UNC SCHOOL OF GOVERNMENT

Indigent Defenders in Civil Proceedings Webinar

June 28, 2024 / 1:30 p.m. – 3:00 p.m.

Cosponsored by the UNC-Chapel Hill School of Government
&
The North Carolina Office of Indigent Defense Services

The webinar, presented by School of Government faculty Timothy Heinle, will cover **(i) lay witness fact and opinion testimony, (ii) expert witness qualifications, including grounds for tendering and challenging the admission of a witness as an expert, and (iii) permissible expert testimony in proceedings involving children.** The webinar will be live, meaning that in addition to a visual and audio presentation, participants will have the opportunity to ask questions and share comments in real time.

Details on a new expert witness resource for civil defenders will also be shared.

CLE Credit: 1.50 Hours of General CLE Credit

SPEAKERS

Timothy Heinle, *Teaching Assistant Professor*

Timothy Heinle is an expert on civil indigent defense in North Carolina, including abuse, neglect, and dependency cases, guardianship, and child support contempt proceedings. As a faculty member in the School's Public Defense Education program, he focuses on providing education and resources to civil defense attorneys, including parent attorneys and guardian ad litem attorneys in adult incompetency matters. Heinle joined the School in 2020.

Previously, Heinle practiced law in areas including trial and appellate level work on juvenile abuse, neglect, and dependency cases; termination of parental rights hearings; incompetency and guardianship matters; and child support contempt proceedings. In 2022, he received the School's Margaret Taylor Writing Award for “outstanding writing that displays [a] clear and direct style,” for *The First Seven Days as a Parent Defender* and the Performance Excellence Award for "collaborative, dedicated, and innovative efforts that advance the mission of the School of Government.” Heinle earned a J.D. from New England Law in Boston.

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.

Expert Witness Fees as a Civil Cost – An Amendment to the Statute

I promised to follow up my last post with a discussion of that little change in S.L. 2015-153 to G.S. 7A-314, the witness fee statute. First some background: General Statute 7A-305 sets out the costs assessable in North Carolina civil actions. [Note that *liability* for costs in a given case is generally determined under G.S. Chapter 6.] Subsection (d) of 7A-305 lists the expenses of a party that may be recovered as costs. Prior to 2007, there was confusion about whether the list of expenses in 7A-305(d) was exclusive, or whether additional expenses—such as expert witness fees—could also be awarded in the court's discretion. Then, in July 2007, the statute was amended to make clear that subsection (d) was indeed an exclusive list. The list was also expanded to include several other types of expenses, including "reasonable and necessary fees of expert witnesses *solely for actual time spent providing testimony at trial, deposition, or other proceedings*." 7A-305(d)(11)(emphasis added). Soon thereafter, the Court of Appeals held that this very limited category of expert fees could only be awarded if the expert witness was under subpoena. *See* Jarrell v. The Charlotte Mecklenburg Hosp. Auth., 206 N.C. App. 559 (2010) (reiterated in Peters v. Pennington, 210 N.C. App. 1 (2011) and Lassiter v. North Carolina Baptist Hospitals, Inc., 761 S.E.2d 720 (N.C. App. 2014)) [see comments section below for update].

So for a time it seemed that the only recoverable expert witness fees were for time a subpoenaed expert spent *actually testifying*. Then, in *Springs v. City of Charlotte*, 209 N.C. App. 271 (2011), the court held that the new 7A-305(d)(11) must be read in conjunction with G.S. 7A-314(d), which states that, "[a]n expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court…, in its discretion, may authorize." The court held that the language of 7A-314(d) gives the trial court discretion to also award fees of experts for time spent *attending* the trial, deposition, or proceeding, even when not testifying. *Springs* at 283?84.

Now to the new legislation: With S.L. 2015-153, the General Assembly has limited the trial court's discretion in G.S. 7A-314(d) by making it "subject to the specific limitations set forth in G.S. 7A-305(d)(11)." In other words—as I read the amendment—the trial court no longer has the discretion (articulated in *Springs*) to award fees incurred for time an expert spends attending but not testifying. The only fees to be awarded are "for actual time spent providing testimony at trial, deposition, or other proceedings." The amendment goes into effect on October 1, 2015 and applies to motions for costs filed on or after that date.

A closing point: Civil costs may seem esoteric, but the truth is that our courts grapple with costs-related issues all the time. Questions about the extent of the trial court's discretion to award them—particularly under the wide-reaching G.S. 6-20—have been tossed about in the appellate division for many years, and some particular points of controversy remain. For a recent discussion of the question of discretion, for example, see *Khomyak ex rel. Khomyak v. Meek*, 214 N.C. App.

54 (2011). There's more to say about that broader issue, and I'll likely do that in a future post.

What happens when a party fails to disclose an expert witness?

Back in 2015, my former colleague Ann Anderson, wrote about legislation amending provisions in Rule 26(b)(4) dealing with expert witnesses in this post https://civil.sog.unc.edu/north-carolinas-expert-witness-discovery-rule-changes-and-clarifications/.

