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## Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information

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# Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information

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## I. INTRODUCTION

The Federal Rules of Evidence permit an expert to testify in terms of inferences and opinions without prior disclosure of the underlying facts and data upon which the opinions or inferences are based.<sup>1</sup> Traditionally, the factual basis for the expert's testimony was

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1. Rule 705 states that: "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705.

In addition to permitting an expert to state an opinion before disclosing the factual basis for the opinion, the Federal Rules of Evidence expand the range of permissible data upon which an expert may base an opinion. See FED. R. EVID. 703 advisory committee's note, 56 F.R.D. 183, 283. Rule 703 states that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the

established through the use of hypothetical questions.<sup>2</sup> Such hypothetical questions, however, confused juries and resulted in the presentation of expert testimony that did not accurately reflect the expert's opinion as to the actual facts in dispute.<sup>3</sup> The Federal Rules of Evidence have now eliminated the requirement that a party use hypothetical questions to disclose the foundation for the expert's opinion. Under the Federal Rules, once the witness' qualifications as an expert have been established during direct examination, the attorney conducting the direct examination need only ask the expert whether he has an opinion based on a reasonable degree of scientific or medical certainty and, if so, ask the expert to state that opinion.<sup>4</sup>

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hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

2. *Smith v. Ford Motor Co.*, 626 F.2d 784, 791 (10th Cir. 1980). Under the common law, hypothetical questions were allowed to include any material fact favorable to the party asking the question. These facts, however, had to be supported by evidence already admitted at trial. At a minimum, the propounder of the question had to include any material fact essential to the formation of a rational opinion. *Id.*

3. Because hypothetical questions were required to contain all material facts necessary for the expert's opinion, they tended to be long and extremely complex. Dean Wigmore strongly criticized the use of hypothetical questions:

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of the truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of the actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 686, at 812 (1940). Professor McCormick praised the theoretical basis for the use of hypothetical questioning, but also identified its weaknesses in practice as follows:

The hypothetical question is an ingenious and logical device for enabling the jury to apply the expert's scientific knowledge to the facts of the case. Nevertheless, it is a failure in practice and an obstruction to the administration of justice. If we require that it recite all the relevant facts, it becomes intolerably wordy. If we allow, as most courts do, the interrogating counsel to select such of the material facts as he sees fit, we tempt him to shape a one-sided hypothesis. Those expert witnesses who have given their views seem to agree that this partisan slanting of the hypothesis is the fatal weakness of the practice.

C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 16, at 33-34 (1954).

4. Rule 705 of the Federal Rules of Evidence would permit the following perfunctory exchange between an attorney and an expert witness:

Q: Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to the extent of permanent disability suffered by the plaintiff as a result of this automobile accident?

A: Yes.

Q: What is your opinion?

On cross-examination, the opposing counsel may inquire into the facts and data underlying the expert's opinion.

Elimination of the hypothetical question assumes that cross-examination of the expert is a more efficient method of disclosing to the trier of fact the factual bases of the expert's opinions.<sup>5</sup> Effective cross-examination and rebuttal of an opponent's expert witness, however, requires advance knowledge of the expert's opinions and the factual bases underlying those opinions.<sup>6</sup> Such advance knowledge is obtained through the discovery techniques provided in Federal Rule of Civil Procedure 26(b)(4).<sup>7</sup> Specifically, Rule 26(b)(4) creates the framework through which a party may discover the facts known and opinions held by his opponent's expert witness.

Rule 26(b)(4) essentially operates by establishing four distinct categories of experts and subjecting each category to varying degrees of discovery.<sup>8</sup> The degrees of discovery permitted by the Rule reflect an attempt to balance the discovering party's need to prepare for cross-examination against the resulting unfairness to the party employing the expert if the discovering party were permitted to build his case through the information developed and acquired at the expense of his opponent.<sup>9</sup> The situations that arise in practice, however, often involve experts who do not fall neatly into any one of the

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A: She is totally permanently disabled.

Q: Thank you Doctor, that is all.

*Hearings on Proposed Rules of Evidence Before the Special Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 355-56 (Supp. 1973).

Although the rule requires no prior disclosure of the basis of the expert's opinion, the proponent usually will lay a detailed foundation for the opinion of the expert in order to give it greater credibility and weight in the eyes of the jury. It is clear, nevertheless, that the most telling examination of the expert's opinion on a disputed matter will be the cross-examination conducted by the opponent.

5. 3 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 399, at 703 (1979).

6. The advisory committee stated in its note to Rule 705 that:

[Leaving it to the cross-examiner to bring out the supporting data] assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.

FED. R. EVID. 705 advisory committee's note, 56 F.R.D. 183, 286. For a discussion of the problems inherent in the cross-examination of expert witnesses, see Comment, *Cross-Examination of Expert Witnesses: Dispelling the Aura of Reliability*, 42 U. MIAMI L. REV. 1073 (1988).

7. *Id.*

8. See *infra* notes 86-91 and accompanying text.

9. For a discussion of the problems inherent in the discovery of experts prior to the adoption of Rule 26(b)(4) see *infra* notes 34-74 and accompanying text.

Rule's expressed categories but straddle two or more categories. Courts, therefore, have struggled in seeking to apply the Rule's rigid classification scheme to the myriad situations that arise in actual practice. Because Rule 26(b)(4) is designed to accommodate the needs of both the party seeking discovery and the party employing the expert, an understanding of the Rule's operation is critical to a practitioner's ability to cope with the unique problems that arise in discovering expert information.

An understanding of the Federal Rules of Civil Procedure concerning the discovery of expert information is becoming increasingly important in a growing number of states. Subsequent to the adoption of Federal Rule of Evidence 705,<sup>10</sup> twenty-seven states adopted an identical or similar rule in their respective codes of evidence.<sup>11</sup> Of these twenty-seven states, twenty-three have adopted a rule of civil procedure identical or similar to Federal Rule of Civil Procedure 26(b)(4).<sup>12</sup>

10. FED. R. EVID. 705, 56 F.R.D. 183, 285.

11. Sixteen states have adopted a rule identical to Federal Rule of Evidence 705. See ARIZ. R. EVID. 705; ARK. R. EVID. 705; COLO. R. EVID. 705; IOWA R. EVID. 705; MICH. R. EVID. 705; MINN. R. EVID. 705; MISS. R. EVID. 705; MONT. R. EVID. 705; N.H. R. EVID. 705; N.D. R. EVID. 705; OKLA. STAT. tit. 12, § 2705 (1978); ORE. R. EVID. 705; UTAH R. EVID. 705; VT. R. EVID. 705; W. VA. R. EVID. 705; WYO. R. EVID. 705.

The following states have adopted a rule identical to Federal Rule of Evidence 705, except for the substitution of the word "judge" for the word "court:" NEV. REV. STAT. tit. 4, § 50.305 (1977); N.M. R. EVID. 705; WASH. R. EVID. 705; WIS. STAT. ANN. § 907.05 (West Cum. 1979).

The following states have adopted rules of evidence that are similar to Rule 705 with the noted modifications: ALASKA R. EVID. 705 (The rule requires a balancing test for disclosure of facts that would be otherwise inadmissible.); FLA. STAT. ANN. § 90.705 (West Supp. 1976) (A party against whom expert evidence is offered may conduct preliminary voir dire to establish sufficiency of the basis for expert's opinion.); HAW. R. EVID. 705 (The rule subjects the admissibility of expert testimony to adequate pretrial disclosure.); IDAHO R. EVID. 705 (The rule subjects the admissibility of expert testimony to adequate pretrial disclosure.); ME. R. EVID. 705 (The party against whom expert evidence is offered may conduct preliminary voir dire to establish sufficiency of the basis for expert's opinion.); NEB. REV. STAT. § 27-705 (Cum. Supp. 1978) (The rule subjects the admissibility of expert testimony to adequate pretrial disclosure.); TEX. R. EVID. 705 (The rule specifically allows the expert to disclose the underlying facts and data for his opinion on direct examination.).

12. Of the states that have adopted a rule of evidence similar to Federal Rule of Evidence 705, the following have adopted a rule on discovery of expert information identical to Rule 26(b)(4) of the Federal Rules of Civil Procedure: ALASKA R. CIV. P. 26(b)(4); ARIZ. R. CIV. P. 26(b)(4); COLO. R. CIV. P. 26(b)(4); FLA. R. CIV. P. 1.280(b)(3)(A)-(C); HAW. R. CIV. P. 26(b)(4); IDAHO R. CIV. P. 26(b)(4); ME. R. CIV. P. 26(b)(4); MINN. R. CIV. P. 26(b)(4); MONT. R. CIV. P. 26(b)(4); NEV. R. CIV. P. 26(b)(4); N.M. R. CIV. P. 26(b)(3); N.D. R. CIV. P. 26(b)(4); VT. R. CIV. P. 26(b)(4); W. VA. R. CIV. P. 26(b)(4); WYO. R. CIV. P. 26(b)(4).

Of the states that have adopted a rule of evidence similar to Federal Rule of Evidence 705, the following have adopted a rule on discovery of expert information bearing a similarity to Rule 26(b)(4) but which are notable in their differences: ARK. R. CIV. P. 26(b)(4) (requirement of motion to court under 26(b)(4)(A)(ii) for discovery of expert witnesses using

This Comment examines the federal court decisions which have interpreted the scope and application of Rule 26(b)(4). In delineating the current interpretation and application of the Rule, it identifies and explores recurring problems that arise in the pretrial discovery of expert information. Section II of this Comment describes the history of expert discovery prior to the 1970 amendments to the Federal Rules of Civil Procedure.<sup>13</sup> This historical perspective is the key to understanding the policy concerns that underlie the application of Rule 26(b)(4).

Section III examines the relationship of Rule 26(b)(4) to the general discovery provisions of the Federal Rules of Civil Procedure.<sup>14</sup> This Section discusses Rule 26(b)(1), which provides for a very broad scope for discovery, including within its reach any relevant matter not otherwise privileged. In addition, this Section explains how Rule 26(b)(4) limits the normally broad scope of discovery permitted under the federal rules when the information sought is acquired or developed by experts in anticipation of litigation. Further, this Section examines how Rule 26(b)(4) provides varying degrees of protection for expert information—the degree of protection corresponding to the expert's role in the litigation.

Section IV explores the two-step process of Rule 26(b)(4)(A), which controls discovery of experts expected to testify at trial.<sup>15</sup> This Section highlights the potential shortcomings of interrogatories as a tool for preparing for the cross-examination of expert witnesses. In addition, this Section examines the early resistance of courts to

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methods other than interrogatories omitted, no provision for court to allocate fees and cost for discovery of experts under 26(b)(4)(A)(ii)); MISS. R. CIV. P. 26(b)(4) (deleting reference to discovery of examining physician); N.H. R. CIV. P. 35(b)(3) (no provision for the discovery of an examining physician's report in 26(b)(4)(B)); OKLA. STAT. tit. 12, § 3203(B)(3) (1982) (eliminating two-step procedure for discovery of testifying expert's information); TEX. R. CIV. P. 26(b)(4) (no provision for court to allocate fees and cost for discovery of experts under 26(b)(4)(A)(ii), also allows discovery of an expert's documents and tangible things); UTAH R. CIV. P. 26(b)(4) (no provision for the allocation of fees for discovery under provision 26(b)(4)(A)(ii)); WASH. C.R. 26(b)(4) (must show exceptional circumstances to discover information from any non-testifying expert); WIS. STAT. ANN. § 804.01(2)(d)(1)-804.01(2)(d)(3) (West 1987) (requires disclosure of only the testifying expert's identity in response to interrogatories).

The following states, while they have not adopted a rule of evidence similar to Federal Rule 705, have adopted a rule of civil procedure similar or identical to Rule 26(b)(4) of the Federal Rules of Civil Procedure: ALA. R. CIV. P. 26(b)(4) (The Rule adds the phrase "or assigned" to the provision corresponding to subsection (B) in federal rule.); DEL. R. CIV. P. 26(b)(4); VA. R. CIV. P. 4:1(b)(4)(A)-(C); KY. R. CIV. P. 26.02(4); TENN. R. CIV. P. 26.02(4); IND. T.R. 26(b)(4); MASS. R. CIV. P. 26(b)(4).

13. See *infra* notes 20-74 and accompanying text.

14. See *infra* notes 75-102 and accompanying text.

15. See *infra* notes 103-244 and accompanying text.

allowing additional discovery under subsection (A)(ii), absent a showing of need by the party seeking discovery. This section concludes by discussing the recent trend of cases which hold that no special need is required before deposing testifying experts or discovering their reports.

In Section V, this Comment examines the limited immunity from discovery which Rule 26(b)(4)(B) provides to nontestifying experts.<sup>16</sup> Information acquired or developed in anticipation of litigation by non-testifying experts is subject to discovery only upon a showing of exceptional circumstances. This Section identifies two categories of cases in which courts have found the existence of exceptional circumstances and have consequently allowed the discovery at issue. In addition, this Section examines the question whether the exceptional circumstances standard applies to discovery of the identity of nontestifying experts.

Section VI examines the availability of discovery for nontestifying experts' reports and attorneys' work-product.<sup>17</sup> These materials are normally protected from discovery but may lose some or all of that protection if shown to a testifying expert to prepare him for trial.

Section VII explores the discovery of information from informal consultants and in-house experts.<sup>18</sup> The issues examined regarding informal consultants include the manner in which the courts determine the status of such experts and whether ex-parte contacts with informal consultants violate Rule 26(b)(4)(B). This Section then examines the question whether in-house experts should be protected under Rule 26(b)(4).

Finally, Section VIII addresses the discovery of expert information not acquired in anticipation of litigation.<sup>19</sup> Such information is outside the protection of Rule 26(b)(4). The ordinary witness doctrine is applied to experts who gain information as actors or viewers to occurrences at issue in the lawsuit. This same doctrine has been applied to allow discovery of knowledge acquired by nontestifying experts prior to their retention as experts by one of the parties. This Section also examines the discovery of experts not retained by either party. Such "pure" experts are subject to discovery as ordinary witnesses; however, courts have the ability to modify or quash burdensome discovery subpoenas upon a showing of good cause by the "pure" expert.

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16. See *infra* notes 245-316 and accompanying text.

17. See *infra* notes 317-91 and accompanying text.

18. See *infra* notes 392-496 and accompanying text.

19. See *infra* notes 497-596 and accompanying text.

## II. THE HISTORY OF EXPERT DISCOVERY PRIOR TO THE ADOPTION OF RULE 26(b)(4)

In light of the reliance of the advisory committee for the Federal Rules of Evidence on Federal Rule of Civil Procedure 26(b)(4),<sup>20</sup> the analysis of Rule 26(b)(4) should focus on its ability to serve as a tool that sufficiently enables a party to prepare for cross-examination of its adversary's expert witness at trial. A prerequisite to evaluating the efficacy of the Rule, however, is an understanding of the problems that arose in placing limits on the discovery of expert information prior to the adoption of Rule 26(b)(4). In particular, it is enlightening to analyze the three different sources relied upon by the advisory committee to the Federal Rules of Civil Procedure in drafting the Rule.<sup>21</sup> Two of the sources are articles written by Professor Jack Friedenthal and Mr. Jeremiah Long.<sup>22</sup> The third source is the 1965 case of *Knighon v. Villian & Fassio*.<sup>23</sup>

The scope of discovery<sup>24</sup> of expert information can be limited in two ways: First, the court can place limits on the devices used for discovery. For instance, a court could limit discovery to the use of interrogatories. Second, limitations could be placed on the area of permissible inquiry. In limiting the area of permissible inquiry, a court might permit discovery of the facts known by the expert but protect from discovery the expert's conclusions which were based on those facts. In terms of limitation on the area of permissible inquiry, full discovery can be said to occur when a court permits discovery of an expert witness that is limited only by the general requirement of relevancy which is placed on the discovery of information from ordinary witnesses.<sup>25</sup>

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20. FED. R. EVID. 705 advisory committee's note, 56 F.R.D. 183, 286. See also *supra* note 6.

21. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

22. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1965), updated and reprinted from 39 WASH. L. REV. 665 (1965).

23. 39 F.R.D. 11 (D. Md. 1965).

24. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure, Part One: An Analytical Study*, 1976 U. ILL. L.F. 895, 911 n.70. Professor Graham identifies two possible meanings for the word "scope." He interprets the word "scope" as used in the advisory committee's note to mean the particular device employed to discover the expert's information. In his articles, however, Professor Graham uses "scope" to refer to the "permissible area of inquiry upon discovery . . . without reference to the particular discovery device employed." *Id.*

25. See FED. R. CIV. P. 26(b)(1). For an example of the use of the term "full discovery" in this sense, see Graham, *supra* note 24, at 905 n.48.



Prior to the adoption of Rule 26(b)(4) in 1970,<sup>26</sup> courts differed significantly over the scope of discovery that would be allowed of an adversary's expert witness.<sup>27</sup> Such an inconsistency among the courts resulted in cases with similar factual patterns being decided with diametrically opposite results.<sup>28</sup> As one commentator has since noted, the "discovery of expert witnesses concededly was in a chaotic state."<sup>29</sup>

An unadopted 1946 amendment to the Federal Rules of Civil Procedure reflected the early judicial attitude toward discovery of expert information. The proposal would have denied pretrial discovery of expert reports, except for the reports of physicians under Federal Rule of Civil Procedure 35.<sup>30</sup> It appears that the omission in the

26. Order of the Supreme Court of the United States Adopting the Federal Rules of Civil Procedure as Amended, 48 F.R.D. 459, 461-62 (1970).

27. Graham, *supra* note 24, at 899; *see also* Long, *supra* note 22, at 119 ("[N]o sound body of coherently related propositional law is deducible from the cases, nor have general standards employed by various courts yet furnished an adequate method of attack in this 'hazy frontier of the discovery process.'"). For a short review of the history of expert discovery, *see* Smith v. Ford Motor Co., 626 F.2d 784, 791-94 (10th Cir. 1980). For examples of the divergent degrees of discovery granted in different cases, compare, *Sachs v. Aluminum Co. of Am.*, 167 F.2d 570 (6th Cir. 1948); *United States v. 38 Cases, More or Less*, 35 F.R.D. 357 (W.D. Pa. 1964); *Henlopen Hotel Corp. v. Aetna Ins. Co.*, 33 F.R.D. 306 (D. Del. 1963); *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 425 (N.D. Ohio 1947), all allowing discovery of the expert's conclusions, with *United States v. 6.82 Acres of Land, More or Less*, 18 F.R.D. 195 (D. N.M. 1955); *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952). Both of these latter two cases deny even discovery of the experts' names.

28. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2029, at 240-41 (1970). As an example of the divergent treatment of similarly situated experts, Professors Wright and Miller contrast the experiences of two experts in a single patent infringement action. *Id.* The action spawned two separate cases: *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 425 (N.D. Ohio 1947) (*Cold Metal Process I*), and *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 684 (D. Mass. 1947) (*Cold Metal Process II*). The plaintiff in both these cases, *Cold Metal Process Co.*, had consulted two experts: One from the Massachusetts Institute of Technology (MIT), and the other from Case Institute of Technology (Case). *Cold Metal Process II*, 7 F.R.D. at 685. The plaintiff's attorney advised each expert to refuse to answer questions concerning the work they had done for the plaintiff. *Id.* at 686. The defendant filed separate motions for deposition of the experts in the federal district courts in Massachusetts and Ohio. The United States District Court for Massachusetts denied the defendant's motion to depose the expert from MIT, holding that the attorney-client privilege extended to the discovery of expert information and also that discovery of such information was against public policy. *Cold Metal Process II*, 7 F.R.D. at 686. In contrast, the United States District Court for the Northern District of Ohio granted the defendant's motion to compel answers to questions propounded to the expert from Case during deposition, ruling that such information was not privileged under the attorney-client privilege. *Cold Metal Process I*, 7 F.R.D. at 426. When the expert from Case persisted in his refusal to answer the propounded questions, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of contempt against him by the district court. *Sachs v. Aluminum Co. of Am.*, 167 F.2d 570 (6th Cir. 1948).

29. Graham, *supra* note 24, at 899.

30. *See* Report of Proposed Amendments to Rules of Civil Procedure for the District

rejected amendment of any reference to discovery directly from the expert resulted from the assumption that such discovery was already prohibited.<sup>31</sup> A similarly restrictive view toward the discovery of expert information underlaid many court decisions.<sup>32</sup> Even where courts allowed discovery of expert information, they frequently limited the discovery to the facts known by the expert and did not permit the discovery to reach the expert's conclusions.<sup>33</sup> The courts disagreed as to the limits placed on discovery, as well as to the justifications for limiting discovery.

The three justifications<sup>34</sup> advanced by the early cases for denying discovery were the attorney-client privilege,<sup>35</sup> the work-product the-

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Courts of the United States, 5 F.R.D. 433, 457 (1946) ("The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert." (emphasis in original)). Rule 35 of Federal Rules of Civil Procedure, as it was in effect in 1946 and like its modern day counterpart, provided for the discovery of the reports of examining physicians in cases where the mental or physical condition of a party was in controversy. Fed. R. Civ. P. 35, 308 U.S. 46 (1939).

31. See Graham, *supra* note 24, at 899-900. Professor Graham stated that:

The Advisory Committee Note was silent as to other means of discovering expert witness information, saying only that "[p]arties who have retained expert witnesses at their own expense are also protected, except as provided in Rule 35."

This is an apparent reference to protection from all discovery on work-product grounds.

*Id.* at n.21.

32. *Id.* at 900.

33. See, e.g., Walsh v. Reynolds Metals Co., 15 F.R.D. 376, 378 (D.N.J. 1954) (excluding the conclusions contained in the report of a heating expert who inspected a heating device shortly after it had exploded). Some courts, permitting discovery of the expert's conclusions usually noted that the conclusions were central to the determination of the litigation. See, e.g., E.I. Du Pont De Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959) ("Looked at from a practical rather than a legalistic point of view, the facts of a case like this are the opinions of the experts and the groundwork for those opinions comes within the ambit of a proper search for facts beyond the knowledge of the moving party.").

34. Friedenthal, *supra* note 22, at 455 (1962); see also C. WRIGHT & A. MILLER, *supra* note 28, § 2029, at 241-44 (discussing the changing attitude of courts toward the discovery of experts and their opinions); Long, *supra* note 22, at 123 (discussing the work-product doctrine and considerations of unfairness as grounds for denying discovery).

In contrast, some courts that permitted discovery of the facts and opinions held by an expert, usually did so by relying on the Supreme Court's statement in Hickman v. Taylor that discovery simply advanced the disclosure of such information from the time of trial to the period preceding it. 395 U.S. 495, 507 (1947). See 4 J. MOORE, J. LUCAS & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE ¶26.66[1], at 26-405-06 (2d ed. 1987) [hereinafter J. MOORE].

35. See, e.g., American Oil Co. v. Pennsylvania Petroleum Prods. Co., 23 F.R.D. 680, 685-86 (D.R.I. 1959); Schuyler v. United Air Lines, Inc., 10 F.R.D. 111, 113 (M.D. Pa. 1950); Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 684, 686 (D. Mass. 1947).

ory,<sup>36</sup> and "the rule of unfairness."<sup>37</sup> In their articles, Professor Jack N. Friedenthal and Mr. Jeremiah Long analyzed and rejected the attorney-client privilege and the work-product doctrine as justifications for denying discovery. Professor Friedenthal distinguished facts and opinions known and held by an expert from the expert's reports on the basis that the former constitutes evidence, whereas the latter only constitutes communication.<sup>38</sup> He concluded that it would be undesirable to extend the attorney-client privilege to prevent discovery of the expert's analysis and conclusions for two reasons.<sup>39</sup> First, the attorney-client privilege traditionally protected only communications.<sup>40</sup> Although the expert's report might arguably fall within the protection of the rule, Professor Friedenthal concluded that it should not be extended to preclude discovery of the expert's observations and conclusions.<sup>41</sup> Second, there is a legitimate need to prepare for effective cross-examination and rebuttal at trial.<sup>42</sup> Professor Friedenthal similarly argued against the application of the work-product doctrine.<sup>43</sup> Unlike the observations and opinions of the attorney, which

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36. See, e.g., *United States v. 284,392 Square Feet of Floor Space*, 203 F. Supp. 75, 76, 79 (E.D.N.Y. 1962); *Korman v. Shull*, 184 F. Supp. 928, 934-35 (W.D. Mich. 1960); *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257, 262 (D. Neb. 1959); *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521, 522 (N.D. Ohio 1952).

37. See, e.g., *United States v. 2,001.10 Acres of Land, More or Less*, 48 F.R.D. 305, 308 (N.D. Ga. 1969); *Maginnis v. Westinghouse Elec. Corp.*, 207 F. Supp. 739, 742 (E.D. La. 1962); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 378-79 (D.N.J. 1954); *Roberson v. Graham Corp.*, 14 F.R.D. 83, 84 (D. Mass. 1952); *Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593, 595 (D. Mass. 1941); *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21, 23 (W.D. Pa. 1940).

38. Friedenthal, *supra* note 22, at 469.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* Professor Friedenthal wrote his article prior to the adoption of Rule 705 of the Federal Rules of Evidence. The adoption of Rule 705 increases the need to prepare an effective cross-examination since the attorney on direct examination no longer needs to establish the foundation for the expert's opinion.

43. *Id.* at 472. Professor Friedenthal argued that the opinions and conclusions of experts are not the type of information that *Hickman v. Taylor* sought to protect. Justice Murphy writing for the majority in *Hickman* stated that:

Proper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. The work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals . . . as the "Work product of the lawyer." Were such material open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts,

the work-product doctrine is intended to protect, the observations and opinions of the expert constitute evidence.<sup>44</sup>

Both Professor Friedenthal and Mr. Long recognized, however, that genuine concerns were raised that discovery of expert information might be unfair to both the expert and the party who hired the expert.<sup>45</sup> Two separate and distinct theories underlie the "rule of unfairness."<sup>46</sup> Under the first theory, it is proposed that both the expert and the party hiring the expert have a property right in the expert's information.<sup>47</sup> Thus, permitting discovery of the expert information would violate this property right. Courts frequently addressed the extent to which an expert possessed a property right in his own expertise in cases in which an expert was subpoenaed to testify as an ordinary witness.<sup>48</sup> The majority of the courts that decided the "property right" issue held that an expert could be compelled to testify about knowledge he had acquired prior to the litigation in the same manner as any other citizen possessing relevant knowledge.<sup>49</sup> The litigant, however, could not require the expert to do additional research to prepare for examination at trial.<sup>50</sup>

On the other hand, a minority of the courts took the view that the expert's special training and knowledge comprised his stock in trade.<sup>51</sup> Under such a view, compelling an expert to testify—even about knowledge the expert already possessed—amounted to the taking of property without just compensation.<sup>52</sup> Although the protection

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heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effects on the legal profession would be demoralizing. And the interests of justice would be poorly served.

