Pre-Trial in North Carolina: The First Eight Months

J. Francis Paschal

PRE-TRIAL IN NORTH CAROLINA: THE FIRST EIGHT MONTHS

J. FRANCIS PASCHAL*

I

The pre-trial statute,[1] sponsored by the special Commission for the Improvement of the Administration of Justice and enacted by the 1949 General Assembly, has now been in effect eight months. The Commission, with ample warrant, looked on this legislation as perhaps the most promising procedural advance made in North Carolina in many years. The Commission's successor, the Judicial Council, fully subscribes to this estimate. But the Council realizes, as did the Commission, that the mere enactment of legislation will not suffice to bring the advantages of pre-trial to our courts. These advantages will come only after Bench and Bar have become familiar with the new procedure and only after the difficulties of adapting pre-trial to our own peculiar circumstances have been overcome by the knowledge gained from experience. It is the purpose of this article to give a brief review of the experience under the statute, including the problems which have arisen and the tentative solutions of these problems which have been achieved. The material presented, for the most part, comes from letters from superior court judges. In a few instances, I am relying on my own personal observation.

It seems clear that pre-trial is not being utilized on any large scale except by a few judges and only in a few localities. For this failure to take advantage of the statute, several reasons have been advanced. To begin with, there was some confusion concerning whether the statute applied to cases in which issue was joined prior to October 1, 1949.[2] In many counties the attitude has been that there was too much other business waiting to be disposed of to justify taking time out of the term for pre-trial. This attitude is common among attorneys who have waited long for their case to be called and who fear that a pre-trial conference would result in further delay. In some instances the statute has not been used because lawyers were only vaguely aware of the uses to which it could be put.[3] Whatever the reason, neither lawyers nor

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[1] N. C. Session Laws, 1949, c. 419; N. C. GEN. STAT. 1-169.1-6 (Supp. 1949), 27 N. C. L. REV. 430 (1949).

[2] The language of the statute is: "This Act shall become effective as to civil cases in which issue is joined on or after October 1, 1949."

[3] In this connection, I should like to pay tribute to Judge Johnson J. Hayes. Judge Hayes, with his usual generosity, has given of his time and energy to popularize the statute. His "model hearings" have been enjoyed by lawyers throughout the State.

judges have generally been willing to take the initiative in placing cases on the pre-trial calendar. It seems unlikely that lawyers will take the initiative until they become more aware of the advantages of a pre-trial hearing. In these circumstances, several of our judges have expressed the opinion that the responsibility for providing grist for the pre-trial mill must rest with the judges themselves, at least until lawyers begin to feel at home in the procedure and realize its possibilities. One judge, after observing that "pre-trial cannot possibly prove a hindrance," suggests that the best remedy would be to make pre-trial conferences compulsory in every case. Another sums up his experience and conclusions as follows:

> At present, with possible exceptions, the number of cases formally placed on the pre-trial calendar at the request of counsel is not sufficient to justify setting apart any fixed period (such as a day) for pre-trial conferences. Consequently, at this initial stage of our experience, *the court must place cases on the pre-trial calendar under some formula to be devised.*

II

This same judge continues with an explanation of a formula he has used "with some measure of success." He writes:

> Monday (of each week) is set aside for pre-trial conferences. No jury is there on Monday. The jury reports at 9:30 Tuesday morning. Cases are calendared for trial on Tuesday, Wednesday, Thursday and Friday. *All these cases,* by order of the Court, *are deemed on the pre-trial calendar for Monday;* and all attorneys in cases calendared for trial on any day during the week are to be present upon the convening of court on Monday morning at 10 o'clock.
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> Upon convening of court on Monday, the judge and lawyers go over the calendar, determining the motions for continuance and receiving information concerning settlements, thus identifying the cases that will be for actual trial. Upon completion of this preliminary (some 30 minutes), the judge has two things to say in relation to which he asks the cooperation of the bar: first, that during the morning he must be permitted without interruption to study the files of those cases to be tried; and second, that the lawyers can help greatly if they will study the cases with two thoughts particularly in mind, namely, subjects on which stipulations may be made and the issues to be submitted to the jury. The judge then recesses until 2 P.M. He may indicate that the lawyers in certain designated cases are to be present at 2 P.M. while those in later cases need not be back until some designated later hour. At 2 P.M. the pre-trial conferences proceed, the judge taking up the cases in the order in which they appear on the calendar.

