

Senate Judiciary Committee

Jennifer Horgan 271-3092

SB 70, relative to disclosure of expert testimony in civil cases.

Hearing Date: January 24, 2017

Time Opened: 10:11 a.m.

Time Closed: 10:45 a.m.

Members of the Committee Present: Senators Carson, Lasky, French, Gannon and Hennessey

Members of the Committee Absent : None

Bill Analysis : This bill requires all expert witnesses to be disclosed, and all reports concerning their testimony to be filed, before any expert witness may be deposed.

Sponsors :

Sen. D'Allesandro
Sen. Reagan

Sen. Bradley
Rep. Hynes

Sen. Feltes
Rep. McBeath

Who supports the bill: Anna Goulet Zimmerman, NH Association of Justice

Who opposes the bill: R. Matthen Cairns

Summary of testimony presented in support:

Senator D'Allesandro

- This bill would require that all expert witnesses be disclosed before any are deposed.
- There have been issues with defense attorneys saying they can depose the plaintiff's experts before disclosing their own.
- Defendants are getting an unfair advantage.
- This about fairness and a level playing field for the scales of justice.

Anna Goulet Zimmerman (NH Association for Justice) (provided written testimony)

- This has recently become an issue, as for years both sides would take turns
- Rule 516:29-b outlines the process for disclosure of expert testimony who have a report requirement.
- The concept was that plaintiffs would produce their reports, including a summary of all opinions, facts and data relied on, and the expert's qualifications and background.
- Following the disclosure of the plaintiff's report, the defendants would then produce their report.
- This process was meant to facilitate settlements prior to depositions.
- When the defense takes the depositions of the plaintiff's experts, the plaintiff knows what the defendant is going to say because they have the defendant's report.
- A Practical Guide to Discovery and Depositions in NH was put together by Justice Hicks, which outlined that once both sides disclose their experts, they then have to decide if they want to take expert depositions.
- Recently, a lot of attorneys from MA are waving into NH and it is quite a different

world in MA than in NH in terms of depositions.

- Some defense attorneys are arguing that they are entitled to depose the plaintiff's experts before disclosing their own.
- This bill only applies to retained experts who are required to submit written reports and are subject to reporting requirements.
- Senator Lasky asked if this would give a more orderly and predictable process for depositions.
 - Yes. In most cases people are going to want to know what the plaintiff's experts have to say about what the defendant's experts said. Allowing this to continue could result in the needing a second deposition for the plaintiff's experts to respond to the defendants. This is not a vast issue and the majority of attorneys recognize that taking turns is how things are done.
- Senator Lasky asked if this puts the defense at a disadvantage.
 - No, as they still get the plaintiff's expert's full report before the deposition. All fact witnesses can still be deposed before the experts issue a report. It only impacts the order of actual expert depositions.
- Senator Lasky asked if this makes it an equal playing field.
 - Yes, because before starting depositions both sides have seen the reports and can comment appropriately.

Summary of testimony presented in opposition :

R. Matthew Cairns (provided written testimony)

- Supports fairness in litigation, but believes this is a solution in search of a problem.
- Has not heard how courts have addressed this issue, as it is the responsibility of the judge to determine how discovery flows in the case.
- RSA516:29-a spells out the contents of an expert's report, but it does not outline when a lawyer chooses to do something in their case.
- There is already a process in place that makes this bill unnecessary.
- The Superior Court rules govern the procedures of the courts in all suits of civil nature.
- Rule 5 requires the parties to complete a case structuring conference order and paragraph 9 says when plaintiff and defendant's experts are due. Paragraph 10 says when depositions have to be completed by.
- Paragraph 19 covers other orders, which is designed to take care of issues such as the one raised by this bill, through potentially allowing experts to provide rebuttal reports, the timing of depositions, and the handling of electronic discovery.
- If the parties cannot agree on these matters, it is the role of the judge to decide how to proceed.
- SB70 ignores that the plaintiff has the burden of proof.
- Before they bring the suit, the plaintiff should know what their expert is going to say and then discovery takes place.
- One would presume that the expert's opinion would not change based on what the defense's expert says.
- In most cases both parties agree to allow both sides to see the reports before taking depositions.
- It is the choice of the defense lawyer to take that risk of being ambushed with the plaintiff's experts changing their opinion after seeing the defense's report.
- There does not seem to be a number of how many times this has taken place or if judges dropping the ball on addressing this.

- MA does not have expert depositions, so this is not a matter of engaging MA practices in NH.

Future Action: Pending

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Date Hearing Report completed: January 25, 2017