*Hickman*, 329 U.S. at 511. Professor Friedenthal argued that discovery of expert information would not have the same demoralizing effect on the expert or the attorney "since the only danger is that the expert might trip himself should he change his testimony at the trial." Friedenthal, *supra* note 22, at 472. Professor Friedenthal concluded that with respect to the application of the work-product doctrine, therefore, the expert witness should be treated no differently than any other witness with relevant information. *Id.*

44. Friedenthal, *supra* note 22, at 473.

45. *Id.* at 479-88; Long, *supra* note 22, at 138-39.

46. Friedenthal, *supra* note 22, at 479; Graham, *supra* note 24, at 902-06.

47. Friedenthal, *supra* note 22, at 479.

48. *Id.*

49. *Id.* at 480.

50. *Id.* at 481.

51. *Id.* at 480. Professor Friedenthal noted that this argument is even more compelling when it is realized that if a party is free to call any expert, the most desirable expert in a particular field might be unduly burdened by being called in every situation. *Id.*

52. *Id.* at 481. See, e.g., *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D.N.J. 1954). Courts extended the property right theory to prevent discovery of information not only from the expert, but also from the party employing the expert. *Id.* at 481-82. Other courts prevented discovery from the party in the mistaken belief that a confidential relationship exists

afforded by property right theory does not extend to the expert's knowledge of the underlying facts of the litigation,<sup>53</sup> in most situations it is next to impossible for an expert to separate his opinions and conclusions from his observations.<sup>54</sup>

The second theory used for denying discovery under the rule of unfairness was that unlimited discovery would encourage a party to wait until his opponent had hired experts and then make his own case through the discovery process using the more diligent litigant's expert.<sup>55</sup> Permitting a party to prepare his case in such a manner is not only unfair; it also promotes laziness.<sup>56</sup> A party may seek to discover the information of the adversary expert for a number of purposes: to obtain favorable testimony which might be used at trial, to acquire ideas which can lead to new theories of the case, or to lay the foundation for cross-examination in case the witness is called at trial by the party employing him.<sup>57</sup> Although the final purpose—preparation for cross-examination—is a legitimate and necessary activity, it is impossible to monitor a party's use of information which was obtained to prepare for cross-examination.<sup>58</sup> Therefore, it is difficult to prevent a party from using this information to build his own case or to develop new ideas.<sup>59</sup> Professor Friedenthal concluded, however,

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between the party and the expert and that much of the information the expert receives concerning a case is attributable to his being a member of a team that assists in the litigation. *Id.* at 482. Professor Friedenthal noted that this latter position ignores the court's power to compel any person having information relevant to the litigation, including the client, to divulge the information either during discovery or at trial. *Id.* Professor Graham observed that, although Professor Friedenthal rejected the "teammate" theory, it is very similar to Professor Friedenthal's argument for protecting expert reports—specifically, that discovery of expert reports would discourage parties from hiring experts. Graham, *supra* note 24, at 903 n.39; *see* Friedenthal, *supra* note 22, at 460.

53. Friedenthal, *supra* note 22, at 481.

54. *Id.*

55. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504 ("Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation."); Friedenthal, *supra* note 22, at 481; Graham, *supra* note 24, at 903.

56. Friedenthal, *supra* note 22, at 483.

57. *Id.* at 485. Professor Friedenthal noted that the fear that one party will call another party's expert witness is the most appealing argument in favor of the "rule of unfairness." *Id.* Realistically, however, several factors make it an unlikely practice. First, the adverse party often calls its own expert who is then subject to complete cross-examination. *Id.* During cross-examination, most of the information which the cross-examining party might wish to elicit may be drawn out while testing the basis of the expert's opinion. *Id.* at 484. Second, if the expert is not called by the employing party, the non-employing party may nevertheless be reluctant to call him for fear that the expert has become "client oriented" and may go to great lengths to testify favorably for the employing party. *Id.*

58. *Id.* at 487.

59. *Id.* Professor Friedenthal analyzed the problem of allowing unlimited discovery as follows:

that discovery of an expert's opinion is necessary because "[t]he ultimate requirement that judicial decisions be based on the true facts overcomes any detriment which might be suffered by the adversary system."<sup>60</sup> Nevertheless, Friedenthal noted, courts should use their powers to avoid the related inequities by controlling the timing and mutuality of discovery.<sup>61</sup>

In order to discourage laziness, Professor Friedenthal proposed that discovery be limited to experts who are to be called as witnesses at trial unless good cause to the contrary is shown.<sup>62</sup> To prevent the discovering party from using his opponent's experts to build his own case, discovery should also be contingent on mutuality of discovery.<sup>63</sup> Under a policy of mutuality, a party's right to discovery would be conditioned on the party allowing his adversary equal access to his own experts.<sup>64</sup> Mr. Long proposed a similar plan, emphasizing that courts take an active role in tailoring the course of discovery to ensure that the parties are "in a reciprocal position so that the advantages of discovery may be mutually available."<sup>65</sup>

Though the advisory committee's note to Rule 26(b)(4) states that the Rule adopts the proposals of Professor Friedenthal and Mr. Long, the language of the Rule is patterned after Judge Rozel Thom-

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The obvious objection to permitting unlimited discovery for cross-examination is that it is impossible to divorce information for purposes of impeachment from information to be used in direct support of the discoverer's own case. A court may control the actual introduction of evidence at trial, but it cannot prevent the use of information, ostensibly obtained for cross-examination only, to provide new approaches or to collect data which can be utilized by the discoverer's experts but which information was obtained only after considerable calculation and expense to the adverse party. A decision must be made, then, whether the needs of cross-examination outweigh the unfairness which could result. As already pointed out, the benefits to cross-examination in cases involving expert witnesses are substantial, whereas the unfairness, if it does exist in a particular case in terms of time, effort, and money, is often no worse in the case where an attorney seeks information from an adverse party's expert than it is where he seeks it from an eyewitness found by the adverse party after long and costly search.

*Id.*

60. *Id.*

61. *Id.*

62. *Id.* Professor Friedenthal noted that discovery would therefore occur shortly before trial when a party knows which experts it will present as witnesses.

63. *Id.* at 488.

64. Specifically, Professor Friedenthal proposed that the court require parties to designate their experts a short time before trial, with any expert not listed being prohibited from testifying at trial. *Id.*

65. Long, *supra* note 22, at 154. In addition, Mr. Long proposed that the parties exchange reports prior to engaging in discovery that is unlimited in its scope. *Id.*

sen's<sup>66</sup> decision in *Knighton v. Villian & Fassio*.<sup>67</sup> In *Knighton*, the court established the following procedure for discovering the information of the adversary's expert:

A party, by means of interrogatories served under Rule 33, F.R.Civ. P., a reasonable time prior to trial, may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert will testify. The party who served the interrogatories may proceed by any appropriate method to discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter and not privileged.<sup>68</sup>

In accordance with *Knighton*, appropriate methods of discovery include production of documents, depositions upon written interrogatories, or "any agreed procedure."<sup>69</sup>

There are striking differences between Judge Thomsen's approach and the Friedenthal and Long proposals.<sup>70</sup> Professor Friedenthal and Mr. Long both supported unlimited discovery to leave unrestricted the opportunity to prepare for cross-examination.<sup>71</sup> In contrast, the *Knighton* court limited discovery to the expert's opinion and the reasons for that opinion.<sup>72</sup> In addition, the court required only that the interrogatories be propounded a reasonable time before

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66. Judge Thomsen served on the advisory committee that drafted the 1970 amendments, including Rule 26(b)(4). Graham, *supra* note 24, at 906 n.53.

67. 39 F.R.D. 11 (D. Md. 1965); see FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

68. *Knighton*, 39 F.R.D. at 13. The *Knighton* court continued:

The phrase "expects to call" has been chosen rather than the term "may call", because the latter phrase is too broad; but the phrase "expects to call" will be interpreted broadly, to achieve the purpose of the ruling, which is to make available to each party a reasonable time before trial the facts, the opinions and the reasons for the opinions of the experts whom his opponent will call at the trial, so that a party may adequately prepare for cross-examination of his opponents' experts. While it is contemplated that a party will be entitled to obtain full disclosure of an expert's opinion and the facts and reasons upon which it is based, it is not contemplated that a party will be allowed, by deposition or otherwise, to conduct a preliminary cross-examination of his opponents' experts for the purpose of developing material to be used for impeachment nor to obtain the opinion of his opponents' expert on other facts than those which shaped his opinion. *Id.* at 13-14.

69. *Id.* at 13 n.2.

70. Graham, *supra* note 24, at 907-08. There are also a number of similarities. Like Professor Friedenthal and Mr. Long, the *Knighton* court rejected both the attorney-client privilege and the work-product doctrine as grounds for denying discovery of expert information. *Id.* at 907. The two-step procedure established by the Rule is also in agreement with similar suggestions by the two writers. *Id.*

71. *Id.* at 907.

72. *Id.*

trial, in contrast to Professor Friedenthal's proposal that discovery occur shortly before trial in order to encourage parties to develop their own cases instead of relying on their opponent's experts.<sup>73</sup> Finally, the *Knighton* court did not require any mutuality of discovery, apparently deciding that there was no inherent unfairness in allowing a party to discover information from his opponent's expert.<sup>74</sup>

### III. AN OVERVIEW OF RULE 26(b)(4)

Discovery of expert information under Rule 26(b)(4) acts as a limiting exception to the broad discovery provisions of the Federal Rules of Civil Procedure. A general discussion of discovery is thus necessary for an appreciation of Rule 26(b)(4)'s operation.

#### A. *The Relation of Rule 26(b)(4) to Discovery in General*

Rule 26 of the Federal Rules of Civil Procedure establishes the permissible scope of discovery.<sup>75</sup> Rule 26(b)(1) permits a party to discover any information that is not privileged and which is relevant to the subject matter of the litigation.<sup>76</sup> Relevancy is broadly interpreted in the context of discovery.<sup>77</sup> Thus, a party is permitted to discover information that would be inadmissible at trial as long as it is reasonably calculated to lead to the discovery of admissible information.<sup>78</sup>

Professors Wright and Miller identify three purposes which are served by a rule permitting liberal discovery:<sup>79</sup> First, liberal discovery aids in narrowing and clarifying the disputed issues prior to trial.<sup>80</sup> Second, it facilitates the acquisition of evidence by the parties for use

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73. *Id.*

74. *Id.* at 908.

75. C. WRIGHT & A. MILLER, *supra* note 28, at § 2001.

76. Rule 26(b)(1) states in part as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

77. C. WRIGHT & A. MILLER, *supra* note 28, at § 2001 (scope of discovery is broad with restrictions directed toward the use of, rather than the acquisition of, the information discovered).

78. FED. R. CIV. P. 26(b)(1); *see supra* note 76.

79. C. WRIGHT & A. MILLER, *supra* note 28, at § 2001.

80. *Id.*



at trial.<sup>81</sup> And third, it assists in securing information about the existence of evidence that may be used at trial, and how and from whom such evidence may be obtained.<sup>82</sup> In fulfilling these goals, discovery helps to avoid surprise at trial, while providing information that may be used as the basis for a pretrial settlement.<sup>83</sup>

Rule 26(b)(4), however, does place limits on the otherwise broad scope of discovery:<sup>84</sup>

*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 only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(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.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall 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.<sup>85</sup>

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81. *Id.*

82. *Id.*

83. *Id.*

84. See FED. R. CIV. P. 26(b)(4); J. MOORE, *supra* note 34, at ¶ 26.66[2].

85. FED. R. CIV. P. 26(b)(4). Rule 35 of the Federal Rules of Civil Procedure, referred to

Rule 26(b)(4) establishes four distinct categories of experts subject to varying degrees of discovery:<sup>86</sup> First, experts a party expects to call at trial;<sup>87</sup> second, experts retained or specially employed in anticipation of litigation or preparation for trial, but not expected to be called to testify at trial;<sup>88</sup> third, experts informally consulted in preparation for trial but not retained as such;<sup>89</sup> and fourth, experts whose information was not acquired in preparation for trial.<sup>90</sup> The first two classes are created by the explicit language of subsections (A) and (B) of the Rule. The latter two classes are implicit in the Rule and are discussed in the advisory committee's note.<sup>91</sup>

### B. Rule 26(b)(4) and the Multiple Roles of the Expert in Litigation

Experts play two primary roles in litigation: as witnesses and as consultants. As witnesses, experts are used to educate the trier of fact concerning evidence that has already been introduced but which may not be properly understood without the assistance of an expert's specialized knowledge.<sup>92</sup> Additionally, the testimony of an expert may be used to establish a fact in dispute. Rule 26(b)(4) permits the party faced with cross-examining the expert the opportunity to discover information concerning the opinion to which the expert is expected to testify and the factual basis for that opinion.<sup>93</sup>

As consultants, experts play an even more extensive role, both during pretrial preparation<sup>94</sup> and at trial.<sup>95</sup> Experts assist attorneys in

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in subsection (B) of Rule 26(b)(4), concerns the discovery of reports of examining physicians in cases where the mental or physical condition of a party is at issue. FED. R. CIV. P. 35.

86. C. WRIGHT & A. MILLER, *supra* note 28, at § 2029.

87. FED. R. CIV. P. 26(b)(4)(A).

88. FED. R. CIV. P. 26(b)(4)(B).

89. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

90. *Id.*

91. *Id.*

92. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702; *cf.* FED. R. EVID. 701 (Opinion Testimony of Lay Witnesses).

93. FED. R. CIV. P. 26(b)(4)(A); *see supra* note 85 and accompanying text.

94. Generally, expert witnesses perform five basic functions during pretrial preparation. They can: (1) help educate the attorney concerning the technical details of the case; (2) develop factual data through experiments and tests; (3) assist the attorney in evaluating the merits of the case and developing the applicable legal theories; (4) advise the attorney as the attorney attempts to discover and evaluate information from the opposing party's expert witnesses; and (5) actively participate in pretrial negotiations. D. DANNER, EXPERT WITNESS CHECKLISTS §§ 1:21, 1:23 (1983).

Experts have also been hired to prepare demonstrative evidence or analytical models for calculating damages. In particularly complex cases, computer experts have been hired solely to track the immense volume of documents involved in the litigation. Finally, an expert might

developing the theories that will be presented at trial, and also perform experiments and tests which may be used as the basis of their own testimony or the testimony of other experts. Perhaps most importantly, though, experts act as educators to attorneys to give them the background necessary to understand and cope with the factual issues raised by the litigation. These are valuable activities which benefit the litigation process as a whole. It is important, therefore, that the discovery rules not act as a disincentive to parties when they are deciding to engage experts for these roles.

Because Rule 26(b)(4) allows a party legitimately to shield his experts from discovery under certain circumstances, parties are more likely to hire experts. This is especially true in those cases where the benefits of hiring the expert would otherwise be outweighed by the possibility that the information developed by the expert might be used against the hiring party.

A hypothetical case will help to understand the different ways in which experts are involved in litigation and will serve to illustrate the functioning of Rule 26(b)(4) in handling the different types of expert witnesses. Assume for the purpose of illustration that a computer company has hired an attorney to defend it in a lawsuit brought by a purchaser of one of its personal computers. In the complaint, the purchaser alleges that he was injured while installing a circuit board necessary for the computer's operation.

Although the attorney has handled a wide range of product liability claims, she is unfamiliar with computers. In beginning her investigation into the merits of the case, the attorney has contacted the highly respected electrical engineering department of a nearby university. The first person she spoke with was Professor Green. Professor Green made it clear from the outset that he did not wish to become involved in the litigation. He was willing, however, to speak

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be employed to direct and coordinate the work of a team of experts where a background in a number of separate disciplines is essential to an understanding of the work of individual experts. Becker, *The Use of Experts in Pretrial Discovery*, in *USING EXPERTS IN CIVIL CASES* 1, 5-7 (M. Kraft, ed. 1982).

95. An expert may appear in a number of different capacities as a witness at trial. If the expert possesses first-hand knowledge of any of the facts in dispute, the expert may testify both to the disputed facts and any inferences that an expert could draw from those facts. An expert may also testify to the results of any tests or examinations which the expert performed prior to trial. An expert may give an opinion based on evidence that has already been admitted at trial. Finally, under Rule 705 of the Federal Rules of Evidence, an expert may give an opinion based on information that has not been admitted at trial if such information is reasonably relied upon by such experts in the particular field in forming inferences about the subject. D. DANNER, *supra* note 94, at § 1:24. Aside from serving as a witness, an expert may consult with an attorney at trial in order to help the attorney formulate an effective cross-examination of the other party's expert witness. *Id.*

with the attorney informally to recommend to her certain texts on safety standards for personal computers, and to provide her with a list of recognized experts in the field who might be willing to act as consultants or witnesses.

After her discussion with Professor Green, the attorney decided to contact Professor White, one of the individuals on Professor Green's list. Professor White is a tenured member of the electrical engineering faculty of a prominent university. In addition, Professor White has done extensive research on the subject of consumer product safety. After discussing the known details of the case with the attorney, Professor White agreed to assist in defending the case. He warned her, however, that he becomes very nervous when speaking in public, and that he probably would not be very effective as a testimonial expert. Although the attorney agrees that Professor White's demeanor makes him undesirable as a witness, she has entered into a written agreement to retain his services as a consultant. The parties have agreed that Professor White would advise the attorney concerning the technical aspects of the case and perform experiments, which they both have agreed would be necessary to establish that the product was safe.

Due to Professor White's fear of public speaking, the attorney has hired Professor Black to testify in the event that the litigation reaches the trial stage. Professor Black is a poised academician who does not quite possess the research credentials of Professor White, yet has respectable credentials. In addition, she is articulate and able to express even the most technical concepts in easily understandable lay terms. The attorney believes that this will be extremely important in persuading the jury that the computer in question was safe.

Finally, the computer company recommends that the attorney work with Mr. Brown who was the chief technician on the design team that developed the computer. The attorney hopes that Mr. Brown will be valuable both as a witness because he is familiar with the developmental history of the product, and as a consultant for herself and the other experts because he will be able to provide information concerning the early safety testing of the machine. Such information might eliminate any need to perform other tests and experiments.

It can be seen from this hypothetical that during the course of litigation, a number of significant relationships may arise among the attorney, the experts, and the litigating party. As mentioned above, the experts will act as consultants to the attorney. By the very nature of this relationship, it will be necessary that information flow both

from the experts to the attorney and from the attorney to the experts. Furthermore, the experts will exchange information among each other. This latter exchange most commonly occurs in the case of a testifying expert using the information developed by a non-testifying expert. Finally, an expert might be a party or a representative of a party involved in the litigation.

Frequently, an expert will prepare a report that will be communicated to the attorney to guide him in the handling of the case, or to another expert to be used as the basis of that expert's testimony at trial. Conversely, the attorney may prepare materials that will allow the experts to become familiar with the specific factual background of the case. A question arises, therefore, concerning the extent to which such materials are discoverable.

As a testifying expert, Professor Black will be subject to discovery in accordance with Rule 26(b)(4)(A).<sup>96</sup> Following the procedures of the Rule, discovery of the facts known and opinions held by Professor Black will normally begin with the propounding of interrogatories followed by a motion to the court for further discovery. If the motion for further discovery is granted, it may be limited at the discretion of the court, and fees may be allocated in accordance with Rule 26(b)(4)(C).<sup>97</sup> In contrast, Professor White, the expert who was retained but who was not expected to testify at trial, will only be subject to discovery under exceptional circumstances in accordance with Rule 26(b)(4)(B).<sup>98</sup> The stark difference between the treatment of the two experts becomes readily apparent when both experts cooperate in performing a single set of tests on the company's product in preparation for trial. Though the results of such experiments will usually be discoverable from Professor Black, they will rarely be discoverable from Professor White. By shielding the non-testifying expert from discovery, it is hoped that parties will be more likely to engage such experts to assist in the litigation, thereby improving the quality of pre-trial preparation.

Because discovery of information is based on whether the expert in possession of the information is expected to testify at trial, rather than on the role the expert played in the preparation of the information, prudence dictates that an attorney carefully consider to whom certain pretrial work is assigned. For instance, if tests must be performed, but there is a substantial possibility that the tests will produce results that are unfavorable to the client's case, there is a strong incen-

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96. See *supra* note 85 and accompanying text.

97. *Id.*

98. *Id.*

tive to have the tests performed by the non-testifying expert. Once it has been ascertained that the results of the test are not damaging to the client's case, they may be passed on to the testifying expert to be used as the basis of the expert's opinion at trial.

Courts have allowed parties to be fairly flexible in designating their testifying and non-testifying experts. For example, citing the right of the defendant to execute the trial strategy it deemed appropriate, the court in *Mantolite v. Bolger*<sup>99</sup> permitted a party to redesignate its testifying expert as an expert not expected to testify in order to invoke the higher degree of protection afforded to non-testifying experts.<sup>100</sup> Similarly, courts have limited the scope of inquiry in the discovery of a testifying expert to the subject matter upon which the expert is expected to testify at trial.<sup>101</sup> Thus, an expert might be subject to discovery as a testifying expert concerning one matter raised by the litigation, but not subject to discovery as a non-testifying expert on another matter in the same litigation.

Allowing a party to limit discovery of its expert's information by either redesignating the expert or limiting the scope of the expert's testimony at trial is not contrary to the overall policy objectives of the Rule. In both cases, the need for preparing for cross-examination and rebuttal at trial has been eliminated, resulting in a corresponding reduction in the need for discovery. As noted, the very purpose of allowing the discovery of expert information is to allow the opponent of the witness to prepare for cross-examination at trial.<sup>102</sup> Nevertheless, the need for one party's preparation for cross-examination must be balanced against the benefits of encouraging parties to seek out and obtain reliable expert advice so that advantages of using experts in pretrial preparation is not lost.

#### IV. RULE 26(b)(4)(A): DISCOVERY OF A TESTIFYING EXPERT'S INFORMATION

The two-step procedure of Rule 26(b)(4)(A) governs discovery of a testifying expert.<sup>103</sup> This section explores two questions: First, the information that may be gathered through interrogatories propounded under Rule 26(b)(4)(A)(i); and second, when additional discovery may be granted under Rule 26(b)(4)(A)(ii).

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99. 96 F.R.D. 179 (D. Ariz. 1982).

100. *Id.* at 182 n.2.

101. *See, e.g.,* *Bailey v. Meisterbrau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972) (Discovery should be limited to those opinions which the expert is expected to give at trial.).

102. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504; *see supra* notes 6-8 and accompanying text.

103. For the text of Rule 26(b)(4)(A), *see supra* note 85 and accompanying text.

### A. Information That May be Gained Through Interrogatories

Rule 26(b)(4)(A) sets up a two-step procedure that a party must follow to discover the facts known and opinions acquired or developed by an opponent's testifying expert in anticipation of litigation or for trial.<sup>104</sup> The Rule reflects the understanding that to effectively prepare for cross-examination and rebuttal at trial, a party must be able to anticipate the potential testimony of the experts his opponent expects to call.<sup>105</sup> The first step, laid down in Rule 26(b)(4)(A)(i), permits a party to propound interrogatories asking the adversarial party to identify each expert witness that party expects to call at trial, and to disclose the subject matter on which the expert is expected to testify.<sup>106</sup> In addition, the adversarial party may be compelled to disclose the substance of the facts and opinions about which the expert is expected to testify, as well as a summary of the grounds for each opinion.<sup>107</sup> Discovery under this subsection of the Rule is viewed as a matter of right.<sup>108</sup> The second step, laid down in Rule 26(b)(4)(A)(ii), permits the discovering party, after propounding interrogatories, to make a motion to the court for additional discovery.<sup>109</sup> This additional discovery may occur through any of the discovery techniques allowed by Federal Rule of Civil Procedure 26(a).<sup>110</sup>

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104. *Hockley v. Zent, Inc.*, 89 F.R.D. 26, 29 (M.D. Pa. 1980); *In re IBM Peripheral EDP Device Antitrust Litig.*, 77 F.R.D. 39, 41 (N.D. Cal. 1977); *United States v. IBM*, 72 F.R.D. 78, 81 (S.D.N.Y. 1976); *Herbst v. International Tel. & Tel. Co.*, 65 F.R.D. 528, 530 (D. Conn. 1975); *United States v. John R. Piquette Corp.*, 52 F.R.D. 370, 372 (E.D. Mich. 1970); *Continental Ins. v. Cole*, 467 So. 2d 309, 311 (1985) (construing a state rule of civil procedure identical to Rule 26(b)(4)). *But see* *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. 301, 303 n.1 (E.D. Pa. 1983) (Read literally, Rule 26(b)(4) does not require that written interrogatories be propounded before a party may move for further discovery.).

105. *Hoover v. United States Dept. of the Interior*, 611 F.2d 1132, 1142 (5th Cir. 1980); J. MOORE, *supra* note 34, at ¶ 26.66[3]; FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 503-04. Because experts may base their conclusions on any combination of a multitude of underlying facts, it is frequently difficult for an attorney to anticipate the approach that his adversary's expert will undertake. *Id.* at 503. Rule 26(b)(4) was designed to alleviate this problem by providing the attorney with the advance knowledge necessary to prepare properly for cross-examination and rebuttal. *Id.*; *see also* *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740, 743 (E.D. Mo. 1983) (The predicament in which Rule 705 of the Federal Rules of Evidence places a cross-examiner justifies the interpretation of Rule 26(b)(4)(A)(ii) as permitting discovery of a testifying expert's information.).

106. FED. R. CIV. P. 26(b)(4)(A)(i); *see supra* note 85 and accompanying text.

107. *Id.*

108. *See* *Bates v. Firestone Tire & Rubber Co.*, 83 F.R.D. 535, 539 (D.S.C. 1979); *Rupp v. Vock & Weiderhold, Inc.*, 52 F.R.D. 111, 113 (N.D. Ohio 1971).

109. FED. R. CIV. P. 26(b)(4)(A)(ii); *see supra* note 85 and accompanying text.

110. FED. R. CIV. P. 26(b)(4)(A)(ii); J. MOORE, *supra* note 34, at ¶ 26-416 (The term "other means," as used in Rule 26(b)(4)(A)(ii), includes both the taking of the expert's deposition, and the production of documents upon which the expert has relied.); *see also* FED. R. CIV. P. 26(a).

