

## II. Discovery Motions

- A. Request for Voluntary Discovery/Motion for Discovery
- B. Motion to Compel Discovery
- C. Motion for Sanctions (Discovery or Other Violation)
- D. Motion for Prior Trial or Hearing Transcript
- E. Motion to Preserve Evidence
- F. Motion for Deposition

### A. Request for Voluntary Discovery/Motion for Discovery

#### Authority

G.S. 15A-902; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny.

#### Deadlines

This request must be filed within ten days of probable cause hearing or after waiving probable cause hearing. If no probable cause hearing or waiver occurs, the request should be filed within ten days of service of indictment, consent to bill of information, or appointment of counsel, whichever occurs later.

#### Key Principles

The request is filed in superior court. A request for voluntary discovery must be filed before filing a motion for discovery or a motion to compel, although many practitioners combine the request with an alternative motion, as discussed in “Practice Tips,” below.

A defense request for discovery gives the State the right to request certain discovery from the defendant, known as *reciprocal discovery*. The defense right to discovery is far broader than the State’s reciprocal discovery right. Generally, the benefit of defense access to information far outweighs any risk of having to provide discovery to the State. Therefore, the defense should almost always request discovery.

The defendant must give notice of defenses and notice of testifying experts (discussed *infra* in Sections IV. C. and F., respectively), if the defense has requested discovery from the State and the State has requested discovery from the defense in return. The State usually makes its discovery request in or with the same document with which it provides notices of intent to use evidence subject to suppression deadlines or when it asks the defense to acknowledge receipt of discovery.

#### Practice Tips

- A request for voluntary discovery may be combined with an alternative motion for discovery, so as to avoid having to file two separate documents. The combination motion is largely the same as the request for voluntary discovery, but in the prayer for relief it asks the court to treat the request as a motion from which the court can issue orders, to the extent such orders become necessary in the case.

- The deadline to request discovery applies to statutory discovery only, not to constitutional discovery, but best practice is to include citations to both statutory and constitutional authority whenever formally requesting discovery.
- While the statute sets a deadline for requests for statutory discovery, in practice discovery motions are filed without regard to a timeline. Best practice is to file within the deadline and as soon as possible, but counsel should file a request or motion for discovery whenever the need arises.
- Tailor discovery requests to the particular type of case and relevant issues. Think about what information is needed before filing your request.
- Once you receive discovery, consider filing more specific motions for discovery or motions to compel on any other information needed. Examples of more specific discovery requests may include, for example, motions to obtain dispatch records, 911 recordings, dash or body camera video, records of drug or alcohol treatment, medical records, confidential informant file or identity, deals and concessions with witnesses, law enforcement personnel files, and basis for expert opinion.
- Where the pleading fails to give enough information to defend the case, consider filing a motion for a bill of particulars (discussed *infra* in Section III. J.).
- Where there is a legitimate concern about the loss or destruction of evidence, consider drafting a preservation letter to the agency in possession of the evidence and filing a motion to preserve evidence with the court (discussed *infra* in Section II. E.).

### References

N.C. DEFENDER MANUAL Vol. 1, § 4.2 (Procedure to Obtain Discovery).

## B. Motion to Compel Discovery

### Authority

G.S. 15A-902; Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

### Deadlines

If the State fails to respond or responds inadequately to a discovery request, this motion may be filed seven days after filing a request for voluntary discovery. It may be filed anytime by stipulation of the parties or for good cause.

### Key Principles

The statute sets a minimum waiting period before a motion for discovery or to compel discovery may be filed. It does not set an outer limit by which the motion must be filed and, further, allows the motion to be heard at any time for good cause or by stipulation. Good cause may be shown by demonstrating a good faith belief that the evidence sought exists and would be material to the defense and that there is some reasonable explanation for the timing of the motion.

If a combination request for voluntary discovery/alternative motion for discovery has been filed, that should be sufficient to effectively serve as a motion from which the court can issue

discovery orders, including orders to compel discovery. Counsel should file a separate motion to compel where the State has not abided by discovery orders of the court or otherwise has refused to produce information to which the defendant is entitled.

### **Practice Tips**

- Generally, the sooner a discovery motion is made and heard, the more likely it is to be granted. A motion for discovery or to compel discovery should not be made on the eve of trial or during trial unless there is a reasonable explanation for the timing of the motion, such as new evidence that could not have been discovered sooner through the exercise of due diligence (unless the motion is being filed immediately before trial for preservation purposes only).
- When filing a motion to compel, reference any earlier requests for the information (formal or informal) in the motion and consider attaching to the motion any such requests for the information, any prior court orders on discovery, and any transcript of previous hearings on the issue.

### **References**

N.C. DEFENDER MANUAL Vol. 1, § 4.2 (Procedure to Obtain Discovery).

## **C. Motion for Sanctions (Discovery or Other Violation)**

### **Authority**

G.S. 15A-910; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

### **Key Principles**

The court may sanction a party for discovery violations. Sanctions may include dismissal, mistrial, exclusion of evidence, a recess or continuance, a finding of contempt, and any other remedy the court deems appropriate. The court has broad discretion to determine whether sanctions are warranted and to fashion an appropriate sanction.

Where there is evidence of willful disobedience of orders of the court, intentional wrongdoing, bad faith, or gross negligence, consider requesting that the court impose more serious sanctions. Violations of discovery obligations by the State may also implicate due process or other constitutional issues, as well as ethical concerns.

