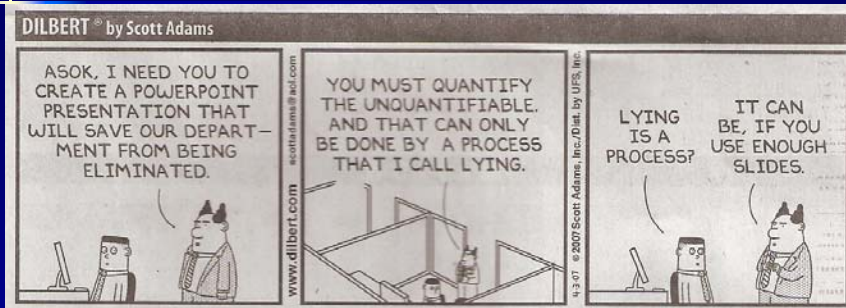


Civil Pretrial Motion Practice North Carolina Judicial College

John W. Smith
Special Superior Court Judge
May 10, 2007



What this section is about

- You show up for a Civil Motion Calendar
- You look at the 15 page calendar with 10 cases on each page and see notes by the Trial Court Administrator such as:
 - SJ- 1 hr;
 - MTA-5 min;
 - dism-30 min
- The courtroom is full of lawyers and people you don't recognize
- Everybody is looking at you.

Civil Pretrial Motions Management

- What to expect in a Motion Calendar
- Substantive Law of Pretrial Issues
- Practical suggestions for Management
- Practical suggestions for Rulings

Issues of Substantive Law

- Motion to Dismiss: 12(b)(6)
- Motion to Compel
- Motion for Protective Order
- Motion for Sanctions
- Motion for Summary Judgment
- Motions in Limine

Substantive Law Checklist

- **North Carolina Trial Judges' Bench Book for Superior Court Third Edition Volume 2 Civil Trial Procedure**

- **Chapter 3: Motions in Civil Cases -- a Checklist; Updated (5/98)**

- SECTION II: MOTIONS IN CIVIL CASES: Chapter 3: Motions in Civil Cases -- a Checklist

(There is a similar listing in the District Court Benchbook)

Motion to Dismiss 12(b)(6)

- If not filed with answer, remember the effect of the motion on scheduling
 - No answer required until you rule
 - Denial is interlocutory, not appealable; Allowing it ends the case and is appealable
- Pay attention to:
 - Whether discovery might cure defect
 - Affidavits: may convert motion into a hearing for Summary Judgment

Motion to Amend Rule 15(a)

- May amend as matter of right before responsive pleading filed
- Freely allowed, unless
 - a. Undue delay
 - b. Bad faith
 - c. Undue prejudice
 - d. Futility
 - e. Repeated failure to cure defects
 - f. Another judge has previously denied motion
- 30 days to respond unless otherwise ordered

Discovery Issues

Compelling, Protecting, Sanctioning

The Tools of Discovery

- Pretrial/Discovery Conf. Rule 16, 26(f)
- General provisions Rule 26
- Depositions Rule 27-32
- Interrogatories Rule 33
- Production of Documents Rule 34
- Physical/Mental Exams Rule 35
- Request for Admissions Rule 36

Motion to Compel, Rule 37(a)

- If contested, usually connected with an objection or motion for a protective order
- Can be simple or very complicated
- Requires notice
- Must *ordinarily* be heard before the issue of sanctions becomes serious
- Raises an issue of Attorney Fees

What is non-compliance?

- For purposes of **this subdivision** [Rule 37(a)] an evasive or incomplete answer is to be treated as a failure to answer.
- Failure to comply with discovery procedures need not be willful refusal to comply. Willfulness is relevant only to the selection of sanctions, if any, to be imposed. *Société Internationale v. Rogers*, 357 U.S. 197 (1958). G.S. 1A-1, Rule 37, Official Commentary.

Discoverable: 26(b)(1)

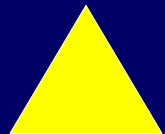
- Any matter that is not privileged that is relevant.
- Information is relevant for discovery purposes if it is "reasonably calculated to lead to the discovery of admissible evidence."