An empirical study conducted by Professor Graham in 1976 concluded that the actual procedures followed by attorneys varied greatly from the two-step procedure set out in Rule 26(b)(4)(A), with full discovery occurring routinely.<sup>111</sup> Professor Graham found that the liberal, extra-judicially conducted discovery that was occurring in practice at the time of his study was in sharp contrast with the conservative attitude of the courts toward the granting of additional discovery under Rule 26(b)(4)(A)(ii).<sup>112</sup> Nevertheless, despite suggestions that the two-step procedure of Rule 26(b)(4)(A) be eliminated,<sup>113</sup> courts have consistently required the discovering party to propound interrogatories before making a motion for additional discovery under Rule 26(b)(4)(A)(ii).<sup>114</sup>

If a court denies a party's motion for additional discovery under Rule 26(b)(4)(A)(ii), interrogatories will be the only discovery device available to the party to obtain information concerning his adversary's testifying experts. Professor Graham argues that, by their very nature, interrogatories are inadequate when used as the sole discovery device for preparing the cross-examination and rebuttal of an expert witness.<sup>115</sup> An empirical study that he conducted revealed that many attorneys share this view.<sup>116</sup> In apparent recognition of this problem,

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111. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 172. A similar study has confirmed this result in at least one state that has adopted a rule identical to Rule 26(b)(4). Day, *Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota*, 31 S.D.L. REV. 40, 51 (1985).

112. Graham, *supra* note 111, at 170, 172.

113. Day, *supra* note 111, at 51.

114. See, e.g., *In re IBM Peripheral EDP Device Antitrust Litig.*, 77 F.R.D. 39, 41 (N.D. Cal. 1977) (Rule 26(b)(4)(A) envisions a two-part procedure.); *United States v. IBM*, 72 F.R.D. 78, 81 (S.D.N.Y. 1976) (Rule 26(b)(4)(A) sets forth a "two-step" procedure.).

115. Graham, *supra* note 24, at 917-18. Professor Graham noted that depositions are clearly superior to interrogatories if a searching inquiry of an opponent's expert is necessary. *Id.* at 918. The flexibility of the deposition as a discovery device allows a party to gain a great deal of information and to pursue immediately newly discovered avenues of inquiry. *Id.* In addition, it helps to prevent the sanitization of the expert's opinions by depriving the expert of the opportunity to consult with the opposing attorney at length before answering. *Id.* In contrast, interrogatories are normally used to gather information concerning general pleading allegations, simple facts, and admissions, and to learn of the existence of documents and persons with relevant facts. *Id.* at 917. Professor Graham concluded that Rule 26(b)(4)(A)(i) is an "uncomfortable modification and overreaching of the normal function of interrogatories." *Id.* at 918.

116. Graham, *supra* note 111, at 172, 174. The open-ended responses received in Professor Graham's survey reveal the practical problems of using interrogatories as devices for gathering expert information. Attorneys typically described responses to interrogatories propounded under Rule 26(b)(4)(A)(i) as being sparse and incomplete. *Id.* Attorneys also noted that the responses are frequently "couched in language of [the] lawyer, not [the] expert witness" or that answers reflect the testimony that the other attorney would like the expert to give at trial. *Id.* Another complaint is that interrogatories are inadequate to explore sufficiently the impact on



the trend in the most recent court decisions has been toward an increasingly liberal granting of additional discovery; as long as there is no abuse of the discovery process and the parties have made a proper allocation of the expert's fees.<sup>117</sup>

Although interrogatories have severe limitations as a discovery device in preparing for cross-examination, responses to interrogatories can provide attorneys with useful information upon which to base tactical decisions concerning the utility of pursuing certain lines of inquiry either during discovery or at trial.<sup>118</sup> Moreover, as the Court of Appeals for the Second Circuit noted in *Weiss v. Chrysler Motors Corp.*,<sup>119</sup> the 1970 amendment to Rule 26(b)(4) "was not merely for [the] convenience of the court and the parties, but was intended to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact."<sup>120</sup>

Answers to interrogatories are often too evasive, however, to properly fulfill even these functions. A number of cases concerning interrogatories propounded to experts under Rule 26(b)(4)(A)(i), therefore, have focused on whether answers to the interrogatories were sufficient under the Rule.<sup>121</sup> One method for preventing evasive answers to interrogatories is to ask detailed and narrowly-focused questions. Specific questions may be asked in an interrogatory propounded to an expert if that question falls within the areas of inquiry specifically allowed by Rule 26(b)(4)(A)(i). Some courts have attempted to delineate specifically what information a party may obtain when propounding interrogatories to experts.<sup>122</sup> While these cases have helped to establish some minimum guidelines for information that may be obtained under Rule 26(b)(4)(A)(i), the decisions have failed to establish any truly useful general measure of sufficiency.

*Rupp v. Vock & Weiderhold, Inc.*<sup>123</sup> was one of the first cases to consider the issue of the sufficiency of responses to interrogatories in terms of specific information. The court found that the plaintiff's

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the expert's opinion of differing factual assumptions. *Id.* Finally, interrogatories fail to provide an attorney with an opportunity to assess the expert's demeanor or ability to withstand rigorous cross-examination. *Id.* Such information may affect tactical decisions ranging from the bargaining posture assumed by the party during settlement negotiations to the selection of jurors during voir dire. The problems with discovery through interrogatories is perhaps best summarized by an attorney who wrote: "Need full discovery—experts on cross are dangerous unless maximum preparation is afforded." *Id.*

117. See *infra* notes 151-229 and accompanying text.

118. Graham, *supra* note 24, at 917.

119. 515 F.2d 449 (2d Cir. 1975).

120. *Id.* at 457.

121. Graham, *supra* note 24, at 918.

122. See *infra* notes 123-150 and accompanying text.

123. 52 F.R.D. 111 (N.D. Ohio 1971).

identification of expert witnesses by name only was insufficient and ordered the plaintiff "to furnish defendant with each expert's present address, his current occupation or profession, and his particular specialty."<sup>124</sup> Subsequent to *Rupp*, courts have gone further by encouraging parties to exchange helpful information, including biographical data of their experts.<sup>125</sup> In *Boselli v. Southeastern Pennsylvania Transportation Authority*,<sup>126</sup> the district court required a plaintiff to respond to interrogatories that asked how much time each of the plaintiff's experts had spent in their examination of the plaintiff. The court declared such information to be within the scope of "the substance of the facts relied on by the expert in reaching his opinions."<sup>127</sup>

By focusing on whether certain questions fall within the scope of inquiry permitted by Rule 26(b)(4)(A)(i), the courts have avoided the problem of deciding whether a party's response provides the information required by the Rule in terms of disclosing the substance and basis of the expert's opinion. This approach may prove useful in cases where the course of investigation undertaken by the expert is relatively easy to predict, as in the case of interrogatories submitted to an examining physician. To place on the discovering party the burden of anticipating the myriad possible lines of investigation undertaken by the expert, however, defeats one of the primary purposes of Rule 26(b)(4)—that of aiding the lawyer "in anticipat[ing] the particular approach his adversary's expert will take or the data on which the expert will base his judgment on the stand."<sup>128</sup>

In *Weiss v. Chrysler Motors Corp.*,<sup>129</sup> the court established a more useful test for measuring the sufficiency of responses to interrogatories. In *Weiss*, the plaintiff sued for injuries received during an automobile accident which the plaintiff claimed was caused by a defect in

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124. *Id.* at 113; see also *Mann v. Newport Tankers Corp.*, 96 F.R.D. 31, 32 (S.D.N.Y. 1982) (It is insufficient identification of an expert to list his address as "New York, New York."); *Clark v. General Motors Corp.*, 20 Fed. R. Serv. 2d 679 (D. Mass. 1975) (The expert's qualifications are part of his identity.); *Olmert v. Nelson*, 60 F.R.D. 369, 371 (D.D.C. 1973) (Plaintiffs must provide defendant with each expert's present address, current occupation or profession, and particular specialty.); *Manna Music, Inc. v. Smith*, 26 Fed. R. Serv. 2d 595 (M.D. Pa. 1978) (The plaintiff is entitled to the name, job title, and business and home addresses of each expert witness expected to testify.)

125. *United States v. International Business Mach. Corp.*, 72 F.R.D. 78, 83 (S.D.N.Y. 1976).

126. 108 F.R.D. 723 (E.D. Pa. 1985).

127. *Id.* at 727; see also *Baise v. Alwel's, Inc.*, 99 F.R.D. 95 (W.D. Mo. 1983) (Because a party is entitled to a summary of the grounds for each opinion, the responding party was ordered to provide opposing counsel with a list of books upon which its expert's opinion was based.)

128. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 503.

129. 515 F.2d 449 (2d Cir. 1975).

the steering mechanism manufactured by the defendant.<sup>130</sup> During discovery, a metallurgist for Chrysler conceded that the break in the Pitman arm stud of the steering mechanism was caused by two successive fractures.<sup>131</sup> At trial, Chrysler sought to refute the plaintiff's theory that the fractures in the system were due to fatigue by having its expert testify that both breaks in the steering mechanism occurred after the plaintiff's car had already left the road and hit a stump.<sup>132</sup> The plaintiff moved to have the expert's testimony stricken because the the defendant had not revealed in either its original or supplemented answers to interrogatories that the expert would testify to such a theory.<sup>133</sup> The trial court refused to grant the plaintiff's motion.<sup>134</sup> The court of appeals reversed the trial court's decision noting that the policy of "mak[ing] the task of the trier of fact more manageable by means of an orderly presentation of complex facts" had been frustrated by Chrysler's failure to disclose the potential testimony of its expert.<sup>135</sup>

In *Hockley v. Zent*,<sup>136</sup> the trial court followed the approach of the court of appeals in *Weiss* by viewing the purpose of expert interrogatory answers as that of giving notice of the theory that the expert will testify to at trial. The plaintiffs in *Hockley* were injured when a truck driven by one of the original defendants to the action collided with the back of their stationary car.<sup>137</sup> The original defendants in the action, the driver of the truck and his employer, joined the co-manufacturers of the truck as third-party defendants.<sup>138</sup> The truck manufacturers then propounded interrogatories to the truck driver and his employer that closely paralleled the language of Rule 26(b)(4)(A)(ii). The interrogatories asked for information as to the expected testimony of the experts hired by the truck driver and his employer concerning any theories of liability that were to be asserted against the truck manufacturers.<sup>139</sup> In response, the truck driver and his employer gave a series of short answers, essentially stating that the brake system manufactured by the truck manufacturers was equipped with safety devices that were inadequate to warn the third-party

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130. *Id.* at 453.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 456.

135. *Id.* at 457.

136. 89 F.R.D. 26 (M.D. Pa. 1980).

137. *Id.* at 27.

138. *Id.*

139. *Id.*

plaintiff of brake failure.<sup>140</sup> The court stated that the primary function of the interrogatories required under Rule 26(b)(4)(A)(i) was to afford the discovering party notice of the basic arguments the responding party intended to present at trial.<sup>141</sup> The court noted that even the "skeletal" answers provided by the responding party in this case fulfilled this requirement of the Rule.<sup>142</sup>

At least one other circuit court has applied a test of sufficiency similar to the one in *Weiss*. In *Grogan v. Garner*,<sup>143</sup> the Court of Appeals for the Eighth Circuit upheld the trial court's decision to exclude the testimony of an expert witness concerning the tax implications of a stock transaction because the party calling the witness had failed to disclose this possible "subject area" in his answer to interrogatories.<sup>144</sup> The trial court had apparently excluded the testimony in question because it presented an unexpected theory at trial, rather than simply being a component of a broader range of testimony concerning the financial statements about which the expert was permitted to testify.<sup>145</sup>

The advantage of a standard of sufficiency based on a theory of notice is that it does not depend on a determination by the court as to whether a response provides the information necessary for cross-examination. It is apparent from the conclusory answer that was held to have been adequate by the *Hockley* court, however, that the rule would permit answers to interrogatories that were insufficient for the actual preparation of cross-examination. If the courts are to adopt a standard of sufficiency based on a theory of notice, then a liberal policy of granting additional discovery under Rule 26(b)(4)(A)(ii) would also seem appropriate. Once a party knows what theories its opponent expects to assert at trial, the party will know whether, and to

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140. *Id.* at 28.

141. *Id.* at 30. Apparently, under the notice standard, only minimal information concerning the theory that will be pursued at trial by the expert needs to be conveyed in the answers to interrogatories. In *Hockley*, the court found that the answers given by the plaintiff fulfilled the requirements of the notice standard even though they simply stated that the expert had concluded that the brake system manufactured by the defendant was "equipped with inadequate failsafe devices, disconnect features, nor [sic] devices to warn of system failure." *Id.* at 28.

142. *Id.* at 31.

143. 806 F.2d 829, 837 (8th Cir. 1986).

144. *Id.*; see also *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726 (1st Cir. 1986) (The district court could reasonably have concluded that defendants were not surprised by a new theory brought up by the expert at trial.); *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir. 1986) (In light of the lack of notice to the plaintiffs and the cumulative nature of the testimony, the trial court did not abuse its discretion in excluding the expert's new theory.).

145. *Grogan*, 806 F.2d at 837-38.

what extent, additional discovery will be required to prepare for cross-examination and rebuttal of the witness.

Viewing the role of interrogatories as a means of providing notice to the other party of the need to develop contrary evidence is also consistent with the purpose behind the adoption of Rule 26(e)(1)(B),<sup>146</sup> which requires a party to supplement seasonably<sup>147</sup> its answer to any question directly addressed to the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.<sup>148</sup> This duty to supplement seasonably information provided during discovery continues even through the time of the trial.<sup>149</sup> Rule 26(e)(1)(B) was adopted to carry out the provisions of Rule 26(b)(4) when "new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made."<sup>150</sup>

In summary, though courts consistently have required parties to follow the two-step procedure of Rule 26(b)(4)(A) for discovering information from a testifying expert, the main function of interrogato-

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146. Rule 26(e) of the Federal Rules of Civil Procedure states in part:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows: (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

FED. R. CIV. P. 26(e)(1). Rule 26(e)(1) requires a party to inform its opponent of any potential change in its expert witness' testimony. The Rule reflects the concern of the advisory committee that, at a minimum, a party should have notice of any new issue or theory that might be raised at trial. See FED. R. CIV. P. 26(e) advisory committee's note, 48 F.R.D. 487, 508; see also *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726 (1st Cir. 1986) (The supplementation requirement of Rule 26 should not be read mechanically, but rather in light of its dual purposes of narrowing issues and eliminating surprise.).

147. See, e.g., *Tabatchnick v. G. D. Searle & Co.*, 67 F.R.D. 49 (1975) ("In the absence of unexpected developments, supplementation after the jury has been drawn cannot be considered to have been made 'seasonably.'").

148. See *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726 (1st Cir. 1986). *Laaperi* was an action in negligence and breach of warranty centered on a smoke detector manufactured by the defendant. *Id.* at 728. Although the defendant claimed that the plaintiff had failed to supplement his interrogatories to alert it to the fact that the expert would testify to a "separate circuit" theory, the United States Court of Appeals for the First Circuit found that the trial court did not abuse its discretion in allowing the expert to testify to this theory because the company had had notice or was actually aware of the theory. *Id.* at 733. Significantly, an official of the defendant company conceded at trial that a group of company executives had discussed a "separate circuit" theory two weeks earlier. *Id.*

149. *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir. 1975).

150. FED. R. CIV. P. 26(e) advisory committee's note, 48 F.R.D. 487, 507-08.

ries has become that of providing a party with notice of the theories that the expert will assert at trial.

### B. Rule 26(b)(4)(A)(ii) - Granting Additional Discovery

Although eighteen years have passed since the adoption of Rule 26(b)(4), relatively few published decisions have addressed the question of what showing a party needs to make in order to be granted additional discovery under subparagraph 26(b)(4)(A)(ii).<sup>151</sup>

#### 1. THE DEPOSITION/REPORT DICHOTOMY

The earliest decisions concerning the granting of additional discovery under Rule 26(b)(4)(A)(ii) reflected divergent approaches to the issue. The results often appeared to turn on whether the expert's deposition or the expert's report was being sought.<sup>152</sup> This divergence of results reflects the confusion which has developed because of the absence in the rule of a standard for granting additional discovery.<sup>153</sup>

The early trend with respect to the production of the expert witness' reports was to permit such discovery only if the party seeking discovery showed some need for the materials.<sup>154</sup> In the medical malpractice action of *Wilson v. Resnik*,<sup>155</sup> the plaintiff sought production of defendant's expert witness' report under subparagraph 26(b)(4)(A)(ii).<sup>156</sup> The plaintiff alleged that the defendant's answers to interrogatories were sketchy and conclusory.<sup>157</sup> The court rejected

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151. Pursuant to 28 U.S.C. § 1292 (1982 & Supp. IV 1986), discovery orders are interlocutory and thus are usually not appealable until a final judgment has been entered. As a result, few appellate decisions deal with issues concerning the granting or denial of motions for discovery.

152. Compare *Herbst v. International Tel. & Tel. Corp.*, 65 F.R.D. 528, 530-31 (D. Conn. 1975) (granting the motion to depose the expert witness without requiring a showing of substantial need) with *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, 205 (N.D. Miss. 1972) (denying a motion for production of expert reports because there was no showing of "unique or exceptional circumstances" or "substantial need") and *Wilson v. Resnick*, 51 F.R.D. 510, 511-12 (E.D. Pa. 1970) (denying motion for production of the expert witness' report absent a showing of substantial need).

153. For an explanation of the rule's failure to set forth a standard, see *Graham*, *supra* note 24, at 895, 920.

154. See, e.g., *Breedlove*, 57 F.R.D. at 205; *United States v. 145.31 Acres of Land*, 54 F.R.D. 359, 360 (M.D. Pa. 1972); *Wilson v. Resnick*, 51 F.R.D. 510, 511-12 (E.D. Pa. 1970).

155. 51 F.R.D. 510 (E.D. Pa. 1970).

156. *Id.* at 511.

157. *Id.* The plaintiff's interrogatories paralleled Rule 26(b)(4)(A)(i) in requesting the defendant to identify each expert and disclose the subject matter on which the expert was expected to testify, the substance of the facts and opinions to which the experts were expected to testify, and a summary of the grounds for each opinion. *Id.* In response the defendant identified his expert and stated that the expert would testify essentially that the plaintiff was treated in accordance with good, sound, medical practice and that any damage suffered by the plaintiff was minimal. *Id.*

this claim, finding that the defendant's answers were sufficient.<sup>158</sup> In addition, the court stated that "to compel production of documents . . . on mere allegation that answers to interrogatories were insufficient would defeat the entire procedure which Rule 26(b)(4) sets forth."<sup>159</sup> Therefore, the court held that discovery of the reports was controlled by the work-product doctrine of Rule 26(b)(3),<sup>160</sup> and that the plaintiffs had failed to make the showing of substantial need required under the rule.<sup>161</sup>

Similarly, in *Breedlove v. Beech Aircraft Corp.*,<sup>162</sup> a federal district court in Mississippi prohibited the discovery of the expert's report because the plaintiff failed to show either "exceptional circumstances" or "substantial need."<sup>163</sup> The reports sought by the plaintiff in *Breedlove* had been prepared by the defendant's employees.<sup>164</sup> Subsequent to the preparation of the reports, the defendant permitted the plaintiff to depose the employees.<sup>165</sup> When the plaintiff requested the court to order production of the reports that had been given to the defendant's attorney, the defendant objected that the scope of inquiry for the depositions, to which the defendant had voluntarily consented, should not be any greater than the scope permitted under subsection 26(b)(4)(A)(i) for interrogatories.<sup>166</sup> In denying discovery, the *Breedlove* court first held that the defendant had not waived the protection that the employees might have had as expert witnesses under Rule 26(b)(4)(A), because they had consented to the taking of the deposition.<sup>167</sup> Thus, the court reasoned, the plaintiffs were initially limited

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158. *Id.*

159. *Id.*

160. *Id.* Rule 26(b)(3) of the Federal Rules of Civil Procedure reads in part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3).

161. 51 F.R.D. at 512.

162. 57 F.R.D. 202 (N.D. Miss. 1972).

163. *Id.* at 205.

164. *Id.* at 204-05.

165. *Id.*

166. *Id.*

167. *Id.* at 205.

in the deposition to the scope of discovery permitted under Rule 26(b)(4)(A)(i).<sup>168</sup> In considering the plaintiff's request for additional discovery, the court noted that there was no showing of "unique or exceptional circumstances" that required the production of the report.<sup>169</sup> The court added that "unique or exceptional circumstances" would exist to require production of the reports if the requesting party could demonstrate that it otherwise could not elicit the basis and scope of the experts' opinions and supporting data.<sup>170</sup>

Next, the court considered whether the report was discoverable under Rule 26(b)(3), which controls the discoverability of attorney work-product.<sup>171</sup> After examining the expert's report in camera, the *Breedlove* court found that the reports had been prepared in anticipation of litigation, and that they were responsive to inquiries of the defendant's attorney.<sup>172</sup> The court held, therefore, that the party seeking discovery of such reports needed to show both "substantial need" for the reports and the inability to obtain their substantial equivalent without undue hardship. Because the plaintiff had failed to make such a showing of need, the court denied discovery.<sup>173</sup>

In contrast, in *Herbst v. International Telephone & Telegraph Corp.*,<sup>174</sup> the discovering party was seeking to take the deposition of its adversary's experts.<sup>175</sup> The *Herbst* court adopted a liberal approach under Rule 26(b)(4)(A), reasoning that discovery of experts should be just as liberal as the discovery of ordinary witnesses once the problem of a party unfairly obtaining the benefit of its opponent's expert "cheaply" has been resolved.<sup>176</sup> The *Herbst* court held that the expert was subject to discovery after the parties properly allocated the expert's fees between themselves.<sup>177</sup> The *Herbst* court placed no restriction on the discovery,<sup>178</sup> although restrictions, such as those on mutuality and timing suggested by Professor Friedenthal and Mr.

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168. *Id.*

169. *Id.* at 205.

170. *Id.*

171. *Id.*

172. *Breedlove*, 57 F.R.D. at 205.

173. *Id.*

174. 65 F.R.D. 528 (D. Conn. 1975).

175. *Id.* at 528.

176. *Id.* at 531-32.

177. *Id.* at 532. The *Herbst* court stated that the parties were to determine how the expert's fees would be shared, any disagreement between the parties being submitted to the court. *Id.*

178. Professor Graham argues that the fact that the court imposed neither a restriction on timing nor a requirement of mutuality indicates that it did not recognize the concerns of Professor Friedenthal and Mr. Long over the unfairness of allowing one party to use discovery of an adverse party's expert to develop its own case. Graham, *supra* note 24, at 924.



Long, would have been within the court's power.<sup>179</sup>

The *Herbst* decision was followed in a product liability action in *Dennis v. BASF Wyandotte Corp.*,<sup>180</sup> in which the court allowed discovery of the plaintiff's expert witness by deposition without any showing of substantial need.<sup>181</sup> In *Dennis*, the plaintiff's answers to the defendant's interrogatories stated little more than the opinion that the product had been manufactured and designed negligently, and that it was not fit for the ordinary purpose for which it had been designed.<sup>182</sup> In permitting the deposition, the court equated the right to depose the expert as "at least equal to the right of a litigant to depose an eyewitness to an intersectional traffic accident where injured parties are involved in litigation."<sup>183</sup> The court reasoned that permitting the deposition would serve four important policy goals: First, it would improve the prospects of a settlement because the parties would be better able to judge the relative strengths and weaknesses of their respective cases.<sup>184</sup> Second, it would increase the likelihood of a fair trial by bringing all the relevant facts to light.<sup>185</sup> Third, it would avoid trial by surprise.<sup>186</sup> And fourth, it would reduce the possibility that the expert would alter or amend a generalized opinion to fit the evidence at trial.<sup>187</sup> In holding that additional discovery was not conditioned on a showing of substantial need, the court noted that it was particularly important in cases in which the replying party's answers to interrogatories were "very general and conclusory."<sup>188</sup> To balance any concern that it would be unfair to allow the additional discovery, the court followed the *Herbst* decision and ordered the party seeking discovery to pay all fees and expenses incurred by its opponent in accordance with Rule 26(b)(4)(C)(i).<sup>189</sup>

## 2. THE TREND TOWARD A CONSISTENT STANDARD

In contrast to the conservative approach taken by the courts in *Wilson* and *Breedlove* with respect to discovery of expert reports, the

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179. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504 ("The court may order further discovery and it has ample power to regulate its timing and scope to prevent abuse."); see Friedenthal, *supra* note 22, at 487-88; Long, *supra* note 22, at 152-54.

180. 101 F.R.D. 301, 303 (E.D. Pa. 1983).

181. *Id.* at 301.

182. *Id.* at 302.

183. *Id.* at 303.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 304.

189. *Id.*

liberal approach to discovery taken by the *Herbst* and *Dennis* courts is consistent with the Supreme Court's view of the discovery process<sup>190</sup> and the policy reasons which brought about the 1970 amendments to Rule 26.<sup>191</sup> As the advisory committee to Rule 26(b)(4) noted: "Effective cross-examination of an expert witness requires advance preparation."<sup>192</sup>

The question remains, however, whether a distinction should be made between a motion to depose the expert and a motion for the production of the expert's report. Professor Graham argues against the application of a higher standard for the discovery of expert reports than for other forms of discovery. He notes that the advisory committee specifically rejected the work-product doctrine as a justification for denying discovery of expert information and that Rule 26(b)(3), which codifies the work-product doctrine into the Federal Rules of Civil Procedure, is "subject to" the provisions of Rule 26(b)(4).<sup>193</sup> Professor Graham then argues:

With respect to discretionary incorporation [of the standard of Rule 26(b)(3) into Rule 26(b)(4)(A)(ii)], the distinction between *Wilson* and *Breedlove* as involving experts' reports, and *Herbst* and *Piquette* as involving oral depositions, is not significant. Any attempt to superimpose the substantial need requirement of Rule 26(b)(3) solely as to expert reports as the standard for further discovery pursuant to Rule 26(b)(4)(A)(ii) in fact is doomed to failure. Such incorporation would allow depositions more readily than discovery of expert reports. Yet discovery of expert reports often may be preferable to depositions when a party seeks further discovery to prepare for cross-examination and rebuttal. Document discovery clearly is less of an imposition on an expert's time while being no more of an intrusion on the expert's mental processes than is face-to-face inquiry about his opinions and the grounds therefor.<sup>194</sup>

Subsequent to the publication of Professor Graham's article, a number of decisions have adopted a more consistent standard for dis-

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190. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); accord *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. at 303 (citing *Hickman v. Taylor*, 329 U.S. at 495) ("This liberal reading of Rule 26 is entirely consistent with the Supreme Court's position that the deposition-discovery rules are to be given a broad and liberal treatment and should enable the parties to obtain the fullest possible knowledge of the issues and facts before trial.").

