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Amendments to Rule 26, SCRPC



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On April 30, 2024, the Supreme Court's amendment of Rule 26, SCRPC, became effective.¹ All expert discovery since that date is subject to the new expert rules. This article summarizes the changes and reviews federal precedent on the issue for guidance.

The text of the new rule is relatively straightforward. The amendment adds the following paragraphs:

(D) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rule 26(b)(3) and Rule 26(b)(4)(A) protect communications between the party's attorney and any witness designated as an expert, regardless of the form of the communications, including draft reports, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.²

This amendment conforms the state rule more closely to the equivalent federal rule.³ The federal rule technically applies only to "any witness required to provide a report under Rule 26(a)(2)(B)."⁴ But, as our state rules do not require witnesses to provide reports, this difference is merely textual.

The rule's plain reading protects all communications between attorneys and expert witnesses, specifically including draft reports. The rule carves out three exceptions



for communications containing the following: (1) information regarding the expert's compensation; (2) facts or data that the attorney provided and the expert considered in forming opinions; and (3), assumptions the attorney provided and that the expert relied on in forming opinions. The rule thus makes discoverable any facts or data which the expert *considered*, but only those assumptions on which the expert *relied*, in forming an opinion for the case.

In its note to the 2024 amendment, the Supreme Court indicated that the amendment "will allow a freer exchange of information" between attorneys and "an expert in the process of developing her thoughts."⁵ This gives an expert "the consideration of the mental impressions of a lawyer" while protecting those impressions from disclosure.⁶ Thus, communications between a lawyer and the expert are protected except for those "about matters that fall within the three exceptions" related to compensation, information, and assumptions.⁷

In the absence of state appellate opinions on a rule of civil procedure, practitioners and state courts may look to federal precedent on comparable rules as persuasive authority.⁸ Federal court opinions dealing with Rule 26(b)(4)(C), Fed. R. Civ. P., as amended in 2010, may be instructive on the extent of the new privileges.⁹ Federal courts have found the privilege protects not



A REPORT TO MEMBERS OF
THE SOUTH CAROLINA BAR
YOUNG LAWYERS DIVISION

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only the expert's file, but even protects experts from deposition questions about what documents were shown to them during a deposition preparation session.¹⁰ Thus, while the phrase "facts or data" should "be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients,"¹¹ courts have still construed the privilege to protect the mental impressions of counsel.

Firms are still sending requests and subpoenas for "all communications" or for experts' "entire file," often explicitly asking for "draft reports." As these are privileged under the new Rule 26, objections to such requests and motions to quash such subpoenas are appropriate, after the requisite Rule 11 consultation.¹² By protecting this privilege, litigants can reduce costs and enjoy a freer exchange of information with experts retained for litigation, making the process more efficient for all involved.

Endnotes

¹ See *Re: Rule Amendments*, S.C. Sup. Ct. Order dated April 30, 2024. The Supreme Court submitted the proposed rule changes to the legislature on January 31, 2024; when the General Assembly did not reject them within 90 days, the amendments became immediately effective. *Id.*

² Rule 26(b)(4)(D), SCRPC.

³ See Rule 26(b)(4)(C), Fed. R. Civ. P.

⁴ *Id.*

⁵ Rule 26, SCRPC, Note to 2024 Amendment.

⁶ *Id.*

⁷ *Id.*

⁸ See, e.g., *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561–62, (Ct. App. 2000) ("In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive."). See also *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 323–24, 821 S.E.2d 908, 913 (2018) (noting similarities between state statute and federal constitution and "survey[ing] federal jurisprudence on the issue" for guidance).

⁹ See, e.g., *Wellin ex rel. Estate of Wellin v. Farace*, No. 2:16-CV-00414-DCN, 2018 WL 7247056, at *5 (D.S.C. Dec. 5, 2018) (citing Advisory Committee's Note to Fed. R. Civ. P. 26(a)(2)(A) & (B)), *report and recommendation adopted sub nom. Wellin v. Farace*, No. 2:16-CV-0414-DCN, 2019 WL 466461 (D.S.C. Feb. 6, 2019).

¹⁰ See *id.* (discussing at length which deposition questions were appropriate and which were objectionable).

¹¹ See *id.*

¹² See, e.g., Rule 45(c)(3)(A)(iii) (requiring courts to quash or modify a subpoena that "requires disclosure of privileged or otherwise protected matter" if "no exception or waiver applies").

Stars of the Quarter

Kelly Leddy
Brian Jenkins
Gedney Howe
Chase Kinsey
Samantha Albrecht
Rachel Lee
Jordon Cox
Abigail Toohey
Beth Bowen
Ryan Swancy
Adrian Pequese



11th Circuit Paint and Pour

The young lawyers of the 11th circuit gathered together for a family friendly activity where they each painted their own canvas to take home, just in time for the holiday gifting season!

Letter from the YLD President



Dear Young Lawyers:

Almost half of the bar year is behind us and we just added over 300 young attorneys to our ranks! These new attorneys were sworn in before the South Carolina Supreme Court on November 12, and I am sure they are eager to make their mark on our legal profession. Regardless of age, you become a member of the South Carolina Young Lawyers Division during your first 5 years of practice or until you turn 36 years old. I encourage our newly admitted attorneys to attend YLD events, sign up to join a committee, and get involved with YLD leadership by becoming a committee chair or a circuit representative. The SC Bar has launched a new website where you can find information about all of these YLD opportunities. Additionally, the upcoming YLD events are included in the SC Bar's E-Blast that is emailed out every Thursday afternoon.

In September, YLD members across South Carolina went into dozens of elementary schools for Constitution Day to educate students about our founding document and answer questions about being an attorney. I presented to students at North Hartsville Elementary school and thoroughly enjoyed the experience! Thank you to all the volunteers who took time away from their

practice to make this student outreach project a roaring success!

Our circuit representatives have been busy planning new admittee receptions around the state during November and December. These are great opportunities for new attorneys to meet members of the judiciary, fellow young lawyers, and members of their local bar. I encourage each of you to please attend the new admittee reception in your circuit!

Looking ahead to January, the South Carolina Bar Convention is in Columbia on January 16-19th. This year's convention will be special as it is the 50th anniversary of the SC Bar! The YLD leadership, committee chairs and circuit representatives will meet at the convention and plan for the second half of the Bar year.

I am honored to serve you as President of the YLD and look forward to the second half of the year. The holidays are coming with plenty of opportunities to attend festive YLD networking events. I hope you can make time to attend these, but also enjoy time relaxing with friends and family. Thank you for all you do for the YLD and for the legal profession!

Mike Burch

Mike Burch
YLD President