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MEMORANDUM

TO: Ron Luke

FROM: Bill Christian and Hailey Suggs

DATE: July 12, 2022

RE: Discovery under Texas Rules of Civil Procedure regarding testifying experts

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You have asked us to evaluate the impact of 2021 amendments to the Texas rules of civil procedure governing the discovery of expert draft reports and communications between attorneys and experts.

I. The 2021 Amendments limit discovery of attorney communications with experts and of an expert's draft reports.

The Texas Rules of Civil Procedure (both before and after the 2021 amendments) specify that the following information is within the scope of discovery regarding a testifying expert:

> (1) the expert's name, address, and telephone number;
>
> (2) the subject matter on which a testifying expert will testify;
>
> (3) the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
>
> (4) the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
>
> (5) any bias of the witness;
>
> (6) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;
>
> (7) the expert's current resume and bibliography

Tex. R. Civ. P. 192.3(e).

The 2021 amendments added the following two provisions to the rules that carve out exceptions from the scope of discovery for certain attorney communications and draft reports:

Expert Communications Protected. Communications between the party's attorney and any testifying expert witnesses in the case are protected from discovery, regardless of the form of the communications, except to the extent that the communications:

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

Draft Expert Reports and Disclosures Protected. A draft expert report or draft disclosure required under this rule is protected from discovery, regardless of the form in which the draft is recorded.

Tex. R. Civ. P. 195(c), (d).

II. The 2021 Amendments apply only to cases filed on or after January 1, 2021.

The Texas Supreme Court adopted these new provisions of Rule 195 to be effective January 1, 2021, but not to apply retroactively:

> "The amendments apply to cases filed on or after January 1, 2021, except for those filed in justice court. The rules amended by this Order continue to govern procedures and limitations in cases filed before January 1, 2021."
>
> Order, Misc. Docket No. 20-9153 (Tex. Dec. 23, 2020).

Thus, whether Rule 195(c) and (d) apply is determined by the date the Plaintiff filed its original petition: The new rules apply only to cases where the original petition was filed on January 1, 2021 or after.

III. Before adoption of the 2021 amendment, all communications with experts were discoverable under Texas law.

In a 2007 case interpreting the rules in place before the 2021 amendments, the Texas Supreme Court ruled that the work-product privilege did not protect any communications with experts from discovery. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437 (Tex. 2007).

In the *Christus Spohn Hosp. Kleberg* case, a defense firm inadvertently sent an expert a confidential investigative memorandum. The expert did not rely on the memorandum in forming her opinion, and the memorandum itself constituted attorney work product that is ordinarily privileged from discovery. The defendant therefore sought to protect the memorandum from discovery. The Texas Supreme Court ruled, however, that the memorandum was discoverable, because (1) the memorandum was within the broad scope of discovery for testifying experts and (2) work-product protection did not apply to information otherwise within the scope of expert discovery. *Id.*

First, the Court noted that the scope of discovery of experts was broad, including anything "provided to" the expert in anticipation of her testimony, even if the expert did not review or rely on that information. *Id.* (quoting Tex. R. Civ. P. 192.3(e)(6)).

Second, Texas's codification of the work-product privilege contains an explicit exception for expert discovery:

> "Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery:
>
> (1) information discoverable under Rule 192.3 concerning experts . . ."

Tex. R. Civ. P. 192.5(c)(1). Based on the *Christus Spohn Hosp. Kleberg* case, it should therefore be assumed that for cases filed before January 1, 2021, all communications with counsel and all draft reports are subject to discovery.

IV. The 2021 Amendments align Texas with Federal Procedure.

The Texas Supreme Court's comments to the adoption of the 2021 amendments state that the new rules "are based on Federal Rules of Civil Procedure 26(b)(4)(B) and (C) and are added to clarify protections available." The federal rules cited in this comment are substantively identical to the 2021 amendments:

> ***Trial-Preparation Protection for Draft Reports or Disclosures***. Rules 26(B)(3)(A) and (B) [the federal rules protecting attorney work product] protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.
>
> ***Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses***. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, 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.

Fed. R. Civ. P. 26(b)(4)(B) & (C).

Because the Texas Supreme Court explicitly modeled the 2021 amendments on the federal rules, the history of the adoption of the federal rules sheds light on the probable application of the Texas 2021 amendments.

The federal amendments to Rule 26 were adopted in 2010 to resolve a conflict over the interaction between the attorney work-product privilege and the scope of discovery from testifying experts. Before 2010, federal courts were divided on this issue, as one court of appeals explained:

> [T]wo lines of cases have formed regarding protections of work-product associated with those [testifying] experts. The first holds that attorney work product is not discoverable merely because it has been shared with a testifying expert. The second holds that Rule 26 creates a bright-line rule requiring disclosure of all information provided to testifying experts, including attorney opinion work product.

Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 714 (6th Cir. 2006) (citations omitted).

This conflicting authority created substantial uncertainty and inefficiency in the way parties litigated cases involving experts: "attorneys often [felt] compelled to adopt a guarded attitude toward their interaction with testifying experts that impede[d] effective communication, and experts adopt[ed] strategies that protect[ed] against discovery but also interfere[d] with their work." Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

The amendments to Rule 26 were adopted to resolve this conflict in favor of protecting attorney work product by limiting discovery of attorney-expert communications and draft expert reports: *See id.* (2010 amendments were proposed to "address concerns about expert discovery" and to "provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel").