191. See generally FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 503-05.

192. *Id.* at 503.

193. Graham, *supra* note 24, at 927.

194. *Id.*

covery of expert depositions and expert reports.<sup>195</sup> For example, in *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*,<sup>196</sup> a case arising out of a helicopter crash, the trial court anticipated that the complex litigation would turn on the testimony of the expert witnesses because of the disputes over technical facts that existed between the parties.<sup>197</sup> In ordering the production of the expert's report, including reports containing the preliminary conclusions of the expert, the court rejected the plaintiff's contention that expert reports were discoverable only upon a showing of substantial need and undue hardship.<sup>198</sup> It observed that allowing pretrial discovery of expert reports would "guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date."<sup>199</sup>

The *Quadrini* court's approach was adopted by a California district court in *In re IBM Peripheral EDP Devices Antitrust Litigation*.<sup>200</sup> Though the trial court rejected the discovering party's motion for the production of documents as overly broad, it also analyzed and rejected the Rule 26(b)(3) substantial need test of *Wilson and Breedlove*.<sup>201</sup> In rejecting the work-product standard, the *IBM* court focused on the texts of Rules 26(b)(3) and 26(b)(4). Reaching the same conclusion as Professor Graham, it remarked that "Rule 26(b)(3) expressly states that it is subject to the provisions of subsection (b)(4)" and that "where the drafters wanted to include a specific standard, they did so."<sup>202</sup> The *IBM* court declared that "the purpose behind the requirement of a court order for further discovery in Rule

195. *E.g.*, *American Steel Prod. Corp. v. Penn Central Corp.*, 110 F.R.D. 151 (S.D.N.Y. 1986); *Delcastor, Inc. v. Vail Ass'n, Inc.*, 108 F.R.D. 405 (D. Colo. 1985); *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. 301 (E.D. Pa. 1983); *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740 (E.D. Mo. 1983); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 553 F. Supp. 45 (S.D.N.Y. 1982); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39 (N.D. Cal. 1977); *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 74 F.R.D. 594 (D. Conn. 1977); *Herbst v. International Tel. & Tel. Co.*, 65 F.R.D. 528 (D. Conn. 1975); *see also* J. MOORE, *supra* note 34, ¶ 26-416 (Although some early decisions required that substantial need for experts' reports be shown, most courts have construed Rule 26(b)(4)(A)(ii) liberally.).

196. 74 F.R.D. 594 (D. Conn. 1977).

197. *Id.* at 595.

198. *Id.*

199. *Id.*

200. 77 F.R.D. 39, 41 (N.D. Cal. 1977) ("The court is of the opinion that *Quadrini* correctly interpreted Rule 26(b)(4)(A)."); *see also* *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740, 743 (E.D. Mo. 1983) ("This court is of the opinion that the *Quadrini* and *IBM* cases correctly read Rule 26(b)(4)(A)(ii) as allowing production of testifying expert's documents where such documents are needed for effective cross-examination.").

201. *In re IBM*, 77 F.R.D. at 41; *see also* *Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983) (rejecting application of Rule 26(b)(3) substantial need test).

202. *In re IBM*, 77 F.R.D. at 41. An example of a specific standard incorporated into Rule

26(b)(4)(A)(ii) is to insure that the movant's only interest is in obtaining information for cross-examination."<sup>203</sup>

In another recent case, *American Steel Products Corp. v. Penn Central Corp.*,<sup>204</sup> the Federal District Court for the Southern District of New York granted the discovering party's request to take the expert's deposition as well as obtain his report, rejecting any suggestion that additional discovery of an expert witness required a showing of compelling need or exceptional circumstances.<sup>205</sup> The *Penn Central* court stated that "although Rule 26(b)(4)(A)(ii) is normally used to obtain an expert's deposition, courts that have considered the issue have found no reason to refuse to apply the rule to a request for documents from an adversary's expert."<sup>206</sup>

The most thoroughly reasoned rejection of the incorporation of the work-product doctrine into discovery under Rule 26(b)(4)(A)(ii) of expert reports is found in the patent litigation case of *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*<sup>207</sup> In *Hewlett-Packard*, the plaintiff sought production of the drafts of a declaration that the defendant's expert had prepared for a prior proceeding before the United States Patent and Trademark Office.<sup>208</sup> The objectives of the lawsuit and the proceeding before the Patent Office were the same: The plaintiff was attempting to have the defendant's patent declared invalid.<sup>209</sup> The plaintiff thus sought the drafts of the declaration to enable it to challenge the expert's anticipated testimony before the district court and to show that the Patent Office's decision had been based on the incomplete and purposefully misleading declaration of the defendant's expert.<sup>210</sup> The court quickly focused on what it viewed as the dispositive issue: whether the drafts of the declaration were discoverable under Rule 26(b)(4)(A)(ii).<sup>211</sup> The court noted that *Quadrini* and its progeny had rejected the work-product doctrine as grounds for protecting the reports and the drafts of reports generated by experts.<sup>212</sup>

The district court ruled that the drafts of the expert's declaration were not protected by the work-product doctrine and were discoverable.

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26(b)(4) is the requirement of a showing of exceptional circumstances before allowing discovery of non-testifying, retained experts. FED. R. CIV. P. 26(b)(4)(B).

203. *In re IBM*, 77 F.R.D. at 41.

204. 110 F.R.D. 151 (S.D.N.Y. 1986).

205. *Id.* at 153.

206. *Id.*

207. 116 F.R.D. 533 (N.D. Cal. 1987).

208. *Id.* at 534.

209. *Id.* at 535.

210. *Id.* at 535-36.

211. *Id.* at 536.

212. *Id.*

ble under Rule 26(b)(4).<sup>213</sup> The court responded in detail to the defendant's assertion that allowing discovery of the drafts would do "great violence to the values that the work-product doctrine was developed to protect."<sup>214</sup> The court interpreted the decision in *Hickman v. Taylor* as focusing solely on the privacy interest of attorneys.<sup>215</sup> Attorneys' privacy was protected in *Hickman* for two related reasons: First, the attorney's work-product was protected to allay the attorney's fear that his opponent would gain access to his ideas, perceptions, assessments, and plans: Second, the attorney's work-product was protected to lessen the temptation of a lazy attorney to wait until the other side had completed its "investgatory homework" and then receive the information thus acquired through discovery.<sup>216</sup> The district court reasoned that the drafters of Rule 26(b)(3), in codifying the work-product doctrine, however, had specifically removed experts and the information they develop from the purview of the work-product doctrine's protection.<sup>217</sup> Because the expert's declaration in the instant case consisted of descriptions of physical facts and of engineering reasoning, rather than legal reasoning or litigation strategy, the court reasoned that discovery of the information would not threaten the values at the center of the work-product doctrine.<sup>218</sup>

Anticipating that the decision to permit discovery might be appealed, the district court continued by addressing possible arguments that might be advanced for extending the work-product doctrine to protect the drafts of expert's reports. One possible argument posited by the court was the fact that, in reality, reports of experts in complex litigation often are drafted by the attorneys handling the cases.<sup>219</sup> Alternately, the drafts of the report of an expert could be viewed as the product of an intense and very private dialogue between the expert and the attorney in which "the expert contributes the raw data and the lawyer packages it into a form that is likely to go the farthest toward satisfying the relevant legal standard."<sup>220</sup> The court rejected either argument as a ground for extending the work-product doctrine to the drafts of an expert's reports. The court said that it was not interested in "furthering the corruption of the truth finding process" by developing rules that encouraged attorneys to write self-serv-

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213. *Id.* at 537.

214. *Id.* at 538.

215. *Id.*

216. *Id.*

217. *Id.* at 539.

218. *Id.*

219. *Id.*

220. *Id.*

ing opinions which were then presented to the trier of fact as the independent opinions of "technical experts."<sup>221</sup> Moreover, because the trier of fact needed to assess the relative credibility of opposing experts, it was important to determine to what degree the opinions of the expert reflected the direct input of the attorney who hired the expert.<sup>222</sup>

The defendant argued that discovery of the report would have a chilling effect on the exchange between the expert and the attorney.<sup>223</sup> The court noted that permitting discovery of the drafts would chill the dialogue; however, the truth finding process would be better served "if lawyers played a lesser role in the formulation of other people's opinions."<sup>224</sup>

As the *Quadri* court suggested, a liberal policy toward discovery of expert witnesses is needed most when expert testimony is central to the resolution of a dispute.<sup>225</sup> In such cases, advance knowledge of the basis of the expert witness' opinion through pretrial discovery is essential for effective cross-examination. The decision in *Hewlett-Packard* pushes the concept to its fullest by recognizing that not only is it important that the cross-examiner have access to the conclusions of the expert, but also, to a certain extent, that the cross-examiner have access to the process by which the expert's final opinion is articulated in order to ensure that it has not been "purged of less favorable opinions expressed at an earlier date."<sup>226</sup> Because interrogatories are relatively ineffective in the preparation of cross-examination, a liberal policy of granting additional discovery under Rule 26(b)(4)(A)(ii) is appropriate to effectuate the policy goals of discovery.<sup>227</sup> The liberal granting of discovery must be tempered, however, by the court's willingness to place limitations on the discovery and to order the payment of fees and expenses when required to prevent abuse. Nevertheless, despite the trend favoring discovery of expert reports and the criticism of the conservative approach,<sup>228</sup> some courts have continued to require a showing of some special need before permitting discovery of expert reports.<sup>229</sup>

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221. *Id.*

222. *Id.* at 540.

223. *Id.*

224. *Id.*

225. 74 F.R.D. at 595.

226. *Id.*

227. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

228. Graham, *supra* note 24, at 897.

229. Bell v. General Elec. Co., 38 Fed. R. Serv. 2d 671, 674 (E.D. Pa. 1984); see also Boselli v. Southeastern Pennsylvania Transp. Auth., 108 F.R.D. 723 (E.D. Pa. 1985). In *Boselli*, the plaintiff was attempting to discover copies of the expert's notes which were used in the

## 3. EVASIVENESS IN DISCOVERY

Because the disclosure requirements of Rule 26(b)(4)(A) are ambiguous at best, parties seeking discovery of expert information frequently encounter three, often-used evasive practices by the responding party. First, the problem is most readily apparent with interrogatories are propounded under Rule 26(b)(4)(A)(i). Parties seeking to avoid discovery usually answer such interrogatories in a brief, conclusory, and evasive manner, even though the interrogatories are frequently phrased in language paralleling the Rule.<sup>230</sup> Second, evasiveness is encountered in the discovery of expert reports.<sup>231</sup> Expert reports often progress through a series of changes by the expert and the attorney. Therefore, there is an obvious temptation to purge the report of any information that may be unfavorable to the client's case.<sup>232</sup> Similarly, an attorney may withhold information from the expert until after the opposing party has been given the expert's report or has completed its deposition of the expert.<sup>233</sup> Finally, Professor Graham has identified the use of "Saturday Night" experts as one of the most effective ways of avoiding discovery.<sup>234</sup> A "Saturday Night" expert is an expert selected such a short time before trial that the discovering party is not able to obtain full discovery.<sup>235</sup>

Courts frequently order additional discovery, such as the deposition of an expert or the production of the expert's report, in order to combat evasiveness during discovery.<sup>236</sup> In addition, courts may

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preparation of the expert's report. *Id.* at 727. Although the plaintiff did not establish that the notes constituted a report of the expert, the court analyzed the discovery of the notes as if discovery of an expert's notes and an expert's report were the same thing. *Id.* The court rejected the request for the discovery of the notes, stating that the plaintiff had failed to show "any particular need or necessity." *Id.*

230. *See, e.g.*, Kane Gas Light and Heating Co. v. Pennzoil Co., 99 F.R.D. 614, 615 (W.D. Pa. 1983); Mann v. Newport Tankers Corp., 96 F.R.D. 31, 32-33 (S.D.N.Y. 1982); Hockley v. Zent, Inc., 89 F.R.D. 26, 28 (M.D. Pa. 1980); Bates v. Firestone Tire & Rubber Co., 83 F.R.D. 535 (D.S.C. 1979); Rupp v. Vock & Weiderhold, Inc., 52 F.R.D. 111, 113 (N.D. Ohio 1971).

231. Graham, *supra* note 111, at 188.

232. *Id.*

233. *Id.*

234. *Id.* at 185.

235. *Id.* Professor Graham noted that it is impossible to establish whether the expert was actually engaged shortly before trial or was actually engaged months in advance and only revealed shortly before trial. Professor Graham also identifies two variations of the "Saturday Night" expert. *Id.* The first variation is the "newly discovered critical" expert who surfaces immediately prior to or during trial. The second variation is substituting a new expert for an expert who performed poorly during a deposition. *Id.* at 186-87. The original expert is usually called "unexpectedly" out of town, necessitating a replacement. *Id.* at 187 n.38.

236. *See, e.g.*, Mann v. Newport Tankers Corp., 96 F.R.D. 31, 33 (S.D.N.Y. 1982) (Because the plaintiff failed to respond to interrogatories, the defendant was allowed to depose experts with costs paid by the plaintiff.); Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F. Supp. 1013 (S.D.N.Y. 1983) (Production of expert's report was ordered because of

exclude the expert's testimony at trial if the evidence was not revealed during discovery.<sup>237</sup> It must be noted, however, that in the case of "Saturday Night" experts, the opposing party may be forced to interview the expert or read his report during a short recess.<sup>238</sup>

Two states, Illinois and Pennsylvania, have adopted rules specifically designed to reduce the incentive for engaging in dilatory discovery practices. Illinois Rule of Civil Procedure 220(d) limits an expert's direct testimony at trial to the extent of disclosure during pretrial discovery.<sup>239</sup> A similar limitation is contained in Pennsylvania Rule of Civil Procedure 4003.5(c).<sup>240</sup> Both rules, however, allow the expert to testify to matters upon which no inquiry was made during discovery. The rationale for this latter provision is that the

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insufficient interrogatory responses.). *But see* *Wilson v. Resnick*, 51 F.R.D. 510, 511 (E.D. Pa. 1970) (Even if the responses to interrogatories were insufficient, production of the expert's report is not warranted.).

237. *See* *Grogan v. Garner*, 806 F.2d 829, 837 (8th Cir. 1986) (excluding expert testimony when the party failed to disclose the existence of the experts in response to interrogatories); *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir. 1986) (excluding the expert opinion of defendant's employee, where defendant's testimony gave no evidence that such individuals would testify as experts); *Scott & Fetzer Co. v. Dile*, 643 F.2d 670, 673 (9th Cir. 1981) (The district court abused its discretion by allowing a party to call an expert witness and present a new theory where no notice was provided in pretrial preparation.); *Voegeli v. Lewis*, 568 F.2d 89 (8th Cir. 1977) (It was reversible error for the district court to allow important testimony of an expert witness at trial different from that indicated at the expert's deposition because the proponent of the expert testimony had a duty to supplement its expert's deposition testimony.); *Barnes v. St. Francis Hospital and School of Nursing*, 211 Kan. 315, 507 P.2d 288 (1973) (excluding expert testimony for failure to supplement answers to interrogatories).

238. *Graham*, *supra* note 111, at 188.

239. Although Rule 220(d) of the Illinois Rules of Civil Procedure differs significantly from Federal Rule 26(b)(4), it is designed to address many of the same problems sought to be addressed by Rule 26(b)(4). Illinois Rule 220(d) states:

To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, depositions or requests to produce, his direct testimony at trial may not be inconsistent with nor go beyond the fair scope of the facts known or opinions disclosed in such discovery proceedings. However, he shall not be prevented from testifying as to facts or opinions on matters regarding which inquiry was not made in the discovery proceedings.

ILL. R. CIV. P. 220(d).

240. Rule 4003.5 of the Pennsylvania Rules of Civil Procedure is similar, but not identical, to Federal Rule 26(b)(4). Subparagraph (c) of Rule 4003.5 states:

To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, his direct testimony at the trial may not be inconsistent with or go beyond the fair scope of his testimony in the discovery proceedings as set forth in his deposition, answer to an interrogatory, separate report, or supplement thereto. However, he shall not be prevented from testifying as to facts or opinions on matters on which he has not been interrogated in the discovery proceedings.

PA. R. CIV. P. 4003.5(c).



discovering party should not be permitted to control the scope of the expert's trial testimony by limiting the scope of discovery requested.

Additional weapons against evasiveness in expert discovery have been provided by amendments to Federal Rule 26. In 1980, Rule 26(f)<sup>241</sup> was adopted, permitting discovery conferences in which the trial court may establish a proposed plan of discovery upon the motion of any party. Rule 26(g),<sup>242</sup> adopted in 1980, requires an

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241. Rule 26(f) provides:

At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion. Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16. FED. R. CIV. P. 26(f).

The advisory committee's note to Rule 26(f) observes that the provision would only be used only in rare cases. FED. R. CIV. P. 26(f), advisory committee's note, 85 F.R.D. 521, 527. The committee's note also states, however, that the provision was adopted in lieu of more fundamental changes to the provisions of Rule 26(b)(1) to address discovery abuses. The 1983 amendment to Rule 26(b)(1) and the related advisory committee's note propose a much more active role for the courts during discovery in complex cases. Cases turning on expert testimony are particularly in need of judicial monitoring.

242. Rule 26(g) provides:

Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing

attorney to sign discovery requests and responses to certify that they are not interposed for the purpose of delay or evasiveness. Further, Rule 26(b)(1) was amended in 1983 to encourage federal courts to take a more active role in addressing the problems of evasiveness and excessive discovery.<sup>243</sup> Both the adoption of Rule 26(f) and the amendment to Rule 26(b)(1) greatly increase the ability of the courts to address discovery abuses.<sup>244</sup>

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law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issue at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

FED. R. CIV. P. 26(g).

The advisory committee noted that "[t]he subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection." FED. R. CIV. P. 26(g), advisory committee's note, 92 F.R.D. 165, 219.

243. Rule 26(b)(1) reads in part:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

FED. R. CIV. P. 26(b)(1).

244. The advisory committee's note to the 1983 amendment to Rule 26 states in part that:

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. . . . The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or *unnecessary use of defensive weapons or evasive responses*. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake.

FED. R. CIV. P. 26 advisory committee's note, 97 F.R.D. 165, 216-17 (emphasis added); see

V. RULE 26(b)(4)(B): DISCOVERY OF AN EXPERT RETAINED OR  
SPECIALLY EMPLOYED BUT NOT EXPECTED TO BE  
CALLED AT TRIAL

Discovery of experts retained for assistance in trial preparation but not expected to testify is governed by Rule 26(b)(4)(B).<sup>245</sup> Such experts are given much greater protection than experts who are expected to testify at trial.<sup>246</sup> Because the expert will not be called upon to testify, the policy concern of adequate preparation for cross-examination and rebuttal is absent.<sup>247</sup> Instead, the focus is on the prevention of unfairness to the retaining party.<sup>248</sup>

Rule 26(b)(4)(B) protects the facts known or opinions held by an expert that were acquired in anticipation of litigation.<sup>249</sup> Judges and scholars disagree, however, over whether the rule extends to protect the identity of such an expert. The advisory committee's note states that a party may, on a proper showing, require its opponent to name non-testifying experts.<sup>250</sup> Some courts have held that the proper showing in such a situation is the same exceptional circumstances standard required to discover the facts known and opinions held by the non-testifying expert.<sup>251</sup> Other courts take the more liberal view that the discoverability of a non-testifying expert's identity is governed by the relevancy standard of Rule 26(b)(1) and that only addi-

also FED. R. CIV. P. 26(f) advisory committee note, 85 F.R.D. 521, 527 ("To this end this subdivision provides that counsel who has attempted without success to effect with opposing counsel a reasonable program or plan for discovery is entitled to the assistance of the court.").

245. For the text of Rule 26(b)(4), see *supra* text accompanying note 85.

246. See *Ager v. Jane C. Stormont Hosp.*, 622 F.2d 496, 503 (10th Cir. 1980) ("The party 'seeking disclosure under Rule 26(b)(4)(B) carries a heavy burden' in demonstrating the existence of exceptional circumstances.") (quoting *Hoover v. Department of the Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980)).

247. *Mantolete v. Bolger*, 96 F.R.D. 179, 181 (D. Ariz. 1982), *rev'd in part on other grounds*, 767 F.2d 1416 (9th Cir. 1985); *Inspiration Consol. Copper Co. v. Lumberman's Mut. Casualty Co.*, 60 F.R.D. 205, 210 (S.D.N.Y. 1973); Day, *The Ordinary Witness Doctrine: Discovery of the Pre-Retention Knowledge of a Nonwitness Expert Under Federal Rule 26(b)(4)(B)*, 38 ARK. L. REV. 763, 793 (1985).

248. See, e.g., *Ager*, 622 F.2d at 502; *In re Sinking of Barge "Ranger I."* 92 F.R.D. 486, 488 (S.D. Tex. 1981). For a discussion of the policy concern of fairness, see 8 C. WRIGHT & A. MILLER, *supra* note 28, § 2032; Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71, 91 (1984); Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 282 (1968).

249. For the text of Rule 26(b)(4)(B), see *supra* text accompanying note 85.

250. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

251. E.g., *Ager*, 622 F.2d at 503; *In re Pizza Time Theatre Sec. Litig.*, 113 F.R.D. 94, 97 (N.D. Cal. 1986); *Kuster v. Harner*, 109 F.R.D. 372, 375 (D. Minn. 1986); *Puerto Rico Aqueduct and Sewer Auth. v. Clow Corp.*, 108 F.R.D. 304, 311 (N.D. Cal. 1985); *Gidlewski v. Bettcher Indus.*, 38 Fed. R. Serv. 2d 664, 667 (E.D. Pa. 1983); *In re Sinking of Barge "Ranger I."* 92 F.R.D. 486, 488 (S.D. Tex. 1981); *Guilloz v. Falmouth Hosp. Ass'n*, 21 Fed. R. Serv. 2d 1367, 1371 (D. Mass. 1976); *Perry v. W.S. Darley & Co.*, 54 F.R.D. 278, 280 (E.D. Wis. 1971).

tional discovery is given the further protection of the exceptional circumstances test.<sup>252</sup> These inconsistent approaches result from the promotion of the competing policy concerns of adequate trial preparation and the "fairness doctrine" which underlie the application of Rule 26(b)(4).<sup>253</sup>

#### A. *Discovery of the Identity of a Non-Testifying Expert*

The leading case for liberal discovery of the identification of non-testifying experts is *Baki v. B.F. Diamond Construction Company*.<sup>254</sup> In *Baki*, a Jones Act case, the plaintiff sought a court order to compel the defendant to answer interrogatories regarding the identity of any expert consulted in anticipation of trial but not expected to be called as a witness.<sup>255</sup> The defendants refused to answer the interrogatories on the ground that the plaintiff had failed to establish exceptional circumstances as required by Rule 26(b)(4)(B).<sup>256</sup> After analyzing the relationship between Rules 26(b)(1), 26(b)(4)(A)(i) and 26(b)(4)(B), the *Baki* court concluded that the broad scope of Rule 26(b)(1) encompassed the identities of both testifying and non-testifying experts.<sup>257</sup> The word "identify" in Rule 26(b)(4)(A)(i), the court said, calls for designating specifically which experts are expected to be trial witnesses out of the overall list obtained initially under Rule 26(b)(1).<sup>258</sup> It added that the word "identify" was deliberately left out of Rule 26(b)(4)(B) because no further identification of experts was needed. Thus, the authority for obtaining the name and address of non-testifying experts was located in Rule 26(b)(1).<sup>259</sup> Therefore, according to the *Baki* court, a party must provide the identity of every expert that it formally consults for trial preparation, whether or not it intends to call the expert at trial.

The leading case for the restrictive view is *Ager v. Jane C.*

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252. *Martin v. Easton Publishing Co.*, 85 F.R.D. 312, 314 (E.D. Pa. 1980); *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 303 (E.D. Pa. 1980); *In re Folding Carton Antitrust Litig.*, 83 F.R.D. 256, 259-60 (N.D. Ill. 1979); *Arco Pipeline Co. v. S/S Trade Star*, 81 F.R.D. 416, 417 (E.D. Pa. 1978); *Weiner v. Bache Halsey Stuart, Inc.*, 76 F.R.D. 624, 628 (S.D. Fla. 1977); *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179, 181-82 (D. Md. 1976); *Sea Colony, Inc. v. Continental Ins. Co.*, 63 F.R.D. 113, 114 (D. Del. 1974); see also 8 C. WRIGHT & A. MILLER, *supra* note 28, § 2032 (construing the "proper showing" standard as simply requiring a party to request the identity of a nontestifying expert by an interrogatory, to which the opponent could object and seek a protective order).

253. See *supra* notes 34-65 and accompanying text.

254. 71 F.R.D. 179 (D. Md. 1976).

255. *Id.* at 181.

256. *Id.*

257. *Id.* at 181-82.

258. *Id.*

259. *Id.* at 182.

*Stormont Hospital and Training School*.<sup>260</sup> The plaintiff in *Ager* brought a medical malpractice action against the defendant, Stormont Hospital. During discovery, the defendant propounded an interrogatory on Ms. Ager requesting the identities of any person contacted, and whether they were going to testify as to the care and treatment rendered by a co-defendant physician.<sup>261</sup> The magistrate, relying on *Baki*, ordered Ms. Ager to answer the interrogatory.<sup>262</sup> Ms. Ager's counsel refused and was found in civil contempt for failing to comply with the order to answer defendant's interrogatory regarding the identity of experts who were consulted but who were not expected to testify at trial.<sup>263</sup> The Court of Appeals for the Tenth Circuit rejected the *Baki* view, however, and held that the proper standard in such a situation, called for in the advisory committee's note, was the exceptional circumstances standard found in Rule 26(b)(4)(B).<sup>264</sup> The Tenth Circuit's decision flowed from its analysis of the policy concerns that led to the 1970 amendments to Rule 26, specifically the "doctrine of fairness."<sup>265</sup> The court stated that "once the identities of retained or specially employed experts are disclosed, the protective provisions of the rule concerning facts known or opinions held by such experts are subverted."<sup>266</sup>

The Tenth Circuit identified four specific problems which would subvert the rule. First, the expert may be contacted or his records obtained and information thereby revealed which normally would not be discoverable under Rule 26(b)(4)(B).<sup>267</sup> Second, the opponent may seek to compel the testimony of the non-testifying expert at trial.<sup>268</sup> Third, the opponent may call the party to the stand and question him about non-testifying experts in an attempt to place an inference in the minds of the jurors that the party may have suppressed adverse facts or opinions.<sup>269</sup> And fourth, disclosure of the identities of non-testifying experts may create a chilling effect on the field of consulting experts.<sup>270</sup>

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260: 622 F.2d 496 (10th Cir. 1980).

