and then
suddenly suffered that backlog under the new system to increase or at
best remain constant in 1972, there is some reason to doubt the efficacy
of the system inaugurated by the Rules of Superintendence in expediting
criminal cases. And if, at the same time, the general civil docket backlog
was reduced by only 1,200 cases statewide in 1971 and the personal injury
case backlog alone was reduced by 3,837 cases statewide under the Rules
in 1972, it shakes faith in whether the priorities are, in fact, being observed.

The obvious should be pointed out, however. Old civil and
particularly old tort cases can be terminated by notice and pen stroke.
Criminal terminations depend on the willingness of defendant and
prosecutor to bargain pleas, or on the cooperation of the prosecutor in
entering a nolle prosequi. In addition, the effects of massive, if belated,
terminations are likely to have different effects on the observed time spans
in the criminal and the tort jury field, since a much higher percentage of
the criminal class is disposed of in the calendar year of filing than
of the latter. Nonetheless, the greater reduction of civil backlog so far
indicated by the 1972 Summary under the Rules does indicate that
the priorities assigned are not so far working to the advantage of the
criminal case dispositions. And tort jury dispositions are not hurt as
much as might be expected by the unlimited personal docket system.
Such an observation, incorrectly premised, may well be one of the side
effects of purposeful neglect in correcting computer programming errors
which affect official court statistics.

But even considering the above amelioration of relative loss, the
personal docket system mandated by the Rules has inherent difficulties
of application which will continue to inhibit more rapid termination of
either class of cases in the metropolitan counties where the masses of case
filings occur. Under the divisioned system in Cleveland, for instance, 10
judges at most would be trying defended state felony cases and probably
not more than 12 others would be at work on tort jury matters at the
same time. Under the unlimited personal docket system practiced by
compulsion in the local common pleas court and by preference in the
U.S. District Court there, it is conceivable that a total of 35 judges could
all select either a criminal or a tort jury case for trial on the same day.
The strain on the limited number of lawyers in the "21st Street" criminal
bar would be unbearable. Yet the pressure on the equally limited insurance defense bar and the select products liability claimants bar might be scarcely less so. Of course, questions of probabilities or chance would be likely to prevent such an atrocity from occurring. But chance is a less effective protector against excesses of the engaged counsel rule than is the advance structuring of the courts to meet available demands and needs.

But regardless of nightmarish results, it has been observed that calendar breakdowns occur less frequently in divisionalized courts such as Jacksonville, Florida, and Baton Rouge, Louisiana, as well as in the separate court systems in Tennessee, than they do under individual judges' docket systems where the court is undivisioned. It must be admitted that this is an age of specialization and that the same trial counsel in metropolitan communities rarely engage in criminal, civil jury and equity trials. It is unrealistic to insist that they do so, simply because the decision has been made to make every judge a generalist to operate under the theory that he be set to work trying one of these three types of cases at the very same time. Under the unlimited individual docket system, massive calendar breakdowns cannot be avoided, even by adopting a trailing docket for each judge or by overloading beyond reason his daily trial docket. Either alternative is highly distasteful to the practicing bar.

It has been previously noted that tort jury dispositions by early settlement are inhibited by the unfortunate use of the term "norm" in describing the apparent maximum time a case is supposed to be allowed to remain pending after its filing. But the greatest impediment to faster progress in these tort jury cases is some uninspired tinkering with the time-tested Federal Rules of Civil Procedure when they were used as a model for the writing of the Ohio Civil Rules. A case in point is Ohio Rule 16,103 relative to pretrial procedure, and copied with much stultifying additional verbiage from the federal rule of the same number. The success of the federal district court judges in an unstructured pretrial conference, which they have the unfettered discretion to convene, is proverbial. They cajole; they threaten; they insist upon stipulations of minor and undisputed fact; they require advance disclosure of witnesses and testimony and, most important, they insist upon the completion of discovery before the conference is held. Admittedly, they have, by virtue of good behavior

103 Other examples of tinkering: Rules 3(B) and 4.6(A), which confuse the subject of in personam jurisdiction and venue, as applied particularly to the limited jurisdiction courts, thus eliminating statutory limitations of the exercise of in personam jurisdiction. The federal rules wisely left the subject of in personam jurisdiction and venue to statute.

Rule 49(C) abolishing special verdicts which the federal judges have wide discretion to frame.

