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Blind Man's Bluff: An Analysis of the Discovery of Expert Witnesses Under Federal Rule of Civil Procedure 26(b)(4) and a Proposed Amendment

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NOTES

Blind Man's Bluff: An Analysis of the Discovery of Expert Witnesses Under Federal Rule of Civil Procedure 26(b)(4) and a Proposed Amendment.

INTRODUCTION

As litigation has become more complex, the use of expert witnesses to render authoritative opinions on issues in dispute has increased dramatically.¹ Consequently, the rules governing the discovery of expert witnesses have undergone significant change. The purpose of discovery under the Federal Rules of Civil Procedure is to promote the just, speedy, and inexpensive disposal of litigation by facilitating the formulation of issues in dispute, preventing unfair surprise at trial, identifying groundless claims and defenses, and encouraging pre-trial settlement.² The rules governing discovery also recognize that effective cross-examination of an expert witness requires significant preparation; advance knowledge of the expected testimony of an opposing party's experts is the only acceptable substitute for what would otherwise be lengthy and fruitless cross-examination at trial.³ These policies take on special significance in the context of the discovery of expert witnesses.

Discovery of expert witnesses is governed by Rule 26(b)(4) of the Federal Rules of Civil Procedure.⁴ Through sub-divisions (A) and (B), the rule delineates the circumstances in which counsel may discover information about the identity and substance of testimony of an adversary's expert witnesses.⁵ A cursory review of the rule indicates that the limitations on discovery of experts retained or consulted by opposing counsel are clear. A

1. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.11, at 202 (2d ed. 1977); Daniels, *Managing Litigation Experts*, A.B.A. J., Dec. 1984, at 64.

2. Comment, *Discovery of Expert Information Under the Federal Rules*, 10 U. RICH. L. REV. 706, 706 (1976). An excellent treatment of the history of Rule 26(b)(4) is found in 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, 898-99.

3. Advisory Committee's Note, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 503-04 (1970) [hereinafter Advisory Notes].

4. The text of Rule 26(b)(4) is reproduced *infra* at note 38.

5. FED. R. CIV. P. 26(b)(4)(A), (B).

more probing analysis, however, confirms that the rule leaves unanswered many vital questions concerning the practicalities of the discovery of experts.

Part I of this Note briefly discusses the history of Rule 26(b)(4),⁶ and Part II discusses the current application of the rule and the rule's inadequacy regarding practical application, interpretation by the courts, and ex parte contact between opposing counsel and expert witnesses.⁷ Finally, Part III suggests an amendment of Rule 26(b)(4) to correct the rule's current deficiencies and to provide a more practical process for the discovery of expert witnesses.⁸

I. THE HISTORY OF RULE 26(b)(4)

Prior to the proposal of Rule 26(b)(4) in 1966 and its subsequent adoption as revised in 1970, the Federal Rules placed no limitation on the discovery of experts other than the requirement of relevance and the restriction arising from privilege.⁹ The lack of explicit guidelines for determining the acceptable extent of discovery of expert witnesses created a chaotic situation,¹⁰ as federal trial court practices ranged from allowing a party to depose an adversary's expert concerning the expert's conclusions to denying disclosure of even the names of expert witnesses retained by another party.¹¹ The classic illustration of the confusion surrounding expert discovery is a case where, in a patent infringement action involving the plaintiff's experts residing in Massachusetts and Ohio, the federal district court in Massachusetts denied the defendant's motion to compel any discovery of the expert in Massachusetts, and the federal district court in Ohio granted the defendant's motion to compel full discovery of the expert in Ohio.¹²

In an attempt to impose order on the chaos of expert discovery, the Advisory Committee for the Federal Rules of Civil Procedure proposed an amendment to the Rules in 1946 that would have banned all pre-trial discovery of facts known and opinions held by experts.¹³ The proposed

6. See *infra* notes 9-37 and accompanying text.

7. See *infra* notes 38-180 and accompanying text.

8. See *infra* notes 181-206 and accompanying text.

9. Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111, 116 (1966) (originally printed in 39 WASH. L. REV. 665 (1964)) [hereinafter Long].

10. See Graham, *supra* note 9, at 899.

11. See Long, *supra* note 9, at 117.

12. *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 684 (D. Mass. 1947); *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 425 (N.D. Ohio 1947); see also C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2029, at 240-41 (1970) [hereinafter WRIGHT & MILLER]. For a more thorough analysis of the *Cold Metal* cases, see Note, *Discovery of the Nontestifying Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program*, 37 HASTINGS L.J. 201, 203 n.6 (1985).

13. See *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 456-70 (1946).

amendment omitted any reference to discovery of the expert himself and prohibited a discovering party from obtaining reports or writings prepared by the expert or counsel unless denial of the production of such documents would unfairly prejudice the discovering party or cause him undue hardship or injustice.¹⁴ Congress did not adopt the proposed amendment, however, and courts were left to resolve the difficulties of expert discovery without further guidance.¹⁵

The courts that allowed the discovery of experts viewed it as merely advancing the time of disclosure of information that would eventually be learned at trial, and believed that the potential unfairness to the party retaining the expert was outweighed by the opposition's need to discover the expert's information.¹⁶ The courts denying discovery relied upon at least one of three distinct theories: the attorney-client privilege, the work-product doctrine, and the "unfairness" rule.¹⁷ Professor Friedenthal, in his influential article on the discovery of experts, suggested that the attorney-client privilege theory be rejected to the extent that facts known by the expert receive protection from discovery.¹⁸ Commentators urged that since facts known by the client himself were discoverable and could not be shielded simply by repetition to the client's attorney, the client's knowledge of the facts was not protected, and, therefore, the expert's factual knowledge should not be protected.¹⁹ The application of the work-product doctrine restricting or preventing the discovery of experts was also dismissed on the basis that the expert is the witness rather than the attorney, and thus the need to protect the mental impressions of the attorney was not at issue.²⁰ Exceptions could be made, however, for sensitive materials prepared by the expert containing strategic suggestions for the litigation.²¹ Both the attorney-client privilege theory and work-product doctrine were repudiated as restrictions on the discovery of experts by the Advisory Committee in creating the provisions of Federal Rule of Civil Procedure 26(b)(4).²²

The restrictions on expert discovery based on the principle of unfairness received more favorable treatment by courts and commentators than did the attorney-client privilege and work-product limitations.²³ The courts had formulated two theories based on the principle of unfairness. The first

14. *Id.* at 456-57.

