



HOUSE BILL 376: Civil Procedure/Modernize Expert Discovery

2015-2016 General Assembly

Committee:
Introduced by:
Analysis of: S.L. 2015-153

Date:
Prepared by: Bill Patterson
Staff Attorney

SUMMARY: *S.L. 2015-153 amends the rules of civil procedure to modernize discovery of expert witnesses and to clarify expert witness costs in civil actions.*

This act became effective October 1, 2015. The changes to expert discovery procedure apply to actions commenced on or after that date, and the changes to expert witness costs apply to motions or applications for costs filed on or after that date.

CURRENT LAW: Rule 26(b)(4) of the North Carolina Rules of Civil Procedure permits a party to serve interrogatories requiring another party to identify each expert witness expected to testify at trial, to state the subject matter on which the witness is expected to testify, and to state the substance of the facts and opinions the witness is expected to present and a summary of the grounds for each. Upon motion, the court may order further discovery by other means, including depositions. Unless manifest justice would result, the party seeking discovery must pay the expert a reasonable fee for time spent in responding to discovery, and a party seeking discovery beyond that obtained by interrogatories must pay the other party a fair portion of the fees and expenses reasonably incurred in obtaining facts and opinions from the expert.

G.S. 7A-305(d)(11) requires the court to include in any award of costs the reasonable and necessary fees of expert witnesses "solely for actual time spent providing testimony at trial, deposition, or other proceedings." G.S. 7A-314(a) requires all witnesses subpoenaed to appear at trial to receive a fee of \$5.00 per day, but in addition, G.S. 7A-314(d) authorizes payment to an expert witness of such compensation and allowances as the court, in its discretion, may authorize. The North Carolina Court of Appeals has interpreted G.S. 7A-314(d) as authorizing trial courts to award compensation to an expert witness for time spent in attendance at trial, in addition to the compensation awarded under G.S. 7A-305(d)(11) for actual time spent testifying.¹

BILL ANALYSIS: Section 1 of the act rewrites Rule 26(b)(4) in the Rules of Civil Procedure.

As amended by Section 1, Rule 26(b)(4) provides the following procedure governing expert witness discovery, which correspond in large part to the current practice in federal courts:

- A party must disclose the identity of any witness it may use at trial to present evidence.
- A party may elect to accompany the required disclosure with a written report prepared and signed by the witness. Any such report must include:
 - a statement of all opinions the witness will express and the reasons for them;
 - the facts or data considered by the witness in forming the opinions;
 - any exhibits that will be used to summarize or support the opinions;

¹ Springs v. City of Charlotte, 209 N.C. App. 271, 284, 704 S.E.2d 319, 328 (2011) aff'd sub nom. Springs v. City of Charlotte, 222 N.C. App. 132, 730 S.E.2d 803 (2012).

O. Walker Reagan
Director



Research Division
(919) 733-2578

House Bill 376

Page 2

- the witness's qualifications and publications authored in the past 10 years;
 - all other cases in which the witness testified as an expert in the previous four years; and
 - the expert's compensation for work in the case.
- If a party elects not to provide a written report, then the party must, in response to interrogatories, identify each expert witness expected to be called at trial, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert witness is expected to testify.
 - A party may depose any expert witness after that expert's identification is disclosed or identified in response to interrogatories.
 - Generally, parties may not use discovery to learn facts known or opinions held by an expert who is not expected to testify at trial. Under the following circumstances, however, such discovery may be conducted:
 - if the party shows that exceptional circumstances exist making it is impracticable for the party to obtain facts or opinions on the same subject by other means; or
 - if the expert is the physician to whom a party has been ordered by the court to submit for a physical or mental examination in a case in which that party's mental or physical condition is in controversy.
 - The party deposing an expert witness must pay the witness a reasonable fee for the time spent at the deposition unless this would result in manifest injustice.
 - A party is not required to produce drafts of any written report provided as part of that party's expert witness disclosure.
 - Communications between a party's attorney and any expert witness providing a report are not discoverable, except to the extent that the communications:
 - relate to compensation for the expert's study or testimony;
 - identify facts or data that the attorney provided and that the expert considered in forming the opinions to be expressed; or
 - identify assumptions that the attorney provided and that the expert relied on in forming the opinions to be expressed.
 - Unless otherwise stipulated by the parties or ordered by the court, parties opting to provide written reports of their expert witnesses, and parties wishing to serve interrogatories seeking expert witness information, must do so:
 - at least 90 days before the date set for trial or the case to be ready for trial; or
 - 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 time requirements do not apply if all parties had less than 120 days' notice of the trial date.

- Expert witness disclosures must be supplemented under the same circumstances as other discovery responses.

Section 2 of the act amends G.S. 7A-314(d) to clarify that the compensation that may be awarded to an expert witness under that subsection in the discretion of the court is limited to the reasonable and necessary fees solely for actual time spent providing testimony, as provided in G.S. 7A-305(d)(11).

House Bill 376

Page 3

EFFECTIVE DATE: The act became effective October 1, 2015. Section 1, relating to expert witness discovery procedure, applies to actions commenced on or after that date. Section 2, relating to expert witness costs applies to motions or applications for costs filed on or after that date.

Brad Krehely, counsel to House Judiciary II, substantially contributed to this summary.