

**Pre-Trial Motions Practice**  
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**Depositions Before Trial &  
Pending Appeal**

**Motions In Limine**

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**Depositions Before Action or Pending  
Appeal**

- N.C. R. Civ. P. 27 – Vests trial court with jurisdiction and establishes procedure
- Rule 27(a) permits pre-suit depositions
- Rule 27(b) permits depositions pending appeal

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**Deposition Before Action  
is Filed**

- Available when “perpetuation of testimony may prevent a failure or delay of justice.”  
N.C. R. Civ. P. 27(a)(3)

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**Procedure – N.C. R. 27(a)(1)**

- File notice of hearing and verified petition with court in county where any expected adverse party lives

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**Procedure – N.C. R. 27(a)(1)**

Petition must be entitled in petitioner’s name and show:

- Expects to be party to lawsuit but can’t file or cause suit to commence
  
- Subject matter of expected action and petitioner’s legal interest

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### Petition

- Facts petitioner desires to establish by proposed testimony
- Names and addresses of expected adverse parties
- Names and addresses of deponents, and substance of expected testimony

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### Service and Notice of Petition

- Must serve all expected adverse parties
  - At least 20 days before hearing
  - In manner per N.C. R. Civ. P. 4(j) (1), (2) for service of summons
- Not required to serve proposed deponents with petition or notice of hearing

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### Court may:

- Expedite hearing to less than 20 days after service
- Permit service by publication if necessary but must appoint attorney to represent those served by publication
- Must also appoint Guardian ad litem per N.C. R. Civ. P. 17(c) for adverse party minor or incompetent

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### Burden of Proof at Hearing

- If Court “is satisfied that the perpetuation of the testimony *may* prevent a failure or delay of justice, it *shall* make an order....” N.C. R. Civ. P. 27(a)(3)(emphasis added)
- e.g. Deponent is:
  - In poor health or aged
  - Deploying overseas or moving out of state

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### Burden of Proof at Hearing

- Simply gathering information to file complaint insufficient
- Rule amended in 1975 to eliminate that as acceptable purpose
- Show special circumstance that may result in evidence being lost

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### Order Granting Petition

- Identify deponents
- Specify subject matter
- Specify whether depositions are upon oral or written questions

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### May Also Make Orders

- “of the character provided for by Rules 34 and 35...”:
  - Document production, entry upon land for inspection
  - Physical and mental examinations

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### Inspection Without Deposition?

- Purpose of rule: To avoid loss of relevant discovery

Fed. Rule 27 permits discovery of documents, inspection, entry upon land, even without deposition *Martin v. Reynolds*, 5 Fed. R. Serv. 2d 467, 297 F. 2d 49 (1961)

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### Deposition May Be Used

- In any action in North Carolina courts involving same subject matter to same extent as other depositions under Rule 32(a)

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### Deposition May Be Used

Even if deposition was not taken under Rule 27 (e.g. taken out of state), it may still be used in North Carolina courts if it would be admissible in Federal Court or the state where it was taken

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### Depositions Pending Appeal

- For use if further trial proceedings follow appeal

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### Depositions Pending Appeal – May Be Allowed

- After an appeal has been taken or petition for review or cert served and filed; or
- Also before appeal or petition filed if time for those events hasn't expired

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### Procedure

- File petition with trial court
- Petition must show names and addresses of the persons to be examined, the substance of the expected testimony, and why testimony is needed. N.C. R. Civ. P. 27(b)

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### Petition – Service and Notice

- Use same notice and service methods as if case were pending in trial court. N.C. R. Civ. P. 27(b)

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### Burden of Proof

- “If the court finds that perpetuation of the testimony is proper to avoid a failure or delay of justice, it *may* make an order...” N.C. R. Civ. P. 27(b)(emphasis added)

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### Different Standards

- If Court “is satisfied that the perpetuation of the testimony *may* prevent a failure or delay of justice, it *shall* make an order...” Rule 27(a)
- If Court “finds that perpetuation of the testimony is proper to avoid a failure or delay of justice, it *may* make an order...” Rule 27(b)

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### If Petition Granted

- Court may also make orders of the character provided for by Rules 34, 35
- Depositions may be taken and used as prescribed by Rules of Civil Procedure

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### Standard of Review

- Denial of petition immediately appealable - loss of evidence constitutes denial of substantial right
  - Grant of petition is interlocutory
  - Standard is abuse of discretion
- Bryte v. American Household 142 Fed. Appx. 699 (2005)

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**Motions in Limine**

Pre-trial request that certain inadmissible evidence not be referred to or offered at trial

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**N.C. R. Evid. 104**

N.C. R. Evid. 104 - Preliminary questions concerning the admissibility of evidence shall be determined by the court

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**Service – Does Rule 6 Apply?**

N.C. R. Civ. P. 6(d) Time - Written motions shall be served at least five days before hearing

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N.C. R. Civ. P. 7(b)(1)

Application for order “shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing...”