Non-discoverable

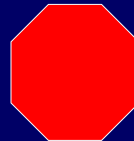
- Fifth Amendment Privilege
 - Courts cannot compel disclosure of information which would tend to incriminate the person from whom it is sought and cannot impose sanctions on one who refuses to disclose privileged information. *Stone v. Martin*, 56 N.C. App. 473, cert. denied, 306 N.C. 392 (1982). It is not an abuse of discretion, however, to refuse to allow that privilege to serve also as a sword, *Stone v. Martin*, 53 N.C. App. 600, (1981)
- Some Privileged material is subject to balancing test
- Attorney & Work Product privilege.
 - *See also* Rule 26(b)(3), (4). *Willis v. Duke Power Co.*, 291 N.C. 19 (1976) (any materials prepared in anticipation of any litigation by the party from whom discovery is sought are protected). *See also Hall v. Cumberland County Hospital System*, 121 N.C. App. 425 (1996) (where defendants refused to disclose documents on grounds of attorney client privilege and work product privilege, trial court erred in releasing documents to plaintiffs without ruling on defendant's Rule 26(b) claims and without making findings of fact when requested to do so by defendants).

Prerequisite to Motion to Compel

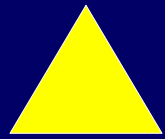
- Must give "reasonable notice"
- The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.



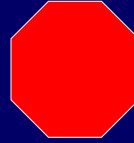
Caution



- Avoid Conditional Orders: "- Where a court order conditioned the dismissal of plaintiff's action upon plaintiff's failure to produce discovery materials previously ordered, the second order was not self-executing, and was therefore conditional and void. Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983). "



Caution



- A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under subsection (d) of this rule. *Goss v. Battle*, 111 N.C. App. 173, (1993).
- Imposition of Section (d) Sanctions Dependent on Circumstances. - Whether such **extreme sanctions** as are authorized by section (d) of this rule should be imposed must be determined from the circumstances of each case. *Cutter v. Brooks*, 36 N.C. App. (1978).
- Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss and plaintiff's failure to comply with G.S. 1A-1, Rule 33 clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. *Hayes v. Browne*, 76 N.C. App. 98, (1985),
- Review of Sanctions Directed to Outcome of Case. - Impositions of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the **most drastic penalties**, dismissal or default, are examined in the light of the general **purpose of the rules to encourage trial on the merits**. *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Protective Orders Rule 26(c)

- **SEEKING A PROTECTIVE ORDER.** A Party or person from whom discovery is sought may file a motion for a protective order in the court where the action is pending.
 1. Motion must be filed in court where action is pending and served on all parties.
 2. Filing motion does not automatically stay discovery request; thus a separate stay order must be obtained if the hearing on the motion for a protective order is not held prior to date for compliance with the discovery request.
 3. Movant has burden of showing "good cause" exists for issuance of a protective order.

GROUNDS FOR GRANTING PROTECTIVE ORDER

- Judge may for good cause shown enter any order which justice requires to protect a party or person from whom discovery is sought from
 - 1. unreasonable annoyance,
 - 2. embarrassment, or
 - 3. undue burden or expense.

Costs & Attorney Fees

- 1. If the **motion** for a protective order is **granted**, judge **shall**, after opportunity for hearing, **require** the party or deponent whose conduct necessitated the motion, or the party advising such conduct (or both of them), **to pay to the moving party** reasonable expenses incurred in obtaining the order, including attorneys' fees.
 - a. **Exception:** Expenses are not awarded if the judge finds either that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.
 - b. Judge is not required to make any findings in order to award or to deny reasonable expenses.
- 2. If the motion is **denied**, the judge, after opportunity for hearing, **shall require** the moving party to pay to the party or deponent who opposed the motion reasonable expenses including attorney's fees.
 - a. **Exception:** Expenses are not awarded if the judge finds either that the motion was substantially justified or that other circumstances make an award of expenses unjust.
 - b. Findings are not required for the award or denial of reasonable expenses.
- 3. **Apportioned expenses:** If the motion is granted only in part, judge may apportion reasonable expenses incurred relating to the motion among parties and persons in a just manner.

