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Practice and Procedure -- Pre-trial in North Carolina -- The First Eight Years

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of the superior who has given the order. It is usually safer and wiser for the inferior to obey the order even though it is to his own detriment. From the viewpoint of the Armed Services there could be no more dangerous philosophy than that each serviceman should determine for himself whether or not an order is legal, and then disobey it if, in his judgment, the order is illegal.

RICHARD J. TUGGLE

Practice and Procedure—Pre-trial in North Carolina—The First Eight Years

The information presented in this Note was obtained from the following sources: communication by mail with the clerks of the superior court in sixty-nine counties; communication by mail with the judge or recorder of twenty-one inferior courts possessing civil jurisdiction above that of a justice of the peace; interviews with the clerk of the superior court, a deputy or assistant clerk, or with a leading member of the bar in twenty-two counties; communication by mail with all members of the North Carolina Bar who submitted suggestions and criticism on pre-trial to the Bar Association Committee on Improving and Expediting the Administration of Justice; and communication by mail with nineteen superior court judges. All opinions and conclusions contained herein are a summary or digest of the ones gathered from these various sources.

The General Statutes require the clerk of the superior court to maintain a pre-trial docket. Yet a survey of the actual practice in the various counties shows that, out of those contacted, fourteen maintain such a docket, nine others have one that is never used, and fifty-four do not even have a pre-trial docket. No information is available for the remaining twenty-three counties. At the same time, it is clear that

1 N.C. Gen. Stat. §§ 1-169.1-.6 (1953). For a digest of these provisions, see A Survey of Statutory Changes in North Carolina in 1949, 27 N.C.L. Rev. 405, 430-32 (1949). For comment on the early days of pre-trial in this state, see Paschal, Pre-Trial in North Carolina: The First Eight Months, 28 N.C.L. Rev. 375 (1950). For a detailed bibliography of material on pre-trial, see Institute of Judicial Administration Bulletin 2-U22, Pre-Trial Rules (Dec. 11, 1953). The most comprehensive general text available is Nims, Pre-Trial (1950). For forms used in federal courts, see Joiner, Trials and Appeals 92 (1957). For demonstrations of the pre-trial conference, see 11 F.R.D. 3 (1952). For other material on pre-trial, including general discussions, forms, and demonstrations of the conference, see the following: Kincaid, A Judge's Handbook of Pre-Trial Procedure, 17 F.R.D. 437 (1955) (also prepared and distributed in pamphlet form under the auspices of the Pre-Trial Committee, Section of Judicial Administration, American Bar Association); Murrah, Pre-Trial Procedure, 14 F.R.D. 417 (1954); Supreme Court of New Jersey, Manual of Pretrial Practice (rev. ed. 1955); Judicial Council of California, California Manual of Pre-Trial Procedure (1956). A 16 mm. film entitled A Pre-Trial Conference, which demonstrates an actual conference, is available for a rental fee of $4.75 plus postage from the National Legal Audio-Visual Center, Indiana University School of Law, Bloomington, Indiana.
the absence of a separate docket is not the factor that limits the use of pre-trial. Many clerks reported that at one time they had such a docket, but that after several years of disuse it was abandoned. Over a third of the clerks reporting indicated a procedure they used (or would use if the opportunity presented itself) to handle pre-trial cases. Most of these would place the case awaiting pre-trial on the civil issue docket.

Sixty superior court clerks reported the number of cases in which the pre-trial hearing, as such, was used during the preceding year. Out of this number, thirty-four (or fifty-six percent) did not have a single case involving a pre-trial hearing within the year. Another eleven counties (an additional eighteen percent) reported that they had from one to five pre-trial cases. No county had over twenty cases.

These figures speak for themselves. There is no widespread use of pre-trial in North Carolina.

