

Amendments to Rule 26, SCRCP



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On April 30, 2024, the Supreme Court's amendment of Rule 26, SCRCP, 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



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

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have found the privilege protects not 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), SCRCP.

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

⁴ *Id.*

⁵ Rule 26, SCRCP, 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)(20)(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").

Letter from the YLD President



The South Carolina Bar kicked off celebrating 50 years of being a unified bar at the annual SC Bar Convention on January 16-19 in Columbia. The Young Lawyers Division

hosted several events including a CLE, blood drive, oyster roast and leadership luncheon. It was great to see old friends and make new ones, along with eating some fantastic oysters.

If you missed these events or other events in your area in 2024, I challenge you to attend and volunteer for the exciting YLD events coming up this spring and summer, especially newly admitted young lawyers. This quarter, the YLD will coordinate two of my favorite annual events: the Cinderella and Prince Charming Projects and Palmetto Pages. During the Cinderella Project and the Prince Charming Projects around the state, YLD members will help high schoolers select free formalwear for their prom while giving them the opportunity to connect with lawyers and ask questions about the profession. Palmetto Pages organizes YLD members to read to elementary school children and talk about their jobs as attorneys. I had a great time reading to the students at North Hartsville Elementary School last spring! These community events allow young people to meet all types of young attorneys and showcase different ways we help South Carolinians outside of the courtroom and office.

Additionally, I encourage you to seek out and be open to taking on new opportunities and positions for the upcoming Bar year, which begins in July. Please be on the lookout for our committee sign-up brochure which has information about all our committees.

Thank you for continuing to make the South Carolina YLD one of the most highly regarded young lawyer divisions in the nation. As always, I am proud to be a South Carolina lawyer, and I am especially proud to serve as your YLD president this year. Thank you for all that you do for the profession!

Mike Burch
Mike Burch



11th Circuit Paint and Pour

The young lawyers of the 11th Circuit gathered together for a family-friendly networking event last December, strengthening their professional bonds while engaging in a fun activity!

Stars of the Quarter (Q4 2024 and Q1 2025)

Phylicia Coleman
Destinee Wilson
Mary Catherine Harbin
Savannah Hurteau
Kendall Miller
Maya Weeks
Ashley Bagwell
Shelby Herbkersman
Ryan Pasquini
Taylor Owens Wise
Lisa Bisso
Ally Burch
Paige Ornduff
Megan White
Kelly Leddy
Brian Jenkins
Gedney Howe
Chase Kinsey
Samantha Albrecht
Rachel Lee
Jordon Cox
Abigail Toohey
Beth Bowen
Ryan Swancy
Adrian Pequese