Protective Order “In Your Discretion”

- “If the court denies a motion to compel, in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c)”

STANDARD OF REVIEW

**ABUSE
OF
DISCRETION**

Sanctions Rule 37(b)

- Must be previous order to compel UNLESS motion is under Rule 37(d) (no response)
- Sanction options include:
 - Deeming matter admitted or established
 - Barring evidence by the failing party
 - Striking pleadings, staying action, dismissing action or claim, defaulting
 - Contempt
 - Expenses and Attorney fees (mandatory if movant prevails)

Attorney Fees & Expenses

- PARTY SEEKING SANCTIONS WHO PREVAILS is **always** entitled to recover reasonable expenses, including attorneys' fees, in connection with subject matter of motion and hearing on motion to impose sanctions unless judge finds as fact that failure to comply with discovery was substantially justified or that other circumstances make such an award unjust.
 - 1. Award of expenses and attorneys' fees to prevailing movant who seeks sanctions is not discretionary but **mandatory** (absent findings by judge that failure to comply was substantially justified or that other circumstances make such an award unjust). N.C. R. Civ. P. 37(a)(4), (b)(2), (d).
 - 2. Judge errs in imposing sanctions and awarding expenses but refusing to reward attorneys' fees. *Kent v. Humphries*, 50 N.C. App. 580 (1981).

Attorney Fees & Expenses No-Order vs. Order-Compelling

DIFFERENCES IN AWARD OF EXPENSES under Rule 37 (a)(4) versus similar awards under Rule 37(b)(2), (c), (d) or (g) and Rule 26(g):

1. **Which party is movant.** Rule 37 (a)(4): expenses may be awarded to winning party even if winning party is not original movant. However, under Rule 37(b)(2), (c), (d) or (g) and Rule 26(g): only the moving party seeking sanctions is entitled to recover expenses. If movant does not prevail, adversary may not recover expenses incurred in defending against motion to impose sanctions.
2. **Sanctions against non-party.** Rule 37 (a)(4): judge may require failing party or person who advised party not to comply (usually counsel), **or both**, to pay movant's expenses and counsel fees. Rule 26(g): judge may impose upon person who makes certification in violation of Rule or upon party on whose behalf the certification was made, **or both**, an "appropriate sanction," including payment of reasonable expenses, including attorneys' fees. In all other instances where sanction may be imposed for discovery violations, only the party (and not a third party or counsel) may be required to pay or to take some action.
3. **Hearing.** Rule 37(a)(4) and (g): award of expenses and counsel fees is to be made "after opportunity for hearing." Rule 37(b)(2), (c), (d) or Rule 26(g): no hearing requirement.

Source: BenchBook, Chap. 11(F)

Practical suggestion, Remember this Language:

- "...the motion was substantially justified and the circumstances make an award of expenses unjust "
- "...Opposition to the motion was substantially justified and the circumstances make an award of expenses unjust"

Practical suggestion II

- "If the motion to compel is granted only in part, judge may apportion reasonable expenses incurred relating to the motion among parties and persons in a just manner."
- You may require each party to pay their own costs and expenses.

Practical suggestion III Setting Attorney Fees

- Hourly rate of this attorney
- Hourly rate generally for similar work
- Amount of time in this matter
- Amount of time reasonable for similar services
- Overall, is it reasonable, necessary, and fair?

BASIS OF MOTIONS TO IMPOSE SANCTIONS

- Failure to seasonably update or correct response to a request for discovery if new or additional information is obtained. N.C. R. Civ. P. 26(e).
- Failure to participate in good faith in the framing of a discovery plan. N.C.R. Civ P. 37(g).
- Certification (by signing of a discovery request, response or objection) that is in violation of Rule 26(g) as to what a signing, or a certification constitutes. Rule 26(g).

An Oversimplified Chart of Who can be made to Pay?