There are a few judges who consistently require pre-trial in all contested civil litigation, but this number—small to start with—is steadily decreasing. Several superior court judges stated that at one time they had required pre-trial consistently, but that for one or more of the reasons discussed below they have stopped this practice. Several clerks in one district reported that a particular judge used to require pre-trial frequently but that since he had left the district the practice had fallen into disuse. There remain three or four judges whose names are repeatedly connected with extensive and successful use of pre-trial.

A survey of the inferior courts exercising civil jurisdiction above that of a justice of the peace shows that there are at least five such courts that utilize the pre-trial powers given them under our statute. It is reported that pre-trial has been very successful in some of these courts; but since the problems involved in the inferior courts are not the same as those encountered in the superior court, no details on the procedure in these five courts will be considered here.

Answers touching the success of pre-trial when used vary greatly according to the personal experiences of the person concerned, but the general consensus of opinion is that very good results were usually obtained. It is also interesting to note that the most favorable results

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This information was collected during the month of October 1957.

The breakdown on these figures is as follows:

<table>
<thead>
<tr>
<th>Number of Pre-trial cases</th>
<th>Counties</th>
<th>Percent of counties reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>34</td>
<td>56.7</td>
</tr>
<tr>
<td>1 to 5</td>
<td>11</td>
<td>18.4</td>
</tr>
<tr>
<td>6 to 10</td>
<td>7</td>
<td>11.6</td>
</tr>
<tr>
<td>11 to 15</td>
<td>6</td>
<td>10.0</td>
</tr>
<tr>
<td>16 to 20</td>
<td>2</td>
<td>3.3</td>
</tr>
<tr>
<td>Over 20</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

These figures include all of the larger counties.

*N.C. Gen. Stat. § 1-169.6 (1953).*
were reported by those who had used pre-trial—or had been connected with its use—consistently over a period of time, rather than from those who used it only occasionally.

The reasons given why pre-trial is not used more often seem to fall into four general categories. Since opinions are so widely spread as to the relative importance of each, there is no attempt here to attach to one reason any more significance than to another.

**Unfamiliarity and uncertainty.** Most lawyers seem to be unfamiliar with the procedure involved in pre-trial and uncertain as to the goals to be sought. As a result the bar generally makes little or no effort to push the use of pre-trial. Likewise, many judges are not sure how much initiative they should take in requiring a hearing and they seem to be unsure of their powers and duties when the hearing is held. Judges therefore generally do not encourage lawyers to use this procedure. The result of this situation is that the bar waits for the bench to require pre-trial, and the bench generally waits for the bar to request it.

**Attitude.** Some lawyers and judges simply do not want to change the procedure they have been using for many years. This is not mere unfamiliarity, but a "resentment" of new procedure and a "fear of change." With this attitude present, it is clear that little can be accomplished by pre-trial. In addition, many lawyers do not want to give up any chance of surprising their opponents and impressing the jury. At the pre-trial conference, they will attempt to hold out information and refuse to disclose their hands. They will concede nothing if they can avoid doing so. Under the old idea that a trial is a game of wits between counsel, they want to have as much to work with as possible and therefore do not want to see anything settled prior to trial.

**Lack of a satisfactory time for holding pre-trial.** Pre-trial has generally worked best when the conference could be held some two to four weeks prior to trial, thus enabling counsel to prepare the case for trial with the pre-trial order before him.\(^5\) This is nearly impossible in most of the superior courts in this state under the present system. In the small counties where only a few civil terms of court are held each year, the conference must now either be held early in the term at which the case is to be tried (whereby pre-trial loses much of its effectiveness because there is insufficient time to take full advantage of its benefits) or held at one term of court with a delay of four or six months before trial can be had at the next civil term. Neither alternative is completely satisfactory. Even in the larger counties where civil terms are held frequently, the calendars are often so crowded that a long delay will result after the case is put on the calendar before trial is had.\(^6\)

\(^5\) See note 1 supra for bibliography of materials on pre-trial.

