

Expert Discovery

Author : Jeff Welty

Categories : [Procedure](#), [Uncategorized](#)

Tagged as : [discovery](#), [expert testimony](#), [expert witnesses](#)

Date : August 10, 2011

For a variety of reasons, I've spent some time recently looking at expert discovery in criminal cases. I thought I'd put together a short summary of the law.

The discovery statutes impose identical obligations on the parties regarding their experts. Each side must give notice to the other of any expert witnesses that it "reasonably expects to call." The witness must prepare, and the party must disclose, a "report of the results of any examinations or tests conducted by the expert." The party must also disclose "the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion." This must be done "within a reasonable time prior to trial, as specified by the court." G.S. 15A-903(a)(2) (state); G.S. 15A-905(c)(2) (defense).

Several issues may arise regarding expert discovery. The first concerns timing. Often, a judge will enter a scheduling order mandating the exchange of expert discovery by a certain date. Absent such an order, what is a "reasonable time prior to trial"? The leading case is *State v. Cook*, 362 N.C. 285 (2008), a second-degree murder case arising out of an impaired driving accident. The state retained an expert to perform a retrograde analysis of the defendant's blood alcohol content. The witness completed his report five weeks prior to trial, but the state only identified the expert and provided his CV five days (three working days) before trial, and did not provide his report until three days (one working day) prior to trial. The defendant sought a continuance based on the late disclosure, but the trial court denied the motion. The state supreme court eventually reviewed the case, and held that the trial court had erred, though it found the error to have been harmless. The court found that the defendant was unfairly surprised by the timing of the disclosure, because he "had just a weekend to find his own expert in this field and to decide whether to call such a witness to counter the State's evidence." Thus, *Cook* suggests that disclosure just a few days before trial may be inadequate, and that the adequacy of discovery should be measured by whether the discovery provides sufficient notice to prevent surprise and to allow the opposing party to prepare to meet the evidence in question. *See also generally* *State v. Greene*, 2010 WL 3465328 (N.C. Ct. App. Sept. 7, 2010) (unpublished) (state's disclosure of expert witnesses during jury selection was untimely, but two-day continuance to allow defendant to prepare was sufficient remedy).

The second issue that arises frequently with respect to experts is how much detail a party must provide when describing the expert's opinion and its basis. Few, if any, North Carolina cases speak directly to this issue. (There's an interesting body of federal cases on point, but the cases don't all agree on the proper analysis, so I don't think that they provide much guidance, in the end.) However, the courts' emphasis on preventing unfair surprise suggests that the disclosure must provide enough detail to allow the opposing party to prepare to meet the expert's testimony, whether by cross examination or by presenting an expert of its own.

Finally, issues may arise concerning the proper remedy for a violation of the expert discovery statutes. Several options are available under G.S. 15A-910, including granting a continuance to allow the surprised party additional time to prepare; prohibiting the introduction of the evidence in question; or granting a mistrial or even a dismissal. However, when the violation is due to the conduct of an expert – rather than a party – the court's options are limited by *State v. Gillespie*, 362 N.C. 150 (2008). In *Gillespie*, the trial judge ordered the parties to exchange reports from their mental health experts two weeks before trial. The defendants' experts failed to produce their reports in a timely fashion, so the

trial judge sanctioned the defendant by prohibiting him from calling the experts. On review, the supreme court ordered a new trial, ruling that G.S. 15A-910 only allows the court to sanction parties for their own discovery violations, not for violations committed by third parties, which is how it viewed the defendants' experts.

If there are other recurrent issues concerning expert discovery, I'd like to know about them. I'm writing something more formal on the subject, and your feedback would help me improve that product.