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N.C. R. Civ. P. 7(b)(1)

Motions don't need to be in writing when made:

- During hearing or trial; or
- At session of court in which case is calendared

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If motion *doesn't have to be* in writing per Rule 7(b)(1):

- 5 day notice requirement per Rule 6 doesn't apply
- Even if movant chooses to serve written motion *Sims v. Oakwood Trailer*, 18 N.C. App. 726, 198 S.E.2d 73 (1973)

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*Sims v. Oakwood Trailer*

- Defendant served motion to dismiss on day case calendared for trial – no advance notice
- Court granted dismissal
- Plaintiff appealed – defense should have filed written motion 5 days in advance per Rule 6

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*Sims v. Oakwood Trailer*

- Per Rule 7(b)(1), motion doesn't have to be in writing if made during session at which case is on calendar
- Fact that defendant chose to put motion in writing doesn't matter
- Writing wasn't mandatory, so Rule 6 doesn't apply

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*Wood v. Wood*

- Where motion is properly made under Rule 7, party is charged with constructive notice of all orders and motions made during session of court in which case is calendared
- Actual notice not required

*Wood v. Wood, 297 NC 1, 252 SE2d 799 (1979)*

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### Rule 6 Doesn't Apply

Motions in limine are almost always made

- during hearing, trial or session when case calendared
- Rule 6 doesn't apply (whether movant chooses to present motion orally or in writing)

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### Motions in Limine Not Appealable

“On appeal, the issue is not whether the granting or denying of the motion *in limine* was error, as that issue is not appealable...”,  
*Southern Furniture v. BB&T*, 136 N.C.App. 695, 526 S.E.2d 197 (2000)(emphasis added)

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### Motions in Limine Not Appealable

“...instead [the issue on appeal is] whether the evidentiary rulings of the trial court, *made during the trial*, are error.”

*Southern Furniture* (emphasis added)

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### Rationale

Rulings on motions in limine are preliminary and subject to change during trial, depending on actual evidence offered at trial

*Hamilton v. Thomasville Medical Associates, Inc.*, 654 S.E.2d 708 (N.C. Ct. App. 2007)

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### Preserving For Appeal

Objection on record after ruling on motion in limine is insufficient to preserve issue for appeal

*Evans v. Family Inns of America, Inc.*, 141 N.C. App. 520, 540 S.E.2d 46 (2000)

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### Preserving for Appeal

Where motion in limine to exclude evidence is denied, movant must object when evidence offered at trial (not *just* when court rules on motion in limine)

*Martin v. Benson*, 348 N.C. 684, 500 S.E.2d 664 (1998)

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### Preserving For Appeal

Where motion in limine is granted, non-movant must attempt to introduce evidence at trial (e.g. offer of proof).

*Martin v. Benson*, 348 N.C. 684, 500 S.E.2d 664 (1998)

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### Conflict With N.C. R. Evid. 103(a)(2)

Rule 103(a)(2) (Rulings on Evidence) – Once court makes definitive ruling admitting or excluding evidence, *either at or before trial*, a party need not renew objection or offer of proof to preserve a claim of error for appeal. (emphasis added).

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### N.C. Supreme Court – Rule 103(a)(2) Doesn't Apply

Trial court's evidentiary ruling on pretrial motion *not* sufficient to preserve issue of admissibility for appeal, unless party renews objection at trial

*State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)

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*State v. Oglesby*

- N.C. R. Evid. 103(a)(2) conflicts with Rules of Appellate Procedure
- NC Constitution gives Supreme Court final authority on appellate procedure
- N.C. R. Evid. 103(a)(2) violates separation of powers, unconstitutional

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To Properly Preserve

- Objection on the record after ruling on motion in limine insufficient
- Object when evidence is offered; or
- Make offer of proof during trial

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Standard of Review

When issue of admissibility of evidence is properly preserved –  
 No reversal in absence of abuse of discretion  
*Katy v. Capriola*, 742 S.E.2d 247, 255-256  
 (N.C. Ct. App. 2013)

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### Bottom Line

- Absent stipulation or order of court, unlimited number of evidentiary motions can be served without notice on morning of trial

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### Alternatives

- Stipulation – Be prepared to abide by it
- Rule 16 (Pre-trial procedure; formulating issues) – In its discretion, Court can order discovery conference to consider wide range of issues, including “such other matters...”

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### Alternatives

- Rule 26 – Amended in 2011
- If requested, attorneys must hold discovery meeting within 21 days
  - Discovery plan must be submitted to court
  - If no agreement, joint report must be submitted and parties must appear before court for discovery conference

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## Alternatives

Rule 26 – Amended in 2011

- Unclear to whom discovery plan or joint report must be submitted (Sr. Resident Judge?)

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## Alternatives

Always Check the Local Rules!

- Do they impose more stringent notice requirements than Rules of Civil Procedure?
- e.g. Rule 56 requires 10 days' notice
- Some local rules require 20 days' notice

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