Event	Person liable
Rule 37(g) Failure to cooperate	Whoever fails to act in good faith
Motion to Compel	Either prevailing party
Motion to Protect	Either prevailing party
Motion to Sanction	Non-moving party only

Motion for Summary Judgment Rule 12(c)

- Must give 10 days notice
- Any party may make the motion
- Once made, may grant SJ against movant
- May be granted even if 12(b)(6) denied
- May not be granted if previously denied
- No findings of fact required (if you feel the need to find facts, may need to deny)

Summary Judgment: Affidavits

Wake County Rule is typical: **“3.8** Attorneys and unrepresented parties shall serve briefs or memoranda at least two days prior to the hearing on any motion seeking a final determination of the rights of any party as to any claim or defense, and shall serve affidavits in opposition to motions for summary judgment at least two days before the motion hearing in accordance with G.S. §1A-1, Rule 5, Rule 6 and Rule 56. However, this rule does not preclude an attorney or party from providing to the court copies of cases or statutes relied upon at a hearing.”

Motions in Limine (BenchBook)

1. **General rule.** "A motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, ___ N.C. ___ 500 S.E.2d 664 (9 July 1998) (by failing to object at trial, plaintiff waived their right to appellate review of the admission of expert's testimony). **But see** *State v. Hayes*, ___ N.C. App. ___ (21 July 1998) [motion in limine sufficient to preserve objection provided that (1) there has been a full evidentiary hearing on the objection, (2) the order denying the objection is explicit and definite, (3) the evidence offered at trial is substantially the same as the evidence explored at the hearing on the motion, and (4) there was no suggestion at the hearing on the motion in limine that the trial court would reconsider the matter at trial].

Issues worth thinking about

- Sanctions for failure to provide discovery which become known or relevant during the trial
- Issues arising during the taking of depositions in or out of the county



Stilley v. Auto Enterprises 55 NC App. 33 (1981)

In their answers to interrogatories plaintiffs stated they intended to call no expert witnesses. They listed no witnesses who would testify about defects, but stated they expected to develop further evidence concerning defects or unsafe conditions prior to trial. They did not supplement their answers. During trial the court ordered, in response to a motion in limine by defendant, that plaintiffs could not offer any expert testimony and could only offer, concerning alleged defects or unsafe conditions, their own testimony and that of four witnesses whose affidavits they had filed.

Through this motion in limine defendant sought imposition of a Rule 37(b)(2)(B) sanction. Such sanction may only be imposed for failure of a party to comply with a court order compelling discovery. G.S. 1A-1, Rule 37(b)(2)(B) ; W. Shuford, N.C. Civil Practice and Procedure § 37-3 (2d ed. 1981). Defendant did not obtain an order compelling plaintiffs to supplement their answers to the interrogatories referred to above. Because plaintiffs had not failed to comply with a discovery order, the court improperly granted defendant's motion in limine.



Stilley v. Auto Enterprises 55 NC App. 33 (1981)

- Compare the later case of Hill v. Williams 144 NC App. 45:
 - A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
 - It is well established that the purpose and intent of Rule 26(e)(1) is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery. Imposition of sanctions pursuant to N.C.G.S. § 1A-1, Rule 37(d) (1999) for failure to comply with Rule 26 (e) is within the sound discretion of the trial court. The trial court [Bonner] did not abuse its discretion by denying defendants' pre-trial motions for sanctions in a negligence action arising from a Rottweiler attack where plaintiffs did not supplement their responses to interrogatories regarding a veterinarian's testimony, defendants filed motions in limine to prohibit the testimony and for sanctions on the morning of trial, and the court denied those motions but ordered that the witness be made available to defendants by telephone that day. Defendants sought to prohibit testimony rather than compel discovery, defendants' motions did not reference a Rule of Civil Procedure, defendants were aware of the witness four months before trial and aware of plaintiffs' intention that he render opinions on the Rottweiler breed two months before trial, defendants declined to depose the witness and waited until the week of trial to file their motions, and the court afforded defendants the opportunity to "depose" the witness.
- In the case of experts which are required to be disclosed pursuant to an order under Rule 26(f), exclusion may be permitted under Rule 32(b)(2)



Miller v. Forsyth, 173 N.C. App. 385 (2005)

- In a medical malpractice case, objection to evidence excluded by motion in limine was not preserved for appellate review where there was no attempt to introduce the evidence during the trial. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838 (2005).

