

The Supreme Court of South Carolina

Request for Written Comments

The South Carolina Bar has filed a petition seeking to amend Rule 26 of the South Carolina Rules of Civil Procedure (SCRCP) with regard to discovery of communications between counsel and expert witnesses retained for trial. These proposed amendments incorporate a version of the corresponding federal rule that was adopted in 2010.

The Supreme Court is considering adopting a modified version of the Bar's proposed amendments to existing Rule 26(b)(4)(A) and proposed new paragraph (b)(4)(D) for submission to the General Assembly in accordance with Article V, Section 4A of the South Carolina Constitution. The proposed changes are set forth in the attachment.

Persons or entities desiring to submit written comments on the proposed amendments should submit their comments to the following email address, rule26comments@sccourts.org, on or before December 6, 2023. Comments should be submitted as an attachment to the email as either a Microsoft Word document or an Adobe PDF document.

Columbia, South Carolina
November 15, 2023

RULE 26
GENERAL PROVISIONS GOVERNING DISCOVERY

. . .

(4)(A) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses, and subdivision (b)(4)(D).

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. A party is not required to disclose nor produce an expert who was only consulted informally, or consulted and not retained or specially employed.

(C) Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(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.

Note to 2024 Amendment:

The amendment adding new paragraph (b)(4)(D) incorporates portions of the 2010 changes to Federal Rule 26(b)(4)(C), which provide additional protection for communications between lawyers and expert witnesses. The amendment will allow a freer exchange of information with an expert in the process of developing her thoughts and opinions and allow the consideration of the mental impressions of a lawyer without having to disclose those. These protections do not apply to the extent the lawyer and the expert communicate about matters that fall within the three exceptions in subdivisions (b)(4)(D)(i), (ii) and (iii).