15. Note, *supra* note 12, at 203 n.6.

16. *Id.* at 203-04.

17. See Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); see also Long, *supra* note 9, at 123-42.

18. Friedenthal, *supra* note 17, at 455-69.

19. See Note, *supra* note 12, at 205; see also Graham, *supra* note 2, at 901.

20. Graham, *supra* note 2, at 901.

21. See Note, *supra* note 12, at 205 n.20.

22. See Advisory Notes, *supra* note 3, at 504-05; Graham, *supra* note 2, at 902.

23. See Graham, *supra* note 2, at 902.

theory recognized that the expert information involved in the litigation could be protected by a property right in the information, although courts were divided on the issues of whether it was necessary to compensate the expert for his developed expertise and whether such protection extended to facts known by the expert.²⁴ Friedenthal dismissed this first theory as "hardly a substantial basis for prohibiting disclosure" because the court has the power to compel any person having knowledge of relevant facts to disclose them during discovery or at trial.²⁵

The second theory was based on the policy of discouraging laziness by opposing counsel and prohibited counsel from using the information obtained through the discovery of an expert retained and groomed for trial by an adversary to prepare his own case.²⁶ This second theory focused on the need to distinguish between the purposes for which the discovery was sought, as opposing counsel might be attempting either to build his own case, reveal new avenues for the discovery of potentially important information, or prepare for cross-examination of the expert witness.²⁷ The problem with this approach 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," and, therefore, the court would have to decide whether the need for preparation for cross-examination outweighed the unfairness to the retaining party.²⁸

In order to eliminate or mitigate the unfairness created by this approach to discovery, Friedenthal proposed the principle of "mutuality."²⁹ Friedenthal suggested that discovery of the expert should be permitted absent a showing of good cause only as to experts expected to testify and that both parties be required to decide upon their experts prior to discovery.³⁰ These

24. *Id.*; see also, e.g., *Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941); *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21 (W.D. Pa. 1940).

25. Friedenthal, *supra* note 17, at 482.

26. See *Graham, supra* note 2, at 903. Parties should be dissuaded from playing a waiting game in the retention and preparation of expert witnesses since this practice could lead to unnecessary delay in bringing the case to trial and would prejudice the diligent party in the litigation. See Note, *supra* note 12, at 209-10 n.46.

27. Friedenthal, *supra* note 17, at 483.

28. *Id.* at 487; see also *WRIGHT & MILLER, supra* note 12, at 247.

29. *Graham, supra* note 2, at 904. Friedenthal asserted that "[t]he most satisfactory way to solve the problems of discovery in this area" was the free exchange of all relevant expert information, and that a party seeking discovery of the expert of another party should first be required to provide a list of his expert witnesses by which he would be bound at trial. The trial court would be allowed to deny discovery upon a finding that the party has not made a reasonable effort to obtain expert information of his own. The court could then insist on a list of previously consulted experts before allowing discovery by the requesting party; this will prevent prejudicing the party who had prepared diligently. Friedenthal, *supra* note 17, at 488. Listing the experts prior to discovery of the adversary's experts would eliminate the dangers posed by "advocate experts" retained to differ with an adversary's experts once those latter experts' theories were revealed, and such a listing would also prevent the prejudice created by an adversary's attempt to subvert preparation by opposing counsel by withholding a surprise expert witness until just before trial. See *id.* at 485, 487.

30. See Friedenthal, *supra* note 17, at 487.

procedures would further the general policy of independent preparation if combined with "timing" considerations providing for the exchange of the names of these experts shortly before trial.³¹

The final significant development prior to the creation of Rule 26(b)(4) in 1970 was Judge Roszel Thomsen's decision and opinion in *Knighton v. Villian & Fassio* in 1965.³² In *Knighton*, the court formulated a rule on the discovery of experts through which a party could require any other party to identify witnesses that he expected to call as an expert at trial and to disclose the subject matter of the expert's proposed testimony by submission of an interrogatory to such party a reasonable time before trial.³³ This rule agreed with Friedenthal and Long to the extent that it rejected the limitations on expert discovery based on the attorney-client privilege and work-product theories.³⁴ The rule contrasted sharply with the commentators' suggestions for full discovery limited only by fairness considerations, however, by limiting the scope of the permissible discovery of experts to the experts' opinions and the facts and reasons upon which those opinions were based.³⁵ The *Knighton* decision did incorporate, to a limited degree, the "two-step" process suggested by Friedenthal providing for an initial listing of experts followed by further discovery if warranted, but ignored the mutuality and timing concerns stressed by the commentators.³⁶ These facets of the *Knighton* decision take on special significance in light of the fact that the text of Rule 26(b)(4) eventually adopted in 1970 bears greater similarity to the policies outlined in the *Knighton* decision than to the suggestions of the commentators.³⁷ The impact of the Advisory Committee's reliance on the *Knighton* rule is the subject of the next portion of this Note.

II. THE PRESENT STRUCTURE OF RULE 26(b)(4) AND PROBLEMS THEREIN

A. Current Interpretations of the Rule

Rule 26(b)(4) of the Federal Rules of Civil Procedure establishes the exclusive means of discovering facts known and opinions held by experts if

31. *Id.* at 487-88; see also Graham, *supra* note 2, at 904-05. Jeremiah Long also identified timing problems, with his primary concern being the tendency of a party to find an accommodating expert if permitted to discover the adversary's expert before retaining one of his own. Long feared that this practice could lead, intentionally or otherwise, to the manufacturing of contrary evidence. Long, *supra* note 9, at 125.

32. 39 F.R.D. 11 (D. Md. 1965). In this case, the defendant objected to the service of several interrogatories by plaintiff's counsel in a personal injury action, one of which sought the disclosure of the identity and specialty of each expert defendant planned to call at trial and requested any written reports prepared by the experts be attached to the answers to the interrogatories. Graham, *supra* note 2, at 906.

33. *Knighton*, 39 F.R.D. at 13. Chief Judge Roszel Thomsen subsequently served on the Advisory Committee which adopted Rule 26(b)(4).