Miller v. Forsyth, 173 N.C. App. 385 (2005)

A trial court's pretrial ruling on a motion in limine is merely "preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial." *Gregory v. Kilbride*, 150 N.C. App. 601, 611, 565 S.E.2d 685, 693 (2002). The trial court's grant or denial of a motion in limine is not appealable. *Id.* In order to preserve the evidentiary issues for appeal where such a motion had been granted, the party objecting to the grant of the motion "must attempt to introduce the evidence at trial." *Id.* In this case, even though the trial court brought the conditional nature of its ruling to plaintiffs' attention, they did not attempt to introduce any evidence regarding defendants' peer review process or that an internal investigation had occurred following the injection.

Effective 1 October 2003, the rule requiring that a party attempt to offer evidence in order to preserve the evidentiary issue for appeal was changed, so that "once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C. Gen. Stat. § 8C-1, Rule 103 (a)(2) (2004)¹. However, the amendment applies only to rulings on evidence made on or after 1 October 2003. *State v. Pullen*, 163 N.C. App. 696, 701, 594 S.E.2d 248, 251-252 (2004) (citing 2003 N.C. Sess. Laws ch. 101).

The trial court granted defendants' motion in limine on 22 September 2003. Plaintiffs rested their case-in-chief on 29 September 2003. Defendants presented their evidence on 29 and 30 September 2003. Plaintiffs offered no rebuttal evidence. The trial court conducted the charge conference and counsel made their final arguments to the jury on 30 September 2003. On 1 October 2003 the trial court instructed the jury, the jury deliberated, and returned its verdict. At no time during the trial did plaintiffs attempt to present the evidence, which was the subject of the motion in limine, to the jury. Plaintiffs did not move to reopen the evidence. The only ruling upon this evidence was made on 22 September 2003. As such, the ruling is governed by the previous version of Rule 103(a)(2) of the Rules of Evidence and not the version applicable to rulings made on or after 1 October 2003. By failing to offer this evidence at trial, plaintiffs failed to preserve this issue on appeal. This argument is without merit.

Evidence Code, Ch. 8C

Rule 103. Rulings on evidence.

- Once the court makes a **definitive** ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

State v. Barber

120 NC App 505 (1995)

- He (the judge) deferred his decision on the matter until such time as the facts and context would allow him to make a well-reasoned decision
- In this case, the trial court used a fair and balanced approach to the issue. At the beginning of the trial the court stated:
 - It's difficult for me to rule on what the evidence is going to be until I've heard what the evidence is. I don't know what the evidence in this case is . . . so at this point I don't think I'm in any position to rule whether or not it's admissible So we'll defer it until a later session. We can bring it up, either side may bring it up at a later time out of the presence of the jury. And we'll discuss it further when we get further along in the case.
 - Well, sir, the rules permit 404(b) type information be received if it meet [sic] certain criteria. But until it is asked, I don't see how I can rule one way or the other. If it's admissible then I would admit it. And if it is not admissible, then I will not allow it to be admitted.
 - The State at this point has not tried to introduce it in its case in chief. So the issue as anticipated at the beginning of the trial, or the motions in limine, have not arisen. But at this point I don't feel that I can give you a definitive ruling as to whether or not questions about those cases would be permitted. But we would certainly hear it out of the presence of the jury first if it should be elicited.
- "The Rules of Evidence are not to be applied in a vacuum; they are to be applied in a factual context. A trial court makes its decisions as that factual context unfolds and as the circumstances warrant."

Motions in Limine

- Pretrial rulings often expedite case
- Examine to see if the motion presents a real issue for trial, or if it is just an attempt to clutter the record with hard rulings which would otherwise be mooted
- Some require a full development of context before the balancing of relevancy against prejudice can be made

Motions in Limine

- If you are not the trial judge, consider requiring the motion to be heard by the trial judge
- Look to see whether the motions are the type that should be allowed as a matter of law, and give counsel an opportunity to agree
- Keep a record or list for yourself

Discussion Scenarios

1. Handling the motion calendar
2. Motion to Amend Problem
3. Discovery Problems
 1. Motion to Compel
 2. Motion for Protective Order
 3. Motion for Sanctions
4. Summary Judgment Problem