Although Texas did not have this same conflict of authority, due to the 2017 *Christus Spahn Hosp. Kleberg* case discussed above, the Texas Supreme Court presumably recognized the same inefficiencies and costs of unchecked discovery of attorney-expert communications. The adoption of the 2021 amendments was therefore intended to limit the scope of that discovery and bring Texas in line with federal practice.

V. The advisory committee notes accompanying the adoption of the federal rules should guide application of the 2021 amendments.

There are no reported Texas cases yet interpreting the 2021 amendments. In adopting the 2010 federal rules on which the 2021 amendments are based, the federal rules advisory committee published extensive commentary on the intended application of the new rules that should also govern the Texas version of these rules. Below is a summary of the main points in the commentary, along with any applicable federal case-law:

1. The term "party's attorney" includes in-house counsel and communications respecting related cases:

> The protection for communications between the retained expert and "the party's attorney" should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the

> expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the "party's attorney" concept.

Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

See Seven Seas Cruises S. DE R.L. v. V. Ships Leisure SAM, No. 09-23411-CIV-UNGARO/SIMONTON, 2011 WL 13220158 (S.D. Fla. Apr. 29, 2011) (holding that "party's attorney" applied to both prior defense counsel and current defense counsel).

2. Communications between an attorney and the expert's staff are also protected:

> "Protected 'communications' include those between the party's attorney and assistants of the expert witness."

Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

See In re Application of Republic of Ecuador, 280 F.R.D. 506, 514 (N.D. Cal. 2012), *aff'd sub nom*, *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014) ("Because the term 'expert' includes assistants of the expert, such internal communications, as well as those between [the expert]'s assistants and [the party's] attorneys, are protected work product.").

3. An expert's communications with anyone not an attorney are not protected:

> "[I]nquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule."

Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

See In re Application of Republic of Ecuador, 280 F.R.D. 506, 514 (N.D. Cal. 2012), *aff'd sub nom*, *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014) ("Respondents cannot withhold communications between their testifying experts under a rule that protects only attorney-expert communications."); *Nat. Res. Def. Council, Inc. v. Illinois Power Res. Generating, LLC*, No. 14-CV-1181, 2018 WL 3414319, at *3 (C.D. Ill. July 13, 2018) (holding that communications between an expert and his staff/assistants are not "subject to a blanket work product privilege" and ordering that the expert "produce notes of test results and other such documentation that underlies his or her expert opinions," including the expert's assistant's "communications of the substance of … third-party conversations to the expert").

4. The discoverability of communications from an attorney that "identify facts or data" that the expert considered does not extend to discussions analyzing those facts and data:

> "The exception applies only to communications "identifying" the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected."

Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

See Republic of Ecuador v. Mackay, 742 F.3d 860, 870 (9th Cir. 2014) ("[D]iscussions with counsel about the 'potential relevance of facts or data' and more general discussions 'about hypotheticals, or exploring possibilities based on hypothetical facts' are protected. Thus, materials containing 'factual ingredients' are discoverable, while opinion work product is not discoverable.").

5. Similarly, the discoverability of "assumptions" conveyed from lawyer to expert "is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts," are not discoverable. Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

6. The exception for disclosure of communications regarding an expert's compensation should be interpreted broadly to encompass all information bearing on potential sources of bias:

> [The exception] is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Id.

See D'Souza v. Marmaxx Operating Corp., No. EP-15-CV-00256-DCG, 2017 WL 1322243, at *9 (W.D. Tex. Apr. 7, 2017) (ordering expert to produce "[a]ll contracts and agreements [the expert] has with any insurance company and defense firm for the year 2015 to present," upon finding that "production of the requested documents would further [the] objective [of permitting full inquiry into potential source of bias" in this case); *Innovention Toys, LLC v. MGA Entertainment, Inc.*, No. 07-6510, 2012 WL 12990384, at *6 (E.D. La. Oct. 17, 2012) (ordering disclosure of the portion of the fee that the expert personally receives).

7. When only part of a communication between lawyer and expert falls within one of the three discoverable exceptions, then the other parts of the communication remain protected from discovery:

> "Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics."

Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

MEMORANDUM

TO: RPC Staff and Consultants

FROM: Ron Luke

DATE: July 19, 2022

SUBJECT: Discoverability of communications between RPC Staff and Consultants.

After reading Bill Christian's memo on the effect of the new Texas rules on discoverability of communications and drafts between RPC and attorneys, I had one additional questions:

What is the discovery status of written communications (e.g., emails, memos) between RPC staff or between RPC and other experts when the attorney is/is not copied? Do the new rules change the answer?

Here is his answer which we should all keep in mind:

The new rules do not affect those communications. Again, we have no Texas caselaw yet, but the notes to the federal rule and the existing federal case-law are clear that non-attorney communications are not protected:

An expert's communications with anyone not an attorney are not protected: "[I]nquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule." Fed. R. Civ. P. 26 (2010 Advisory Committee Note).

***See In re Application of Republic of Ecuador*, 280 F.R.D. 506, 514 (N.D. Cal. 2012), aff'd sub nom, Republic of Ecuador v. Mackay, 742 F.3d 860 (9th Cir. 2014) ("Respondents cannot withhold communications between their testifying experts under a rule that protects only attorney-expert communications."); *Nat. Res. Def. Council, Inc. v. Illinois Power Res. Generating, LLC*, No. 14-CV-1181, 2018 WL 3414319, at *3 (C.D. Ill. July 13, 2018) (holding that communications between an expert and his staff/assistants are not "subject to a blanket work product privilege" and ordering that the expert "produce notes of test results and other such documentation that underlies his or her expert opinions," including the expert's assistant's "communications of the substance of … third-party conversations to the expert").**