

North Carolina's Expert Witness Discovery Rule – Changes and Clarifications

The General Assembly has amended the rule of procedure in civil cases for discovery of information about another party's expert witness. North Rule of Civil Procedure 26(b)(4) has largely been unchanged since 1975. With the amendments made by [House Bill 376, S.L. 2015-153](#), the rule updates the methods of disclosing and deposing experts and implements some explicit work-product-type protections. The Rule now looks more like the corresponding provisions in [Federal Rule of Civil Procedure 26](#) (after that Rule's own significant round of changes in 2010). The changes to North Carolina Rule 26(b)(4) apply to actions commenced on or after October 1, 2015. The rule now provides the following:

Expert witness disclosure. It appears that--"to provide openness and avoid unfair tactical advantage"--a party is now required to disclose the identity of an expert witness that it may use at trial (that is, a witness that may be used to "present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence"). It appears that the other party is no longer required to first submit formal interrogatories requesting the disclosure, but, as discussed below, that party has the option of doing so.

Written report provision. If the expert 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," the disclosing party has the option of submitting a written report prepared by the expert that includes: a complete statement of the witness's opinions and the bases and reasons for them; facts the witness considered in forming the opinions; exhibits that will be used to summarize or support them; the witness's qualifications and a list of certain publications; certain prior expert testimony by the witness; and a statement of the expert's compensation. (This report is *required* under the Federal rule.) In the absence of this report, the other party may discover through interrogatories the subject matter of an expert's expected testimony; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.

Time frames for disclosure. The rule sets default time frames for submitting written reports of experts or interrogatory responses: 90 days before trial or, for rebuttals, 30 days after the opposing party's disclosure. These requirements may—and surely in many cases will be—altered by stipulation or court order.

Depositions of experts without court order. Before, if a party objected to its disclosed expert being deposed, the rule permitted depositions (and "further discovery") only upon court order. The amended rule provides that a party may proceed to depose the expert after receiving the written report or interrogatory responses. This change reflects modern practice: It is already largely routine in North Carolina civil litigation for parties to agree on tiered schedules for deposing each other's

experts. The amended rule also provides that the deposing party “shall” pay the expert a reasonable fee for time spent at the deposition (unless “manifest injustice would result” or the court orders otherwise). Before, fees for an expert’s deposition time were in the trial court’s discretion.

Certain information shielded from discovery:

Non-testifying experts. Discovery of certain information about trial-preparation experts (or “consulting” experts) is now explicitly prohibited. A party may not, through interrogatories or depositions, discover “facts known or opinions held by” these individuals who are not expected to be called as experts at trial. Exceptions are allowed as provided by Rule 35(b) (related to court-ordered examining physicians) and for “exceptional circumstances”—such as when a party has retained the expert primarily to shroud some otherwise discoverable information in that expert’s possession.

Draft expert reports. Drafts of the written report of an expert witness submitted in connection with the expert’s disclosure are protected and “not discoverable regardless of the form in which the draft is recorded.”

Communications between attorney and expert witnesses. Communications between a disclosed expert and the party’s attorney are protected from discovery, regardless of the form of the communications. As in the Federal rule, exceptions apply to communications that relate to the expert’s compensation for the study or testimony; that identify facts or data the attorney provided and the expert considered in forming the opinions; or that identify assumptions the party’s attorney provided and the expert relied on in forming the opinions.

The title of the House Bill states that it is intended to “modernize discovery of expert witnesses...in civil actions.” For those of you civil practitioners who regularly deal with expert witness discovery: I’d be interested to hear about whether—or how—these changes will affect your approach to the process.

Oh, and for those of you who’ve read the bill: If you’re wondering about that last little section amending 7A-314(d)...I’ll give you the upshot of that in my next post.