Calendar Control

- You arrive in court and are presented with a five page calendar
- Mixed in are the following
 - 4 motions to dismiss 15 minutes each
 - 1 motion to dismiss 30 min.
 - 1 motion to dismiss 1 hr
 - 6 motions to withdraw, 5 min. each
 - 2 motions for summary judgment, 30 min
 - 3 motions to amend, 5 min. each
 - 1 motion to amend, 1 hr.
 - 1 motion for summary judgment, 2 hrs
 - 4 motions to compel, 30 min
 - 1 motion to compel, sanctions, protective order, 1hr
 - 1 motion in limine, 1 hr

Calendar Control

Here is one way to do it efficiently:

As you call the calendar,

1. mentally divide the cases into groups by time: 5, 15, 30, 1hr, more;
2. note "H" (hearing) for cases requiring hearings, "C" for matters continued, "S" for matters settled, "O" for matters left open,
3. note time required everyone says the matter will require, and
4. note a sequential number you can organize and keep up with easily. For example begin with:
 - 1- = 5 minutes, summary matters
 - 200- = 15 minutes to thirty minutes
 - 300- = 30 minutes to an hour
 - 400- = 1 hr or more
5. I usually announce the order of hearings in the 5 minute group as I go through the calendar telling the lawyers "this will be the first, second or third matter heard," and so on; and then go back through the second group, then through the third, then the fourth. That way you can give them a real sequential setting. Since they have heard the discussions which inevitably occur as you call the calendar, everybody should be on the same page with an idea of when the case will come up.
6. This process will reorganize the calendar as follows:

Calendar Control

- 6 motions to withdraw, 5 min. each, if unopposed hear it while you call the calendar
- 3 motions to amend, 5 min. each: during call of calendar if any are unopposed
- 4 motions to dismiss 15 minutes each
- 4 motions to compel, 30 min

Somewhere along here, it will become apparent what can not be heard during the morning and you can start releasing people further down the list.

- 1 motion to dismiss 30 min.
- 2 motions for summary judgment, 30 min
- 1 motion to compel, sanctions, protective order, 1hr
- 1 motion to amend, 1 hr.
- 1 motion to dismiss 1 hr
- 1 motion for summary judgment, 2 hrs
- 1 motion in limine, 1 hr, but have discussion and if it is an issue which should be heard by trial judge, move up near top.

An Example
of
Your Calendar

Your County
Your Civil Court
Civil Motion Calendar

1	Party v Party Summary Judgment	2 hrs
2	Party v Party Motion to Withdraw	5 min
3	Party v Party M. to Dismiss	15 min
4	Party v Party Motion for Protective Order	15 min
5	Party v Party Motion to Compel	30 min
6	Party v Party Motion to Compel	5 min
7	Party v Party Motion for Protective Order	20 min
8	Party v Party Motion for Sanctions	2 hours
9	Party v Party Motion to Compel/Prot. Ord	45 min
10	Party v Party Motion to Dismiss	30 min
11	Party v Party Motion in Limine	30 min
12	Party v Party Motion for Summary Judgment	30 min
13	Party v Party Motion for Summary Judgment	1 hr
14	Party v Party Motion to Compel	15 min
15	Party v Party Motion to Withdraw	30 min

Your County
Your Civil Court
Civil Motion Calendar

7 400	13	1	Party v Party Summary Judgment	2 hrs
7 1	1	2	Party v Party Motion to Withdraw	5 min
e		3	Party v Party M. to Dismiss	15 min
o		4	Party v Party Motion for Protective Order	15 min
7 300	7	5	Party v Party Motion to Compel	30 min
7 2	2	6	Party v Party Motion to Compel	5 min

# 200	5	7	Party v Party Motion for Protective Order	20 min	
# 400	11	8	Party v Party Motion for Sanctions	2 hours	1 hr
# 300	8	9	Party v Party Motion to Compel/Prot. Ord	45 min	
# 300	9	10	Party v Party Motion to Dismiss	30 min	
# 3	3	11	Party v Party Motion in Limine	30 min	5 min
# 300	10	12	Party v Party Motion for Summary Judgment	30 min	
# 400	12	13	Party v Party Motion for Summary Judgment	1 hr	
# 200	6	14	Party v Party Motion to Compel	15 min	
# 4	4	15	Party v Party Motion to Withdraw	30 min	5 min