261. *Id.* at 498.

262. *Id.*

263. *Id.* at 499.

264. *Id.* at 503.

265. For a discussion of the "fairness doctrine," see *supra* notes 45-65 and accompanying text.

266. *Ager*, 622 F.2d at 503.

267. *Id.*

268. *Id.* (citing *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976) (The court has the power to compel an expert to testify concerning previously formed opinions.)).

269. *Id.*

270. *Id.*

Subsequent decisions have strengthened the position taken by the Tenth Circuit in *Ager* by directly refuting the *Baki* court's reading of the interrelationship of Rules 26(b)(1) and 26(b)(4). These decisions have espoused the view that although Rule 26(b)(1) is the general rule concerning discovery, its broad scope is limited by the specific directives of Rule 26(b)(4).<sup>271</sup> They argue that the "proper showing" mentioned in the advisory committee's note refers to the specific requirement of exceptional circumstances contained within Rule 26(b)(4)(B).<sup>272</sup>

An additional argument for protecting the identities of non-testifying experts was raised in *In re Pizza Time Theatre Securities Litigation*.<sup>273</sup> In *Pizza Time Theatre*, a federal district court in California rejected the *Baki* ruling, in part, because the lawyer's decision of which experts to call as witnesses, and which ones not to call, involves a decision at the trial preparation stage that "implicates values that the work-product doctrine was designed to protect."<sup>274</sup> It should be emphasized that this argument is not contrary to the advisory committee's rejection of work-product protection for expert information<sup>275</sup> because the focus of the protection here is not the expert's information but the lawyer's trial preparation decisions.<sup>276</sup> The policy arguments of *Ager* as well as the subsequent interpretations of the relationship between Rules 26(b)(1) and 26(b)(4) refute the analysis of the *Baki* court and combine to make a more compelling argument in favor of the application of the exceptional circumstances requirement for discovery of non-testifying expert's identities.<sup>277</sup> In fact, a recent

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271. See *Kuster v. Harner*, 109 F.R.D. 372, 374-75 (D. Minn. 1986) (Rule 26 (b)(1) creates a general rule for discovery, but subdivision (b)(4)(B)'s restriction on discovery of non-testifying experts constitutes a specific limitation upon that general rule.); *In re Sinking of Barge "Ranger I,"* 92 F.R.D. 486, 488 (S.D. Tex. 1981) (The broad scope of discovery allowed by Rule 26(b)(1) must be read in light of the more specific directive of 26(b)(4), requiring a showing of exceptional circumstances.).

272. *Kuster*, 109 F.R.D. at 374-75; "*Ranger I*," 92 F.R.D. at 488.

273. 113 F.R.D. 94 (N.D. Cal. 1986).

274. *Id.* at 98. The court stated that "a solid argument could be advanced that decisions by lawyers about which people to use for confidential pretrial consultation fall into that most sacrosanct category recognized in the last sentence of the first paragraph of Rule 26(b)(3), namely 'the mental impressions, conclusions, opinions, or legal theories of an attorney.'" *Id.*

275. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 505 (The Rule rejects "as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.").

276. 113 F.R.D. at 98; see also *Mantoletto v. Bolger*, 96 F.R.D. 179, 182 n.2 (D. Ariz. 1982) (allowing the defendant to follow the trial strategy it deemed appropriate, including changing the status of an expert and thereby narrowing the scope of discovery), *rev'd in part on other grounds*, 767 F.2d 1416 (9th Cir. 1985); *In re Agent Orange Prod. Liab. Litig.* 105 F.R.D. 577, 580 (E.D.N.Y. 1985) (allowing the defendants to follow the trial strategy they deemed appropriate).

277. *But see Note, Discovery of the Nontestifying Expert Witness' Identity Under the Federal*

federal district court decision which adopted the *Ager* ruling stated that it is the prevailing viewpoint on the issue.<sup>278</sup>

### B. *The Exceptional Circumstances Requirement of Rule 26(b)(4)(B)*

Rule 26(b)(4)(B) protects the facts and opinions of non-testifying experts by limiting an opposing party's discovery to "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."<sup>279</sup> The Rule does not define this requirement and thus courts have been left to apply this standard on a case-by-case basis.<sup>280</sup> In their analysis of the cases and comments on this issue, Professors Wright and Miller conclude that it will rarely be possible to make the required showing, and in their opinion that result was deliberately intended by the draftsmen of the rule.<sup>281</sup>

The 26(b)(4)(B) limitation on discovery of non-testifying experts covers only the facts or opinions "acquired or developed in anticipation of litigation or for trial."<sup>282</sup> Thus, knowledge possessed by a non-testifying expert that was acquired prior to retention by a party to the lawsuit is outside the protection of Rule 26(b)(4) and is instead subject to the general discovery provisions of Rule 26(b)(1).<sup>283</sup> Knowl-

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*Rules of Civil Procedure: You Can't Tell the Players Without a Program*, 37 HASTINGS L.J. 201, 223 (1985) (arguing that the *Ager* court's analysis is flawed because it improperly construed the unfairness doctrine as mandating that exceptional circumstances are required before a non-testifying expert's identity can be discovered); Note, *Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 67 IOWA L. REV. 349, 372 (1982) (arguing that the overriding policy of Rule 26(b) is to provide full pretrial preparation, and it is thus appropriate that courts allow discovery of non-testifying expert's identities under Rule 26(b)(4)(B) whenever relevant to the litigation, as opposed to adopting the *Ager* court's exceptional circumstances requirement).

278. *Kuster*, 109 F.R.D. at 375; see also *Pizza Time Theatre*, 113 F.R.D. at 98 (quoting the *Kuster* court's recognition of *Ager* as the prevailing viewpoint).

279. FED. R. CIV. P. 26(b)(4)(B). For the entire text of the Rule, see *supra* note 85 and accompanying text.

280. See *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1137 (S.D. Tex. 1976); see also *Graham*, *supra* note 24, at 933 (noting that a test which requires a court to balance independent availability and need against harm must obviously be applied on a case-by-case basis).

281. 8 C. WRIGHT & A. MILLER, *supra* note 28, § 2032, quoted in *Eliassen v. Hamilton*, 111 F.R.D. 396, 402 (N.D. Ill. 1986); see *Ager v. Jane C. Stormont Hospital and Training School*, 622 F.2d 496, 503 (10th Cir. 1980) ("The party 'seeking disclosure under Rule 26(b)(4)(B) carries a heavy burden' in demonstrating the existence of exceptional circumstances.") (quoting *Hoover v. Department of the Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980)).

282. *E.g.*, *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 990 (D.C. Cir. 1979).

283. *Marine Petroleum*, 641 F.2d at 990; *Eliassen*, 111 F.R.D. at 403; see *United States v. 22.80 Acres of Land*, 107 F.R.D. 20 (N.D. Cal. 1985) (The government's land appraisal report

edge acquired by the expert prior to being retained may include opinions expressed by the expert in previous testimony, or in reports, books and articles which were prepared prior to the expert being hired for the present litigation.<sup>284</sup> The protection of Rule 26(b)(4)(B) may be lifted, even from trial preparation materials prepared by non-testifying experts specifically for the present litigation, if the materials are shown to an expert who is expected to testify at trial.<sup>285</sup>

Cases interpreting Rule 26(b)(4)(B) reveal two general categories of exceptional circumstances in which the rule is applicable.<sup>286</sup> The first category encompasses situations where a change in circumstances involving a matter at issue in the action renders the party seeking discovery unable to obtain any information on that issue from any source except the opponent's non-testifying expert. These cases generally involve a dispute over an object or condition which has been altered or destroyed prior to one party's expert having had the opportunity to examine the object or condition in question. The second category encompasses situations where the party seeking discovery could only gain access to the necessary facts or opinions through the expenditure of an inordinate amount of time, money and other resources.

*Delcastor, Inc. v. Vail Associates, Inc.*,<sup>287</sup> a case exemplifying the first category of exceptional circumstances, involved an action arising from a mudslide. In *Delcastor*, the plaintiff sought discovery of a report prepared by defendant's expert. The defendant's engineering consultant was the only expert to have made observations of the mudslide site the day after it occurred, that is, before its condition had appreciably changed.<sup>288</sup> The only other expert to have made any observations of the mudslide did so five days after the event when the site conditions had significantly changed.<sup>289</sup> The court found these facts sufficient to meet the exceptional circumstances test because it was impractical for plaintiff to obtain information similar to that con-

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is not protected under Rule 26(b)(4) because the government failed to show that the report was prepared in anticipation of litigation or for trial.); *Barkwell v. Sturm Ruger Co.*, 79 F.R.D. 444, 446 (D. Alaska 1978) (By its own terms, Rule 26(b)(4)(B) is not applicable to an expert's facts and opinions not acquired or developed in anticipation of litigation.).

284. See *infra* notes 497-542 and accompanying text.

285. *Eliassen*, 111 F.R.D. at 399-401; *Heitmann v. Concrete Pipe Machinery*, 98 F.R.D. 740, 742 (E.D. Mo. 1983). For further discussion of materials that lose protection from pretrial discovery when shown to an expert witness, see *infra* notes 318-92 and accompanying text.

286. Day & Dixon, *A Judicial Perspective on Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study of Trial Court Judges and a Proposed Amendment*, 20 JOHN MARSHALL L. REV. 377, 384 (1987).

287. 108 F.R.D. 405 (D. Colo. 1985).

288. *Id.* at 408.

289. *Id.* at 409.



tained in the defendant's expert's report, and it ordered the defendant to produce the report for the plaintiff.<sup>290</sup>

Similarly, the court in *MacDonald Sprague Roofing Co. v. USM Weather-Shield Systems Co.*<sup>291</sup> held that a change in the condition of the roof at issue amounted to a showing of exceptional circumstances which warranted discovery of a report prepared by the defendant's expert.<sup>292</sup> This case involved an action by a roofing contractor against a manufacturer of roofing materials over defective materials supplied by the defendant and installed by the plaintiff for a third party.<sup>293</sup> After the plaintiff notified the defendant of the defect, the defendant had its expert examine the roof and prepare a report.<sup>294</sup> Prior to the replacement of the roof, the defendant informed the plaintiff that the expert's report would not be made available to the plaintiff.<sup>295</sup> In spite of that warning, the plaintiff replaced the entire roof without having any other expert examine the defect.<sup>296</sup> The court ruled that exceptional circumstances had been demonstrated by the plaintiff and ordered the defendant to produce its expert's report.<sup>297</sup>

In *Dixon v. Cappellini*,<sup>298</sup> the plaintiff brought a civil rights

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290. *Id.* The court rested its decision on two cases decided before the 1970 amendment to Rule 26. *Sanford Const. Co. v. Kaiser Aluminum & Chemical Sales*, 45 F.R.D. 465, 466 (E.D. Ky. 1968); *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521, 522 (N.D. Ohio 1952). *Sanford Construction* involved a dispute over a ruptured sewer pipe, where the plaintiff refused to allow the defendant's expert to observe the excavation and replacement of the damaged pipe on the plaintiff's property. Only the plaintiff's experts were present. The United States District Court for the Eastern District of Kentucky allowed discovery of the report prepared by the plaintiff's expert because the information contained in the report could not be obtained by the defendant through independent investigation. *Sanford Construction*, 45 F.R.D. at 466. The *Delcastor* court found the facts of its own case to be analogous to those of *Sanford Construction* "for practical purposes," because "[in] both cases, circumstances precluded all but one of the party's experts from gaining a first hand observation of the object or condition." *Delcastor*, 108 F.R.D. at 409. In *Colden*, a defendant was allowed discovery of the plaintiff's expert's report because the automobile at issue had been disassembled after it had been examined by the plaintiff's expert. Following *Colden*, the *Delcastor* court allowed discovery because it was "impracticable" for the defendant to obtain the information elsewhere. *Delcastor*, 108 F.R.D. at 409.

291. 35 Fed. R. Serv. 2d 1121 (D. Mass. 1983).

292. *Id.* at 1124.

293. *Id.* at 1123.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 1124. The court recognized that the plaintiff could have engaged its own expert to examine the roof before making repairs but was careful to emphasize that it granted the discovery due to the fact that the plaintiff had not yet engaged an attorney when the decision to repair the roof was made. *Id.* *But cf.* *Hoffman v. Owens-Illinois Glass Co.*, 107 F.R.D. 793 (D. Mass. 1985) (denying discovery of a non-testifying expert's report because any impracticability in obtaining discovery resulted from the defendant's "own counsel's tardiness in seeking to inspect the [now unavailable] machine").

298. 88 F.R.D. 1 (M.D. Pa. 1980).

action claiming that she suffered extreme fright and nervous shock as a result of the defendant's attempt to "de-program" her from the control of the Unification Church.<sup>299</sup> The central issue in the case focused on the mental and physical condition of Ms. Dixon immediately following the "de-programming" which occurred eight months prior to the lawsuit.<sup>300</sup> The court permitted discovery of the reports made by plaintiff's non-testifying psychologist and psychiatrist because an independent medical examination would not have produced equivalent information regarding Ms. Dixon's mental state at the time in question.<sup>301</sup>

The leading case in the second category of exceptional circumstances is *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*<sup>302</sup> In *Pearl Brewing*, a liquor wholesaler sued its supplier for antitrust violations alleging price fixing by the supplier.<sup>303</sup> The defendant sought discovery of a complex econometric computer program created by the plaintiff's non-testifying experts for the plaintiff's case.<sup>304</sup> The plaintiff objected to discovery on two grounds. First, the plaintiff argued that the defendant was only entitled to interrogatory responses as prescribed in Rule 26(b)(4)(A),<sup>305</sup> and second, that the defendant should only be entitled to discovery of the testifying expert who was an observer to the creation of the computer program.<sup>306</sup> Before undertaking an analysis of the above issues, the *Pearl* court rejected the contention that Rule 26(b)(4)(B) contains a<sup>307</sup> two-step procedure similar to that found in Rule 26(b)(4)(A). Instead, the court interpreted Rules 26(b)(4)(A) and 26(b)(4)(B) as being mutually exclusive, and held that the latter rule permitted the court to order whatever form of discovery was required by the exceptional circumstances encountered in a given case.<sup>308</sup> The court found that limiting discovery to the testifying expert who had observed the creation of the complex computer program would not be sufficient because he had inadequate expertise in that area.<sup>309</sup> After examining the potential

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299. *Id.* at 3.

300. *Id.*

301. *Id.*

302. 415 F. Supp. 1122 (S.D. Tex. 1976).

303. *Id.* at 1134.

304. *Id.* at 1135.

305. *Id.*

306. *Id.*

307. *Id.* at 1137.

308. *Id.*; see also *Delcastor, Inc., v. Vail Assoc. Inc.*, 108 F.R.D. 405, 410 (D. Colo. 1985) (granting the production of an expert's report because of exceptional circumstances which made the information otherwise unavailable, but denying deposition of the non-testifying expert).

309. *Pearl Brewing*, 415 F. Supp. at 1138.

unfairness to the plaintiff, and after balancing the expenditure of time and resources that would be necessary to decipher the program against the potential delay in an already protracted case, the court concluded that the totality of the circumstances qualified as exceptional circumstances under Rule 26(b)(4)(B).<sup>310</sup>

The Court of Appeals for the D.C. Circuit has stated that the focus of the exceptional circumstances test is on the particular information at issue and not on the availability of the personal testimony of the non-testifying expert.<sup>311</sup> Therefore, it may be concluded from the above cases that a party must demonstrate that it is virtually unable to acquire any facts or opinions on the subject in which it is interested in order to meet the exceptional circumstances requirement of Rule 26(b)(4)(B).<sup>312</sup>

Critics argue that the availability of Rule 26(b)(4)(B) protection for certain experts can lead to the suppression of unfavorable findings or opinions by a party buying out available experts by hiring them as non-testifying experts.<sup>313</sup> This criticism, however, is not very convincing for the following reasons. First, the rule does not protect opinions or reports of non-testifying experts expressed or written prior to their retention by either of the parties.<sup>314</sup> In addition, the court has the power to compel an expert to testify to opinions already held.<sup>315</sup> Second, it is unlikely that a party could buy out all experts on an issue given the ever-increasing pool of expert witnesses. Furthermore, if all such experts were bought off, it is within the court's power to find such a situation as meeting the exceptional circumstances requirement of the rule.<sup>316</sup>

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310. *Id.*

311. *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 996 (D.C. Cir. 1979).

312. *Id.* at 996-97 (quoting 8 C. WRIGHT & A. MILLER, *supra* note 29, § 2032); see also *In re Agent Orange Prod. Liab. Litig.*, 105 F.R.D. 577, 581 (E.D.N.Y. 1985) (allowing deposition of experts on specific information which was not "readily available from any other source," and denying discovery on issues for which information was readily available in literature on the subject).

313. *United States v. Meyer*, 398 F.2d 66, 76 (9th Cir. 1968); Note, *Discovery of Expert Information*, 47 N.C.L. REV. 401, 406 (1969). For a comparison of state and federal decisions which have dealt specifically with the use, by one party, of an expert consulted initially by the opponent but not used by that party because of an adverse opinion, see *infra* notes 397-458 and accompanying text.

314. See *infra* notes 497-542 and accompanying text.

315. *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976).

316. See *Eliassen v. Hamilton*, 111 F.R.D. 396, 402 (N.D. Ill. 1986) (A party may depose an opponent's non-testifying expert under the unusual circumstances that there are no other available experts in the same field or subject area.); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 14 (N.D. Ill. 1972) ("The Rule clearly contemplates a showing that a party has found opinions by others on the subject to be unavailable before he may obtain discovery from his opponent's

## VI. DISCOVERY OF MATERIALS GIVEN TO A TESTIFYING EXPERT

Cases such as *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.* and *In re IBM Peripheral EDP Devices Antitrust Litigation* address the issue of whether materials developed in anticipation of trial by an expert who is expected to testify at trial are discoverable. A different issue is raised under Rule 26(b)(4)(A)(ii) when discovery is sought of the materials that a testifying expert relied upon in reaching an opinion. Though the advisory committee specifically rejected the work-product doctrine and the attorney-client privilege as grounds for protecting materials produced by an expert,<sup>317</sup> it failed to address clearly the issue of whether materials an expert relied upon in developing an opinion lost any privilege or protection that they possessed prior to being shown to the expert.

At least one court has held that the mere act of an attorney arranging documents in a purposeful manner may confer work-product status on the documents.<sup>318</sup> It could be argued, therefore, that almost any materials gathered and arranged by an attorney for presentation to an expert could be claimed to fall within the protection of the doctrine. Under Federal Rule of Civil Procedure 26(b)(3),<sup>319</sup> work-product materials are not discoverable unless a party can show both that it has a substantial need for the materials and that it could not obtain the substantial equivalent of the materials without undue hardship.<sup>320</sup> Materials that constitute the opinion work-product of an attorney enjoy an even higher standard of protection that makes such materials rarely discoverable.<sup>321</sup> Similarly, materials prepared by a non-testifying expert, such as his report, are normally discoverable only upon a showing of exceptional circumstances.<sup>322</sup>

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retained expert who is not expected to be called to testify on the same subject."); see also *Ager v. Jane C. Stormont Hospital and Training School*, 622 F.2d 496, 503-04 n.8 (10th Cir. 1980) (Professor Sacks, a reporter to the advisory committee, cited one example of exceptional circumstances as occurring when the number of experts in a field is small and those experts are already retained by others.).

317. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 505.

318. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977). The *Berkey* court noted that the pages collate the expected, imagined, or hoped-for proofs of counsel and reflected, among other things, the "advocate's professional interaction with the materials of his art." *Id.*

319. For the text of Rule 26(b)(3), see *supra* note 160.

320. FED. R. CIV. P. 26(b)(3); J. MOORE, *supra* note 34, ¶ 26.64[3.-1], at 26-362; C. WRIGHT & A. MILLER, *supra* note 28, § 2025, at 214.

321. FED. R. CIV. P. 26(b)(3); J. MOORE, *supra* note 34, ¶ 26.64[3.-2], at 26-383; C. WRIGHT, A. MILLER & F. ELLIOT, *FEDERAL PRACTICE AND PROCEDURE* § 2026, at 107 (2d ed. 1987).

322. See *supra* notes 279-316 and accompanying text.

A problem arises when a testifying expert relies upon materials prepared by a non-testifying expert. A problem results because in cross-examining the testifying expert, it may be necessary to attack the materials upon which he based his opinion, although the materials were prepared by someone else—someone who will not appear at trial.<sup>323</sup> In addition, when materials have been prepared by one expert and given to another, a party may need to discover not only the content of the materials but also information about, and from, the expert who prepared the materials.<sup>324</sup> Professor Graham has observed that to cross-examine the testifying expert effectively, it may be necessary to discover information from the non-testifying, or “second-tier” expert.<sup>325</sup> Such discovery is necessary to explore the non-testifying expert’s qualifications and background, to determine the facts, data or opinions upon which the non-testifying expert relied, and to evaluate the acceptance within the discipline of any tests that were performed by the non-testifying expert.<sup>326</sup> Finally, a cross-examiner needs to know whether the second-tier expert’s opinion exhibits a reasonable degree of scientific, medical or technical certainty. Such information can only come directly from the second-tier expert.<sup>327</sup>

The work-product doctrine protects materials prepared in anticipation of litigation or for trial.<sup>328</sup> It does not, however, protect from discovery relevant facts known, or available, to the party from whom discovery is being sought even if the facts are contained in a document which is itself not discoverable.<sup>329</sup> Similarly, Rule 26(b)(4)(B) does not protect from discovery facts or opinions of the non-testifying expert which were not acquired or developed in anticipation of litigation.<sup>330</sup> To the extent that materials or information given to the testifying expert encompass such information, the underlying information is discoverable. Nevertheless, the manner in which the underlying facts or opinions were set out by the attorney or the non-testifying expert may itself have a subtle influence and effect on the testifying expert’s opinion. This is particularly true where the opinion of the expert depends on the expert’s subjective impressions.

Discovery of the actual material given to the expert is necessary,

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323. Graham, *supra* note 111, at 197.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. FED. R. CIV. P. 26(b)(3); *see supra* note 160 for the text of the Rule.

329. J. MOORE, *supra* note 34, ¶ 26.64[1], at 26-348; C. WRIGHT & A. MILLER, *supra* note 28, § 2023, at 194.

330. J. MOORE, *supra* note 34, ¶ 26.66[2], at 26-408; C. WRIGHT & A. MILLER, *supra* note 28, § 2029, at 250.

therefore, even in those cases where substantially the same information may be provided to the discovering party in another form. Prohibiting discovery of this type of information would encourage parties to give experts information in a protected form in order to frustrate discovery. In contrast, because the information may usually be presented to the expert in a form other than that which represents the work-product of an attorney or the report of a non-testifying expert, a rule permitting discovery of otherwise protected material would not be unduly burdensome on parties in preparing their expert witnesses for trial.

In the antitrust action, *United States v. International Business Machines Corp.*,<sup>331</sup> IBM sought depositions of the government's expert witnesses and production of all materials considered by the expert's in reaching their conclusions. The court denied the request for the deposition of the experts themselves because IBM had failed to follow the two-step procedure of 26(b)(4)(A).<sup>332</sup> The court, however, did permit discovery of the information given to the experts by the government.<sup>333</sup> Quoting from the advisory committee's note, which referred to Rule 26(b)(4) as "a new provision dealing with discovery of information (including facts and opinions) *obtained by a party from an expert* retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party," the court held that only discovery of materials generated by the expert would be controlled by Rule 26(b)(4)(A).<sup>334</sup> By ordering production of the documents, the court apparently held that discovery of materials relied upon by an expert would be limited only by the requirement of relevancy imposed by Rule 26(b)(1).<sup>335</sup>

Despite the sweeping language of this decision, a number of courts still wrestle with the problem of deciding whether to grant motions for the discovery of material given by a party to its expert. Though courts usually permit the discovery of materials not otherwise protected by the work-product doctrine or by Rule 26(b)(4)(B), they have been reluctant to permit discovery where these protections have been invoked. The primary question then is whether showing materials to a testifying expert is included within an exception to the rules which permit a party to protect materials from discovery.

Courts that have considered the issue of permitting discovery of

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331. 72 F.R.D. 78 (S.D.N.Y. 1976).

332. *Id.* at 81; see *supra* notes 103-20 and accompanying text for an explanation of the "two-step" procedure of Rule 26(b)(4)(A).

333. *Id.*

334. *Id.* at 82.

335. *Id.*

work-product materials given to testifying experts have reached varying results. In *Boring v. Keller*,<sup>336</sup> the defendant's expert was expected to testify as to whether the plaintiff had given her informed consent to a medical procedure.<sup>337</sup> Inadvertently, the defendant doctor's attorney gave to his testifying experts papers containing the attorney's impressions of the plaintiff's demeanor and appearance during a deposition.<sup>338</sup> The court recognized that because the expert had read the attorney's characterization of the witness, the materials would be relevant to an evaluation of the expert's assessment of the plaintiff.<sup>339</sup> Therefore, the court held that the defendant had effectively waived the protection of the work-product doctrine by showing the materials to his testifying experts, even though the materials constituted "opinion" work-product, which, as shown immediately below, some courts have ruled is never discoverable.<sup>340</sup>

Hesitancy in allowing the discovery of opinion work-product appeared in the antitrust action, *Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>341</sup> *Berkey* was cited by the *Boring* court for the proposition that work-product protection is waived when the materials are shown to an expert witness.<sup>342</sup> The *Berkey* court prohibited the discovery of four notebooks prepared by Kodak's attorney containing the attorney's synthesis of the facts and factual issues of the litigation.<sup>343</sup> During discovery, it was revealed that two of Kodak's expert witnesses had received and read the notebooks subsequent to their being retained.<sup>344</sup> Although one expert could not recall using the notebook in reaching his conclusions, the other expert stated that it provided him with background information concerning the company's product development.<sup>345</sup>

Instead of applying the discovery procedures of Rule 26(b)(4), the *Berkey* court analyzed the discovery request in light of Federal Rule of Evidence 612,<sup>346</sup> which gives a court the discretionary power

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336. 97 F.R.D. 404 (D. Colo. 1983).

337. *Id.* at 406.

338. *Id.* at 404.

339. *Id.* at 408.

340. *Id.* at 407.

341. 74 F.R.D. 613 (S.D.N.Y. 1977).

342. 97 F.R.D. at 407.

343. 74 F.R.D. at 617.

344. *Id.* at 614.