34. See *supra* notes 18-23 and accompanying text.

35. See Graham, *supra* note 2, at 907.

36. *Id.* at 907-08.

37. *Id.* at 909.

those facts or opinions were acquired or developed in anticipation of litigation.³⁸ Prior to the creation and adoption of Rule 26(b)(4) in 1970, the critical issue concerning the scope of expert discovery was whether discovery of the expert would be restricted to the expert's direct testimony and the factual basis of such testimony.³⁹ The Rule essentially adopted the position advocated by Friedenthal and Long⁴⁰ by not placing substantive limitations on the scope of the discovery of experts other than the requirement that discoverable facts and opinions be prepared "in anticipation of litigation."⁴¹

As a substantive limitation, the "in anticipation of litigation" requirement involves more than the consultation of an expert after the filing of a suit. The information in question must have been prepared in response to, or in furtherance of, a specific suit; information prepared or obtained with the mere contingency of litigation is not within the protection of the Rule.⁴² As

38. FED. R. Crv. P. 26(b)(4) provides:

(4) *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.

39. 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 J. MARSHALL L. REV. 377, 387 (1987).

40. See *supra* notes 24-31 and accompanying text.

41. See Day & Dixon, *supra* note 39, at 387-88.

42. See Note, *supra* note 2, at 710-11. In *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972), the court rejected a broad definition of "in anticipation of litigation" which would have allowed reports prepared by an expert after a claim had arisen and litigation was a contingency to be protected from discovery. The court noted that the party claiming protection of Rule 26(b)(4) had not yet consulted counsel and that there was a substantial time lag between the preparation of the reports and the eventual

a result, limitations on the discovery of experts are imposed by procedural mechanisms, and although the primary concern of the Rule is the method by which discovery may be accomplished, the procedural limitations also have a significant impact on the substantive development of a party's case.⁴³

The accepted approach for analyzing the procedural limitations of Rule 26(b)(4) divides experts into four separate classes:

- 1) Experts a party expects to call at trial;
- 2) Experts retained or specially employed in anticipation of litigation or preparation for trial but not expected to testify at trial;
- 3) Experts informally consulted in preparation for trial but not retained;
- 4) Experts whose information was not acquired in preparation for trial.⁴⁴

Each class of experts receives distinct treatment under the Rule, and the following paragraphs will detail the limitations of discovery of the expert according to his class in the order presented above.

1. Experts expected to testify.

Rule 26(b)(4)(A)(i) provides for limited discovery of the facts known and opinions held by experts who are expected to testify at trial and is intended to facilitate cross-examination and rebuttal at trial.⁴⁵ Rule 26(b)(4)(A) es-

filing of the suit. The court feared that such an interpretation would immunize from discovery any documents prepared in the ordinary course of business relating to potential claims and leave the party seeking discovery with severely limited access to necessary information. *Id.* Courts have resorted to various other tests. *See, e.g., In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) ("a possibility") (cited in Wilson, *Rules Pertaining to Discoverability of Expert Opinion Evidence in Federal Court*, 1983 TRIAL LAW. GUIDE 411, 420-21 (1983)); *Securities & Exchange Comm. v. World-Wide Coin Investors*, 92 F.R.D. 65 (N.D. Ga. 1981) ("a substantial probability"); *In re Sinking of Barge "Ranger I"*, 92 F.R.D. 486 (S.D. Texas 1981) ("a prospect"). Wilson suggests that a two-factor test considering whether litigation is a contingency and the motive of the investigation be used to resolve the issue of what is "in anticipation of litigation." *Id.* Day & Dixon argue, however, that the anticipation of litigation limitation is illusory and ultimately meaningless since the relevance standard of Rule 26(b)(1) governing general discovery would apply; because the relevance standard is very broad regarding what constitutes "in anticipation of litigation," the Rule only superficially imposes substantive restrictions. Day & Dixon, *supra* note 39, at 388 n.81. It is apparent that what is considered to be "in anticipation of litigation" in any given case will depend on the individual facts of the case and the particular jurisdiction.

43. *See* Day & Dixon, *supra* note 39, at 388. Notably missing from the procedural constraints to be discussed in the following paragraphs are the mutuality and timing concerns of the commentators. There is nothing in the text of the Rule or the accompanying advisory committee notes which requires mutuality in the expert discovery process. The provisions of the Rule do not condition a party's discovery of an adversary's expert on an ability or willingness to engage in reciprocal discovery, and there is no prioritization or race aspect to the process under the current Rule. The timing considerations urged to ensure each party prepared his own case prior to discovering facts and opinions from his adversary's expert were similarly not adopted in the Rule, and there are no significant timing constraints on parties in conducting discovery of the experts. *Id.* at 388-89.

44. *See supra* note 38; *see also* WRIGHT & MILLER, *supra* note 12, at 250.

45. *See supra* note 38.

establishes a two-step method for the discovery of experts expected to testify at trial. The first step allows the discovering party to obtain, without court intervention, the identity of any expert witness his adversary expects to call at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion through interrogatories.⁴⁶ The phrase "expected to testify" was chosen over the term "may call" in order to ensure adequate preparation for cross-examination by making an adversary's expert's facts, opinions, and reasons for those opinions available to each party a reasonable time before trial.⁴⁷ The second step provides that discovery beyond interrogatories can only be obtained through motion to the court, and such further discovery is at the discretion of the court.⁴⁸

Because Rule 26(b)(4)(A) relies on the use of interrogatories to discover the information necessary to facilitate cross-examination and rebuttal of the expert at trial, the strengths and weaknesses of interrogatories as a discovery method take on great significance.⁴⁹ Generally, the interrogatory's principal advantage is the saving of time and money; retaining counsel can answer the interrogatories with information he would have already obtained from his expert to prepare his own case for trial, and this process requires no significant extra time or expense on the part of the expert or the party retaining the expert.⁵⁰ The interrogatory was selected as the initial discovery device over the superior deposition process⁵¹ in an attempt to reconcile the countervailing policies of the need to prepare for cross-examination and the

46. FED. R. CIV. P. 26(b)(4)(A)(i).

47. Judge Thomsen, in *Knighton v. Villian & Fassio*, 39 F.R.D. 11 (D. Md. 1965), indicated that the phrase "expected to call" was preferred to the term "may call" because the latter term was simply too broad. Judge Thomsen acknowledged that the former phrase could also be subject to broad interpretation, but determined that the "expected to call" standard achieves the purpose of Rule 26(b)(4) by making these facts, opinions and bases for the opinions available to opposing counsel. *Id.* at 13; see also *Hoover v. United States Dept. of the Interior*, 611 F.2d 1132, 1141 n.12 (5th Cir. 1980); *WRIGHT & MILLER*, *supra* note 12, at 251-52.

