

The Supreme Court of South Carolina

Re: Amendment to Rule 26, South Carolina Rules of
Civil Procedure

Appellate Case No. 2023-001063

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 26 of the South Carolina Rules of Civil Procedure is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

Columbia, South Carolina
January 31, 2024

Rule 26(b)(4) of the South Carolina Rules of Civil Procedure is amended to provide:

**RULE 26
GENERAL PROVISIONS GOVERNING DISCOVERY**

. . .

(b)(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).