# 400 13	13	1	Party v Party Summary Judgment	2 hrs	
# 1	1	2	Party v Party Motion to Withdraw	5 min	
0		3	Party v Party M. to Dismiss	15 min	
0		4	Party v Party Motion for Protective Order	15 min	
# 300 7	7	5	Party v Party Motion to Compel	30 min	
# 2	2	6	Party v Party Motion to Compel	5 min	
# 200 5	5	7	Party v Party Motion for Protective Order	20 min	
# 400 11	11	8	Party v Party Motion for Sanctions	2 hours	1 hr
# 300 8	8	9	Party v Party Motion to Compel/Prot. Ord	45 min	
# 300 9	9	10	Party v Party Motion to Dismiss	30 min	
# 3	3	11	Party v Party Motion in Limine	30 min	5 min
# 300 10	10	12	Party v Party Motion for Summary Judgment	30 min	
# 400 12	12	13	Party v Party Motion for Summary Judgment	1 hr	
# 200 6	6	14	Party v Party Motion to Compel	15 min	
# 4	4	15	Party v Party Motion to Withdraw	30 min	5 min

Calendar Control

- Be aware of local custom and practice
- Be aware that some districts may have local rules that affect calendar calls:

Wake: 3.4 The calendar request for motions and judicial approval of minor settlements shall be filed with the Trial Court Administrator and mailed to all opposing counsel at least six weeks before the beginning of the requested session. In the calendar request, an attorney may ask that a motion be set only on a specified day. Mailing by the Clerk of the calendar as provided in Local Rule 2.5, designating a motion to be heard on a specified day and time, constitutes notice of hearing on the motion and further notice is not required unless the date and time of the hearing is changed. In exigent circumstances, the Trial Court Administrator may set a motion for hearing at any time, so long as notice requirements of G.S. §1A-1, Rule 6(d) are satisfied or all parties consent.

Rules from Nash County:

6. The Clerk of Court in each county shall place matters on the court calendar in the following order:

First: Uncontested matters calendared in the order in which the calendar requests were filed with the clerk.

Second: Cases in which the parties have not agreed upon the court date in the order. This hearing is for the setting of a trial date only.

Third: Motions certified on the calendar request not to require more than ten minutes for hearing.

Fourth: Cases in which a hearing is required within a specified time pursuant to statute or court order including but not limited to Chapter 50B and restraining orders. A motion must be made on the calendar request that this section is applicable.

Fifth: Motions and pre-trial conferences.

Sixth: Small claims appeals and other matters.

Seventh: Peremptory settings.

Eighth: Cases in which the parties have agreed upon the court date, or there was no answer or other appearance made by the opposing party, in the order the calendar requests were filed with the clerk, including cases continued from prior court dates. The earlier court date shall stand as the "filing date" for purpose of place on the calendar unless otherwise ordered.

7. **The presumption shall be that matters will be heard in the order calendared. However, the presiding judge shall determine the order of trial at the calendar call.**

Calendar Control

- Local Rules are now easily accessible at www.nccourts.org:

<http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Default.asp>

Motion to Amend

- Complaint alleges accident producing injury which occurred in 2001, six years before the filing of the lawsuit
- Answer pled Statute of Limitations and contains 12(b)(6)
- Parties are now before you on plaintiff's motion to amend
 - to allege that plaintiff was still under treatment for her permanent injuries and had major surgery six months before the lawsuit was filed for complications from the accident; and
 - to add a claim for punitive damages because defendant had driven impaired at the time.
- Assume no other motions have yet been filed by either party. How do you rule?
- Assume the motion to amend was filed after defendant calendared for hearing the motion to dismiss under 12(b)(6). Any difference?

The Motion to Compel

- Request for Production of Documents asked for all medical records in personal injury case
- No response, no objection, time passed
- On eve of hearing, respondent claimed privilege & asked orally for a protective order

The Motion to Compel II

- Same facts except you notice that the attorneys seem to be extremely oppositional and refuse to talk to each other, and as you read the motion to compel it lacks any certificate of "good faith" as required in Rule 37
- Rule 37(a)(2) "The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action."

