

VII. Other Motions to Consider

- A. Motion for Advance Notice of 404(b) Evidence
- B. Motion for *Voir Dire* of Expert/Incompetent Witness/Others
- C. Motion to Appear and Testify Before Grand Jury
- D. Notice of Assertion of Rights to Remain Silent, Refuse Consent, etc.
- E. Motion for Remote Testimony

A. Motion for Advance Notice of 404(b) Evidence

Authority

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

Key Principles

Under the Federal Rules of Evidence, notice of the prosecution's intent to use Federal Rule 404(b) evidence of other crimes, wrongs, or bad acts at trial must be provided on request. Note that N.C. Rule of Evidence 404 has no comparable subsection requiring the provision of notice of intent upon request.

As a matter of statutory open-file discovery and due process under the state and federal constitutions, counsel should consider requesting advance notice of the State's 404(b) evidence a reasonable time before trial.

B. Motion for *Voir Dire* of Expert/Incompetent Witness/Others

Authority

N.C. R. EVID. 601, 702, and 404; G.S. 9-3; Fifth and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

Counsel may request that witnesses be questioned outside the presence of the jury to establish that they are competent to testify or to otherwise establish whether their testimony would be admissible at trial, such as with expert testimony under N.C. Rule of Evidence 702 or character evidence under Rule 404. This may be useful when faced with a child witness, witnesses with intellectual or other disabilities, character evidence witnesses, expert witnesses, or any other witness where the admissibility of the testimony is in dispute.

Practice Tips

- Where the competency of a witness to testify is in question, counsel should request a pretrial hearing and determination of the issue with this motion.
- A motion to exclude 404(b) testimony may request an evidentiary hearing or *voir dire* of the witness on the question of admissibility of the evidence.

- Where the State is offering expert testimony, a motion should be filed seeking a pretrial hearing on the qualification of the expert and the admissibility of his or her opinion. Consider obtaining or consulting with a defense expert to best prepare for a hearing seeking to exclude an expert.
- To preserve any objections to the court's ruling on the admissibility of testimony, an objection must be made during trial to the testimony; the court's ruling on the issue pretrial is not sufficient to preserve the issue for review.

C. Motion to Appear and Testify Before Grand Jury

Authority

G.S. 15A-626(d).

Key Principles

Although generally a person in North Carolina has no right to call witnesses or appear before the grand jury, this section of the statute allow a person to petition the judge or district attorney (D.A.) to testify before the grand jury. In the discretion of the judge or D.A., the person may be allowed to do so. This presumably includes the defendant.

D. Notice of Assertion of Rights to Remain Silent, Refuse Consent, etc.

Authority

Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 19 and 23 of the N.C. Constitution.

Key Principles

While arguably unnecessary after the appointment of counsel, some jurisdictions have had issues with law enforcement or other state agents approaching defendants in custody to obtain statements, obtain permission for searches, discuss unrelated cases, or for other purposes, even after the appointment or general appearance of counsel. If it is a concern, filing a notice that the defendant asserts all constitutional rights (such as to remain silent) can have a deterrent effect on law enforcement. Where a notice is filed and improper actions by the State subsequently occur, a violation of the defendant's rights may be more easily established.

E. Motion for Remote Testimony

Authority

G.S. 15A-1225.1; G.S. 15A-1225.2; *Maryland v. Craig*, 497 U.S. 836 (1990); *State v. Jackson*, 216 N.C. App. 238 (2011).

Key Principles

Where there are serious public policy concerns about a witness appearing in person before the court, a motion to allow the witness to testify by way of remote testimony may be made. This most commonly arises in sex offense prosecutions involving child victims where there is a serious risk of emotional or psychological harm to the child by physically being present in court and seeing the defendant.

To satisfy the Confrontation Clause, when the State moves for remote testimony the court must find that the use of remote testimony (and consequent denial of confrontation rights) furthers a significant public policy interest and that the remote testimony is reasonably assured to be reliable. The statute identifies findings that the court must make before authorizing remote testimony, and the determination of whether or not remote testimony should be used is made on a case-by-case basis.

The procedure for remote testimony should be one that allows all of the parties to the case and the fact finder to view the witness while he or she testifies, such as by use of closed-circuit television, so that the demeanor of the witness may be observed. This method preserves and protects all methods of confrontation other than literal “face-to-face” confrontation.

Whether the use of remote testimony for witnesses other than child sex victims can satisfy the Confrontation Clause is an open question.

Practice Tips

- Defense counsel should oppose a request by the State for remote testimony as a violation of the defendant’s confrontation rights by filing a motion *in limine* or other objection. If the testimony is allowed, an objection on confrontation grounds should be renewed during trial when the remote testimony is presented.
- Defense counsel may consider moving the court to allow a defense witness to testify remotely where compelling circumstances exist. Because the State does not have a constitutional right to confrontation, a defense motion for remote testimony may be more easily granted.
- The State will often use an expert to establish the need for remote testimony, such as a child psychologist to establish the potential for trauma to the child in the event the child had to testify in person. Defense counsel should consider consulting with or retaining his or her own mental health expert to counter such evidence.

References

N.C. DEFENDER MANUAL Vol. 2, § 29.8 (Remote Testimony).