

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2015

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HOUSE BILL 376  
Committee Substitute Favorable 4/21/15  
PROPOSED SENATE COMMITTEE SUBSTITUTE H376-PCS40479-TG-36

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.** G.S. 1A-1, Rule 26(b)(4) reads as rewritten:

7 "(4) ~~Trial Preparation; Experts.—Discovery of facts known and opinions held by~~  
8 ~~experts, otherwise discoverable under the provisions of subsection (b)(1) of~~  
9 ~~this rule and acquired or developed in anticipation of litigation or for trial,~~  
10 ~~may be obtained only as follows:~~ Trial Preparation; Discovery of Experts. —  
11 Discovery of facts known and opinions held by experts, that are otherwise  
12 discoverable under the provisions of subdivision (1) of this subsection and  
13 acquired or developed in anticipation of litigation or for trial, may be  
14 obtained only as provided by this subdivision:

15 a. 1. ~~A party may through interrogatories require any other party to~~  
16 ~~identify each person whom the other party expects to call as~~  
17 ~~an expert witness at trial, to state the subject matter on which~~  
18 ~~the expert is expected to testify, and to state the substance of~~  
19 ~~the facts and opinions to which the expert is expected to~~  
20 ~~testify and a summary of the grounds for each opinion.~~

21 2. ~~Upon motion, the court may order further discovery by other~~  
22 ~~means, subject to such restrictions as to scope and such~~  
23 ~~provisions, pursuant to sub-subdivision (b)(4)b. of this rule,~~  
24 ~~concerning fees and expenses as the court may deem~~  
25 ~~appropriate.~~

26 b. ~~Unless manifest injustice would result, (i) the court shall require that~~  
27 ~~the party seeking discovery pay the expert a reasonable fee for time~~  
28 ~~spent in responding to discovery under subdivision (b)(4)a.2. of this~~  
29 ~~rule; and (ii) with respect to discovery obtained under subdivision~~  
30 ~~(b)(4)a.2. of this rule the court may require the party seeking~~  
31 ~~discovery to pay the other party a fair portion of the fees and~~  
32 ~~expenses reasonably incurred by the latter party in obtaining facts~~  
33 ~~and opinions from the expert.~~

34 a. 1. In general. — In order to provide openness and avoid unfair  
35 tactical advantage in the presentation of a case at trial, a party



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- 1 must disclose to the other parties in accordance with this  
2 subdivision the identity of any witness it may use at trial to  
3 present evidence under Rule 702, Rule 703, or Rule 705 of  
4 the North Carolina Rules of Evidence.
- 5 2. Witnesses providing a written report. – The parties shall have  
6 the option, in connection with the disclosures required by this  
7 subdivision, of accompanying the disclosure with a written  
8 report prepared and signed by the witness if the witness is one  
9 retained or specifically employed to provide expert testimony  
10 in the case or one whose duties as the party's employee  
11 regularly involve giving expert testimony. If the parties agree  
12 to accompany their disclosure pursuant to this subdivision  
13 with a written report, the report must contain all of the  
14 following:
- 15 I. A complete statement of all opinions the witness will  
16 express and the basis and reasons for them.
- 17 II. The facts or data considered by the witness in forming  
18 them.
- 19 III. Any exhibits that will be used to summarize or  
20 support them.
- 21 IV. The witness' qualifications, including a list of all  
22 publications authored in the previous 10 years.
- 23 V. A list of all other cases in which, during the previous  
24 four years, the witness testified as an expert at trial or  
25 by deposition.
- 26 VI. A statement of the compensation to be paid for the  
27 study and testimony in the case.
- 28 3. Witnesses not providing expert reports. – Unless otherwise  
29 stipulated to by the parties, or ordered by the court, a party  
30 may through interrogatories require any other party to  
31 identify each person whom the other party expects to call as  
32 an expert witness at trial, to state the subject matter on which  
33 the expert is expected to testify pursuant to Rule 702, Rule  
34 703, or Rule 705 of the North Carolina Rules of Evidence and  
35 to state the substance of the facts and opinions to which the  
36 expert is expected to testify and a summary of the grounds for  
37 each opinion.
- 38 b. Depositions. –
- 39 1. Depositions of an expert who may testify. – A party may  
40 depose any person who has been identified as an expert  
41 pursuant to this subdivision, with such deposition to be  
42 conducted after any written report is provided or  
43 identification by response to interrogatory has been made  
44 pursuant to sub-subdivision f. of this subdivision.
- 45 2. Expert employed only for trial preparation. – Except as  
46 otherwise provided in this sub-sub-subdivision, a party may  
47 not, by interrogatories or deposition, discover facts known or  
48 opinions held by an expert who has been retained or specially  
49 employed by another party in anticipation of litigation or to  
50 prepare for trial and who is not expected to be called as a  
51 witness at trial. A party may take such discovery only as