48. FED. R. CIV. P. 26(b)(4)(A)(ii).

49. See *Graham*, *supra* note 2, at 917.

50. See *WRIGHT & MILLER*, *supra* note 12, at 252. It is important to note, however, that some federal district courts require greater disclosure under local rules and compel the disclosure of an expert's reports. Connors, *A New Look at an Old Concern—Protecting Expert Information from Discovery Under the Federal Rules*, 18 DUQ. L. REV. 271, 272-73 (1980).

51. Interrogatories are typically useful for discovering the details of general pleading allegations, simple facts, admissions, and uncovering other potentially discoverable facts and theories. Depositions are superior to interrogatories for conducting a thorough inquiry into an adversary's case. Depositions allow the examining party greater flexibility since the examining party can refer to the expert's answers to previous questions and deprive the expert of the opportunity to fully consult with counsel before responding to a question. See *Graham*, *supra* note 2, at 917-18. A deposition may also reveal to the examining party vulnerabilities in the expert's demeanor and substantive presentation of facts and opinions that would not be disclosed by an interrogatory.

need to protect the retaining party from the unfairness of allowing the discovering party to build his case from the information discovered.⁵² The policy conflict was resolved in favor of preventing unfairness, and, consequently, Rule 26(b)(4)(A)(i)'s "interrogatory first" approach to expert discovery has been described as "an uncomfortable modification and overreaching of the normal function of interrogatories."⁵³

Once a discovering party has learned the identity and substance of testimony of an adversary's expected trial experts through interrogatories, Rule 26(b)(4)(A)(ii) allows a party to seek further discovery through motion to the court. This provision gives the trial court discretion to grant further discovery typically based on the insufficiency of the answers to the interrogatory and allows the court to limit further discovery in timing and scope to prevent abuse of the process.⁵⁴

This provision, however, fails to establish a standard to guide the trial court's determination of when interrogatory answers are insufficient or further discovery is otherwise warranted, and reported cases indicate that trial courts are having difficulty applying the two-step procedure established by the Rule.⁵⁵ This difficulty is a direct result of the Advisory Committee's inability to resolve the issue of whether testifying experts should be treated exactly as any other witness at trial, and the existence of a disagreement in the Committee is substantiated by the lack of a standard guiding the trial court in the use of its discretion.⁵⁶ As a result, commentators have remarked that further discovery is granted on the whim or personal predilection of the trial judge rather than the policy of allowing pre-trial preparation by the parties.⁵⁷

2. Experts not expected to testify.

The discovery of experts retained or specially employed in anticipation of litigation but not expected to be called to testify at trial is governed by Rule 26(b)(4)(B). This provision precludes the discovery of facts known and opinions held by non-testifying experts except under exceptional circumstances demonstrated by the party seeking discovery. The distinction between experts retained but not expected to testify and those expected to be called

52. See Advisory Notes, *supra* note 3, at 504.

53. See Graham, *supra* note 2, at 917-18. The problems created by this modification are discussed more thoroughly *infra* notes 80-101 and accompanying text.

54. See Advisory Notes, *supra* note 3, at 504. Rule 26(b)(4)(C) seeks to further reduce the danger of unfairness to the retaining party by requiring the discovering party to pay fees and expenses in certain cases. See *supra* note 38 for text.

55. See Graham, *supra* note 2, at 918-931.

56. *Id.* at 921-22.

57. See Connors, *supra* note 50, at 272; Graham, *supra* note 2, at 930; Wilson, *supra* note 42, at 432.

at trial reflects the notion that discovery of the information possessed by the expert to testify at trial is inevitable.⁵⁸

The exceptional circumstances standard is designed to minimize the danger that a retaining party may not be as protective of an expert whose information is not indispensable if that information may readily be discovered by his adversary.⁵⁹ By requiring a discovering party to show exceptional circumstances for the disclosure of the facts and opinions of a non-testifying expert, 26(b)(4)(B) protects the retaining counsel's right to decide which of several retained experts to put on the witness stand based on the expert's clarity of presentation, ability to withstand cross-examination, or other strategic concerns without fear that the non-testifying expert's information will get into the "wrong hands." Because the expert will not be testifying at trial, the policy favoring discovery for preparation for adequate cross-examination vanishes and the policy of protecting the retaining party from the unfairness of disclosing developed information takes on greater significance.

Rule 26(b)(4)(B) does not establish an explicit standard to determine whether exceptional circumstances exist for the court to permit discovery of the non-testifying expert, and the Advisory Committee's Notes to the Rule provide little guidance. The Notes state only that it must be "impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."⁶⁰ Because a litigant will not know either the facts known or opinions held by an adversary's expert, one court has held that it will rarely be possible for the party seeking discovery to show that exceptional circumstances exist for obtaining those facts and opinions.⁶¹ However, some commentators assert that this result was specifically intended in the creation of this provision of the Rule.⁶²

This deliberate ambiguity has been clarified by courts and commentators indentifying situations in which the exceptional circumstances test is met. The first requirement for demonstrating exceptional circumstances is that

58. See WRIGHT & MILLER, *supra* note 12, at 254.

59. *Id.*

60. Advisory Notes, *supra* note 3, at 504. One commentator noted that Rule 26(b)(4)(B) "expressly places the burden of showing exceptional circumstances on the party seeking discovery," and that "[c]ourts have consistently adhered to the rule of placing the burden on the discovering party." Comment, *Protecting the Non-Testimonial Expert*, 33 S.D.L. REV. 303, 306 (1988); see also Willett v. General Electric Co., 113 N.H. 358, 306 A.2d 789 (1973) (discovering party claiming exceptional circumstances based on a change in the condition of the inspected item must establish, through discovery or other sources, that the condition of the item has changed substantially). *But see* Roesburg v. Johns-Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980) (discovering party held to have satisfied exceptional circumstances test where party opposing discovery failed to suggest a practical alternative method by which the discovering party could obtain the information).