Other judges have followed a substantially similar procedure. The main objection is that the pre-trial conference is so near to the time of

actual trial that the advantages of the conference are not fully gained. Stipulations eliminating the necessity of proof of certain facts come too late to effect the savings which might accrue if there were a greater interval between the conference and the trial. Of course, the rigidities of our system of fixed terms render difficult a solution of this problem, but one judge has offered two suggestions which in certain situations meet the difficulty. In mixed terms of court where a civil term is soon to follow, after the work on the criminal docket has been completed, he has devoted the remaining time of the term exclusively to the pre-trial of cases set for the ensuing civil term. His second suggestion is that where there are lengthy terms of three or four weeks, the first week be devoted entirely to the pre-trial of cases to be tried in the later weeks of the term.

III

Of decisive importance in the success of pre-trial is the technique employed by the judge in the conference. This must be largely a matter of individual preference, with each judge working out his own procedures, but all would agree with a judge who has written that a satisfactory conference "is unlikely, if not impossible, unless the judge has had opportunity to study the pleadings in advance so that he may exercise some initiative in guiding the discussion." Under the rotation system, the opportunity that a judge has for such preliminary study is necessarily limited. Generally, he will be able to find time for it only in a period carved out of a regularly scheduled term. The necessity of using a part of a term day for this purpose may be regrettable, but the opinion is that the benefits derived completely compensate for the loss of trial time incurred.

Just as in other jurisdictions, there has been a split of opinion as to whether the pre-trial conference should be held in chambers or in open court.[4] Some judges attach great value to the informal atmosphere of chambers. The belligerent attitudes sometimes incident to court room procedure are replaced by a spirit of cooperation. On the other hand, some judges have said that the formality and dignity of an open court proceeding stimulate all parties concerned to stick to the business at hand. It would seem that no hard and fast rule can be formulated. What is wise will vary from case to case depending on the circumstances and the personalities of the judges, lawyers and litigants. Whether the conference is held in open court or in chambers, judges agree that it is well to have the litigants either present or nearby. Lawyers must be hesitant to stipulate to facts which are not within

[4] See Report of the Pre-Trial Committee of the Judicial Conference of Senior Circuit Judges, 4 F. R. D. 83, 92. This report includes a useful survey of the techniques in pre-trial employed by the Federal judiciary.

their own knowledge but which are known to their clients. Furthermore, a client may be more conciliatory when he hears the weaknesses of his own position exposed.

Now for a brief word on the actual procedure used in the conference itself. One judge describes his practice as follows:

> Prior to the conference, I read the pleadings and study as well as limited time will permit. Then at the conference I briefly outline to each party what my conception of his side of the case is and what his contentions are. After I am sure that I have these matters in mind, I then make certain suggestions regarding the phrasing of the issues involved and reach agreement as to the issues. If it appears that amendments to the pleadings are necessary, an order allowing amendments is generally dictated with the understanding that the party will later file a formal prayer for amendments to complete the file in the case. If the pleadings show the type of evidence which may be offered and it appears that there may be some difficulty of proof, stipulations are generally obtained.

Another judge has found it helpful to vary his procedure from case to case. There are certain cases, he writes,

> in which the papers in the file do not disclose the nature of the controversy. In this category are appeals from Magistrates. Here it has been found helpful to the satisfactory trial of the case to call upon the plaintiff's counsel to state the plaintiff's position in the case and to call for a similar statement from the defendant. These statements are incorporated in the pre-trial order. They, in effect, constitute the pleadings. In similar plight are many land controversies, where the pleadings reflect only allegations and denials as to ownership, trespass, etc., without disclosing the basis of the position of either plaintiff or defendant.
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> Assuming the judge has studied the pleadings, the judge has detected many points which appear to be free from controversy. Thus, after dictating the caption, the designation "Pre-Trial Order," and the appearances for the respective parties, the judge may proceed to dictate: "It is stipulated:" Ordinarily the judge will say, in substance, "Gentlemen, I'm dictating what appear to be undisputed matters. If I dictate anything that is disputed by either side or that for any reason you prefer not to stipulate, stop me. . . ."
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> This exploration to determine what stipulations may be entered in the pre-trial order serves the twofold purpose of segregating and identifying undisputed facts and also of determining that certain facts are disputed and must be proven so that counsel will make preparations to do just that without being taken by surprise. In this discussion, it develops often that some pleading should be amended and an order for such amendment may be included in the pre-trial order.
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> All of this, consciously and unconsciously, tends to clarify the case; and, in the absence of special circumstances, the judge is

ready to talk about the issues. Ordinarily, he will proceed to dictate somewhat as follows: "Subject to further consideration at the trial and upon development of the evidence, the Court settles the issues as follows: . . . ."