Rule 50(B) which eliminates the motion for directed verdict as a prerequisite for motion for judgment n.o.v., thus perpetuating one of Ohio's cute little trial from ambush tricks.
tenure, a somewhat greater clout with the practicing bar than do their short-term elected state counterparts who are frequently unnecessarily deferential to the demands of eminent or politically powerful counsel. But in setting pretrial standards, the Ohio pretrial rule introduces the principle of collegiality into whether to have pretrial at all, and then insists that the whole format of the conference be controlled by a collegially adopted judicial rule governing its detail,\textsuperscript{104} which introduces the lowest common denominator of inefficiency and acceptability to the practicing bar at large.

In addition, the Ohio rule poses nine specific objectives of the conference, four of which are so routine and pedestrian that they stamp all other objectives, \textit{eiusdem generis}, as equally pedestrian and routine. One objective: "(8) The imposition of sanctions as authorized by Rule 37\textsuperscript{105} indicates that there can be no insistence on the completion of pretrial discovery before the time of the conference because it is to be taken up with the question of who shall answer what question in an interrogatory or deposition under pain of exclusion of further discovery. A final addition of the objectives of the rule, made first in the priority of mention, if not of importance, is settlement of the case, presumably at the conference itself. This was inserted despite the rarely joined opinions of Mr. Justice Brennan who helped to institute the New Jersey pretrial rule and Professor Maurice Rosenberg, who conducted highly detailed tests of its accomplishments and deficiencies.\textsuperscript{106} They agreed that settlement, per se, was an undesirable subject of the conference action, and a seldom achieved result. It is apparently Ohio's habit not to profit from the experience of other states, however well documented. Judging from the failure of settlement oriented pretrial in Cleveland, as illustrated in the \textit{Cleveland Quarries} case,\textsuperscript{107} Ohio does not even seem to have the desire to profit from its own experiences. The standardization of the pretrial conference and the omission of insistence on really worthwhile and attainable objectives used in connection with it, some of which are set forth herein, stamp pretrial in Ohio as just one more stage in the litigation process to be gone through—just another way station on the path to long-delayed trial or to settlement at leisure.

\textsuperscript{104} Rule 16, O.R.Civ.P. reads, "a \textit{court may} adopt rules concerning pretrial procedure to accomplish the following objectives." (emphasis added.)

\textsuperscript{105} Id.

\textsuperscript{106} Mr. Justice Brennan's remarks to the American Bar Association's Section on Judicial Administration, August 23, 1955, are reprinted in 17 F.R.D. 479, 485 (1955); the Rosenberg claim's 4 and 5 are contained in \textit{The Pretrial Conference and Effective Justice} 18-20 (1964).

\textsuperscript{107} Bognar v. Cleveland Quarries Co., 7 Ohio App.2d 187, 219 N.E.2d 331 (1966). From its nature, the plaintiff's claim for a mandatory injunction requiring production of records in aid of a prospective dissenting stockholder's action, does not seem susceptible of any form of pretrial, and particularly of the mass pretrial technique in which litigants' counsel bargain solely on money settlements.
A PROGRAM TO EXPEDITE TORT JURY CASES TO DISPOSITION

It should be apparent from the limited and purely "housekeeping" gains achieved under the first year of the Rules of Superintendence that there is no real hope of achieving docket currency in the tort jury field by Labor Day, 1973, or by any other Labor Day in the reasonably foreseeable future. This observation is made without regard to the rather easy definition of currency—"a norm" of trial within 24 months as pronounced by the Chief Justice. The reason is the same as that for failures elsewhere: excessive reliance on structural and administrative changes in the courts as cure-alls, and insufficient attention to methods of operation. Ohio, in adopting its policies, rightly recoiled from the New Jersey method of rigid controls on the activities of its trial judges, including a virtual diarying of how he spends his working day and dictating when he should open and close court each day. But insistence upon petty regulations for judicial conduct is no worse than setting a broadaxe standard of ultimate performance—the same for every metropolis and every hamlet—without suggestion as to the methods by which the result is to be achieved.