61. *United States v. Meyer*, 398 F.2d 66, 76 (9th Cir. 1968) (relying on the text of proposed Rule 26(b)(4)).

62. See WRIGHT & MILLER, *supra* note 12, at 256.

the information sought must be material to the cause of action, based on the logic that the information must be necessary to prove a party's case before the need for the information can be described as "exceptional."⁶³ In addition, recent cases indicate a party must be able to substantiate that the information sought through discovery of his adversary's expert is not available from other sources.⁶⁴ The most conclusive showings of exceptional circumstances occurred where the circumstances changed so significantly that the discovering party has been afforded no reasonable opportunity to obtain the requested information on his own,⁶⁵ or where the independent acquisition or development of the information would require excessive time, delay and expense.⁶⁶ While some courts found exceptional circumstances in

63. See *Crockett v. Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974); Comment, *Protecting the Non-Testimonial Expert*, *supra* note 60, at 305. Note, however, that the *Crockett* court over-extended the materiality requirement by insisting on a showing of "substantial need," the standard prescribed in Rule 26 (b)(3) but not contained in Rule 26(b)(4). *Crockett*, 61 F.R.D. at 320.

64. The court in *Marine Petroleum v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1980), in denying discovery, focused on the fact that the plaintiff claiming exceptional circumstances to discover the requested information from the defendant's expert had ample opportunity to obtain the same information through discovery of the defendant himself. The court noted that the plaintiff, once receiving the information from the defendant, could hire an expert to make an independent analysis. *Id.* at 994. Similarly, in *United States v. Hooker Chemicals*, 112 F.R.D. 333 (W.D.N.Y. 1986), the court refused to permit the United States to obtain the report of the defendant corporation's non-testifying expert because the United States had either retained or consulted nine other experts regarding the subject matter of the defendant's expert's report. See also *Grindell v. Am. Motors Corp.*, 108 F.R.D. 94 (W.D.N.Y. 1985) (exceptional circumstances not present where the information was discoverable from the retaining party); *Seiffer v. Topsy's Int'l, Inc.* 69 F.R.D. 69 (D. Kan. 1975) (discovery not allowed regarding adversary's expert's analysis of audit reports and such reports had already been disclosed to the discovering party). These rulings also recognize aspects of the unfairness doctrine by prohibiting the discovering party from building his case from the conscientious preparator of his adversary. See *supra* text accompanying note 52; Peilemeier, *Discovery of Non-Testifying "In-House" Experts Under Federal Rule of Civil Procedure 26*, 58 IND. L.J. 597, 607 (1983).

65. In *Dixon v. Cappellini*, 88 F.R.D. 1 (M.D. Pa. 1980), the plaintiff alleged a civil rights violation and claimed extreme fright and nervous shock resulting from false arrest, imprisonment, and threats of force while in the defendants' custody in late 1978. Plaintiff's counsel resisted the defendants' discovery of psychiatric reports regarding the plaintiff's mental state prepared by plaintiff's experts in January, 1979. The court held that because the plaintiff put her mental state in issue, the defendants demonstrated exceptional circumstances since independent investigation more than a year after the incident would not contain equivalent information on plaintiff's mental state and the reports were unobtainable by other means. *Id.* at 3-4. In *Delcastor, Inc. v. Vail Associates, Inc.*, 108 F.R.D. 405 (D. Col. 1985), the plaintiff sought to compel the full report of the defendant's expert engineer on the condition and cause of the mudslide in dispute in the litigation. The defendant's expert was the only qualified expert able to examine the site before unseasonably warm temperatures and human activity "drastically altered" site conditions. *Id.* at 408-09. The court held that "an expert's opinion based on a summary of another expert's observation of a condition is not equivalent to an expert's opinion based on his own observations" and compelled production of the full report. *Id.*

66. The leading case finding prohibitive time and expense as satisfying the exceptional

less compelling situations,⁶⁷ the "changed circumstances" and "prohibitive cost or delay" rationales for finding exceptional circumstances fit more squarely with the purposes of Rule 26(b)(4)(B).

Whether a party is entitled to discover the name or identity of an adversary's non-testifying expert is an issue that remains in debate. Rule 26(b)(4)(B) makes no mention of the discoverability of the non-testifying expert's identity, and the only indication of a proposed standard in the Advisory Committee Notes states that a party may, "on a proper showing," require the other party to name experts retained or specially employed as an ancillary procedure.⁶⁸ Courts required to interpret the non-treatment of this aspect of the Rule have been split on the appropriate standard for the discovery of the identity of the expert,⁶⁹ and this lack of a stipulated standard has created confusion among federal courts and practitioners and caused complications arising in the context of ex parte contact between opposing counsel and the expert of an adversary.⁷⁰

3. The informally consulted expert.

Rule 26(b)(4) contains no provision for the discovery of an expert who was informally consulted in preparation for trial but not retained or specially employed by the consulting party. 26(b)(4)(B) only applies to experts retained or specially employed, and this subdivision precludes discovery of even the identity of any experts who were informally consulted but not retained.⁷¹

circumstances test, *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex.), involved an anti-trust action in which the defendant attempted to obtain through discovery the documentation of the code and contents of computer programs created by plaintiff's experts as part of a complicated computerized beer marketing distribution model. The defendant contended that its own expert would be unable to properly understand otherwise undefined short-hand codes or symbols comprising the computer program except with the inordinate expense of time, money, and resources. *Id.* at 1138. The court, in granting discovery of the code explanations only, noted that the defendant was not seeking to avoid the expense of retaining his own expert or building his case from his adversary's expert but merely expediting discovery of the means and methods through which the plaintiff's expert would substantiate his conclusions at trial. *Id.* at 1138-39; see also *In re Agent Orange Product Liability Litigation*, 105 F.R.D. 577 (E.D.N.Y. 1985).

67. See *Day & Dixon*, *supra* note 39, at 384-85; Comment, *supra* note 60, at 312-18.

68. Advisory Notes, *supra* note 3, at 504.

69. See *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980) and *Baki v. B.F. Diamond Const. Co.*, 71 F.R.D. 179 (D. Md. 1976) as representative cases.