S.L. 2015-153, in an effort "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial," amended Rule 26 to require a party to disclose the identity of an expert witness that it may use at trial, regardless of whether the other party requested disclosure through discovery.

Since the amendment was enacted, there have been two appellate opinions interpreting the rule in the family law context. These two opinions tell us:

- Rule 26(b)(4)(a)(1) of the Rules of Civil Procedure requires that expert witnesses be disclosed before trial, even if identification of experts is not required by a discovery request, discovery plan or a court order.
- Rule 26 does not specify when experts must be disclosed and does not provide a specific sanction for the failure to disclose.
- If a trial court determines a party failed to disclose an expert within a reasonable time prior to trial, the court has the inherent authority to determine an appropriate sanction.
- The trial court has discretion to exclude expert testimony as a sanction if the court in its discretion determines it is appropriate to do so because the failure to disclose gives a party an "unfair technical advantage."

Myers v. Myers, 269 N.C. App. 237 (2020)

The trial court excluded the wife's expert witness's testimony regarding potential tax consequences of an alimony award because wife failed to disclose the expert to husband until the day before trial. The trial court determined that because of the 2015 legislative amendment to Rule 26, wife was required to disclose her expert witness before trial even if not requested to do so during discovery or required to do so by a discovery plan or other court order. The trial court concluded that her failure to disclose until the day before trial required the court to exclude the expert testimony.

The court of appeals agreed with the trial court's conclusion that Rule 26 requires the disclosure of experts even if not requested in discovery, required by a discovery plan, or required by a local rule or court order. However, the court of appeals did not agree that a violation of the disclosure

provision of Rule 26 requires automatic exclusion of the testimony. The court of appeals held that because Rule 26 does not specify how far ahead of trial disclosure must be made and does not mandate the consequence of a party's failure to disclose, the trial court must exercise its discretion to determine first that a party did not disclose in a reasonable amount of time before trial and then to determine, if disclosure was not made in a reasonable amount of time before trial, what the appropriate sanction should be.

The court of appeals held that Rule 37 provides for sanctions when a party fails to comply with a discovery request or a discovery plan or court order but does not provide sanctions for the failure to disclose when disclosure has not been ordered or agreed to. However, the appellate court held that a trial court has inherent authority to sanction a party for failure to comply with the mandatory disclosure requirement of Rule 26. The specific sanction imposed is within the discretion of the trial court and the sanction can be exclusion of the testimony altogether if the trial court determines the failure to disclose in a timely manner gave the party an "unfair technical advantage."

Because the trial court in this case misinterpreted the law to require exclusion of the testimony, the court of appeals remanded the case to the trial court for further consideration and findings of fact to support the sanction the trial court determines to be appropriate.

Aman v. Nicholson, (N.C. App., March 7, 2023).

Mother filed for custody against father. A temporary custody order was entered granting primary physical custody to mother and visitation to father. The temporary order required that both parents obtain a psychological evaluation and provide the results of the evaluation to the other party. Both parents also were ordered to participate in individual and joint psychological counseling.

On the first day of the custody trial, father provided mother with the names and CVs of three potential expert witnesses, and reports written by two of the potential expert witnesses. One of the witnesses had conducted the evaluation of father required by the temporary custody order and his report had been provided to mother approximately one year prior to the start of the custody trial. Mother had not received notice of the other two potential experts before the first day of the trial and she had not seen the second report. She objected to father's evidence from the experts due to father's failure to disclose the experts before trial. The trial court excluded all three of father's experts and the two reports after concluding that father's failure to disclose the experts before trial gave him an unfair tactical advantage.

On appeal, father argued that the trial court erred in excluding his experts and the reports because the custody trial was scheduled with less than 120 days' notice, citing Rule 26((b)(4)(f), and because mother had been given one expert's report more than a year before the custody trial began. The court of appeals rejected father's argument relating to the fact that the parties had less than 120 days' notice of trial, holding that the time frames referenced by that section of Rule 26 apply only when the parties have agreed to exchange written reports of experts. In this case, there

was no such agreement. In the absence of such an agreement, Rule 26 provides no time frame for the disclosure; the rule only specifies that disclosure be made before trial.

The court of appeals held that the trial court did not err in excluding two of the experts and the one report mother had not seen before the trial. The appellate court held that the trial court findings that the failure to exclude the experts would result in further delay of the custody trial, that father offered no justification for the failure to disclose the experts before trial, and that the late disclosure gave father an unfair tactical advantage were sufficient to show that the trial court had not abused its discretion in excluding the evidence as a sanction for the failure to disclose in a timely manner.

The court of appeals held that the trial court should not have excluded the testimony of the expert who had provided the report to mother more than one year before the trial began. Because she had earlier access to the report, there was nothing to indicate that the use of this report or the expert's testimony would have resulted in any surprise to mother or unfair advantage to father. This error by the trial court did not result in remand of the case, however, because father failed to demonstrate he had been prejudiced by the exclusion of the testimony of this expert.