## GENERAL ASSEMBLY OF NORTH CAROLINA SESSION 2015

H 3

## **HOUSE BILL 376**

## Committee Substitute Favorable 4/21/15 Senate Judiciary II Committee Substitute Adopted 6/30/15

Short Title: Civ Pro/Modernize Expert Discovery. (Pub	olic)		
Sponsors:			
Referred to:			
March 30, 2015			
A DILL TO DE ENTITLED			
A BILL TO BE ENTITLED  AN ACT AMENDING THE RULES OF CIVIL PROCEDURE TO MODERNIZE			
DISCOVERY OF EXPERT WITNESSES AND CLARIFYING EXPERT WITNESS			
COSTS IN CIVIL ACTIONS.			
The General Assembly of North Carolina enacts:			
<b>SECTION 1.</b> G.S. 1A-1, Rule 26(b)(4) reads as rewritten:			
"(4) Trial Preparation; Experts. Discovery of facts known and opinions held	<del>l by</del>		
experts, otherwise discoverable under the provisions of subsection (b)(1)	<del>) of</del>		
this rule and acquired or developed in anticipation of litigation or for trial,			
may be obtained only as follows: Trial Preparation; Discovery of Expert			
Discovery of facts known and opinions held by experts, that are otherwise			
discoverable under the provisions of subdivision (1) of this subsection			
acquired or developed in anticipation of litigation or for trial, may	<u>be</u>		
obtained only as provided by this subdivision:			
a. 1. A party may through interrogatories require any other part	•		
identify each person whom the other party expects to cal			
an expert witness at trial, to state the subject matter on what the expert is expected to testify, and to state the substance			
the expert is expected to testify, and to state the substance the facts and opinions to which the expert is expected			
testify and a summary of the grounds for each opinion.	<del>- 10</del>		
2. Upon motion, the court may order further discovery by or	ther		
means, subject to such restrictions as to scope and s			
provisions, pursuant to sub-subdivision (b)(4)b. of this r			
concerning fees and expenses as the court may de			
<del>appropriate.</del>			
b. Unless manifest injustice would result, (i) the court shall require	that		
the party seeking discovery pay the expert a reasonable fee for the			
spent in responding to discovery under subdivision (b)(4)a.2. of			
rule; and (ii) with respect to discovery obtained under subdivis			
(b)(4)a.2. of this rule the court may require the party seek			
discovery to pay the other party a fair portion of the fees			
expenses reasonably incurred by the latter party in obtaining for	acts		
and opinions from the expert.	c ·		
<u>a.</u> <u>1.</u> <u>In general. – In order to provide openness and avoid un tactical advantage in the presentation of a case at trial, a particular description.</u>			



must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence.

- 2. Witnesses providing a written report. The parties shall have the option, in connection with the disclosures required by this subdivision, of accompanying the disclosure with a written report prepared and signed by the witness if the witness is one retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. If the parties agree to accompany their disclosure pursuant to this subdivision with a written report, the report must contain all of the following:
  - <u>I.</u> A complete statement of all opinions the witness will express and the basis and reasons for them.
  - II. The facts or data considered by the witness in forming them.
  - III. Any exhibits that will be used to summarize or support them.
  - IV. The witness' qualifications, including a list of all publications authored in the previous 10 years.
  - V. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.
  - <u>VI.</u> A statement of the compensation to be paid for the study and testimony in the case.
- 3. Witnesses not providing expert reports. Unless otherwise stipulated to by the parties, or ordered by the court, a party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify pursuant to Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

## <u>b.</u> <u>Depositions. –</u>

- 1. Depositions of an expert who may testify. A party may depose any person who has been identified as an expert pursuant to this subdivision, with such deposition to be conducted after any written report is provided or identification by response to interrogatory has been made pursuant to sub-subdivision f. of this subdivision.
- 2. Expert employed only for trial preparation. Except as otherwise provided in this sub-sub-subdivision, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may take such discovery only as

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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	<u>c.</u>	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	<u>d.</u>	<u>Trial preparation protection for draft reports or disclosures. – Drafts</u>
9		of reports provided under 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	<u>e.</u>	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	<u>f.</u>	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	<u>g.</u>	<u>Supplementation.</u> – The parties must supplement these disclosures
49		when required under subsection (e) of this rule."
50	<b>SECTION 2.</b>	G.S. 7A-314(d) reads as rewritten:

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

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

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