Legal Update: South Carolina Amends Rule 26 to Enhance Attorney-Expert Communication Protections

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In a significant development for civil litigation in South Carolina, the state has recently amended its Rules of Civil Procedure to enhance protections for attorney-expert communications. This change, which aligns South Carolina's practices more closely with federal standards, has important implications for attorneys and their approach to working with expert witnesses.

Background: Protections Under Rule 26 Before the Amendment

Before the 2024 amendment, Rule 26 of the South Carolina Rules of Civil Procedure allowed for broad discovery related to expert witnesses. This included facts known and opinions held by experts, even those acquired or developed in anticipation of litigation or for trial. Communications between attorneys and their expert witnesses were generally discoverable, potentially exposing attorneys' mental impressions and strategies.

The pre-amendment rule provided some protections, including:

- Limiting discovery of experts not expected to testify at trial, requiring a showing of "exceptional circumstances" to obtain their opinions.
- Allowing for cost-sharing of expert fees and expenses related to depositions.
- Protecting experts who were only informally consulted from discovery.

However, the rule did not explicitly protect communications between attorneys and their testifying expert witnesses, which could lead to the disclosure of work product. This risk required attorneys and expert witnesses to be mindful of the information they shared during discussions about the case, potentially hindering the depth of their analysis and arguments.

The lack of protection could limit the candor and thoroughness of attorney-expert communications, which could impact the quality of expert testimony and overall case preparation.

How The Amendment to Rule 26 Enhances Attorney-Expert Communication Protection

The newly introduced Rule 26(b)(4)(D), titled "Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses," extends the protections outlined in Rules 26(b)(3) and (b)(4)(A). It creates a discovery and evidentiary exception that

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covers communications between attorneys and their retained expert witnesses, regardless of the form of communications, including draft reports.

This protection does not extend to three types of communication:

1. Information related to the expert's compensation for their study or testimony.
2. Facts or data provided by the attorney that the expert considered in forming their opinions.
3. Assumptions provided by the attorney that the expert relied on in forming their opinions.

These exceptions ensure that critical information remains accessible for a fair and balanced trial while still protecting a majority of attorney-expert communications.

Practical Implications for Legal Practice

Rule 26(b)(4)(D) has several important implications for attorneys in South Carolina:

1. Early Attorney Involvement: The new rule underscores the importance of involving attorneys early in the claim-handling process, especially when expert opinions are required.
2. Encourages Open Discussions: Attorneys and retained experts can now communicate more freely about cases without fear of these discussions being exposed later in litigation.
3. Preservation of Work Product: The new rule helps preserve attorneys' work product by protecting their communications with experts. This includes safeguarding the attorney's mental impressions, legal theories, and case strategies that may be discussed with expert witnesses during case preparation.

Understanding Work Product in the Context of Attorney-Expert Communications

Work product refers to materials prepared by or for an attorney in anticipation of and during litigation. The work product doctrine, established in the landmark U.S. Supreme Court case Hickman v. Taylor, 329 U. S. 495 (1947), protects these materials from discovery by opposing counsel, with some exceptions. This protection now extends more comprehensively to attorney-expert communications under the new rule.

The Impact of Rule 26(b)(4)(D) in South Carolina

The introduction of Rule 26(b)(4)(D) in South Carolina's Rules of Civil Procedure represents a significant step towards aligning state practices with federal standards. By providing greater protection for attorney-expert communications, this amendment aims to enhance the quality and depth of expert testimony in civil proceedings.

As legal professionals in South Carolina adapt to this change, we can expect to see evolving strategies in expert witness preparation and management. Attorneys should stay informed about how courts interpret and apply this new rule to maximize its benefits for their clients.

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