

Is North Carolina the Only State in Which the Prosecutor Controls the Calendar?

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I was on a panel about criminal case calendaring yesterday at the [Courts Commission](#). While talking to people in preparation for the event, I kept hearing one thing: that North Carolina is the only state in which the prosecutor controls the calendar. After conducting some research, I don't think that's quite right.

The prosecutor doesn't have complete control of the calendar in North Carolina. It's actually a hybrid system in which the court and the prosecutor share responsibility, with some local variation regarding the degree of control allocated to each actor.

The starting point is [G.S. 7A-61](#), which provides that “[t]he district attorney shall prepare the trial dockets.” At one time, that statute and others were interpreted to give the prosecutor nearly complete control over the calendar, subject only to constitutional guarantees such as the right to a speedy trial. That system was challenged in 1992 when two defendants in Durham County brought a civil suit against the district attorney. One claimed that the district attorney “delayed [his] case for the tactical purposes of keeping him in jail . . . and pressuring him into entering a guilty plea.” The other alleged that his case was calendared for trial many times but was never tried, causing defense counsel to “prepare for trial repeatedly” and resulting in inconvenience and expense. *Simeon v. Hardin*, 339 N.C. 358 (1994).

The case eventually reached the state supreme court, which rejected the defendants' claims that the statutory allocation of calendaring responsibility to the district attorney was facially unconstitutional. The court observed that then-existing G.S. 7A-49.3 recognized “the authority of the court in the call of cases for trial,” and concluded that “the ultimate authority over managing the trial calendar is retained in the court,” even though the initial responsibility for preparing the calendar was vested in the prosecutor.

However, the defendants also claimed that the system was “applied in an unconstitutional manner,” in part because the prosecutor placed “a large number of cases on the printed calendar,” knowing that most would not be reached, “thereby providing defendants virtually no notice of which cases are actually going to be called for trial.” The supreme court ruled that the defendants had made a sufficient showing in this regard to require remand for further consideration.

Subsequently, in response to the types of concerns that had animated *Simeon*, the General Assembly enacted [S.L. 1999-428](#). That bill added [G.S. 7A-49.4](#), which addresses superior court criminal case calendaring. It provides that “[c]riminal cases in superior court shall be calendared by the district attorney . . . according to a criminal case docketing plan developed by the district attorney” after consultation with the bench and bar. Each docketing plan must include certain minimum components. Each plan must provide for administrative settings following indictment, and the district attorney must “announce a proposed trial date” at the final administrative setting, which the judge may veto after hearing from the parties. If “a case has not otherwise been scheduled for trial within 120 days of indictment,” a judge may set a trial date. Each plan must also provide for the publication of the trial calendar at least two weeks in advance of a trial session, with the cases listed in the order in which they are to be tried.

Summing up, we know from *Simeon* that the “ultimate” control of the calendar rests with the court, and we know from G.S. 7A-49.4 that although the district attorney has substantial responsibility for calendaring, the court also has a role

to play. For this reason, I don't think it's completely accurate to say that the prosecutor controls the calendar in North Carolina, though clearly the prosecutor plays a major role.

It is also worth noting that some docketing plans give additional control to the court. For example, Mecklenburg County's provides that the court will assign trial dates after consulting with the Trial Court Administrator, and Cumberland County's states that "[t]he Presiding Judge shall establish trial dates in conference with both counsel."

Prosecutors have some influence on the calendar in other jurisdictions. I have not conducted a 50-state survey of calendaring practices, but even a quick look shows that prosecutors retain a role in calendaring in some other states:

- In South Carolina, the state supreme court ruled complete prosecutor control unconstitutional in *State v. Lankford*, 735 S.E.2d 471 (S.C. 2012), then issued an administrative order providing that most cases "shall remain under the control of the Solicitor," subject to certain provisions. Essentially, the prosecutor determines when a case is ready for trial. Once the prosecutor so determines, he or she notifies the court, which then "assumes the responsibility for setting a trial date."
- In Georgia, there has also been litigation about the extent to which prosecutors control calendaring, but some prosecutor control remains. In *Mulvey v. State*, 551 S.E.2d 761 (Ga. Ct. App. 2001), a defendant challenged the "method used for preparing the trial calendar." The reviewing court noted the history of litigation over prosecutorial control of the calendar and found no problem with a system under which the district attorney "prepare[d] criminal trial calendars" but did so subject to a requirement that they be "reflective of and consistent with the then-pending criminal docket." This system appears to remain in effect today, as section IV of [this standing order](#)

So, just as it is not completely accurate to say that in North Carolina the prosecutor controls the calendar, it is not completely accurate to say that prosecutors in other states have no control over the calendar.

A spectrum. Rather than trying to fit every state into one of two boxes – prosecutor control or state control – it may make sense to conceptualize control over calendaring as a spectrum ranging from complete prosecutor control on one end to complete court control at the other. North Carolina appears to be closer to the prosecutor control end of that spectrum than most other states, though local docketing plans vary so much that different parts of the state may be at different points on the spectrum. The national trend over time has been towards greater court control. See Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 Am. J. Crim. L. 325 (2005) (tracing the history of prosecutor control, noting the trend towards court control, particularly in the middle of the 20th century, and arguing that the pre-*Lankford* system in South Carolina was "the only state in the union that formally reserves to its prosecutors the exclusive authority to set the criminal docket").

The School of Government takes no position on the important question of how criminal cases *should be* calendared, i.e., whether North Carolina, or any specific prosecutorial district, is at the right point on the spectrum. (Of course, individual faculty members may have opinions on this issue.) This post merely seeks to provide some context for how criminal cases *are* calendared, compared to other jurisdictions. Many readers will be familiar with the basic arguments for court control (neutral administration of the calendar reduces the risk of prosecutors using the calendar for tactical purposes) and for prosecutor control (prosecutors are more familiar with the cases than judges are, and judges lack the resources to manage the criminal dockets). There's much more that could be said on the normative question, but I'll leave that to others.