345. *Id.*

346. Rule 612 of the Federal Rules of Evidence reads:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either —

(1) while testifying, or

to compel the production of a writing used to refresh the memory of a witness prior to his giving testimony.<sup>347</sup> The *Berkey* court concluded that Rule 612 was applicable because the information in the notebooks impacted on the expert witness' testimony.<sup>348</sup> The court expressed its concern that a party might influence an expert's opinion with items of work-product and then prevent access to the documents that might "reveal and counteract the effects of such materials."<sup>349</sup> In holding that the work-product doctrine was a bar to discovery in this case, however, the court found that there was no testimony that the attorney in this litigation planned to use the work-product materials to influence the opinion of the expert with the intention of thereby preventing their discovery.<sup>350</sup> In addition, other materials which were provided to the discovering party contained most of the information contained in the documents given to the experts.<sup>351</sup> Finally, noting the lack of developed case law on this issue, the court stated that Kodak's counsel was "not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel."<sup>352</sup> The *Berkey* court went on, however, to issue a warning that in future cases, "a sharp discounting of the concerns on which the defendant is prevailing" in the case at hand would result in the discovery of materials shown to expert witnesses.<sup>353</sup>

By focusing on the impact that the materials had on the expert witness' opinion, the court sidestepped the fact that the purpose of Federal Rule of Evidence 612 is to test the existence and accuracy of

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(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

FED. R. EVID. 612.

347. *Berkey*, 74 F.R.D. at 615.

348. *Id.*

349. *Id.* at 616.

350. *Id.* at 617.

351. *Id.*

352. *Id.*

353. *Id.*



the witness' memory.<sup>354</sup> Rule 612 assumes that prior to the giving of the materials to the witness to refresh his memory, the witness had already known the information contained in the materials. The awkwardness, therefore, of applying this rule in *Berkey* lies in the fact that the information provided to the witnesses in *Berkey* was, presumably, not information already known to them.

In addition, the *Berkey* court failed to consider the application of Rule 26(b)(4). Even if the ultimate result in future cases is the same, it is desirable that Rule 26(b)(4) be used to reach the result instead of Rule 612 of the Federal Rules of Evidence. Rule 26(b)(4) has been specifically designed to work in conjunction with the other discovery provisions of Rule 26. To expand unnecessarily the scope of Rule 612 to cover such cases runs the risk of bypassing many of the safeguards built into the discovery provisions of the Federal Rules of Civil Procedure, such as those included in the 1983 amendments to Rule 26(b)(1).<sup>355</sup>

In *Bogosian v. Gulf Oil Corp.*,<sup>356</sup> the Court of Appeals for the Third Circuit took a less expansive view of discovery than that taken in *Boring*, or foreshadowed in *Berkey*. In *Bogosian*, the class-action plaintiffs designated eight experts to testify on the subjects of gasoline marketing, statistics, economics, chemistry and automotive engineering.<sup>357</sup> All parties agreed that the experts would be subject to depositions pursuant to Rule 26(b)(4)(A).<sup>358</sup> In anticipation of the impending depositions, the district court ordered the production of virtually every document the testifying experts had examined during the course of the litigation.<sup>359</sup> The order provided that the plaintiffs need only identify, but not produce, documents which they asserted were protected by the attorney-client privilege or the work-product doctrine.<sup>360</sup> Upon a subsequent motion by the defendant oil companies, the district court ordered the production of the 115 documents which had been identified as attorney work-product.<sup>361</sup> The district

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354. FED. R. EVID. 612 advisory committee's note, 56 F.R.D. 183, 277.

355. The advisory committee's note to Rule 612 of the Federal Rules of Evidence suggests that there was concern that Rule 612 might be used to seek overly broad discovery:

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

*Id.*

356. 738 F.2d 587 (3d Cir. 1984).

357. *Id.* at 589.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

court ordered the production of the materials in accordance with Rule 26(b)(4) because the attorneys needed to adequately prepare for the cross-examination of the experts.<sup>362</sup> In a clash between the work-product protection of Rule 26(b)(3) and the discovery provisions of Rule 26(b)(4), the trial court reasoned that Rule 26(b)(4) would have to take precedence.<sup>363</sup>

In considering the plaintiff's writ of mandamus, the Third Circuit distinguished between two types of attorney work-product.<sup>364</sup> The first type, ordinary work-product, consists of documents or tangible things produced by a party's attorney or agent in anticipation of litigation.<sup>365</sup> Discovery of this type of work-product is controlled by the substantial need test found in the first sentence of Rule 26(b)(3).<sup>366</sup> The second type of work-product consists of the "documents prepared by attorneys containing solely their mental impressions and thought processes relating to the legal theories of a complex case."<sup>367</sup> This core or opinion work-product is entitled to an even greater protection.<sup>368</sup> After making this distinction, the court concluded that the first sentence of Rule 26(b)(3), subjecting discovery of ordinary work-product to the provisions of Rule 26(b)(4), does not limit the work-product protection described in the second sentence of Rule 26(b)(3), which gives heightened protection to opinion work-product materials.<sup>369</sup> The court also found in its analysis of Rule 26(b)(4) that an effective cross-examination of expert witnesses can be accomplished "without an inquiry into the lawyer's role in assisting with the formulation of the theory."<sup>370</sup> The Third Circuit held that the plaintiff did not need to produce the materials it claimed were protected by the work-product doctrine.<sup>371</sup>

In contrast to the cases addressing the issue of attorney work-product given to a testifying expert, courts have been relatively consistent in granting additional discovery under Rule 26(b)(4)(A)(ii) when faced with the question of whether to permit the discovery of a report prepared by a non-testifying expert which was given to a testifying expert. One of the earliest cases to address the question of the protection afforded by Rule 26(b)(4)(B) to a report prepared by a non-testi-

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362. *Id.*

363. *Id.* at 590.

364. *Id.* at 592.

365. *Id.* at 593.

366. See *supra* notes 190-229 and 319-30 and accompanying texts.

367. *Bogosian*, 738 F.2d at 594.

368. *Supra* note 321 and accompanying text.

369. *Bogosian*, 738 F.2d at 594.

370. *Id.* at 595.

371. *Id.*

fyng expert which has been shown to a testifying expert was *Heitmann v. Concrete Pipe Machinery*.<sup>372</sup> In *Heitmann*, the defendant's testifying expert revealed that he had relied upon the report of the defendant's non-testifying expert in forming his opinion.<sup>373</sup> In exercising its discretion under Rule 26(b)(4)(A)(ii), the trial court ruled that although the report would normally have enjoyed the higher level of protection afforded by the exceptional circumstances standard of Rule 26(b)(4)(B), the defendant in *Heitmann* took the report out of the protection of the rule when it voluntarily gave the report to its testifying expert.<sup>374</sup> The court added that the report was necessary for an effective cross-examination of the expert and that the defendant could have prevented the discovery of the report simply by not giving the report to its testifying expert.<sup>375</sup>

The court in *Delcastor, Inc. v. Vail Associates, Inc.*<sup>376</sup> relied on the *Heitmann* decision to support its opinion granting discovery of the defendant expert's report. The report sought by the plaintiff in *Delcastor* was written by the defendant's expert who was going to testify at trial, but only concerning the factual circumstances surrounding the mudslide that was the subject matter of the litigation.<sup>377</sup> Because the expert was not expected to testify concerning his opinions on the cause of the mudslide, the defendant argued that the report should be protected under Rule 26(b)(4)(B) as the report of a non-testifying expert.<sup>378</sup> The plaintiff sought discovery of the defendant's expert's report because the expert was the only expert to have seen the property immediately after the mudslide.<sup>379</sup> Though the court found that this created sufficient exceptional circumstances to justify its decision to permit discovery of the report,<sup>380</sup> it further supported its decision by noting that the report had been given to and relied upon by the defendant's expert who was expected to testify at trial on the issue of causation.<sup>381</sup> The court rejected as meaningless the defendant's characterization of the testifying expert's reliance on the report as only being a general, as opposed to a specific, reliance.<sup>382</sup> The court stated that if the testifying expert relied upon the report at all in

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372. 98 F.R.D. 740 (E.D. Mo. 1983).

373. *Id.* at 741.

374. *Id.* at 742.

375. *Id.* at 743.

376. 108 F.R.D. 405 (D. Colo. 1985); see also *supra* notes 287-90 and accompanying text.

377. *Delcastor*, 108 F.R.D. at 407.

378. *Id.* at 408.

379. *Id.* at 409.

380. *Id.*

381. *Id.* at 408.

382. *Id.*

formulating an opinion, the need for preparing cross-examination required the production of the report.<sup>383</sup>

In *Eliassen v. Hamilton*,<sup>384</sup> the trial court limited the breadth of the *Delcastor* holding by refusing to grant the deposition of plaintiffs' non-testifying expert who had written a report which was then given to the plaintiffs' testifying expert. The plaintiffs in *Eliassen* permitted the defendants to depose their testifying expert and gave them a copy of the non-testifying expert's report.<sup>385</sup> The testifying expert had reviewed the report, but declined to use it or rely upon it in the formation of an opinion.<sup>386</sup> The court refused to permit the deposition of the report's author because it went "beyond the report considered by the testifying expert."<sup>387</sup> To do so, reasoned the court, the deposition would have exceeded the scope of discovery permitted in either *Heitmann* or *Delcastor* where only production of the report was granted and not full discovery of the non-testifying expert.<sup>388</sup>

To date, no court has explicitly adopted Professor Graham's analytical approach for dealing with the problem of second-tier experts under Rule 26(b)(4). Professor Graham suggests that in all cases courts should find that second-tier experts are retained and that exceptional circumstances are present.<sup>389</sup> Professor Graham buttresses his argument by pointing out that it is impossible for a party to obtain the necessary information about the second-tier expert from anyone but the second-tier expert.<sup>390</sup>

Professor Graham has proposed an amendment to Rule 26(b)(4)(A), which would in effect permit discovery of any materials given to the expert witness in addition to discovery of any underlying second-tier experts. The proposed amendment reads in relevant part as follows:

(A) A party may discover from a person whom any other party expects to call as an expert witness at trial, and from the other party, facts and data known and opinions held by the expert witness together with the grounds of each opinion. Furthermore, if such expert witness relies in forming his opinion, in whole or in part, upon facts, data, or opinions contained in a document or made known to him by or through another person, a party may

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383. *Id.*

384. 111 F.R.D. 396 (N.D. Ill. 1986).

385. *Id.* at 397.

386. *Id.*

387. *Id.* at 399.

388. *Id.*

389. Graham, *supra* note 111, at 199. For further discussion of the discovery of second-tier experts, see *supra* notes 323-27 and accompanying text.

390. Graham, *supra* note 111, at 199.

also discover with respect thereto.<sup>391</sup>

Though Professor Graham proposed the amendment to deal specifically with the problem of the second-tier expert, the broad language of the amendment would also seem to encompass the discovery of work-product materials. In essence, the proposed amendment would reject the approach taken by the court in *Eliassen* and would allow discovery of the second-tier expert so that the discovering party may fully prepare to cross-examine and rebut the testifying expert at trial.

## VII. DISCOVERY OF OTHER CLASSES OF EXPERTS WITHIN THE SCOPE OF RULE 26(b)(4)

Rule 26(b)(4) deals expressly with experts who have been retained or specially employed in anticipation of litigation or preparation for trial.<sup>392</sup> There are, however, other classes of experts that have been the subject of debate in the courts and in the scholarly literature. The advisory committee's note identifies certain experts as falling within the category not covered by Rule 26(b)(4); experts who are actors or viewers with respect to the subject matter of the lawsuit,<sup>393</sup> general employees of a party not specially employed,<sup>394</sup> and experts informally consulted in preparation for trial but not retained or specially employed.<sup>395</sup> Other discovery questions not covered by the

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391. *Id.* at 200.

392. FED. R. CIV. P. 26(b)(4). For the text of Rule 26(b)(4), see *supra* note 85 and accompanying text.

393. FED. R. CIV. P. 26(b)(4) advisory committee's notes, 48 F.R.D. 487, 503 (noting that Rule 26(b)(4) treats as an ordinary witness an expert "whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit"); see, e.g., *Sipes v. United States*, 111 F.R.D. 59, 61 (S.D. Cal. 1986) (A treating physician is not protected as an expert by Rule 26(b)(4) because the information and opinions he possessed were obtained by virtue of his role as actor or viewer of the occurrences giving rise to the litigation.); *Quarantillo v. Consolidated Rail Corp.*, 106 F.R.D. 435, 436 (W.D.N.Y. 1985) (A neurologist's role in the actual treatment of the plaintiff removes discovery limitations of Rule 26(b)(4)(A).); *Baran v. Presbyterian Univ. Hosp.*, 102 F.R.D. 272, 273 (W.D. Pa. 1984) (Opinion testimony by the defendant doctor is admissible without advance notice during pretrial discovery because Rule 26(b)(4)(A) is not applicable to the testimony of a party to the lawsuit.).

394. FED. R. CIV. P. 26(b)(4)(B) advisory committee's note, 48 F.R.D. 487, 504 (Rule 26(b)(4)(B) excludes "an expert who is simply a general employee of the party not specially employed on the case."). Compare *Virginia Elec. & Power Co. v. Sun Shipbuilding & D.D. Co.*, 68 F.R.D. 397, 408 (E.D. Va. 1975) (treating in-house experts, for discovery purposes, as ordinary witnesses) with *Seiffer v. Topsy's Int'l, Inc.*, 69 F.R.D. 69, 72 (D. Kan. 1975) (holding a partner in the defendant accounting firm to be "specifically employed in anticipation of litigation," thereby giving him limited immunity as a non-testifying expert).

395. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504 (Rule 26(b)(4)(B) "precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed."); see, e.g., *Ager v. Jane C. Stormont Hosp.*,

Rule concern the knowledge and opinions of retained non-testifying experts which were not acquired in anticipation of litigation (pre-retention knowledge), and the ability to compel discovery of experts who may hold relevant information but have not been retained by either party (pure experts).

#### A. *Experts Informally Consulted but Not Retained*

The advisory committee's note expressly precludes any discovery of experts who have been informally consulted but not retained or specially employed by a party to the dispute.<sup>396</sup> The ambiguity of the Rule lies in the definition of retained or specially employed. If a court finds that an expert has been retained or specially employed by one of the parties for litigation, then the expert moves up into the subdivision (B) class of experts, which is subject to discovery upon a showing of exceptional circumstances.<sup>397</sup> On the other hand, if the expert was only informally consulted, this expert is completely protected from the discovery process.<sup>398</sup> The leading case on informal consultants is *Ager v. Jane C. Stormont Hospital and Training School*.<sup>399</sup> In *Ager*, a medical malpractice action, the defendant sought to discover the identities of all experts whom the plaintiff had contacted regarding the care and treatment rendered by the co-defendant physician.<sup>400</sup> The plaintiff's attorney refused to divulge the identities of any non-testifying experts.<sup>401</sup> As a result of continued refusal to comply with court orders, the plaintiff's attorney was found in civil contempt, which was appealed to the Court of Appeals for the Tenth Circuit.<sup>402</sup>

The plaintiff urged the court to adopt Professor Graham's definition of an informal consultant, by which "an expert 'would be infor-

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622 F.2d 496, 501 (10th Cir. 1980) (The advisory committee's note precluding discovery of informal consultants encompasses information, opinions, and the identity of the consultants.); *USM Corp. v. America Aerosols, Inc.*, 631 F.2d 420, 424-25 (6th Cir. 1980) (Because discovery of expert information acquired in anticipation of litigation must be made according to Rule 26(b)(4), "if no provision is made for experts consulted informally in anticipation of litigation, no discovery concerning them is permissible.").

396. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504; 4 J. MOORE, *supra* note 34, § 26.66[4]; 8 C. WRIGHT & A. MILLER, *supra* note 29, at § 2033; Graham, *supra* note 24, at 938-40.

397. See Note, *Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 67 IOWA L. REV. 349, 355 (1982); see also Graham, *supra* note 24, at 939 (Although the distinction between experts retained and those only informally consulted is unclear at times, it is important for purposes of discovery.).

398. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504; see, e.g., *Ager*, 622 F.2d at 501-02.

399. 622 F.2d 496 (10th Cir. 1980).

400. *Id.* at 498.

401. *Id.* at 498-99.

402. *Id.*; see *supra* notes 260-72 and accompanying text.

mally consulted if, for any reason, the consulting party did not consider the expert of any assistance', and that, '[a] consulting party may consider the expert of no assistance because of his insufficient credentials, his unattractive demeanor or his excessive fees.'<sup>403</sup> The trial court's magistrate adopted a stricter definition, excluding from the category of "informal consultant" any expert with whom a party had made an appointment to discuss a case or examine records and give advice or opinions for which a fee was paid or promised.<sup>404</sup> The trial court envisioned an informal consultation as being one at a "social event or on a golf course," where a discussion concerning a case ensued, but no written report or charge was made or contemplated.<sup>405</sup>

The Court of Appeals for the Tenth Circuit recognized the merits of both arguments but found that each should be only a factor in the determination of the status of the expert.<sup>406</sup> The appellate court then established the following four-factor test to determine the status of an expert on a case-by-case basis. First, the trial court must ascertain the manner in which the consultation was initiated. Second, the court must identify the nature, type, and extent of information or material provided to, or determined by the expert in connection with his review. Third, the court must ascertain the duration and intensity of the consultive relationship. And fourth, the court must identify the terms of the consultation, if any, such as payment and confidentiality of the test data or opinions.<sup>407</sup> While this multifactor approach has the advantage of flexibility, it is also true, as one commentator has pointed out, that the court's failure to weigh each factor and to clarify the meaning of certain of the factors may render the test difficult to apply.<sup>408</sup>

Several policy reasons compel additional protection from discovery for informal consultants. First, allowing discovery of informal consultants may have a chilling effect on potential expert witnesses.<sup>409</sup> For instance, the *Ager* court expressed a fear that a liberal discovery rule for informally consulted experts may "inevitably lessen the number of candid opinions available as well as the number of consul-

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403. 622 F.2d at 501 (quoting *Graham*, *supra* note 24, at 939-40 n.182).

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. Note, *supra* note 397, at 358-59.

409. See, e.g., *Ager*, 622 F.2d at 503; *Healy v. Counts*, 100 F.R.D. 493, 497 (D. Colo. 1984). See generally *Friedenthal*, *supra* note 22.

tants willing to even discuss a potential . . . claim with counsel.”<sup>410</sup> A second and more direct reason is that allowing discovery of the identity of informally consulted experts may lead to ex-parte contact between the opposing party and the expert.<sup>411</sup> Such ex-parte contacts raise the policy concern about the unfairness of the discovery to the more diligent party. This unfairness is of particular concern when the consultant gives an unfavorable opinion which, if presented to a jury, will carry great weight against the first hiring party.<sup>412</sup> When such ex-parte contacts with consultant experts have occurred in violation of pretrial discovery orders, courts have imposed sanctions against the use of any information received.<sup>413</sup> The question remains, however, whether inadvertent ex-parte contacts are a violation of Rule 26(b)(4)(B) if the opponent of the party that made the initial contact subsequently hires the expert and obtains adverse trial testimony from the expert.

Several state courts which have expert witness discovery rules modeled after Federal Rule of Civil Procedure 26(b)(4) have held that the introduction of such adverse testimony against the initial hiring party is not controlled by the discovery rules.<sup>414</sup> Thus, in *Granger v. Wisner*,<sup>415</sup> a medical malpractice action, the plaintiff sought to prevent the defendant from introducing the testimony of a doctor whom plaintiff's counsel had previously consulted and from whom he had received the opinion that there had been no malpractice.<sup>416</sup> The Arizona Supreme Court affirmed the trial court's admission of the adverse testimony, because the ex-parte contact did not violate the discovery process.<sup>417</sup> The court examined the fairness concerns underlying the exceptional circumstances requirement of Rule 26(b)(4)(B), but ultimately decided that the discovery rules provided no basis for the suppression of the evidence.<sup>418</sup> Recognizing that

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410. *Ager*, 622 F.2d at 503.

411. *Id.*

412. See Friedenthal, *supra* note 22, at 460; Note, *supra* note 397, at 358.

413. See, e.g., *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984) (upholding the trial court's exclusion of testimony of an expert witness because that testimony was improperly solicited from the opponent's non-testifying expert in violation of Rule 26(b)(4)(B)); *Campbell Indus. v. M/V Gemini Enter.*, 619 F.2d 24, 26 (9th Cir. 1980) (The district court did not abuse its discretion in precluding testimony obtained from the opponent's non-testifying expert in "flagrant violation" of Rule 26(b)(4).).

414. See, e.g., *Granger v. Wisner*, 134 Ariz. 377, 656 P.2d 1238 (1982); *Fenlon v. Thayer*, 127 N.H. 702, 506 A.2d 319 (1986); *Cogdell v. Brown*, 220 N.J. Super. 330, 531 A.2d 1379 (Law Div. 1987).

415. 134 Ariz. 377, 656 P.2d 1238 (1982).

416. *Id.* at 379, 656 P.2d at 1240.

417. *Id.* at 381, 656 P.2d at 1242.

418. *Id.*, 656 P.2d at 1242.



unfair prejudice could result against the initial hiring party if jurors, unfamiliar with the adversary system, drew the inference that the initial hiring party had attempted to suppress evidence, the trial court enjoined defendant's counsel from mentioning, on direct examination, the prior consultation by the plaintiff.<sup>419</sup> This restriction, however, would have been lifted had the expert's credibility or credentials been attacked on cross-examination.<sup>420</sup> Because this condition could severely restrict an effective cross-examination of the expert, the court conceded that in some cases the risk of unfair prejudice may be so great that the trial court should preclude the expert's testimony altogether.<sup>421</sup>

In another medical malpractice action, *Fenlon v. Thayer*,<sup>422</sup> the plaintiff learned during discovery of a medical expert whom the defendant had contacted to render an opinion on the malpractice issues and as a potential testifying expert.<sup>423</sup> After learning that the expert had given a preliminary opinion that was favorable to their case and that the defendant was not going to call the expert at trial, the plaintiff listed the expert as a trial witness and subpoenaed him.<sup>424</sup> After a voir-dire examination of the expert, the trial court denied the plaintiff's motion to compel the unwilling expert to testify.<sup>425</sup> The New Hampshire Supreme Court reversed the trial court's order that had denied the plaintiff the use of the expert's testimony. The State Supreme Court rejected the argument that the plaintiff was precluded from calling the expert to testify because he had been consulted initially by the defendant.<sup>426</sup> The court agreed with the *Granger* court that the discovery rules did not control the issue of testimony at trial.<sup>427</sup> It disagreed, however, with *Granger* insofar as the latter had placed a restriction on the introduction of testimony regarding the defendant's previous consultation with the expert.<sup>428</sup> The *Fenlon* court viewed the prior consultation by the defendant as a relevant factor pertaining to the weight and credibility of the expert's testimony which it believed the jury ought to have the opportunity to consider.<sup>429</sup>

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419. *Id.*, 656 P.2d at 1242.

420. *Id.* at 382, 656 P.2d at 1243.

421. *Id.*, 656 P.2d at 1243.

422. 127 N.H. 702, 506 A.2d 319 (1986).

423. *Id.* at 704, 506 A.2d at 320.

424. *Id.*, 506 A.2d at 320.

425. *Id.*, 506 A.2d at 320-21.

426. *Id.* at 705-06, 506 A.2d at 321.

427. *Id.*, 506 A.2d at 321.

428. *Id.* at 708-09, 506 A.2d at 323.

429. *Id.*, 506 A.2d at 323.

In contrast to *Granger* and *Fenlon* is the federal district court opinion in *Healy v. Counts*,<sup>430</sup> a medical malpractice action in which plaintiff's counsel consulted two expert witnesses during the preparation of the case.<sup>431</sup> After reviewing the records, the experts concluded that no malpractice had occurred.<sup>432</sup> One of the experts was later asked independently by defendant's counsel to review the record.<sup>433</sup> When the expert realized that he had already reviewed the record for the plaintiff, he informed defendant's counsel of that fact as well as the opinion he had given to the plaintiff.<sup>434</sup> The defendant subsequently listed both experts as trial witnesses. The magistrate denied the plaintiff's motion to strike the defendant's endorsement of the expert witnesses and the plaintiff appealed.<sup>435</sup> The *Healy* court ruled that the underlying policy concerns of Rule 26(b)(4)(B) precluded both discovery and testimony from a consulting expert when offered against the party that had initially consulted the expert.<sup>436</sup> The court found that "to construct a rule for happenstance that differs from the rule of discovery as set out in Rule 26 and the *Ager* opinion is an invitation to permit 'happenstance' to replace the formal strictures of discovery."<sup>437</sup> This court found that the *Granger* restriction on direct testimony regarding the prior consultation by the opponent was insufficient to prevent unfair prejudice before the jury and that it would further limit the already difficult job of cross-examination of expert witnesses.<sup>438</sup>

The *Healy* court's rule would certainly be easy to administer, however, it is too inflexible because it over-emphasizes the potential unfairness to the initial hiring party. The defendant in *Healy* did not learn of the plaintiff's consultation with the experts in question through the discovery process.<sup>439</sup> The only way it could be said that the defendant was "build[ing] his case out of his opponent's experts"<sup>440</sup> is if at trial the expert was allowed to testify about the initial consultation.<sup>441</sup> Such testimony could be unfairly prejudicial,

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430. 100 F.R.D. 493 (D. Colo. 1984).

431. *Id.* at 494.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 495.

436. *Id.* at 495-96 (relying extensively on the *Ager* decision throughout its analysis).

437. *Id.* at 497.

438. *Id.*

439. *Id.* at 494.

440. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

441. See *Healy*, 100 F.R.D. at 496-97; *Granger*, 134 Ariz. at 382, 656 P.2d at 1243. *But see Fenlon*, 127 N.H. at 704, 506 A.2d at 323 (holding that "the fact that a party's adversary first

but as the *Granger* court indicated, the trial court has the ability to control that problem using the rules of evidence.<sup>442</sup> The *Fenlon* court, on the other hand, unnecessarily ignored the unfairness concerns of expert discovery because, unlike *Healy* and *Granger*, the ex-parte contact in *Fenlon* was initiated after the plaintiff learned through discovery of the defendant's consultation with the expert.<sup>443</sup> An additional distinction is that the expert in *Fenlon* was unwilling to testify for the plaintiff.<sup>444</sup> These two facts raise the argument concerning the chilling effect on potential expert witnesses that the *Ager* court cited as one of the underlying concerns of Rule 26(b)(4)(B).<sup>445</sup> The *Fenlon* court, however, rejected the argument that the discovery rules were applicable, and instead focused on the unfair prejudice that resulted to the party who was denied the use of the expert's testimony.<sup>446</sup>

In *Granger*, although the Arizona Supreme Court emphasized the untimeliness of the plaintiff's objection to the defendant's use of the expert,<sup>447</sup> the court nevertheless carefully examined any potential unfairness to the plaintiff. The court enjoined defense counsel from mentioning the previous consultation with the plaintiff, thereby preventing the expert from receiving unwarranted accreditation at the plaintiff's expense.<sup>448</sup> This restriction upon the defense counsel prevented the defendant from benefitting from the plaintiff's pretrial diligence, while at the same time it allowed the defendant to benefit from the fruits of his own search for favorable expert testimony. Although the court did not discuss the chilling effect on potential expert witnesses noted in *Ager*,<sup>449</sup> it should be noted that that concern was not relevant in *Granger* because the ex-parte contact with the expert did not violate the trial court's discovery orders<sup>450</sup> and because the expert voluntarily accepted employment with the opposing party.<sup>451</sup>

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contacted the expert is material to the weight and credibility of that expert's testimony, and we think the jury should have the opportunity to consider this fact").