There are four distinct methods of expediting the tort jury process, tried singularly in diverse jurisdictions with almost uniform success, which could be erected into a single system, since they revolve around a single fulcrum: the pretrial conference. There is nothing that is new or revolutionary about them; they are known and have been described

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108 There would appear to be two errors in planning that all cases be completed within a specified time. The first is that all cases, even all tort jury or personal injury cases, are NOT equal or that some are more equal than others. Emphasis on the maximum time a difficult or unsettled or an unmatured jury case is to pend tends to make the judges less conscious of the possibility of disposing of routine cases in considerably less time. Since some cases are filed without intention of pursuing them to the ultimate conclusion, it would appear only good housekeeping to force their disposition within the maximum allowable time, but without diverting attention from those more quickly disposable. A sliding scale, insisting on a disposition of 50 per cent of cases within six months, 75 per cent within 10 months, 90 per cent within 15 months, and the balance within two years, would seem more reasonable and engage the judges' attention on the truly disposable cases at an earlier time.

The second, and related, error is in selecting the period of 24 months as a goal, at a time when many counties inside and outside the state have already exceeded that goal. If Portage and Summit counties, Ohio, in 1966 and 1968 respectively could achieve this, if Sullivan, Hamilton and Knox counties, Tennessee, Calcasieu Parish, Louisiana, and Duval and other counties in Florida, can consistently do far better, what is the magic of the goal set for Ohio? See note 14, supra.

109 For description of what many have referred to as the "stop watch" system of weekly judicial reporting of activity see VANDERBILT, The Application of Sound Business Principles to Judicial Administration, SELECTED WRITINGS OF ARTHUR T. VANDERBILT 90, as reprinted from Improving the Administration of Justice, Two Decades of Development, 26 CIN. L. REV. 155 (1957). Recently the administrator and Chief Justice were seriously considering changing the hour at which each New Jersey judge was required to go into the courtroom to open court, regardless of the nature of the business at hand.
in professional journals. It is merely that they have never yet been described as combined into a single operation or institutionalized so that combined they can be judged as a unified plan.

The first of these devices is suggested but incompletely implemented by Superintendence Rule 7, that of early file review. The theory of the Rule is that the review shall come not later than 90 days after the case is filed, but the theory is weakened by the stipulation that the judge may, as an alternative, “cause it to be reviewed” by someone else, presumably by a clerk with no power of decision. Actually, the time selected is not too soon for a judicially conducted status conference which the federal judges use with success. At this conference, the judge could ascertain whether the case is actually, or only apparently, defaulted, insist on setting a hearing for damages or the prompt filing of a defensive pleading, inquire as to the progress and problems of discovery and, most important, set in the presence of counsel the date for the pretrial conference. The importance of an early pretrial conference date, taken in conjunction with the following suggestion, is that it will advance the discovery process.

The second step is one already used to advantage elsewhere: the cutoff of discovery opportunity by a date fixed with reference to the filing of the case. Many, if not most, lawyers are born or trained procrastinators who postpone the chore of trial preparation until as close to the actual trial date as possible. The delay provides alternatives as to choice of witnesses to be produced if available, time for second thoughts on the theory of the case, possibility of settlement before any real work is done on the case and the like. Unfortunately, the delay in preparation of the case for trial is likely to represent a delay in any possibility of settlement, because most cases are settled only between adversaries well informed of their own as well as their adversaries’ strengths and weaknesses. Since at least 60 per cent of tort jury cases are settled before trial, early preparation is the sine qua non of early settlement. The most logical time at which to insist on the completion of discovery is that of the pretrial conference. Accordingly, the conference must be set down comparatively early in the litigation process and without regard as to when the case may be reached for trial, if tried—90 to 120 days after the filing of the case. This could not occur too early in the complex class actions or ecological cases in state courts any more than it would in complex antitrust cases in federal

110 See Judge Roger Waybright’s discussion of the Duval County, Florida, system in 52 Judicature 334, as contrasted with those in Allegheny County, Pa., by Judge Aldisert, 51 Judicature 203, 247, 298. The enforcement of discovery cutoff was also recommended in ORDER IN THE COURTS. See also note 14, supra. The scheduling techniques as used in Tennessee and parts of Louisiana were recommended in 14 WM. & MARY L. REV. at 43.

111 Superintendence Rule 7 provides: “Each judge of a court of common pleas shall review or cause to be reviewed quarterly all cases assigned to him. . . .” (emphasis added.)
But for the average personal injury action it not only could but should be done. One additional factor is needed to insure early preparation. The expected testimony of favorable witnesses as to which no discovery is required should be reduced to writing and signed. Finally, testimony of those as to whom there is any doubt as to ability to appear at trial in the remote future, should be recorded by depositions.

