

## CONTROL OF THE CALENDAR IN CRIMINAL DISTRICT COURT

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Questions arise occasionally about judges' authority over the criminal calendar in district court. North Carolina apparently is unique among the fifty states in giving the prosecutor control over setting the criminal calendar, and that responsibility can conflict with the court's inherent authority to manage litigation. The division of responsibility is further complicated by the varying practices for setting district court criminal calendars in the different districts of the state.

Generally judges will be content to have assistant district attorneys decide how to move cases, but tension may occur sometimes over continuances or rescheduling of cases or movement of a case from one judge to another. This paper seeks to provide background for addressing those times when the authority of the judge and prosecutor might come into conflict.

**The statute** — General Statute 7A-61 says, "The district attorney shall prepare the trial dockets, prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district . . . ." Another statute, G.S. 7A-49.4, sets out a detailed scheme for calendaring in superior court, but there is no comparable statute for district court.

**The practice** — The Office of Indigent Services surveyed judges, prosecutors, defenders, clerks and lawyers about scheduling practices in district court and published a *District Court Scheduling Survey Report* in October 2009. Although the survey questions really focused on issues such as communications between prosecutors and defense counsel, the number of continuances granted, plea negotiation practices and the like — and not on calendaring authority — the responses showed that in some districts the DA has no involvement in calendaring, and in other districts the DA's office, clerk and judges all have roles in setting the calendar. The survey results also showed that in various districts defense lawyers may set bond hearings essentially on their own and that clerks' offices can grant continuances in some cases.

Although the survey did not specifically cover the role of magistrates and law enforcement officers in determining calendars, it is common for the magistrate to set a defendant's first court date at the time of arrest, based on the arresting officer's schedule. The case then is continued, if need be, by the presiding judge.

In district court, then, unlike superior court, in many instances the setting of the criminal calendar is handled by someone other than a prosecutor — with the permission or at least the acquiescence of the DA. Undoubtedly this is a function of the sheer volume of cases in district court.

**The court's inherent authority** — A basic axiom of judicial administration is that courts have inherent authority to manage litigation to prevent undue delays, preserve court resources, and assure fair treatment of all parties. Justice Cardozo wrote of the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself,

for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The leading treatise on inherent judicial authority says, “It is well settled that courts have substantial inherent powers to control their calendars and to supervise the conduct of litigation as long as they do not deprive parties of their fundamental constitutional rights . . . .” Felix F. Stumpf, *Inherent Powers of the Court*, § 7.3 (The National Judicial College, 2008).

The North Carolina Constitution recognizes inherent judicial authority. Article IV, Section 1 says that the judicial power of the state is vested in the General Court of Justice and that, “The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government . . . .”

Just as in other states, North Carolina’s appellate courts have recognized the inherent authority of the courts to control the course of litigation to see that justice is administered fairly and efficiently and without undue burden on parties, witnesses or jurors. Such authority is necessary for a court to perform its judicial function. “Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice.” *Beard v. North Carolina State Bar*, 320 N.C. 126, 129 (1987). “This Court has all the power inherent in courts to regulate the practical methods of conducting their business and hearing cases, after they come within its jurisdiction and control.” *Rencher v. Anderson*, 93 N.C. 105, 107 (1885).

A court’s inherent authority is limited by the separation of powers, however, and the judiciary must give due deference to the decisions of the other branches of government. “Just as the inherent power of the judiciary is plenary within its branch, it is curtailed by the constitutional definition of the judicial and the other branches of government.” *In re Alamance County Court Facilities*, 329 N.C. 84, 94 (1991). Accordingly, the courts may not ignore the legislature’s directives on calendaring of criminal cases. Indeed, as discussed below, the State Supreme Court has determined that the statute on calendaring does not usurp judicial authority, but the opinion in that case leaves open questions about ultimate authority over cases.

**Case law** — The current statute on calendaring criminal cases in superior court is G.S. 7A-49.4. It requires the district attorney to develop and follow a docketing plan and to calendar cases at an administrative setting of the court. The statute also specifies when the calendar must be published and regulates the call of cases on the calendar, and it says when a judge can reject a scheduled court date. The statute concludes with a subsection stating, “Nothing in this section shall be construed to affect the authority of the court in the call of cases calendared for trial.”

That last sentence was significant in the Supreme Court affirming the constitutionality of the predecessor to the current calendaring statute. In *Simeon v. Hardin*, 339 N.C. 358 (1994), the court upheld G.S. 7A-61 and 7A-49.3, the predecessor to 7A-49.4, in the face of an argument that, *inter alia*, the district attorney’s responsibility for setting the calendar interfered with the court’s inherent authority. Part of the court’s reasoning was that the statute was constitutional because the prosecutor did not have absolute control over the calendar, as shown by the quoted language in the statute recognizing the judge’s residual authority over the call of cases. “Because the ultimate authority over managing the trial calendar is retained in the court, it cannot be said that these statutes infringe upon the court’s inherent authority or vest the district attorney with judicial powers in violation of the separation of powers clause.” 339 N.C. at 376.