442. *Granger*, 134 Ariz. at 381-82, 656 P.2d at 1242-43. Under Rule 403 of the Arizona Rules of Evidence and its federal counterpart, a court may exclude evidence which is unfairly prejudicial.

443. *Fenlon*, 127 N.H. at 704, 506 A.2d at 320.

444. *Id.* at 704-05, 506 A.2d at 320-21.

445. For a discussion of the fairness doctrine, see *supra* notes 45-65 and accompanying text.

446. *Fenlon*, 127 N.H. at 705-06, 506 A.2d at 321-22.

447. *Granger*, 134 Ariz. 379, 382, 656 P.2d at 1239-40. The court noted that the plaintiff had had numerous opportunities to raise an objection to the defendant's use of the expert but had failed to do so until three days after the trial had begun. The court also noted that it would have been impossible for the defendant to retain another expert at that late date. *Id.*

448. *Id.* at 381-82, 656 P.2d at 1242-43.

449. For a discussion of the *Ager* case, see *supra* notes 399-413 and accompanying text.

450. *Granger*, 134 Ariz. at 379, 656 P.2d at 1240.

451. *Id.*

While the fairness concerns are certainly heightened in the analysis of the availability of discovery of informally consulted experts, situations may arise in which a complete bar to discovery would deny a party access to critical information. If only one expert had reviewed or examined certain evidence which was later altered or destroyed, denial of discovery because of his informal consultant status would squarely conflict with the overriding concern for adequate trial preparation.<sup>452</sup> Under such circumstances, a court should first determine whether the expert is in fact an informal consultant or a retained, non-testifying expert.<sup>453</sup> The *Ager* test, particularly the second and third factors, could be used to determine the actual status of the expert if this scenario were to arise.<sup>454</sup> These factors require the court to look at "the nature, type and extent of information or material provided to, or determined by, the expert" as well as the duration and intensity of the consultation.<sup>455</sup> From such an analysis, the court could determine if the party seeking discovery should be permitted to establish the exceptional circumstances required to allow discovery.<sup>456</sup> By using the multi-factor *Ager* test in conjunction with the exceptional circumstances requirement of Rule 26(b)(4)(B), the courts should have enough flexibility to balance the underlying policy goals of the rule when making a determination concerning discovery of informally consulted experts.<sup>457</sup>

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452. Although this scenario has not yet arisen in the reported cases, it has been hypothesized by courts and commentators. See, e.g., *Nemetz v. Aye*, 63 F.R.D. 66, 68 (W.D. Pa. 1974) (noting that in the event that a claim was made that an informally consulted expert had tampered with records while examining them, then discovery of the informal consultant's identity would be allowed); Graham, *supra* note 24, at 940 n.90 (advocating that in certain unusual circumstances, such as when the consultant is or becomes the only expert with knowledge of certain facts, discovery should be allowed of informally consulted experts).

453. *But see In re Folding Carton Litig.*, 83 F.R.D. 256, 259 (N.D. Ill. 1979) (holding that an "interrogatory need not be answered for experts consulted informally but not retained or employed by plaintiffs because the exceptional circumstances necessary for this discovery have not been shown"); see also Graham, *supra* note 24, at 940.

454. See *supra* notes 407-08 and accompanying text.

455. *Ager v. Jane C. Stormont Hospital and Training School*, 622 F.2d 496, 501 (10th Cir. 1980).

456. Professor Graham proposed an amendment to Rule 26(b)(4) which would eliminate the need for a two-step procedure in such a case. This proposal would allow discovery of informal consultants as well as retained non-testifying experts upon a showing of exceptional circumstances. Graham, *supra* note 111, at 200. Professor Graham argued that in this form the rule would "reflect the actual practice of the discovery of expert witnesses and would also facilitate the policies of the Federal Rules of Evidence." *Id.*

457. See *Ager*, 622 F.2d at 502. The *Ager* court stated that a propounding party should be given the opportunity to request a determination of the status of an opponent's expert at an in-camera review by the court in which the court would apply the multifactor test to the facts. *Id.* For a discussion of the multifactor *Ager* test, see *supra* notes 407-08 and accompanying text.

### B. Discovery of "In-House" and Employee Experts

Courts are split on the question whether discovery of employee or in-house experts is limited by Rule 26(b)(4). The 1970 advisory committee's note states that "subdivision (b)(4)(B) exclud[es] an expert who is simply a general employee of the party not specially employed on the case."<sup>458</sup> There is no dispute over the availability of discovery, limited only by the relevancy standard of Rule 26(b)(1), for information acquired by an in-house expert as an actor or viewer of the occurrences which led to the lawsuit.<sup>459</sup> If an in-house expert is "specially assigned" to a matter for trial preparation, however, courts disagree over whether the protections of Rule 26(b)(4)(B) are available. Because the advisory committee's note is ambiguous, one may read it as supporting either argument.<sup>460</sup> The distinction between the cases turns on whether the phrase "specially assigned" was intended to be included within the provision of Rule 26(b)(4)(B) for experts "specially employed in anticipation of litigation."<sup>461</sup> Absent guidance from the Rule itself, the courts have relied on a variety of factors to determine whether an in-house expert merits Rule 26(b)(4) status. Two 1975 district court decisions represent the leading cases for the opposing viewpoints on this issue.<sup>462</sup>

In the first case, *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*,<sup>463</sup> the plaintiff, Virginia Electric, brought an action against Sun Shipbuilding, the manufacturers of a steam genera-

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458. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504.

459. *Id.* at 503; *see, e.g.*, *Duke Gardens Found., Inc. v. Universal Restoration, Inc.*, 52 F.R.D. 365, 367 (S.D.N.Y. 1971) (party's restoration experts are not protected by Rule 26(b)(4) for information acquired as participants in events giving rise to the lawsuit).

460. *Compare* *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 407 (E.D. Va. 1975) (Use of the term "specially employed" in the advisory committee note refers only to the manner in which the expert's services are obtained, that is, put on the payroll for the specific purpose of deriving facts and opinions for trial preparation.) *with* *Seiffer*, 69 F.R.D. at 72-73 n.3 (stating that the language of the committee note supports, by strong negative implication, the view that an in-house expert may be "specially employed" within the meaning of Rule 26(b)(4)(B)).

461. *Compare* *Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co.*, 109 F.R.D. 12, 15 (D. Neb. 1985) (stating that Rule 26(b)(4)(B) was not intended to protect in-house experts because the terms "retained or specially employed" do not imply the simple assignment of a current employee to work on current litigation) *and* *Virginia Electric*, 68 F.R.D. at 407 (In-house experts are to be treated as ordinary witnesses for purposes of discovery.) *with* *Philadelphia Nat'l Bank v. Dow Chem. Co.*, 40 Fed. R. Serv. 2d 1273, 1274 (E.D. Pa. 1985) (holding that the Rule applies to the rather unusual in-house expert who can be shown to have been retained in anticipation of litigation) *and* *Seiffer*, 69 F.R.D. at 72 (stating that an in-house expert may be specially employed within the meaning of the Rule).

462. *Compare* *Virginia Electric*, 68 F.R.D. at 407 (In-house experts are not protected by Rule 26(b)(4)(B).) *with* *Seiffer*, 69 F.R.D. at 72 (Certain in-house experts are protected by Rule 26(b)(4)(B)).

463. 68 F.R.D. 397 (E.D. Va. 1975).

tor, for breach of contract. Virginia Electric sought to compel the production of documents which Sun Shipbuilding's employees had prepared.<sup>464</sup> The defendant objected to discovery on the ground that the documents were prepared in anticipation of litigation by employees who were experts and who were thus protected by Rule 26(b)(4)(B). They further argued that the term "specially employed," should include the assignment of an employee expert to work on a matter in anticipation of litigation.<sup>465</sup> The trial court rejected this argument reasoning that any employee, even if qualified as an expert, could not be considered an expert within the meaning of the Rule because of the lack of impartiality, non-partisanship, and ability to see both sides of an issue.<sup>466</sup> The court defined "specially employed" as an "expert [who] is put on the payroll for the specific purpose of deriving facts and opinions for use in trial preparation or anticipated litigation."<sup>467</sup> The court supported this view by noting that Rule 26(b)(4)(C) and the accompanying advisory committee's note, requiring payment of fees and expenses to the opposing party and its experts when further discovery is permitted, was not meant to apply to a master-servant relationship.<sup>468</sup> The court concluded that the Rule would have been drafted using "specially assigned" in place of "specially employed" if it had been meant to apply to an ordinary employee assigned for trial preparation.<sup>469</sup>

The leading case for the view that an in-house expert may be "specially employed" and may thereby gain the limited protection of Rule 26(b)(4)(B) is *Seiffer v. Topsy's International, Inc.*<sup>470</sup> *Seiffer* involved a very complex securities law violation with several third party plaintiffs and defendants.<sup>471</sup> One of the defendant underwriters filed a motion with the court seeking to depose one of the partners of Touche Ross & Co., a third party defendant. The court did not allow the discovery concluding that the in-house expert was included within the protection of Rule 26(b)(4)(B) and that the requesting party had failed to meet the exceptional circumstances requirement.<sup>472</sup> It based its decision on four factors. First, the expert was not simply a general employee, but rather had been assigned to assist with the litigation at the attorney's request. Second, the expert had no involvement in the

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464. *Id.* at 399.

465. *Id.* at 407.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.* at 408.

470. 69 F.R.D. 69 (D. Kan. 1975).

471. *Id.* at 71.

472. *Id.* at 72.

audits that gave rise to the issue in the lawsuit. Third, the expert had reviewed the audits in question and had prepared a report for the attorneys. And fourth, the expert would not be called as a witness.<sup>473</sup> The court also noted that the parenthetical language of the advisory committee's note supports, by strong negative implication, the view that "an in-house expert may be specially employed as well as an expert drawn from personnel other than the party's own."<sup>474</sup> Unlike the *Virginia Electric* court, the *Seiffer* court discussed the underlying policy goals which led to the 1970 amendments to Rule 26.<sup>475</sup> The court noted that Rule 26(b)(4)(B) was designed to balance a party's need for the expert's information against allowing a party to build his case using the opponent's experts.<sup>476</sup>

In *Philadelphia National Bank v. Dow Chemical Co.*,<sup>477</sup> a products liability action, Philadelphia National Bank sought an order allowing discovery of an expert, a twenty-year employee of Dow Chemical Co., "who [was] not expected to testify at trial."<sup>478</sup> Deposition testimony revealed that for the preceding five years this employee had been exclusively assigned as an in-house non-testifying expert for trial preparation regarding the product at issue in the lawsuit.<sup>479</sup> The court denied the discovery request, holding that Rule 26(b)(4)(B) applied to the "unusual in-house expert who can be shown to have been retained in anticipation of litigation."<sup>480</sup>

Although the court's opinion lacks a thorough analysis of the

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473. *Id.*

474. *Id.* at 73 n.3. The parenthetical language of the advisory committee's notes to which the *Seiffer* court refers reads as follows: "Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by a party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case) . . . ." 48 F.R.D. 487, 504.

475. *Seiffer*, 69 F.R.D. at 72.

476. *Id.*

477. 40 Fed. R. Serv. 2d 1273 (E.D. Pa. 1985).

478. *Id.* at 1274.

479. *Id.*

480. *Id.* The *Philadelphia National Bank* court opinion cited generally to *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1979), in an apparent reference to this quote; "the rule's tacit acknowledgement of the necessity of meticulous preparation has equal force whether the expert is one originally and exclusively retained for anticipated litigation or one whose employment responsibilities are expanded to encompass consultation and advice in expectation of litigation." *Marine Petroleum*, 641 F.2d at 993. In *Marine Petroleum*, the court had been faced with the question whether Rule 26(b)(4)(B) could be used to shield from discovery a general consultant whose duties had been altered to those of a trial preparation consultant. 641 F.2d at 991-92. This court held that the Rule did protect from discovery the information developed subsequent to the consultant's reassignment to trial preparation. *Id.* at 991-93. It noted that to allow discovery would be at odds with the Rule's implicit recognition that thorough trial preparation requires that any work done by non-testifying experts be protected from discovery. *Id.* at 992-93. The *Marine Petroleum* court

application of Rule 26(b)(4)(B) to in-house experts, the decision is nonetheless noteworthy because it ignored the impartiality requirement of the *Virginia Electric* decision. In addition, the case is noteworthy because it is consistent with the *Seiffer* holding as well as Professor Graham's interpretation of Rule 26(b)(4)(B), which would apply the Rule to certain in-house experts.<sup>481</sup> The court was careful to limit the protection of the Rule to the period during which the expert was assigned to trial preparation on a full-time basis. Thus, any facts known or opinions held prior to his assignment as a litigation expert would not be protected.<sup>482</sup>

In *Kansas-Nebraska National Gas Co. v. Marathon Oil Co.*,<sup>483</sup> the trial court examined the *Seiffer* and the *Virginia Electric* cases in the context of a request for discovery of in-house experts. Finding that any reconciliation of these two cases would be strained at best, the *Marathon Oil* court cited the *Virginia Electric* analysis as being more appropriate to the facts of the case it had at hand.<sup>484</sup> Nonetheless, its analysis actually encompassed elements from both cases.<sup>485</sup> As in *Seiffer*, the *Marathon Oil* in-house experts had not been actors in the occurrences leading up to the lawsuit. The court was convinced, nonetheless, that the ongoing matters alleged by the plaintiff could involve these employees thereby making them actors or viewers.<sup>486</sup> Unlike the *Seiffer* experts, the duties of the in-house experts in *Marathon Oil* were not limited to assisting with the attorney's trial preparation.<sup>487</sup> Finally, the *Marathon Oil* court embraced the *Virginia Electric* court's rejection of employee assignment as being consistent with the term "retained or specially employed," in Rule 26(b)(4)(B).<sup>488</sup>

An analysis of the underlying policy concerns of liberal discovery versus fairness to the employing party is arguably the only way to correct the ambiguities of the Rule.<sup>489</sup> The *Virginia Electric* decision,

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cited to the *Seiffer* case and to Professor Graham's article as support for its holding. *Id.* at 992 n.44 & 993 n.49.

481. Graham, *supra* note 24, at 942-43. According to Professor Graham, the reference in Rule 26(b)(4)(B) and the corresponding advisory committee note to a "specially employed" expert should be interpreted "as encompassing a regular employee of the party who is designated and assigned by that party to apply his expertise to a particular matter in anticipation of litigation or for trial." *Id.*

482. *Philadelphia National Bank*, 40 Fed. R. Serv. 2d at 1274.

483. 109 F.R.D. 12 (D. Neb. 1985).

484. *Id.* at 16.

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

489. For a discussion of how the policy concerns of Rule 26(b)(4) relate to non-testifying in-



however, failed to address both these policy concerns.<sup>490</sup> Instead, the court in *Virginia Electric* applied the literal dictionary definition of the term "expert," which it thought called for a determination of the expert's impartiality.<sup>491</sup> It is difficult to assess if the *Virginia Electric* court was correct in its application of the Rule because the facts given in the court's opinion do not indicate the extent of the experts' involvement in the events which gave rise to the lawsuit. The court's analysis, however, should not be read as the appropriate application of the Rule to all in-house experts. As the *Seiffer* and *Philadelphia National Bank* cases properly indicate, the determination of in-house expert's status is a factual one which courts should make on a case-by-case basis.

In addition, any relevant knowledge held by the employee expert but developed or acquired prior to the assignment for trial preparation is already discoverable and is not protected under Rule 26(b)(4)(B).<sup>492</sup> Forcing a distinction between in-house experts and retained independent experts thus results in "a distinction without a difference."<sup>493</sup> Furthermore, endorsing a rule which requires a party to hire outside experts in order to gain protection under Rule 26(b)(4)(B) encourages economic waste when competent in-house experts are available.<sup>494</sup> Such a rule is contrary to one of the underlying goals of the Federal Rules of Civil Procedure that they "shall be construed to secure the just, speedy, and *inexpensive* determination of every action."<sup>495</sup> A practical solution to this problem is to follow the lead of Alabama and eliminate the ambiguity present in the Rule's current formulation by adding the words "or assigned" to the text of the Rule.<sup>496</sup>

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house experts, see Pielemeier, *Discovery of Non-Testifying "In-House" Experts Under Federal Rule of Civil Procedure 26*, 58 IND. L.J. 597 (1983).

490. Nevertheless, by denying the protection of the rule, the *Virginia Electric* court reflected an obvious preference for liberal discovery.

491. *Virginia Electric*, 68 F.R.D. at 406 (citing BLACK'S LAW DICTIONARY (4th ed. 1951)).

492. See *infra* notes 497-542 and accompanying text.

493. *Craig v. Eastern Airlines*, 40 F.R.D. 508, 509 (E.D.N.Y. 1966); Pielemeier, *supra* note 490, at 615.

494. See *Graham*, *supra* note 24, at 943 n.199; Pielemeier, *supra* note 489, at 620.

495. FED. R. CIV. P. 1 (emphasis added); Pielemeier, *supra* note 489, at 620.

496. ALA. R. CIV. P. 26(b)(4)(B) and committee comments, Alabama Rules of Court, 85, 88 (West 1988). Alabama adopted Rule 26(b) verbatim from the Federal Rule of Civil Procedure. It then added the words "or assigned" in order to expand the protection of the rule to employee experts.

### VIII. DISCOVERY OF INFORMATION NOT ACQUIRED IN ANTICIPATION OF LITIGATION

This section examines how Rule 26(b)(4) applies to experts who have information that was not acquired in anticipation of litigation. The first subsection contains an analysis of how the ordinary witness doctrine has been applied by the courts to allow discovery of some information held by non-testifying experts. In the second subsection, some of the issues which arise when discovery is sought of experts that are not hired by either side are discussed.

#### A. Occurrence Witnesses and Pre-Retention Knowledge

Rule 26(b)(4) does not protect information or opinions held by expert witnesses or consultants unless the information or opinions were developed or acquired in anticipation of litigation or for trial.<sup>497</sup> The 1970 advisory committee's note to Rule 26(b) expressly states that the Rule does not address itself to information acquired by an expert as "an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit."<sup>498</sup> These

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497. *E.g.*, *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1979); *Eliassen v. Hamilton*, 111 F.R.D. 396 (N.D. Ill. 1986); *Sullivan v. Sturm, Ruger & Co.*, 80 F.R.D. 489 (D. Mont. 1978); *Barkwell v. Sturm Ruger Co.*, 79 F.R.D. 444 (D. Alaska 1978); *Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976).

498. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 503. *E.g.*, *Sipes v. United States*, 111 F.R.D. 59, 61 (S.D. Cal. 1986) (Treating physicians who are parties to the lawsuit may not be shielded from discovery because they are experts.); *Quarantillo v. Consolidated Rail Corp.*, 106 F.R.D. 435, 437 (W.D.N.Y. 1985) (The court allowed the deposition of a neurologist who treated the plaintiff's back condition for twelve years prior to the incident and injury at issue, and who continued treatment thereafter because he was an actor or viewer with respect to facts obtained during the plaintiff's treatment.); *Baran v. Presbyterian Univ. Hosp.*, 102 F.R.D. 272, 273 (W.D. Pa. 1984) (The 1970 Advisory Committee's comments to Rule 26(b)(4) clearly show that the drafters did not intend the rule to be applied to a party who is an expert.); *Harasimowicz v. McAllister*, 78 F.R.D. 319, 320 (E.D. Pa. 1978) (The court allowed a medical examiner to be deposed as an ordinary witness regarding the autopsy he performed on the plaintiff's decedent.); *Congrove v. St. Louis-San Francisco Ry.*, 77 F.R.D. 503, 504-05 (W.D. Mo. 1978) (The plaintiff need not pay the defendant's expert witness a fee because the expert developed his opinions while he was an actor or viewer to occurrences that were part of the subject matter of the lawsuit.); *see also* *Norfin, Inc. v. International Business Machines*, 74 F.R.D. 529, 532 (D. Colo. 1977) (Office equipment collator expert in a patent infringement action could be deposed as an actor or viewer with respect to his knowledge and experience concerning the state of the art in the area prior to retention by plaintiff.); *Rodrigues v. Hrinda*, 56 F.R.D. 11, 13 (W.D. Pa. 1972) (In an malpractice action, defendant doctors, as parties in charge of the operation which allegedly injured the plaintiff, can be deposed as ordinary witnesses regarding their "knowledge as to why certain things happened."); *In re Brown Co. Sec. Litig.*, 54 F.R.D. 384 (E.D. La. 1972) (Defendant's employees could be freely deposed as actors or viewers regarding the basis for certain opinions which although part of the subject matter of the lawsuit, they did not develop in anticipation of litigation or for trial.); *Duke Gardens Found., Inc. v. Universal Restoration, Inc.*, 52 F.R.D. 365 (S.D.N.Y. 1972) (Architects hired by plaintiff prior to litigation are not

actors or viewers are subject to discovery as ordinary witnesses. The case law has extended this ordinary witness doctrine to allow discovery of information possessed by non-testifying experts, which they did not acquire in the role of occurrence witnesses but had acquired or developed prior to their retention by a party to the litigation.<sup>499</sup>

The leading case on this issue is *Grinnell Corp. v. Hackett*.<sup>500</sup> At a preliminary hearing, two experts testified for Grinnell on the impact of unemployment benefits paid to workers who were on strike against Grinnell.<sup>501</sup> The experts had been retained by Grinnell because they had researched and published an academic study on the general topic prior to, and unrelated to, the lawsuit.<sup>502</sup> The study had been introduced as evidence at the preliminary hearing.<sup>503</sup> Several years later and after extensive proceedings, the defendant sought discovery of the two experts as actors in the preparation of a piece of evidence.<sup>504</sup> The magistrate rejected this argument and found that any discovery would need to comply with Rule 26(b)(4).<sup>505</sup> Discovery ultimately was denied because the defendants could not meet the exceptional circumstances requirement of subsection (b)(4)(B) of the Rule.<sup>506</sup>

The federal district court for Rhode Island reversed the magistrate's ruling because it had been based on an erroneously narrow reading of Rule 26(b)(4)(B).<sup>507</sup> The district court recognized that even though the experts had not been actors or viewers, the information sought had not been acquired or developed in anticipation of litigation or for trial.<sup>508</sup> Conducting its own textual and policy analysis of Rule 26(b)(4), the court concluded that the discovery sought did not violate the Rule's limitations.<sup>509</sup> The textual analysis emphasized that "Rule 26(b)(4) on its face appears to curtail the discovery of experts only if the information sought was 'acquired or developed in anticipation of

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protected as trial experts by Rule 26(b)(4) and should be subject to deposition as actors or viewers of the events at issue in the lawsuit.)

499. See cases cited *supra* note 497; see also Day, *The Ordinary Witness Doctrine: Discovery of the Pre-Retention Knowledge of a Nonwitness Expert Under Federal Rule 26(b)(4)(B)*, 38 ARK. L. REV. 763, 765 (1985) (criticizing the application of the ordinary witness doctrine for pre-retention knowledge and suggesting that the exceptional circumstances test is more consistent with the underlying policies of the discovery of nontestifying experts).

500. 70 F.R.D. 326 (D.R.I. 1976).

501. *Id.* at 329.

502. *Id.* The study was conducted and published as a Master's Degree thesis at the University of Pennsylvania. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 331.

506. *Id.* at 329.

507. *Id.* at 331.

508. *Id.* at 332.

509. *Id.*

litigation or for trial.’”<sup>510</sup> The court found this textual exegesis to be reinforced by the fact that the expert witness discovery rule was placed within Rule 26. In fact, the heading of Rule 26(b)(4) is “Trial Preparation,” which indicated to the court that subsection (b)(4) was intended to limit the broad discovery range of subsection (b)(1) only for expert information obtained “for the very purpose of preparing for the litigation in question.”<sup>511</sup>

The *Grinnell* court also found that this reading of Rule 26(b)(4) was consistent with two of the underlying policies of the federal discovery rules. First, allowing discovery in the case was consistent with the liberal discovery policy embodied in the rules that seeks to allow the parties “to obtain the fullest possible knowledge of the issues and facts before trial.”<sup>512</sup> Second, the court argued that its interpretation does not offend the fairness doctrine embodied in the 1970 amendments to Rule 26(b)(4) because *Grinnell* had not paid the experts to conduct or write the study. Thus, the choice of the topic by the experts was not a product of *Grinnell*’s diligence.<sup>513</sup>

The ordinary witness doctrine of *Grinnell* was later applied to non-testifying experts in *Barkwell v. Sturm Ruger Co.*<sup>514</sup> and *Sullivan v. Sturm, Ruger & Co.*<sup>515</sup> In both cases, the plaintiffs were suing a gun manufacturer for injury and death caused by faulty safety mechanisms on weapons the defendants had manufactured.<sup>516</sup> In both cases, the plaintiffs attempted to depose the defendant’s non-testifying expert, Hillberg, who had done extensive historical research on gun safety mechanisms while employed by Sturm Ruger prior to any litigation.<sup>517</sup> At one point, Hillberg, on his own initiative, sought employment as an expert witness with the attorney who eventually represented the plaintiff in the *Barkwell* case.<sup>518</sup> After having worked on several other cases as a plaintiff’s expert, Hillberg was rehired by Sturm Ruger as a non-testifying expert in *Barkwell*.<sup>519</sup> Sturm Ruger argued that the plaintiff must establish exceptional circumstances prior to any discovery of Hillberg.<sup>520</sup> The federal district court in Alaska found that the plaintiff in *Barkwell* had failed to establish

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510. *Id.*

511. *Id.*

512. *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

513. *Id.* at 333.

514. 79 F.R.D. 444 (D. Alaska 1978).

515. 80 F.R.D. 489 (D. Mont. 1978).

516. *Id.* at 490; *Barkwell*, 79 F.R.D. at 445.