70. These problems will be thoroughly discussed in Part IIB. See *infra* notes 106-12 and accompanying text.

71. See Advisory Notes, *supra* note 3, at 504; see also *WRIGHT & MILLER*, *supra* note 12, at 257. Rule 26(b)(4)(B) does not provide specifically for the discovery of an individual employee of a party to the case who is specially assigned by the employer/party to investigate, analyze or otherwise form an opinion about the issues in dispute in the litigation. The parameters of discovery of these "in-house" experts is beyond the scope of this Note; however, an analysis and proposals for resolving the problems created by the lack of an articulated standard for such discovery can be found in Peilemeier, *supra* note 64, and Comment, *The In-House Expert Witness: Discovery Under the Federal Rules of Civil Procedure*, 33 S.D.L. REV. 283 (1988).

The distinction between an informally consulted expert and one retained is not always clear. Professor Graham suggests that the drafters of 26(b)(4)(B) contemplated a distinction between an expert who advises a party based upon a review of the relevant facts and whose information or opinion is not likely to significantly assist the consulting party in the preparation of the case and one whose opinions are determined to be helpful to the consulting party.⁷² The possibility of subsequent discovery of the ineffective expert by an adversary would discourage parties from initiating a search for experts because the expert's adverse information would be immediately available to an opponent; if the expert was of assistance to the consulting party, however, the expert would probably be retained by the party and fall under the protection of 26(b)(4)(B).⁷³ Graham has therefore suggested that this provision be read to consider any expert who satisfies the exceptional circumstances test a retained expert subject to discovery regardless of the formality of contact, thereby neither discouraging a party from searching for expert witnesses nor preventing an adversary from discovering information from an expert not helpful to the consulting party where such information is otherwise not obtainable.⁷⁴

4. Experts whose information was not developed in preparation for trial.

The provisions of Rule 26(b)(4) do not address the expert whose information was not acquired in anticipation of litigation or preparation for trial. The rule offers no protection for the expert who was an actor or viewer with respect to transactions or occurrences constituting the subject matter of the litigation and such experts are to be treated as ordinary witnesses whose facts and opinions may be discovered through routine discovery practice.⁷⁵ One commentator has argued that the ordinary witness doctrine is inconsistent with the policies underlying Rule 26(b)(4)(B) when

72. Graham, *supra* note 2, at 939. Graham further asserts that an expert consulted informally but of assistance to the consulting party be considered a retained expert for the purposes of Rule 26(b)(4)(B). In the event an informally consulted expert becomes the only expert with knowledge of certain facts, that expert should be subject to discovery under the exceptional circumstances standard of 26(b)(4)(B). *Id.* at 939-40.

73. *Id.* at 940.

74. *Id.* Note, however, that one court has not accepted the proposition that Rule 26(b)(4)(B) prohibits any discovery of informally consulted experts, and held instead that a party might be entitled to some discovery of the informally consulted expert if there were some reason to believe the discovery would be of assistance to the party seeking discovery. *Nemetz v. Aye*, 63 F.R.D. 66 (W.D. Pa. 1974). For a more detailed discussion of the import of this case and related cases, see Wilson, *supra* note 42, at 423-25.

75. Advisory Notes, *supra* note 3, at 503.

applied to the pre-retention knowledge of the expert witness,⁷⁶ but the Rule continues to operate as written and is interpreted to provide no protection to an expert who is a regular employee of the retaining party and not specially employed in preparation for trial.⁷⁷

B. Problems Presented by the Current Interpretation of Rule 26(b)(4).

Rule 26(b)(4) was originally designed to resolve many of the difficulties faced by federal trial courts concerning the discovery of expert witnesses. The Advisory Committee succeeded in articulating a rule which acknowledged the relevant policies and other theoretical concerns regarding expert discovery, but the adopted rule has generated a myriad of problems in practical and interpretive application. The response to the Rule's complications ranges from a division among the courts to a rejection of the provisions of the Rule by the practicing bar. The purpose of this portion of the Note is to identify and explain the Rule's inadequacy to govern expert discovery in its present form.

1. Discovery orders are not immediately appealable.

Rule 26(b)(4) grants the trial court discretion in applying the provisions of the rule governing expert discovery,⁷⁸ and as a result, most discovery orders are not reviewed by appellate courts.⁷⁹ A discovery order is considered an interlocutory order rather than a final order, and under the provisions of the Interlocutory Appeals Act of 1958, discovery orders are not regarded as presenting a controlling question of law or justifying immediate appeal because these orders do not materially advance the termination of the litigation.⁸⁰ Accordingly, appellate courts will reverse a discovery order only

76. See 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 (1985). This article is an extensive and authoritative discussion of the ordinary witness doctrine under Rule 26(b)(4), a subject outside the scope of this Note.

77. See WRIGHT & MILLER, *supra* note 12, at 258. For an excellent treatment of the problems created when an expert plays more than one role in terms of the four categories governing discovery, see Note, *supra* note 2, at 718-19.

78. See *supra* note 38.

79. Note, *A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained*, 12 U. MICH. J.L. REF. 533, 544 (1979).

80. 28 U.S.C.A. § 1292(b) (1958); see also WRIGHT & MILLER, *supra* note 12, at 29-31. Wright and Miller further state that review under this statute should rarely be allowed, and state that writs of mandamus also are rarely available as a means for review of discovery orders. Review through the writ of mandamus is reserved for "really extraordinary cases." *Id.* Wright and Miller do note, however, that the federal attitude toward mandamus review is loosening and this liberalized attitude will affect discovery orders. *Id.*

for "action which is arbitrary, fanciful, or clearly unreasonable,"⁸¹ and parties usually resolve discovery disputes informally rather than resorting to the formal appeal process.⁸²

Discovery orders are appealable as a final order after judgment, but the issue raised by the discovery order is usually moot by this stage of the proceeding.⁸³ The limited opportunity to appeal discovery orders has resulted in a scarcity of appellate opinions interpreting the provisions of Rule 26(b)(4), and since trial courts rarely have the opportunity to consider the sophisticated policy arguments supporting changes in the interpretation of the Rule, the Rule continues to confuse federal courts and practitioners.⁸⁴

2. The Rule fails to standardize further discovery of the testifying expert.

The absence of a standard in Rule 26(b)(4) for determining when further discovery is warranted under 26(b)(4)(A)(ii)⁸⁵ has led to divergent results both in courts and in practice. Courts have had difficulty balancing the policies of adequate preparation for cross-examination and apparent compliance with the provisions of the Rule.⁸⁶ Some courts have allowed practically unlimited discovery of expert information and required the discovering party only to agree to compensate the expert or negotiate with the retaining party as to splitting the expert's fee in order to obtain further discovery, while other courts have insisted on a more strict application of Rule 26(b)(4)(A)(ii).⁸⁷

81. *Marine Petroleum*, 641 F.2d at 991.

82. Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 MICH. L. REV. 513, 514-15 n.9 (1982).

83. See Note, *supra* note 79, at 544.

84. See *id.*

85. See *supra* notes 55-58 and accompanying text.

86. In *Lanza v. British European Airways, Ltd.*, MDL Docket No. 147 (E.D.N.Y. Mar. 17, 1976), the court held that the plaintiff's responses to defendant's interrogatories regarding the substance of the testimony of plaintiff's expected experts were sufficient despite the fact the responses indicated only that the experts would testify as to the design and testing of the aircraft involved in the litigation. The summary of grounds for the experts' opinions was one short paragraph giving only general indications of the basis for their opinions, yet the court similarly held the response was adequate. While the responses perhaps satisfied the provisions of the Rule, they were not sufficient to allow for adequate cross-examination. See *Graham, supra* note 2, at 918-19. In *Rupp v. Vock & Weiderhold, Inc.*, 52 F.R.D. 111 (N.D. Ohio 1971), the plaintiffs refused to state more than that the experts would testify concerning the machine design, electrical circuitry, and human factors engineering, and when required by the court to supplement such a response, the plaintiffs disclosed one further sentence as to the expected substance of the experts' testimony. Once again, the court accepted this superficial compliance with the Rule despite the discovering party's need for information in order to adequately prepare for cross-examination. See *Graham, supra* note 2, at 919-21.

87. See *Connors, supra* note 50, at 273-74.

The liberal approach to additional discovery is illustrated by *Herbst v. International Telephone & Telegraph Corp.*⁸⁸ In *Herbst*, the court noted that there was no established standard for further discovery in the Rule or Advisory Notes and granted the defendant's motion for a deposition based on the principle that because discovery of non-expert witnesses was liberal, the discovery of experts should be similarly liberal once the unfairness of allowing the discovering party to benefit from the other party's expert was overcome.⁸⁹ The *Herbst* court therefore allowed unlimited discovery of the retaining party's trial expert subject only to payment for the privilege. In *Wilson v. Resnick*,⁹⁰ however, the court considered interrogatories the only means of obtaining initial discovery of the facts known and opinions held by experts under 26(b)(4), and since the plaintiff's responses to the interrogatories were sufficient, further discovery was not allowed by the court.⁹¹

One commentator suggests that the requirement of 26(b)(4)(A)(ii) is meaningless unless courts allow further discovery once a party completes the mechanical step of interrogatories because a prohibition of further discovery based on good faith but superficial responses by the retaining party would interfere with the discovering party's ability to prepare for cross-examination.⁹² He argues that an interpretation of this provision which hinges on the sufficiency of interrogatory responses merely reformulates the problem by allowing liberal courts to declare the responses inadequate and conservative courts to declare the responses sufficient.⁹³

The impact of these divergent approaches on the appropriate standard for further discovery under 26(b)(4)(A)(ii) is mitigated by the fact that the two-step process created by the Rule is virtually being ignored in practice. Three separate empirical studies have concluded that the actual practice of the discovery of experts to be called at trial differs significantly from the procedure envisioned by the drafters of the Rule.⁹⁴ A survey conducted by Professor Graham disclosed that the discovering party deposed his adver-

88. 65 F.R.D. 528 (D. Conn. 1975).

89. See Graham, *supra* note 2, at 924. The court resolved the unfairness aspect of further discovery by permitting the parties to arrange for a division of the expert's fees. *Id.*

90. 51 F.R.D. 510 (E.D. Pa. 1970).

91. See Graham, *supra* note 2, at 925.

92. *Id.* at 929.

93. *Id.* at 929-30.

94. See 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; see also Day, *Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota*, 31 S.D.L. REV. 40 (1985); Day & Dixon, *supra* note 39. It is also notable that the Arizona State Bar Association Committee, in adopting in 1970 expert discovery provisions identical to the Federal Rule (Ariz. R.C.P. 26(b)(4)), stated that the motion for further discovery would be perfunctory and automatically granted in all but the most exceptional circumstances. The Bar Association noted that the provision was included solely to maintain uniformity between state and federal rules and that experts would be subject to depositions exactly as if they were ordinary witnesses. See WRIGHT & MILLER, *supra* note 12, at 253 n.76.

sary's expert without resort to the two-step process of obtaining court approval in 60% of the cases and that either the expert's report was furnished by the adversary, or the expert was deposed by the discovering party, or both, in 84% of the cases.⁹⁵ The survey further indicated that the custom in practice regarding extensive discovery of expected trial experts was to proceed voluntarily without resort to judicial compulsion at all.⁹⁶

The empirical studies conducted by Professor Day essentially mirrored the work done by Professor Graham in both technique and response.⁹⁷ Day's research also indicated that the limitations of 26(b)(4)(A) were rejected in practice in favor of informal agreements between the parties, with stipulations being the primary vehicle of expert discovery under the Rule.⁹⁸ Practitioners requested an adversary's expert's report in over 65% of the cases and deposed the adversary's expert in over 70% of the cases without judicial intervention, and the judges responding to the survey confirmed that discovery occurred in their courts without resort to the court.⁹⁹ Both the practitioners and judges agreed that disregarding the provisions of the Rule provided for adequate trial preparation.¹⁰⁰

The justification offered for side-stepping the limitations of the Rule's two-step procedure was the inherent inadequacy of the interrogatory as a method of providing adequate preparation for cross-examination and rebuttal,¹⁰¹ Professors Graham and Day each reported that over 80% of the respondents in their respective surveys considered the interrogatory wholly inadequate, as practitioners expressed a need for more than "form respon-

95. See Graham, *supra* note 94, at 176. Graham prepared a questionnaire designed to determine whether discovery proceeded beyond the answer to interrogatories voluntarily or under court supervision and mailed the questionnaire to each federal district judge, United States magistrate, United States Attorneys' office, the regional offices of the Securities and Exchange Commission and Department of Justice, Antitrust Division, and to ten practicing attorneys in each state based on the attorneys' participation in federal court practice. Graham received 222 tabulable responses consisting of 48 district judges, 23 magistrates, 12 governmental agencies and 139 practitioners. *Id.* at 171-72.