While the *Simeon* court rejected the challenge to the constitutionality of G.S. 7A-49.3 on its face, the court decided that the allegations about the district attorney's manipulation of the calendar to force pleas and disadvantage defendants were sufficient to remand the case to the trial court to determine whether the statute had been used to deprive defendants of their due process rights. Thus, the Supreme Court recognized that even though the calendaring statute is valid it is subject to abuse. The *Simeon* litigation helped prompt changes in the statute.

A few other cases have noted, like *Simeon*, the court's ultimate control over the trial calendar. In *State v. Mitchell*, 298 N.C. 549 (1979), cited in *Simeon*, the court held that G.S. 7A-61 did not give the district attorney exclusive control of calendaring and that a judge properly scheduled a hearing for a motion for appropriate relief. The statute on motions for appropriate relief (then G.S. 15-217.1 and now G.S. 15A-1420) clearly made it the court's responsibility to schedule the hearing. The *Mitchell* decision is notable for Justice Carlton's concurring opinion which emphasizes the court's ultimate authority over the docket and warns DAs that abuse of the calendaring process could lead to removal of the prosecutor from the process.

In *State v. Monk*, 132 N.C. App. 248 (1999), the Court of Appeals said the trial judge had authority to add an attempted murder charge to the calendar when it had been omitted by clerical error, the district attorney had told the defendant's lawyer it would be heard, and the charge was related to other charges on the calendar. The appellate court relied upon the trial judge's residual authority over the call of cases, as specified in G.S. 7A-49.4, and the statement in *Simeon* that the trial court retains ultimate authority over the calendar.

**The court's role** — Given the broad wording of G.S. 7A-61, the inherent authority of the courts, the limited case law on calendaring, and the actual practice in district court, what can one conclude about a district court's authority over the criminal calendar? As a starting point, it seems clear enough that the district attorney's control over the trial calendar is not exclusive. The statute for superior court explicitly recognizes that the court retains some control, and *Simeon* and *Mitchell* and *Monk* all speak of the court's "ultimate authority", though none of the cases ever really explains what that means.

Here is an attempt to suggest the court's role in the calendaring of criminal cases in district court:

(1) *The court may adopt rules that address generally the scheduling of cases.*

Such rules might specify timelines for setting cases for trial — e.g., within 120 days of arrest — or deadlines for notifying the clerk of the cases to be heard, or forms to be used, or limits on the number of continuances, or notification of opposing counsel, or various other matters related to the general process for setting the schedule. Rules of that nature would not interfere with the district attorney's authority because they do not tell the DA when to put any particular case on the calendar, but they help the court retain control of the overall workflow and assure that lawyers, clerks and judges all have sufficient information to do their jobs efficiently and effectively.

(2) *Generally the court should not be in the business of setting the trial calendar without the permission of the district attorney, but there may be times when the court needs to reach out and bring in cases to assure the proper administration of justice.*

There may be times when the court needs to set cases for hearing or reschedule matters to assure that defendants are being treated fairly or to otherwise assure the proper administration of justice. The exercise of such inherent authority by the court would seem proper so long as it is not used to routinely usurp the district attorney's responsibility under G.S. 7A-61 for setting the calendar. Moreover, considering the extent to which DAs already have allowed others to determine the district court calendar, it is hard to see how the court's occasional foray into scheduling could be thought to interfere with the DA's authority.

*(3) Once the district attorney has placed a case on the calendar the court has authority over the future course of the litigation.*

The statute says the district attorney's responsibility is to "prepare the trial dockets. . . ." That gives the DA the authority to decide when a case is ready for trial, but it would seem that once the case has been placed on the docket it clearly comes within the control of the court. Future court activity then should be scheduled to meet the court's needs for efficient administration of justice. If, for example, the DA has set a case before a judge in one courtroom the DA ought not try to move the case to another judge in another courtroom without the first judge's approval. It may be that judges and prosecutors in a particular district or county have agreed to permit such transfers of cases as a matter of routine, but if that is not the case the DA should be sure that the judge before the case was originally calendared does not object. (In the absence of court approval of a transfer, the DA may have the option to dismiss the case and re-file and re-calendar it later.) Likewise, if a case is on the docket and the judge continues it to a specific date, the DA is not free to ignore that order and unilaterally reschedule the case to a different time.