\(^6\) N.C. Gen. Stat. § 1-169.1 (1953) provides that cases awaiting pre-trial shall not be placed on the calendar until pre-trial is completed.
At present, the first day of each civil term is the time designated for pre-trial and other non-jury matters. It has been the experience of many of our judges that Monday is often needed to hear motions, custody matters, and alimony citations made returnable before the judge at that term. Thus there is little or no time for pre-trial on Monday, and judges and lawyers find it understandably difficult to continue with pre-trial conferences on Tuesday when there are other cases waiting for trial.

Rotation of judges. Many proponents of pre-trial believe that the same judge should hold the pre-trial conference and preside at the trial of the case, since the trial judge is then familiar with all the issues and facts of the case. This is virtually impossible with the rotation of judges unless the pre-trial conference and trial of the case take place during the same term of court. There are also some who think that different judges should preside at pre-trial and at the trial of the case. It is contended that lawyers would then be more inclined to admit weaknesses in their cases and would be more willing to make an honest effort to settle. It seems clear that there are advantages in each system.

But aside from the advantages of having the same judge conduct both the pre-trial and the trial, rotation of judges makes pre-trial more difficult in another respect. Under our statute, the trial judge has the final decision as to the effect to be given the pre-trial order, since it is within his discretion to modify that order. Therefore, the judge conducting the pre-trial hearing, not knowing in many cases which judge will preside at the trial, has no assurance that full advantage will be taken of his pre-trial labors. Such a situation is not likely to encourage the use of pre-trial.

One superior court judge, when asked if he favored the use of pre-trial, answered: "Qualifedly yes, under our present system. Definitely yes, if we should ever abolish rotation."

Many different ideas were proposed as means to get better results from pre-trial. Those that were most often suggested or that seemed to be most significant are put forth here.

Familiarization. One superior court judge stated frankly that "I personally feel the need for instruction." Another suggested that it would be most helpful if judges were furnished with a suggested "form" to be used for the pre-trial order. Also, indications are that many members of the bar need some guide to the procedure to be followed, outlining that which is expected of them. It is therefore submitted that a brief guidebook on pre-trial in North Carolina for lawyers and judges, containing a suggested form for a pre-trial order, would be of tremendous assistance.

\(^7\) Ibid. \(^8\) Ibid.
Provide a time for holding pre-trial. There were many suggestions that a special term of court be held at a stated interval prior to each scheduled civil or mixed term. This special term would handle pre-trial for all civil cases to be tried at the following regular term and would also dispose of motions, custody proceedings, and all other matters not requiring a jury. Then at the regular term—three weeks or a month later—the court could immediately begin trying cases which are known to be ready for trial, thus expediting considerably the disposal of cases during that term. Suggestions concerning which judge should conduct this special term include: the same judge who is to hold the regular term; the resident judge; a special judge who conducts only non-jury terms; or any regular superior court judge to be assigned by the Chief Justice of the North Carolina Supreme Court. Of course, if rotation of judges were ever abolished in this state, it would be much easier to provide for a short non-jury term to precede regularly scheduled terms.

Make mandatory. Perhaps the most controversial question in the field of pre-trial is whether or not it should be required in all contested civil cases. There are some who say pre-trial is not necessary other than in exceptional cases and that it would be a waste of time in all other cases. To this argument the proponents of mandatory pre-trial answer that it will save much time and expense in most cases, and in the other cases little time will be required. A superior court judge stated: "Actually it is not necessary in some cases, but unless required in all, there is a tendency to say that it is not worthwhile in a particular case, and thus pass over many."

It is also argued that most of the cases in our state courts involve only small amounts, so that lawyers do not feel it necessary to have such a conference prior to trial. To this argument another judge answered that pre-trial "would be perfunctory in many cases, but it is impossible to draw the line. Also, 'The littlest possums climb the highest trees.' There is nothing like the $500 case to raise thorny legal problems." Most of the lawyers and judges contacted agree with this statement. Although several qualified their answers to be conditional upon the solving of one or more of the problems raised above, most seemed to think that, under proper circumstances, pre-trial should be made mandatory.

David S. Evans