



HOUSE BILL 376: Civ Pro/Modernize Expert Discovery

2015-2016 General Assembly

Committee:	House Judiciary II	Date:	April 21, 2015
Introduced by:	Reps. Jordan, Stam, Bishop, Glazier	Prepared by:	Brad Krehely
Analysis of:	PCS to First Edition H376-CSR-N-15		Committee Counsel

SUMMARY: *House Bill 376 amends the rules of civil procedure to modernize discovery of expert witnesses and to clarify expert witness costs in civil actions. The Proposed Committee Substitute (PCS) provides that the parties have the option, when disclosing witnesses, to include a written report prepared and signed by the witness (was "unless otherwise stipulated or ordered by the court, the parties shall have the option. . ."). The PCS also makes technical changes.*

BILL ANALYSIS: The PCS for House Bill 376 enacts a new Rule 26(b)(4a) in the Rules of Civil Procedure dealing with trial preparation and the discovery of experts. The discovery of facts known and opinions held by experts that are otherwise discoverable may only be obtained only as provided by this rule provide in this rule, including:

- **In general-** A party must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence.
- **Witnesses providing a written report.-** The parties must 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 or one whose duties as the party's employee regularly involve giving expert testimony. If the parties agree to including a report, the report must include:
 - (I) a complete statement of all opinions the witness will express and the reasons for them.
 - (II) facts or data considered by the witness.
 - (III) any exhibits that will be used.
 - (IV) witness's qualifications, including a list of publications authored in the past 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.
 - (VI) A statement of the compensation to be paid for the study and testimony.
- **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, and to state the substance of the facts and opinions.
- **Depositions of an expert who may testify-** A party may depose any person who has been identified as an expert, and the deposition is to be conducted after any written report is provided or identification by response to interrogatory has been made.

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House Bill 376

Page 2

- **Expert employed only for trial preparation-** Ordinarily, a party may not 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. But a party may take such discovery only as provided in Rule 35(b) or by showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
- **Payment-** The party seeking discovery must pay the expert a reasonable fee for the time spent at the deposition unless manifest injustice would result.
- **Trial preparation protection for draft reports or disclosures-** Drafts of reports are protected from disclosure and are not discoverable regardless of the form in which the draft is recorded.
- **Trial preparation protection for communications between a party's attorney and expert witness-** Communications between a party's attorney and any witness providing a report are protected from disclosure and are not discoverable, except to the extent that the communications do any of the following:
 1. Relate to compensation for the expert's study or testimony.
 2. Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed.
 3. Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.
- **Time to disclose expert witness testimony.-** Parties agreeing to the submission of written reports or parties otherwise seeking to obtain disclosure by interrogatory must set by scheduling order or otherwise ordered by the court, serve such written report or in the case of no agreement on the submission of written reports, interrogatory:
 1. At least 90 days before the date set for trial or the case to be ready for trial; or
 2. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party, within 30 days after the other party's disclosure.

These notice requirements do not apply if neither party had less than 120 days notice of the trial date.

EFFECTIVE DATE: The act becomes effective October 1, 2015.

BACKGROUND: House Bill 376 is a recommendation of the North Carolina Bar Association.