

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

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HOUSE BILL 376
PROPOSED COMMITTEE SUBSTITUTE H376-PCS40419-RN-15

Short Title: Civ Pro/Modernize Expert Discovery.

(Public)

Sponsors:

Referred to:

March 30, 2015

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING THE RULES OF CIVIL PROCEDURE TO MODERNIZE
3 DISCOVERY OF EXPERT WITNESSES AND CLARIFYING EXPERT WITNESS
4 COSTS IN CIVIL ACTIONS.

5 The General Assembly of North Carolina enacts:

6 SECTION 1. Chapter 1A-1, Rule 26(b) of the Rules of Civil Procedure, is
7 amended by adding a new subdivision to read:

8 "(b) Discovery scope and limits. – Unless otherwise limited by order of the court in
9 accordance with these rules, the scope of discovery is as follows:

10 ...

11 (4a) Trial Preparation; Discovery of Experts. – Discovery of facts known and
12 opinions held by experts, that are otherwise discoverable under the
13 provisions of subdivision (1) of this subsection and acquired or developed in
14 anticipation of litigation or for trial, may be obtained only as provided by
15 this subdivision:

16 a. 1. In General. – In order to provide openness and avoid unfair
17 tactical advantage in the presentation of a case at trial, a party
18 must disclose to the other parties in accordance with this
19 subdivision the identity of any witness it may use at trial to
20 present evidence under Rule 702, Rule 703, or Rule 705 of
21 the North Carolina Rules of Evidence.

22 2. Witnesses Providing a Written Report. – The parties shall
23 have the option, in connection with the disclosures required
24 by this subdivision, of accompanying the disclosure with a
25 written report prepared and signed by the witness if the
26 witness is one retained or specifically employed to provide
27 expert testimony in the case or one whose duties as the party's
28 employee regularly involve giving expert testimony. If the
29 parties agree to accompany their disclosure pursuant to this
30 subdivision with a written report, the report must contain all
31 of the following:

32 I. A complete statement of all opinions the witness will
33 express and the basis and reasons for them.

34 II. The facts or data considered by the witness in forming
35 them.



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- 1 III. Any exhibits that will be used to summarize or
- 2 support them.
- 3 IV. The witness' qualifications, including a list of all
- 4 publications authored in the previous 10 years.
- 5 V. A list of all other cases in which, during the previous
- 6 four years, the witness testified as an expert at trial or
- 7 by deposition.
- 8 VI. A statement of the compensation to be paid for the
- 9 study and testimony in the case.
- 10 3. Witnesses Not Providing Expert Reports. – Unless otherwise
- 11 stipulated to by the parties, or ordered by the court, a party
- 12 may through interrogatories require any other party to
- 13 identify each person whom the other party expects to call as
- 14 an expert witness at trial, to state the subject matter on which
- 15 the expert is expected to testify pursuant to Rule 702, Rule
- 16 703, or Rule 705 of the North Carolina Rules of Evidence and
- 17 to state the substance of the facts and opinions to which the
- 18 expert is expected to testify and a summary of the grounds for
- 19 each opinion.
- 20 b. Depositions. –
- 21 1. Depositions of an Expert Who May Testify. – A party may
- 22 depose any person who has been identified as an expert
- 23 pursuant to this subdivision, with such deposition to be
- 24 conducted after any written report is provided or
- 25 identification by response to interrogatory has been made
- 26 pursuant to sub-subdivision f. of this subdivision.
- 27 2. Expert Employed Only for Trial Preparation. – Ordinarily, a
- 28 party may not, by interrogatories or deposition, discover facts
- 29 known or opinions held by an expert who has been retained
- 30 or specially employed by another party in anticipation of
- 31 litigation or to prepare for trial and who is not expected to be
- 32 called as a witness at trial. But a party may take such
- 33 discovery only:
- 34 I. As provided in Rule 35(b); or
- 35 II. On showing exceptional circumstances under which it
- 36 is impracticable for the party to obtain facts or
- 37 opinions on the same subject by other means.
- 38 c. Payment. – Unless manifest injustice would result and absent court
- 39 order, the party seeking discovery under sub-subdivision b. of this
- 40 subdivision shall pay the expert a reasonable fee for the time spent at
- 41 that expert's deposition.
- 42 d. Trial Preparation Protection for Draft Reports or Disclosures. –
- 43 Drafts of reports provided under sub-sub-subdivision a.2. of this
- 44 subdivision are protected from disclosure and are not discoverable
- 45 regardless of the form in which the draft is recorded.
- 46 e. Trial Preparation Protection for Communications Between a Party's
- 47 Attorney and Expert Witness. – Communications between a party's
- 48 attorney and any witness providing a report pursuant to
- 49 sub-sub-subdivision a.2. of this subdivision or identified under
- 50 sub-sub-subdivision a.3. of this subdivision, regardless of the form of

1 the communication, are protected from disclosure and are not
 2 discoverable, except to the extent that the communications:
 3 1. Relate to compensation for the expert's study or testimony;
 4 2. Identify facts or data that the party's attorney provided and
 5 that the expert considered in forming the opinions to be
 6 expressed; or
 7 3. Identify assumptions that the party's attorney provided and
 8 that the expert relied on in forming the opinions to be
 9 expressed.

10 f. Time to Disclose Expert Witness Testimony. – Parties agreeing to
 11 the submission of written reports pursuant to sub-sub-subdivision a.2.
 12 of this subdivision or parties otherwise seeking to obtain disclosure
 13 as set forth herein by interrogatory shall, unless otherwise stipulated,
 14 set by scheduling order or otherwise ordered by the court, serve such
 15 written report or in the case of no agreement on the submission of
 16 written reports, interrogatory:

- 17 1. At least 90 days before the date set for trial or the case to be
 18 ready for trial; or
- 19 2. If the evidence is intended solely to contradict or rebut
 20 evidence on the same subject matter identified by another
 21 party under sub-subdivision a. of this subdivision, within 30
 22 days after the other party's disclosure. If a party fails to
 23 provide timely disclosure under this rule, the court may, upon
 24 motion, take such action as it deems just, including ordering
 25 that the party may not present at trial the expert witness for
 26 whom disclosure was not timely made.

27 The notice requirements of this sub-subdivision shall not apply if
 28 neither party had less than 120-days notice of the trial date.

29 g. Supplementation. - The parties must supplement these disclosures
 30 when required under subsection (e) of this rule."

31 **SECTION 2.** G.S. 7A-314(d) reads as rewritten:

32 "(d) ~~An~~ Subject to the specific limitations set forth in G.S. 7A-305(d)(11), an expert
 33 witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive
 34 such compensation and allowances as the court, or the Judicial Standards Commission, in its
 35 discretion, may authorize. A law-enforcement officer who appears as an expert witness shall
 36 receive reimbursement for travel expenses only, as provided in subsection (b) of this section.
 37 Compensation of experts acting on behalf of the court or prosecutorial offices shall be paid in
 38 accordance with the rules established by the Administrative Office of the Courts.
 39 Compensation of experts provided under G.S. 7A-454 shall be in accordance with rules
 40 established by the Office of Indigent Defense Services."

41 **SECTION 3.** This act becomes effective October 1, 2015. Section 1 applies to
 42 claims pending on or after that date. Section 2 applies to motions or applications for costs filed
 43 on or after that date.