517. *Sullivan*, 80 F.R.D. at 490; *Barkwell*, 79 F.R.D. at 445.

518. *Barkwell*, 79 F.R.D. at 445.

519. *Id.*

520. *Id.* at 446.

exceptional circumstances.<sup>521</sup> The protections of Rule 26(b)(4)(B), however, were only applicable to information or opinions which had been developed in anticipation of litigation.<sup>522</sup> Therefore, the *Barkwell* court subjected Hillberg to discovery as an ordinary witness on any information and opinions he had held prior to this particular litigation.<sup>523</sup>

In the *Sullivan* case, Sturm Ruger once again sought to deny discovery of Hillberg as a non-testifying expert.<sup>524</sup> Sturm Ruger argued that because Hillberg was employed by it prior to his retention as a plaintiff's expert in unrelated cases, and was under its employ once again for this case, that employment should "bracket" the entire time period, thus, entitling Hillberg to the full protection of Rule 26(b)(4)(B).<sup>525</sup> The federal district court in Montana agreed that exceptional circumstances had not been established in this case, and thus any information developed by Hillberg subsequent to his retention for this trial was protected from discovery.<sup>526</sup> Citing to the rationale of the *Grinnell* and *Barkwell* courts, however, the *Sullivan* court held that Hillberg was subject to discovery as an ordinary witness for knowledge, opinions and materials he had acquired or developed prior to his second term of employment with Sturm Ruger.<sup>527</sup>

Professor Day has criticized the manner in which the *Grinnell* court and others have applied the ordinary witness doctrine for pre-retention information held by non-testifying experts.<sup>528</sup> He has concluded that neither the text of Rule 26(b)(4)(B), nor the cases interpreting the rule, can justify the limitation of the Rule's protection in this way.<sup>529</sup> He has further argued that the courts have used faulty reasoning and that each case should have been decided on "less expansive grounds."<sup>530</sup> One of Professor Day's primary concerns is the difficulty that an expert would face in separating pre-retention

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521. *Id.*

522. *Id.*

523. *Id.*

524. *Sullivan*, 80 F.R.D. at 490.

525. *Id.*

526. *Id.*

527. *Id.* at 490-91.

528. Day, *supra* note 500, at 781-87.

529. *Id.* at 801.

530. *Id.* Professor Day suggested that the *Grinnell* court could have reached the same result either by using a waiver theory (that plaintiff waived 26(b)(4)(B) protection by introducing the report into the record) or by finding that the plaintiff's hiring of the experts was an attempt to shield the experts and their reports from discovery thereby constituting exceptional circumstances. *Id.* at 783. Professor Day argued that the *Barkwell* and *Sullivan* courts also could have found that exceptional circumstances existed because the defendant was attempting to suppress otherwise relevant information by retaining Hillberg. *Id.* at 786.

from post-retention knowledge, therefore, creating the potential that the witness may inadvertently reveal the latter during discovery.<sup>531</sup> The result could be abusive discovery practices, attempts by a party to get a 'free ride' on an opponent's expert, or violations of the other policy concerns which led to the 1970 amendments to Rule 26(b)(4).<sup>532</sup> Professor Day, therefore, suggests that the exceptional circumstances test of subsection (b)(4)(B) of the Rule be applied to pre-retention knowledge held by non-testifying experts.<sup>533</sup>

In the recent case of *Eliassen v. Hamilton*,<sup>534</sup> the defendant in a securities action sought discovery of plaintiff's non-testifying expert. The non-testifying expert had prepared a report to be used by the plaintiff's testifying expert for trial preparation.<sup>535</sup> The report had already been produced by the plaintiff, but the defendant sought discovery of the expert who had prepared it.<sup>536</sup> The *Eliassen* court denied the defendant's motion to depose the expert regarding any work he had done for this plaintiff.<sup>537</sup> The court, however, ruled that the defendant could depose the expert regarding information acquired or opinions formed prior to his employment by the plaintiff.<sup>538</sup> Thus, the defendant could question the expert about the methodology he used in preparing reports prior to his retention by the plaintiff, but no questions could be asked about the preparation of plaintiff's report.<sup>539</sup> The court recognized that the difficulty in distinguishing between pre-retention and post-retention facts and opinions may give rise to practical problems, particularly in a case such as the one at hand, which had had a long history of discovery disputes.<sup>540</sup> The *Eliassen* court, however, held that in spite of possible difficulties "there could be no justification for barring testimony concerning facts and opinions not developed in connection with the particular case."<sup>541</sup> It emphasized that this interpretation of Rule 26(b)(4) appears to be the only way to

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531. *Id.* at 775-76, 797.

532. *Id.* at 792-99.

533. *Id.* at 801. Professor Day also suggested that a broad application of the exceptional circumstances test would prevent a party from using the limited immunity of Rule 26(b)(4)(B) to suppress occurrence testimony. He maintained that this solution would encompass the concerns that led courts to extend the ordinary witness doctrine to nonwitness experts and would be consistent with the policy concerns which led to the creation of limited immunity for such experts. *Id.* at 800.

534. 111 F.R.D. 396 (N.D. Ill. 1986).

535. *Id.* at 397.

536. *Id.* at 397-98.

537. *Id.* at 402.

538. *Id.* at 403.

539. *Id.*

540. *Id.* at 403-04 n.9.

541. *Id.* at 403.

prevent a party from hiring an expert for the sole purpose of buying out his expertise in order to prevent the opponent from hiring that expert.<sup>542</sup>

### B. *Pure Experts (Experts Not Retained by Either Party)*

A pure expert is one who has not been retained by any party to the lawsuit.<sup>543</sup> The pure expert's knowledge or opinion is not acquired or formed in anticipation of litigation.<sup>544</sup> A party to a lawsuit typically seeks discovery of a pure expert because the expert may have published a report or study which could be relied upon at trial by an opponent's expert witness.<sup>545</sup> Because pure experts are outside the protective ambit of Rule 26(b)(4),<sup>546</sup> they are subject to discovery pursuant to the broad scope of Rule 26(b)(1).<sup>547</sup> In addition, federal courts have the power to compel testimony from pure experts.<sup>548</sup> This apparent double standard within Rule 26(b) has raised concerns of unfairness regarding the lack of protection for pure experts.<sup>549</sup> Discovery matters, however, are left to the discretion of the trial court judge,<sup>550</sup> who may use other provisions of the Federal Rules of Civil Procedure,<sup>551</sup> as well as recent case law, in order to fashion a variety of protections.<sup>552</sup>

542. *Id.*

543. Maurer, *supra* note 248, at 94-104; Graham, *supra* note 24, at 934-38.

544. Maurer, *supra* note 248, at 95; Graham, *supra* note 24, at 936.

545. Maurer, *supra* note 248, at 94-95.

546. *E.g.*, Wright v. Jeep Corp., 547 F. Supp. 871, 874 (E.D. Mich. 1982).

547. *See, e.g.*, Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 559 (7th Cir. 1984); Farnsworth v. Procter & Gamble Co., 101 F.R.D. 355, 357 (N.D. Ga. 1984); Wright, 547 F. Supp. at 874.

548. Kaufman v. Edelstein, 539 F.2d 811 (2d Cir. 1976); Carter-Wallace, Inc., v. Otte, 474 F.2d 529 (2d Cir. 1972); Wright v. Jeep Corp., 547 F. Supp. 871 (E.D. Mich. 1982).

549. Note, *Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas*, 1987 DUKE L.J. 140, 146.

550. *See, e.g.*, Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985); Richards of Rockford, Inc., v. Pacific Gas & Elec., 71 F.R.D. 388, 389 (N.D. Cal. 1976).

551. *See* FED. R. CIV. P. 26(c) (A court may issue protective orders limiting discovery on a showing of good cause or as justice may require.); FED. R. CIV. P. 45(b)(1) (A court may modify or quash a subpoena if it is unreasonable or oppressive.); FED. R. CIV. P. 26(b)(1) (A court may limit discovery, on its own or upon motion under Rule 26(c), if the discovery is unreasonably cumulative or duplicative or if the information is available from another source that is more convenient, less burdensome, or less expensive, etc.).

552. *See, e.g.*, Farnsworth v. Procter & Gamble, Co., 758 F.2d 1545 (11th Cir. 1985) (The district court acted within its discretionary power in modifying a subpoena on nonparty medical researchers in order to protect the confidentiality of general public volunteer participants in the research project.); Buchanan v. American Motors Corp., 697 F.2d 151 (6th Cir. 1983) (The court found no error in the district court's quashing of a subpoena duces tecum that was unreasonably burdensome on a nonparty expert.); *In re Snyder*, 115 F.R.D. 211 (D. Ariz. 1987) (The district court quashed a subpoena duces tecum served on a nonparty expert because it was excessively burdensome.); Richards of Rockford, Inc., v. Pacific Gas &

Two Second Circuit cases established the Federal Court's power to compel an unretained expert witness to respond to a subpoena. In *Carter-Wallace, Inc. v. Otte*,<sup>553</sup> a patent infringement action, the Court of Appeals for the Second Circuit had to decide whether the testimony of expert witnesses taken in a prior action could be admitted into the record as evidence against Carter-Wallace.<sup>554</sup> The court held that the expert's prior testimony was admissible in view of the court's power to compel an expert to testify to any previously formed opinions.<sup>555</sup>

In *Kaufman v. Edelstein*,<sup>556</sup> the Second Circuit, citing *Carter-Wallace*, upheld a district court order compelling two experts to testify to previously formed opinions.<sup>557</sup> The Second Circuit refused to quash the subpoenas for the following reasons:<sup>558</sup> First, the court noted the presumption that the public is entitled to every person's evidence. Second, the court noted the absence of any constitutional or federal statutory privilege that protects an expert's testimony; that is, an expert does not have a property right to his knowledge. And third, the court noted that the proponent is not required to prove that a voluntary expert of equal qualification cannot be found. Despite its refusal to quash the subpoenas, the court recognized several concerns that might cause a court to quash or modify a subpoena.<sup>559</sup> For instance, the expert may argue that the subpoena is overly burdensome if the expert witness has often been summoned as an involuntary witness, or when the expert can demonstrate reasons for not testifying which outweigh the proponent's need for the evidence.<sup>560</sup>

Dr. Richard G. Snyder is an example of a pure expert who fits the *Kaufman* example of good cause. Dr. Snyder is a co-author of a vehicle safety study prepared by a research institute at the University of Michigan. The report was critical of the Jeep, an all-terrain vehicle manufactured by American Motors Corporation (AMC).<sup>561</sup> In at least three lawsuits subsequent to the report's publication, AMC has

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Elec., 71 F.R.D. 388 (N.D. Cal. 1976) (The district court quashed a subpoena served on a nonparty academic researcher after finding that the research participant's interest in confidentiality outweighed the litigant's need for the information.).

553. 474 F.2d 529 (2d Cir. 1972).

554. *Id.* at 535.

555. *Id.* at 535-38.

556. 539 F.2d 811 (2d Cir. 1976).

557. *Id.* at 817-18.

558. *Id.* at 820-21.

559. *Id.* at 818-21.

560. *Id.* at 821.

561. *Wright v. Jeep Corp.*, 547 F. Supp. 871, 873 (E.D. Mich. 1982). Dr. Snyder was a professor and research scientist at the Highway Safety Institute of the University of Michigan and in that capacity co-authored a report, "On-Road Crash Experience of Utility Vehicles" for



sought to compel discovery of Dr. Snyder and his research materials in order to prepare for any of the plaintiff's trial experts who might rely on Dr. Snyder's report.<sup>562</sup> In *Buchanan v. American Motors Corp.*,<sup>563</sup> the Court of Appeals for the Sixth Circuit relied on *Kaufman* to uphold the district court's quashing of the discovery subpoena served on Dr. Snyder.<sup>564</sup> The Sixth Circuit found the subpoena to be burdensome on a person who is a stranger to the litigation.<sup>565</sup>

In *Wright v. Jeep Corp.*,<sup>566</sup> on the other hand, a separate litigation in which a similar subpoena was served on Dr. Snyder, the federal district court for the Eastern District of Michigan refused to quash the subpoena.<sup>567</sup> The district court found that because Dr. Snyder's report was not prepared in anticipation of litigation, it did not fit within Rule 26(b)(4) and, therefore, the relevant material could be compelled under Rule 26(b)(1).<sup>568</sup> In addition, the district court also ruled that Dr. Snyder had no first amendment or common law academic privilege; that the documents sought were not confidential; and that the potential chilling effect of the discovery on Dr. Snyder, or other researchers, was not sufficient to outweigh the needs of the justice system to use basic research information.<sup>569</sup> The federal district court did, however, respond to Dr. Snyder's claim that the discovery was burdensome and ordered the payment of a reasonable fee that included a professional fee, the cost of supplying the documents, remuneration for the inconvenience, and if appropriate, a portion of the expenses of the original research.<sup>570</sup> The court also left open other measures as necessary to relieve any further burden on Dr. Snyder.

*In re Snyder*<sup>571</sup> marks the most recent encounter between Dr. Snyder and AMC. In this case, the federal district court in Arizona agreed with the *Buchanan* decision and quashed the subpoena for

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the Insurance Institute for Highway Safety. The report concluded that the Jeep CJ-5 had a disproportionately high roll-over rate in accidents.

562. *Buchanan v. American Motors Corp.*, 697 F.2d 151 (6th Cir. 1983); *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982); *In re Snyder*, 115 F.R.D. 211 (D. Ariz. 1987).

563. 697 F.2d 151 (6th Cir. 1983).

564. *Id.* at 152.

565. *Id.* ("Compliance with the subpoena would require the expert who has no direct connection with the litigation to spend many days testifying and disclosing all of the raw data, including thousands of documents, accumulated over the course of a long and detailed research study.")

566. 547 F. Supp. 871 (E.D. Mich. 1982).

567. *Id.*

568. *Id.* at 874.

569. *Id.* at 874-76.

570. *Id.* at 877.

571. 115 F.R.D. 211 (D. Ariz. 1987).

being overly burdensome.<sup>572</sup> The court noted that the number of "legal skirmishes" imposed on Dr. Snyder by AMC might, by themselves, suffice to establish the excessive burden suffered by Dr. Snyder due to the legal expenses incurred and the personal disruption required of Dr. Snyder to respond to the subpoenas.<sup>573</sup> In its analysis, the court expressed particular concern over the potential chilling effect that overly broad discovery orders may have on academic research.<sup>574</sup> The court concluded that the adversarial process of the judicial system was not the appropriate forum to test the validity or acceptability of the opinions formed and expressed in the context of other disciplines.<sup>575</sup> Such research provides great benefits to society, and courts must protect the research from the potential disincentives that the discovery process may inflict.<sup>576</sup>

Courts have also quashed or modified discovery subpoenas to nonparty research groups in order to reduce the impact of judicial interference on academic and medical research, particularly when confidential information gathered from the public was involved,<sup>577</sup> or when the research had not yet been completed.<sup>578</sup> In *Farnsworth v. Procter and Gamble Co.*,<sup>579</sup> a products liability case, the defendant, a tampon manufacturer, served a subpoena on the Center for Disease Control, a nonparty, seeking the names and addresses of women who had participated in the toxic shock syndrome research.<sup>580</sup> In response to the subpoena, the Center turned over numerous documents but sought court protection for the identities of the participants.<sup>581</sup> Although the participants had never been guaranteed anonymity, the Center argued that disclosure of the very personal and "potentially embarrassing information would inhibit future studies by causing the public to fear disclosure of personal information."<sup>582</sup> Based on Rule 26(c), which allows a court, when good cause is shown, to issue any order which justice requires to protect any party or person from undue burden or expense,<sup>583</sup> the trial court granted a protective order denying the defendant access to the identities of the research partici-

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572. *Id.* at 214.

573. *Id.*

574. *Id.* at 215.

575. *Id.* at 215-16.

576. *Id.* at 216.

577. *E.g.*, *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985).

578. *E.g.*, *Deitchman v. E.R. Squibb & Sons*, 740 F.2d 556 (7th Cir. 1984).

579. 758 F.2d 1545 (11th Cir. 1985).

580. *Id.* at 1546.

581. *Id.*

582. *Id.*

583. FED. R. CIV. P. 26(c).

pants.<sup>584</sup> The Court of Appeals for the Eleventh Circuit affirmed the trial court's protective order and agreed that the defendant's need for the identities of the research participants was outweighed by the potential negative effect that disclosure might have on the beneficial public health studies that the Center for Disease Control conducts.<sup>585</sup> Therefore, in determining when to invoke the good cause standard of the rule, courts have balanced the litigant's need for the information against the burdens imposed on the party resisting discovery.<sup>586</sup>

In *Dow Chemical Co. v. Allen*,<sup>587</sup> the Court of Appeals for the Seventh Circuit affirmed a district court's quashing of a subpoena issued on an on-going university research group that was studying the detrimental effects of certain herbicides on animals.<sup>588</sup> The Environmental Protection Agency had threatened to cancel a herbicide contract with Dow Chemical Co., in part, because of adverse findings included in a preliminary report of the university study.<sup>589</sup> The university research group objected to discovery because the project had not yet been completed, and premature exposure of the study's information could seriously impair its success.<sup>590</sup> Employing the balancing test, the court found that Dow Chemical's need for the information was minimal compared to the burdens that premature exposure of the study would impose on the project and its researchers.<sup>591</sup>

In spite of these discretionary controls, the fairness concerns that are discussed in the *Dow Chemical*, *Farnsworth*, and *In re Snyder* cases have led to proposals to change Rules 26 and 45 of the Federal Rules of Civil Procedure so that they may offer more protection than they presently do.<sup>592</sup> Some state courts have gone further and have

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584. *Farnsworth*, 758 F.2d at 1547.

585. *Id.* at 1547.

586. *E.g.*, *Farnsworth*, 758 F.2d at 1547; *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 559 (7th Cir. 1984); *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1268 (7th Cir. 1982).

587. 672 F.2d 1262 (7th Cir. 1982).

588. *Id.* at 1266.

589. *Id.*

590. *Id.* at 1273.

591. *Id.* at 1272-74. The court accepted the following factors as clearly supporting the need to quash the subpoena:

[T]hat public access to the research data would make the studies an unacceptable basis for scientific papers; that peer review and publication of the studies was crucial to the researchers' credibility and careers and would be precluded by whole or partial public disclosure of the information; that loss of the opportunity to publish would severely decrease the researchers' professional opportunities in the future; and that even inadvertent disclosure of the information would risk total destruction of months or years of research.

*Id.* at 1273.

592. See Note, *supra* note 549, at 142, 152, 154. The author discusses, and ultimately rejects as inadequate, the 1985 ABA House of Delegates' recommendations to amend Rule 45

adopted an expert privilege that precludes any compelled discovery or testimony of pure experts.<sup>593</sup> Such an absolute expert privilege, however, has been unequivocally rejected by the Federal Rules of Evidence, the Federal Rules of Civil Procedure,<sup>594</sup> and by the federal courts.<sup>595</sup> The better approach is to continue to use the balancing test in conjunction with the other discretionary powers available to the trial courts, such as ordering the payment of reasonable costs and fees to pure experts that they may incur in responding to burdensome subpoenas.<sup>596</sup> By allowing the court to weigh the competing interests of both the litigant and the pure expert, the balancing test should lead to more consistent and socially desirable discovery decisions.

### IX. CONCLUSION

The adoption of Rule 26(b)(4) has helped to eliminate many of the inconsistencies in the discovery of expert information which existed prior to 1970. For the most part, courts have interpreted the Rule in a manner which promotes the purposes for which it was adopted. The increasingly liberal posture taken by courts in permitting the discovery of experts expected to testify reflects a deep concern on the part of the courts for allowing attorneys to prepare for the effective cross-examination of experts at trial. The similar concern courts have shown for protecting non-testifying experts from discovery has helped to promote the use of experts in consultative, non-

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of the Federal Rules of Civil Procedure, in order to give nonparty witnesses greater protection. The author suggests that the appropriate solution would be to extend the qualified immunity of the work-product doctrine to the work of nonparty experts.

593. *E.g.*, *Commonwealth v. Vitello*, 367 Mass. 224, 235, 327 N.E.2d 819, 827 (1975); *People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 296 N.Y. 223, 225, 72 N.E.2d 165, 166 (1947). *See generally* Annot., *Right of Independent Expert to Refuse to Testify as to Expert Opinion*, 50 A.L.R. 4th 661, 680 (1986) (discussing state and federal cases regarding nonparty experts). *But see* Note, *supra* note 549, at 154 (rejecting the absolute privilege for nonparty experts on public policy grounds).

594. FED. R. CIV. P. 26(b)(4) advisory committee's note, 48 F.R.D. 487, 504-05 ("These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert.").

595. *See, e.g.*, *Kaufman v. Edelstein*, 539 F.2d 811, 820 (2d Cir. 1976) (Rule 501 of the Federal Rules of Evidence does not recognize any general privilege for experts.); *Wright v. Jeep Corp.*, 547 F. Supp. 871, 875 (E.D. Mich. 1982) (refusing to create a new privilege that would shield academics from testifying); *In re Snyder* 115 F.R.D. 211, 213 (D. Ariz. 1987) (same). *But see* *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561 (7th Cir. 1984) (Even though an academic medical research study of great public interest may enjoy a qualified privilege, a party seeking discovery could overcome this privilege by a showing of absolute necessity.).

596. *See, e.g.*, *Wright v. Jeep Corp.*, 547 F. Supp. 871, 877 (E.D. Mich. 1982) (Researchers who may be required to testify involuntarily should be paid a reasonable fee, including a professional fee, remuneration for the cost of supplying the documents, for their inconvenience and, if necessary, for a portion of the expenses of the original report.).

testimonial roles in litigation, while effectively addressing the fear that one party might unduly benefit from the efforts of its opponent. Nevertheless, despite the uniformity that the Rule has helped to bring about, there remains unresolved ambiguities concerning the Rule's application. This Comment examined the Rule in its entirety while identifying and discussing a broad range of issues and ambiguities that have arisen under the Rule.

In respect to testifying experts, court decisions have evinced a trend toward routinely permitting the discovering party to obtain discovery beyond the use of interrogatories. In light of this trend, it is questionable whether the two-step procedure mandated by Rule 26(b)(4)(A), whereby a party must first propound interrogatories to the expert and then make a motion to the court for additional discovery, serves any purpose. By amending the Rule to eliminate the requirement of a motion to the court before proceeding with additional discovery, the rules would more accurately reflect the actual practices of attorneys in exchanging expert information.

Court decisions have also evidenced a general acceptance of Professor Graham's suggestion that the reports of testifying experts be discoverable without any limitation based on the work-product doctrine. In many cases, by providing for liberal access to the reports of testifying experts, parties will be able to forego the use of expensive depositions, thus making discovery more cost effective.

The Rule might still be amended to deal more directly with the problem of evasive discovery practices. In permitting the discovery of the drafts of expert reports, courts have found one method for preventing evasiveness in responding to discovery requests. Similarly, by limiting parties to the fair scope of the information that they divulge during discovery, courts will take away the incentive for reticent responses to requests for discovery.

The paramount policy goal underlying section (B) of Rule 26(b)(4) is to protect the diligent pretrial preparation of a party by allowing discovery of non-testifying experts only under exceptional circumstances. Exceptional circumstances exist only when a party cannot gain access to the information in question by any other means. Such circumstances have been found to exist when a party could either obtain the information only through the expense of an inordinate amount of time, money, and other resources, or when the object or location in question has been altered or destroyed, thereby making it impossible to have a new expert examine it to render an opinion.

Courts remain split on the question whether a party must show exceptional circumstances before being allowed to discover the names

of an opponent's non-testifying experts. An examination of the relationship between Rules 26(b)(4) and 26(b)(1), supports the notion that exceptional circumstances should be shown for such discovery in order to shield non-testifying experts from discovery in furtherance of the policy objectives of the Rules.

The limited immunity available under section (B) should not be available, however, to any information that is used by a testifying expert during his trial preparation. Courts have held that information developed by a non-testifying expert and presented to a testifying expert to be used as the basis of his testimony should be discoverable to the same extent as any other materials relied upon by the testifying expert. Therefore, an attorney should assume that any information or document given to a testifying expert is fair game for discovery. This includes reports prepared by non-testifying experts as well as information and documents which may have, in years past, been protected from discovery by the work-product rule.

Informally consulted experts are completely protected from discovery. One of the concerns which led to this greater protection is that discovery of these experts might lead to a reluctance by consultants to render assistance to attorneys for fear that any consultation would subject them to unwanted discovery procedures or court appearances. Because of this heightened protection, it is imperative that such experts are properly identified so that a party may not be unfairly deprived of relevant information which only that expert may hold. Recent case law has developed a multifactor test that courts should adopt to determine the status of an expert to avoid unwarranted protection from discovery.

Another issue which raises the unfairness concerns of Rule 26(b)(4)(B) is ex-parte contacts between informal consultants and the opposing party's counsel. When such contacts occur in violation of a court's pretrial discovery order sanctions are appropriately imposed. However, when such contacts occur inadvertantly, courts should look at this scenario on a case-by-case basis to determine if the spirit of the discovery rules will be violated by allowing an attorney to adopt his adversary's expert.

Whether in-house experts should receive protection under Rule 26(b)(4)(B) remains an open question. Some courts have decided that the Rule is just not applicable to such experts. The better view is that the Rule may be applicable and that a court should examine each case on its own merits.

The final portion of this Comment examined the expert information that is outside of the protection of Rule 26(b)(4). Any informa-

tion developed or acquired outside of trial preparation falls outside the scope of the Rule. This includes information acquired by an expert as an actor or viewer to an occurrence at issue in the lawsuit. It also means that a non-testifying expert will not be protected from discovery concerning information developed or acquired prior to being retained for trial preparation. The rationale behind this rule is that the limited immunity of Rule 26(b)(4)(B) should not be used to allow a party to buy up unfavorable opinions and that the courts have the power to compel any expert to testify to previously held opinions.

Experts that have not been hired by either party are outside of the Rule's protection as their information was not acquired or developed in anticipation of litigation. The courts as well as the Federal Rules of Evidence and Procedure have refused to recognize any privilege which would exempt these pure experts from discovery. Although these experts are essentially viewed as ordinary witnesses who have relevant information and, as such, may be compelled to submit to discovery, many courts have properly recognized that these experts are not ordinary witnesses. The courts have developed a balancing test to determine whether the need for the expert's information is justified in light of the burden imposed on the expert by the discovery request. While this balancing test does not offer the protection from the judicial system that many pure experts would prefer, many of the court opinions which have applied it offer examples of how sensitive the courts can be to the plight of these experts in light of the litigant's need for the evidence.

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