Thus, the pre-trial order, to be signed by the judge, contains, ordinarily:

1. Formal preliminaries.
2. Stipulated facts.
3. Special orders, such as the allowance of amendments to pleadings, new parties, striking portions of pleadings, etc.
4. Tentative settlement of issues.

IV

What, we may ask, have been the achievements of pre-trial in North Carolina thus far? While it is apparent that the statute has not been used on any large scale, it is equally clear that where it has been used in a manner at all similar to that outlined above, the results have been uniformly encouraging. Stipulations have been secured,[5] the necessity of amendments to pleadings determined, the issues settled. There have also been final settlements. These, it should be emphasized, did not result from pressure by the judges. There is eloquent testimony from one judge on this point:

> It is not thought that the judge should make of pre-trial conference a medium for settlement negotiations. Rather, the purpose should be solely the preparation for the trial. However, this very process of clarification and better understanding, particularly if the litigants are present, tends to make each side aware of its weakness as well as its strength, and the result often is a final settlement of the litigation before the actual trial begins.

Some of the advantages of pre-trial are well illustrated by the following report:

> It has been my experience that pre-trial conferences could be more successfully used in cases involving real estate or the right to possession thereto and particularly in boundary disputes or processioning proceedings. I recall two cases in which it was successful: One, in which an impartial analysis of what was in-

[5] Among others, the following stipulations have been reported as typical: that a certain identified written instrument was in fact signed by certain named persons; that the originals of certain recorded instruments were in fact executed, acknowledged, and delivered by the grantors to the grantees and duly recorded as shown by the public records; that a certain ordinance was duly enacted by the governing body of the municipality and was in force on a certain date; that a certain will has been probated as appears in the records; dates of birth, death, family relations, qualification of personal representatives, date of commencement of action, etc.; ownership of land, automobile, other personal property on or prior to certain dates; the agency of the operator of an automobile; the time and place of a collision, the weather conditions, the lay of the land, such as the direction, surface, width of streets, the location of "STOP" signs or other markings, and the location of electric signal devices; the amount of lost wages, doctors' bills, hospital bills, mechanics' bills.

volved revealed that a building had been built against a wall of an adjoining building without permission of the owner. Numerous surveys showed, at the most, an encroachment of several inches. The conference revealed that no actual damage had resulted and that the only worry on the part of the injured party was that some prescriptive adverse right might be acquired by continued acquiescence of the owner. There were six lawyers and considerable personal feeling involved. A settlement was quickly reached as the result of the hearing. The other case was for possession of certain filling station property. The pleadings showed a typical filling station sublease arrangement, with a sublease to a third party, each of said leases requiring certain improvements to be made by the lessee and setting up certain duties on the part of the lessee in favor of the original owner. The owner sued the last lessee for possession of the property without repudiating the first lease agreement. Pre-trial conference and an analysis of the pleadings convinced the plaintiff that even though he prevailed in his contentions he would still not be entitled to the possession of the property since he was not repudiating the first lease. The case was quickly settled by a cancellation of all existing leases and renegotiation thereof.

In the light of the evidence, fragmentary though it is, the following conclusion appears to be well justified:

> If I have the same experience elsewhere as in ——— County, I will not consider Monday as a lost day as we were able to proceed smoother and more rapidly with trials after first removing all the time consuming hearings on various motions, demurrers, etc., that so frequently come up in so many cases often necessitating sending the jury from the court room while the arguments proceed and leaving many witnesses anxious to give their testimony and return to their work to twist and squirm and plead with the attorneys and court to permit them to go and come back when they are actually needed. In addition to other benefits to be derived from pre-trial hearings, there is no doubt but that it will prove an economic saving to both the county and litigants.

The first eight months of pre-trial in North Carolina is in some ways typical of the usual experience with new procedures. In this experimental stage, the development of techniques suitable to our own peculiar circumstances is the big problem facing us. This problem is a challenging one, challenging in its difficulty, but challenging also because of the immense rewards that will surely attend its solution. It is a problem which can be solved by patient, imaginative thinking. It is indeed heartening to know, from actual results, that already tentative solutions have been found. Where these solutions have been applied, they have confirmed the belief that pre-trial has a major contribution to make in the improvement of the administration of justice in North Carolina.