### **Practice Tips**

- Sanctions against the State are not imposed lightly. Counsel should consider attempting to resolve the complaint with the State informally and outside of court before asking the court for sanctions.
- If a motion for sanctions does become necessary, attach any correspondence with the State that documents efforts to resolve the issue, as well as any relevant court orders, transcripts, or other pertinent evidence.
- Be creative in requesting relief on a motion for sanctions. Other than the relief listed in the statute, consider requesting alternative relief, such as additional peremptory strikes, last

argument despite putting on evidence, having a case declared non-capital, a jury instruction addressing the sanctioned conduct, or any other appropriate sanction.

### References

N.C. DEFENDER MANUAL, Vol. 1, § 4.2J (Procedure to Obtain Discovery—Sanctions).

## D. Motion for Prior Trial or Hearing Transcript

### Authority

G.S. 7A-450(b); Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; *Britt v. North Carolina*, 404 U.S. 226 (1971).

### Key Principles

Where the defendant needs a transcript of a prior trial or proceeding in the case and is unable to afford the expense of the transcript, equal protection and due process under the state and federal constitutions require that a copy of the transcript be provided to the defendant at the State's expense.

The motion should demonstrate why the transcript is necessary to prepare the defense and why any available alternatives are insufficient. The fact that a transcript contains prior sworn testimony may be enough to overcome any proposed alternative.

### Practice Tips

- Counsel should consider filing this motion whenever an earlier proceeding may be relevant to the current case. For instance, where the defendant has received a new trial or where a civil proceeding (such as a G.S. Chapter 50B domestic violence protective order hearing) bears on the current case, defense counsel will often need to review the transcript of a prior proceeding as a matter of effective representation.
- The need of counsel to review transcripts of earlier proceedings goes to defense counsel's trial strategy and may arguably be filed *ex parte* without notice or a copy to the State, although no North Carolina case directly addresses this issue. For more information on *ex parte* motions, see Sections 13.2C (Procedural Requirements in Superior Court—Ex Parte Motions) and 5.5A (Obtaining an Expert Ex Parte in Noncapital Cases—Importance of Ex Parte Hearing) of the N.C. DEFENDER MANUAL Vol. 1.
- The motion should identify the court, the court reporter, and the date(s) of the earlier proceeding(s), as well as the type(s) of proceeding(s). Counsel may also consider requesting that the court set a deadline for production of the transcript.

### References

N.C. DEFENDER MANUAL Vol. 1, § 5.8B (Right to Other Assistance—Transcripts).

## **E. Motion to Preserve Evidence**

### **Authority**

Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution; G.S. 15A-903; G.S. 15-11.1(a).

### **Deadlines**

This motion is not subject to the discovery motions deadlines and has no specific deadline. In order for a motion to preserve evidence to be effective, however, it should be filed as soon as possible. Defense counsel should consider the need for this motion when beginning to investigate the case as a part of discovery preparation.

### **Key Principles**

This motion puts the State on notice that it must retain and preserve evidence for independent testing or examination. Therefore, consider making a motion to preserve when there is a risk that the State may destroy or fail to preserve evidence necessary for the defense—for example, 911 tapes, digital surveillance, forensics, or other physical evidence that is at risk of decay or destruction due to retention policies, testing, passage of time, or any other reason.

In addition to ensuring complete access by the defense to evidence that otherwise may be lost or destroyed, filing this motion can assist in establishing a statutory or constitutional violation for the loss or destruction of evidence.

### **Practice Tips**

- A notice to preserve evidence should be tailored to a specific concern about particular evidence in the case. The notice should identify the evidence that is of concern, specify the importance of that evidence to the defense, and specify the nature and extent of the concern of loss or destruction of the evidence. For instance, jails and 911 call centers often have internal policies regarding retention of audio or video recordings, and labs often have policies regarding testing of small samples of materials that are likely to be destroyed in testing. Where possible, obtain and attach to the motion any policies of the entity with possession of the evidence that document the risk of loss or destruction of the evidence.

### **References**

N.C. DEFENDER MANUAL Vol. 1, § 4.6C (Other Constitutional Rights—Lost or Destroyed Evidence).

## **F. Motion for Deposition**

### **Authority**

G.S. 8-74; N.C. R. CIV. P. 32.

### **Deadlines**

The State must be notified at least ten days in advance of the deposition and be provided an opportunity to participate.

**Key Principles**

While rare in criminal cases, this statute allows for the use of depositions by the defense in limited circumstances. This is a potent discovery tool when available.

Where a material witness is ill, physically unable to attend trial, or resides in another state, the defendant may seek an order from the clerk of superior court of the jurisdiction where the criminal case is pending to take the deposition of the witness by filing an affidavit and request with the clerk.

The affidavit filed with the clerk must (1) include a statement that the testimony of the person sought to be deposed is important to the defense; (2) provide the witness's name; and (3) state that the witness is physically ill, incapacitated, or is not a resident of North Carolina and that the witness cannot attend the trial. By statute, the clerk is directed to appoint a person to take the deposition. Counsel may consider informing the trial judge ahead of time of the intent to seek this request from the clerk.

This provision about criminal depositions applies to the defendant only; the State has no statutory right to obtain a deposition in a criminal case. *State v. Hartsfield*, 188 N.C. 357 (1924).

If a deposition is obtained, the statute states that the testimony from the deposition may be read at trial in the same manner that depositions may be used at civil trials, per Rule 32 of the N.C. Rules of Civil Procedure.

**References**

N.C. DEFENDER MANUAL Vol. 2, § 29.1J (Securing the Attendance of Witnesses by Subpoena or Other Process—Defense Depositions in Criminal Actions).