The Motion to Compel III

Same facts except one of the interrogatories/request for documents included "any statement prepared by you and provided to anyone, including your attorney, summarizing the events occurring on the date of the incident."

Motion for Sanctions

- Order to compel was allowed, and Plaintiff was given 30 days to produce records, with no production of the records
- Motion for sanctions served 7 days before hearing
- Parties appear, respondent says he can have them in a week, asks for "more time"
- Movant says he wants a hearing "right now" because he thinks the complaint should be dismissed with prejudice

Motion for Sanctions II

- Assume the matter was continued, and plaintiff still has not produced the record
- Issue is now back before the court for sanctions, plaintiff says he did not think it was fair to require production in the first place
- Defendant asks for sanctions in the discretion of the court and attorney fees

Summary Judgment

- Complaint alleges Accident and injuries occurred 5 years ago
- Complaint filed this year for PI
- Answer denied negligence and pled statute of limitations
- Ruling?
- Now Plaintiff "Excepts" and demands that the court make findings of fact.

Summary Judgment II

- Same circumstances except plaintiff shows up on the morning of the hearing with an affidavit from victim with an admission of negligence and a copy of a waiver of the statute of limitations signed 2 years after the date of the accident.
- Defendant objects to affidavit

Motion to Dismiss 12(b)(6)

- Simple case alleging trespass
- Answer denied trespass, claims ownership under a specific deed
- At the hearing, plaintiff presents an affidavit without objection supporting his title by deed from defendant postdating the deed cited in the answer
- At the hearing defendant wants to testify. Do/Can you allow him to do so?
- Assume you allow him to testify and under cross he admits the deed and admits it is valid.
- Do you allow or deny the motion, and what difference does it make on these facts?

Motion for protective order

- Plaintiff has asked for defendant's medical records for the past two years
- Defendant objects, claiming medical privilege and denies relevancy; and asks for protective order
- Defendant does not calendar his motion
- Plaintiff files motion to compel and motion for sanctions
- It is now all before you.

Protective Orders

- Same facts, except at the hearing defendant claims records are protected under HIPAA and specifically requests that the court issue a protective order
- What do you do?

HIPAA Protective Order

- It appearing to the satisfaction of the court that medical records which have been sought in the attached subpoena are discoverable in a pending case within this district, and that the production of those records should be required as permitted in the Health Insurance Portability and Accountability Act (H.I.P.A.A.) and the implementing regulations (45 C.F.R. Sec. 164-512(e)(1)(i) et seq.
- IT IS THEREFORE ORDERED that the person or organization to whom the attached subpoena is directed, which subpoena is incorporated herein as though fully set out, shall disclose to the requesting party the information sought therein subject to the following restrictions as required in 45 C.F.R. Sec 164-512(e)(1)(v)(A) and (B):
 1. The requesting party and counsel upon receipt of the protected records is prohibited from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which the information is being requested, and
 2. Shall return to the provider or destroy the protected health information and all copies made at the end of this litigation or proceeding for which they are sought

Motion in Limine

- Before the start of the trial, defendant presents a group of twenty four "motions in limine."
- First is to prevent plaintiff from asking any questions of the jury "intended or calculated to stake the jurors out."
- Second is to prevent plaintiff's witness from testifying about the speed of the defendant's vehicle immediately before the collision.

Remember: STANDARD OF REVIEW

ABUSE OF DISCRETION

RESOURCES

- *Howell's Shuford N.C. Civ. Prac. & Proc.*, (4th ed. 1992)
- BENCHBOOK, Civil, Pretrial Sections (contains sanctions chart)
- GS 1A *Annotated*, Rules 26 ff.
- E-Discovery Decision: Decision by Judge Tennille at <http://www.ncbusinesscourt.net/opinions/2006%20NCBC%2014.htm>
- E-Discovery, background: *Electronic Discovery and the Challenge of Rulemaking in the State Courts*, Pound Civil Justice Institute, 2005 Forum for State Appellate Court Judges. (Justice Mk.Martin, Hudson, Hunter, Jackson, Steelman, Tyson; Judge Hugh Campbell)