MEMORANDUM

To: Supreme Court Rules Advisory Committee
From: Discovery Rules Subcommittee
Date: December 1, 2010
Subject: Amendments to Federal Rule of Civil Procedure 26

The Texas Supreme Court has asked the SCAC to examine whether the recently adopted amendments to Federal Rule 26 should be incorporated in some fashion as part of the Texas Rules of Civil Procedure. Federal Rule 26 has two significant differences from state practice.

The first is that Rule 26(a)(2) requires that a party produce a written report for any expert who is "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." In contrast, current Texas practice provides that a party must request an expert report, and the responding party may either tender the expert for deposition or provide the report. If the requesting party desires a report in addition to an expert's deposition, it must seek a court order requiring a report. In other words, under Texas practice, an expert report is not required absent a request and a court order, so long as the party produces the expert for deposition. Under the new federal rule, a written report is required absent an agreement of the parties or a court order relieving the parties of the obligation to produce written reports. Here is the text of the Texas Rules and the new federal rule on this matter:

I. Current Texas Rule of Civil Procedure 195: Discovery Regarding Testifying Expert Witnesses

A. Rule 195.1. Permissible Discovery Tools:

A party may request another party to designate and disclose information concerning testifying expert witnesses only through a request for disclosure under Rule 194 > [FN1] and through depositions and reports as permitted by this rule.

B. Rule 195.5. Court-Ordered Reports:

If the discoverable factual observations, tests, supporting data, calculations, photographs, or opinions of an expert have not been recorded and reduced to

tangible form, the court may order these matters reduced to tangible form and produced in addition to the deposition.

II. Federal Rule 26(a)(2) (as amended). Disclosure of Expert Testimony:

A. In General. . . . a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

B. Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

C. Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

Recommendation: The subcommittee recommended that the SCAC keep the current Texas court practice on this matter for two reasons. First, and primarily, it is the sub-committee's view that the Texas state practice is more cost effective. It does not require reports when a deposition and initial disclosures will do, thus saving the cost of drafting and preparing

formal reports in the many cases that do not warrant them. Second, the subcommittee is not aware that current Texas practice has presented any problems for the practitioner or the courts. The sub-committee notes, however, that, under the new federal rule, a party seeking the deposition of an expert who has provided a written report must pay that expert's reasonable fee for time spent in "responding to discovery," (i.e. preparing for and testifying by deposition?) and this cost-shifting should be factored into the analysis of whether to incorporate the federal rule in state practice.

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The second difference has to do with work product protection for testifying experts. Under the new Federal Rule 26, a work product privilege is extended to the work a testifying expert does to prepare his report in a case, including discussions with counsel and draft reports. In contrast, Texas practice provides that any draft reports and discussions between counsel and a testifying expert are discoverable. Here is the text of the Texas Rules and the new Federal Rule on this matter:

I. Current Texas Rule of Civil Procedure 192: Expert Work Product

A. Rule 192.3(e). Testifying and Consulting Experts:

> The identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable. A party may discover the following information regarding a testifying expert or regarding a consulting expert whose mental impressions or opinions have been reviewed by 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.

B. Rule 192.5 (b). Protection of Work Product:

(1) Protection of Core Work Product-Attorney Mental Processes. Core work product--the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories--is not discoverable.
(2) Protection of Other Work Product. Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means.
(3) Incidental Disclosure of Attorney Mental Processes. It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1).
(4) Limiting Disclosure of Mental Processes. If a court orders discovery of work product pursuant to subparagraph (2), the court must--insofar as possible--protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

C. Rule 192.5(c). Exceptions: 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, trial witnesses, witness statements, and contentions;

II. Federal Rule 26(b)(3) and (4) (as amended). Trial Preparation, Materials and Experts:

A. Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

B. Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

C. Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is

either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

A. Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

B. Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

C. 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.

D. Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

E. Payment. Unless manifest injustice would result, the court must require that the

party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Recommendation: The subcommittee has no recommendation on this matter, and would like the input of the SCAC. Arguments for adopting the federal rule include that it is desirable in matters of privilege that conformity exist in state and federal practice so as not to trip up the practitioner, and that it allows for a healthy examination of the case between a retained expert and counsel in preparing a case for trial. In addition, a wide array of lawyer groups favored the adoption of the federal rule. Arguments against adopting the federal rule include that is cloaks at least some aspects of an expert's thought processes in secrecy and makes that expert's opinions less susceptible to testing by cross-examination. In addition, the sub-committee is unaware of any problems in current Texas practice, but it would like to hear the input of the entire committee before proceeding further.