1 provided in Rule 35(b) or upon showing exceptional  
2 circumstances under which it is impracticable for the party to  
3 obtain facts or opinions on the same subject by other means.

4 c. Payment. – Unless manifest injustice would result and absent court  
5 order, the party seeking discovery under sub-subdivision b. of this  
6 subdivision shall pay the expert a reasonable fee for the time spent at  
7 that expert's deposition.

8 d. Trial preparation protection for draft reports or disclosures. – Drafts  
9 of reports provided under sub-sub-subdivision 2. of sub-subdivision  
10 a. of this subdivision are protected from disclosure and are not  
11 discoverable regardless of the form in which the draft is recorded.

12 e. Trial preparation protection for communications between a party's  
13 attorney and expert witness. – Except as otherwise provided in this  
14 sub-subdivision, communications between a party's attorney and any  
15 witness providing a report pursuant to sub-sub-subdivision 2. of  
16 sub-subdivision a. of this subdivision or identified under  
17 sub-sub-subdivision 3. of sub-subdivision a. of this subdivision,  
18 regardless of the form of the communication, are protected from  
19 disclosure and are not discoverable. Such communications are  
20 discoverable only to the extent that the communications do any of the  
21 following:

22 1. Relate to compensation for the expert's study or testimony.

23 2. Identify facts or data that the party's attorney provided and  
24 that the expert considered in forming the opinions to be  
25 expressed.

26 3. Identify assumptions that the party's attorney provided and  
27 that the expert relied on in forming the opinions to be  
28 expressed.

29 f. Time to disclose expert witness testimony. – Parties agreeing to the  
30 submission of written reports pursuant to sub-sub-subdivision 2. of  
31 sub-subdivision a. of this subdivision or parties otherwise seeking to  
32 obtain disclosure as set forth herein by interrogatory shall, unless  
33 otherwise stipulated, set by scheduling order or otherwise ordered by  
34 the court, serve such written report or in the case of no agreement on  
35 the submission of written reports, interrogatory:

36 1. At least 90 days before the date set for trial or the case to be  
37 ready for trial; or

38 2. If the evidence is intended solely to contradict or rebut  
39 evidence on the same subject matter identified by another  
40 party under sub-subdivision a. of this subdivision, within 30  
41 days after the other party's disclosure. If a party fails to  
42 provide timely disclosure under this rule, the court may, upon  
43 motion, take such action as it deems just, including ordering  
44 that the party may not present at trial the expert witness for  
45 whom disclosure was not timely made.

46 The time requirements of this sub-subdivision shall not apply if all  
47 parties had less than 120-days' notice of the trial date.

48 g. Supplementation. – The parties must supplement these disclosures  
49 when required under subsection (e) of this rule."

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

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

10       **SECTION 3.** This act becomes effective October 1, 2015. Section 1 applies to  
11 actions commenced on or after that date. Section 2 applies to motions or applications for costs  
12 filed on or after that date.