While the cutoff of discovery and insistence on perpetuation of favorable testimony by the time of the pretrial conference is a feature of many courts, most of them are somewhat accommodating to the bar about setting the date of the conference. Some will not set it until one counsel or the other has formally asked that the case be placed on the trial calendar. Others insist on a certificate of readiness for trial which carries with it the assurance that counsel offering the certificate had already completed his discovery on his own time, at his own pace, and in accordance with his own convenience. The most successful courts, however, are those which give the attorneys no time options on exercising discovery, but set down the run of the mill cases for pretrial conference within a limited time after the filing of the case and require counsel on both sides to be bound by that preset date in exercising their rights to discovery.

The third ingredient, the only one which makes necessary the conducting of a pretrial conference in every case, is the requirement of disclosure. The common requirement of all courts, at least by way of lip service, is that counsel must be as prepared for the pretrial conference as for the trial itself. This requirement, in many state courts including Ohio's, is honored more in the breach than in the observance. Counsel come to pretrial to find out how much evidence they need to produce, rather than to assess the value of what they have. The requirement that all discovery be completed by the time of the conference is valuable, but it is not enough. That of requiring that all the testimony in chief be reduced to an informal trial brief backed by written statements or depositions of expected favorable witnesses is helpful, but still leaves a gap. Counsel at the pretrial conference must be prepared to lay it on the line as to the identity of the witnesses whom they will call to testify and at least the general nature of the testimony to be expected. This must be disclosed both to adversary and to the judge; the adversary so that he can better assess the strength of the case; the judge so that he can better assess in his own mind, the possibility of settlement and length of trial. Many trial counsel will object strongly that this deprives them of the advantage of gamesmanship in flashing the surprise witness. So it does! Trial from ambush should have disappeared from the scene 20 years ago and there is no need for perpetuating it further. Other counsel will

112 See note 92, supra.
object, with more apparent reason, that they are giving opportunity for free discovery to their indolent adversaries. This is only partially true, because the discovery cutoff rule will prevent these adversaries from taking advantage of the disclosure by proceeding further with their efforts to locate potentially adverse witnesses. The adversary will be stuck with the effect of the disclosed witness's story on direct examination, subject only to cross examination at trial, and he will have no opportunity to discover additional witnesses to discredit this witness's tale.

Two additional powers will be needed by the pretrial judges under such requirements. They must have the power to require that each counsel proceed at trial with only the witnesses disclosed at pretrial, and they must also be empowered to prevent the padding of the witness list by reminding each of counsel that he will draw unfavorable comment from the trial judge at trial time if he fails to call the listed witnesses. Exercising both of these powers will require the careful preparation of a document now treated as a pro forma routinized document, the pretrial order, which must be accepted in the sense in which the federal judges use it, as controlling the entire course of the ensuing trial, if trial is held. This is, of course, much paperwork to be expected of a judge in a case which will probably be settled without trial in any event. The justification for it is that it will make possible an earlier settlement than could otherwise be expected.

The final step, also to be performed at the pretrial conference, is the setting of the trial date for a fixed time in the future, while both counsel are present. Again, it will be objected that this is wasted time if the case will be settled early in all probability. The answer is that it will be settled only when counsel on both sides know that the moment of truth is ascertained if not yet reached. The advocates of modernization will immediately offer a computerized trial setting as superior, but it is, in fact, not. A computerized scheduling cannot take advantage of the

113 The pretrial order in many Ohio counties is frequently a preprinted, "fill in the blanks," as to names of parties, medical records, X-rays, and picture exhibits—type of thing used primarily as a checklist on the obvious.

114 See E. ADAMS, COURTS AND COMPUTERS, AMERICAN JUDICATURE SOCIETY, 71-72, 76-79, 108 (1972). Experience of Duval County, Florida, is an example. The computer is used for the typical variety of repetitive tasks, including sorting, classifying, list preparation and summonses, and excluding delivery to each judge at two-week intervals of his older undisposed-of cases. Appearance (progress) docket sheets are printed out and continuously updated with each new document filed, undoubtedly at high expense, but with instant inspectability because a computer terminal and printer is physically located in the clerk's office. Thus, there is no problem of scheduling input at dead times of the computer, since the court has priority of use. Despite such availability and extensive use of the computer, the judges, prior to January 1, 1973, shied away from doing their case scheduling by computer, and each judge scheduled his cases by hand, resolving apparent conflicts with counsel at the time of trial setting.
psychological factors present in the judge's chambers. It gives the opportunity of inventing excuses and of discovering conflicting events by counsel whose only purpose is to delay trial, and it cannot set down multiple trials for the same day in realistic appraisal of their settlement possibilities. Such a system requires that the trials be set down two or three or four on the same day, in accordance with the judge's reasoned estimate, or counsels' assurances, of their settlement possibilities. The order in which those cases will be tried on the day in question, with the first case required to be tried at all hazards if not earlier settled, and the second and third required to be tried on an hour's notice if the first case goes off the schedule for any reason including late settlement, must be known in advance by all concerned. In the event the first case does in fact go to trial, the second and third cases must have their alternate or secondary trial date fixed for a month or two later, at which time they become the priority cases. Under such an arrangement, there is a maximum option for readjusting the later schedules if the second and third cases are themselves actually tried or settled on the original date. Such a system sounds, and is, complex, but it has been used with considerable success in parts of Louisiana and, even without benefit of the partial conference, in much of the State of Tennessee.

It should be noted that nothing has been said here about settlements at the pretrial conference itself. It has not been emphasized, although there is nothing wrong with the judge making settlement negotiations a part of the pretrial conference. As long as he does not insist on a settlement then and there, as so many short-sighted judges do, there is probably nothing inherently evil about the practice; it is simply over-emphasized by judges with fixed-track minds. As Mr. Justice Brennan has indicated, settlement generally comes in the interval between the conference and the trial date. Little is gained by harassing counsel, who must have time to sell their clients on the desirability of any figure arrived at, and settlement reached by such means, as Mr. Justice Brennan suggests, is likely to be more acceptable to them. Trial must, therefore, be postponed until at least three weeks, and probably at least three months, after the conference, to permit interested counsel to work out the details of the settlement, armed with the disclosures of the conference itself. The time is also frequently needed for the convening of the slow thinking and slow acting committees of liability carriers who sometimes have this type of ponderous machinery embedded in their claims settlement processes.

It is not suggested that such a plan be broadaxed in forcing all of Ohio's counties to adopt it at once, regardless of size or condition. The small, one-judge county may not need such elaborate machinery. The metropolitan counties would probably require some modifications of it, including, in some, the recreation of the criminal divisions, and in

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others, divisions of available general duty judges into team units, so that all judges would not be in the position of competing with each other for the attentions of a limited specialist bar. It is in the medium sized counties of two, three or four judges that a single judge doing all pretrial and trial scheduling work for the court may be the best answer. Some such counties may find it advantageous to use experienced litigation counsel as paraprofessional masters and calendar control commissioners to conduct pretrial and trial scheduling. In others it will take a trained judge with all the powers of the full judicial office to force an unwilling bar into line. Such a judge can, in some cases, be secured by the retirement and replacement of overage judges who can then be called back to active duty to try cases while their successors are freed to perform the pretrial and trial scheduling functions. In still others, an assigned judge can be used, on a part-time basis, for the whole of the pretrial-trial scheduling process.

The most important requirement for the success of the plan therefore is that it NOT be immediately adopted throughout the state. It is a theoretical plan which may or may not work out as well as its proposer hopes. It should, therefore, be tried out in a single limited area where the need is great, where the climate is favorable, where existing judges are willing to experiment and have the results of the experiment measured and methods open to review by critique. Most of all, it should be in some area where the trained manpower or judge-power can be quickly made available. The plan may have to be modified in accordance with observed results.

It is suggested that the six-county Order in the Courts territory would be the logical place in which to conduct the experiment on a trial basis. It contains two medium-sized counties, three sub-metropolitan centers and one metropolis which has defied every effort to reform its procedures to obtain worthwhile results. It has its areas in which there are overage judges, some retired and recalled; some merely retired; and some still determinedly sitting. It has its metropolitan counties which are familiar with the use of assigned judges. Finally, it has more than its share of king-sized problems which cry out for solution by any new plan which is available to be tried out.