96. *Id.* at 177.

97. See Day, *supra* note 94; Day & Dixon, *supra* note 39. Like the Graham survey, Graham, *supra* note 94, Day's surveys were designed to determine to what extent the practices in South Dakota diverged in procedure and substance from the provisions of the Rule. South Dakota's expert discovery rule (S.D. CODIFIED LAWS ANN. § 15-6-26(b)(4) (1982)) is modeled on and worded substantially the same as the federal rule, and the survey assumed that the state practices would be consistent with the federal rule. A survey was sent to each active member of the South Dakota Bar, and responding practitioners reported no significant differences between state and federal practice in this area. Day, *supra* note 94, at 40-41. The substantially same survey was sent to South Dakota trial court judges to measure the degree of consistency between what the practitioners reported and what the judges observed from the bench. Day & Dixon, *supra* note 39, at 378.

98. See Day, *supra* note 94, at 49-50.

99. *Id.* at 50.

100. See Day & Dixon, *supra* note 39, at 394.

101. See Graham, *supra* note 94, at 172-74; see also Day, *supra* note 94, at 51-52; Day & Dixon, *supra* note 39, at 394.

ses" to interrogatories to properly prepare for trial.¹⁰² Practitioners complained that interrogatory answers were sparse and incomplete, represented answers opposing counsel would like the expert to give, were not detailed enough to prevent surprise, and failed to disclose information important to unmask bias, hostility, or previous testimony.¹⁰³

In addition, the survey results show that commentators' well-intentioned concerns that full discovery would result in unfairness by allowing the discovering party to build his case from information obtained through the discovery of his adversary's expert were unfounded. Over 80% of those responding to Professor Graham's survey disclosed that the customary practice of ignoring the two-step requirements of the Rule did not prejudice either party involved and that a litigant was required to prepare his own case regardless of his discovery of an adversary's expert.¹⁰⁴ The two-step procedure created by the Rule for the discovery of testifying experts is simply unnecessary.

3. The exceptional circumstances requirement for discovery of non-testifying experts is often not enforced in practice.

Despite Rule 26(b)(4)(B)'s clear prohibition of the discovery of non-testifying experts absent exceptional circumstances, the empirical studies indicate that practitioners have, to some degree, decided to ignore the provisions of the Rule.¹⁰⁵ Professor Graham revealed that the reports of non-testifying experts are often furnished to the opposition and depositions of experts are voluntarily permitted by the retaining party.¹⁰⁶ More striking results were obtained in Professor Day's study, which concluded that adversaries required the discovering party to meet the exceptional circumstances test in only 13% of the cases.¹⁰⁷

102. See Graham, *supra* note 94, at 173; see also Day, *supra* note 94, at 51. It is also conceivable that an adversary could respond with pat answers designed to satisfy the adequacy requirement of the court in an effort to require the opposing party to depose the expert and thus force the opposition to share in the costs incurred by the retaining party in finding and grooming the expert. Such an adversary would, however, be flirting with the imposition of sanctions under Federal Rule 37 for abuse of discovery and would also have to sacrifice the further discovery of his expert with no guarantee the court would require contribution by the deposing party under 26(b)(4)(C).

103. Graham, *supra* note 94, at 174.

104. *Id.* at 181. Graham did note, however, that an attorney may forgo deposing the adversary's expert for fear of further educating the expert regarding the trial strategy of the attorney and hinting at prospective cross-examination of the expert or other tactical reasons. *Id.* at 186.

105. See *supra* note 94 and accompanying text.

106. See Graham, *supra* note 94, at 193-94.

107. See Day, *supra* note 94, at 53. Where the "exceptional circumstances" test was not required the standard typically was only "relevance." *Id.*

These practices disclose a substantial discrepancy between the procedure contemplated by the Rule and actual practice. The provisions of the Rule were designed to effect a compromise between the competing policies of full disclosure of pre-trial information and the danger that the information of a consulted expert whose opinions were of little or no assistance would become available to an opponent.¹⁰⁸ A party who has expended time and resources finding and preparing the expert seeks to prevent such expenditures from benefitting only opposing counsel, especially since the disclosure of the expert's opinion would be severely damaging to the retaining party. There is also the fear that if an adversary calls the expert at trial, discloses that he used that expert to prepare for trial, or refers to the fact that his opponent consulted the same expert in preparation for trial, the jury will give that expert's testimony too much weight and thus compound the prejudice to the party originally retaining the expert.¹⁰⁹

It would seem that a retaining party would therefore do everything in his power to protect his expert from being useful to his opponent in any way. The parties retaining the experts, however, have not always protected their experts from an adversary's inquiries. The primary justification offered for waiving the exceptional circumstances requirement as a means of protecting a retained expert and his opinions from use by an adversary was the retaining attorney's tactical decision to allow such discovery to further his client's position.¹¹⁰ In addition, parties have permitted discovery based on informal stipulations or other agreements to obtain some advantage in the litigation, thus substantially deviating from the specific limitations on discovery of non-testifying experts established by Rule 26(b)(4)(B).¹¹¹

108. See Graham, *supra* note 94, at 194.

109. See *id.* at 194-96. Graham suggests that the court require counsel and the expert to refrain from mentioning the prior contact between the expert and the party originally consulting the expert. *Id.*

110. See Day, *supra* note 94, at 54. Day suggests that an attorney may wish to provide his adversary with a non-testifying expert's report or opinions in order to secure an early settlement of the case. See Day & Dixon, *supra* note 39, at 396. A retaining party may also recognize the inevitability of disclosure of some materials and participate in early or cooperative disclosure to save time and money. In addition, the client's position might be improved by early disclosure since the retaining party would be complying with the requirements of the Rule and allowing the expert to sophisticate his opinions without further harassment from the adversary before trial.

There is also the possibility that the retaining attorney may be willing to forego the considerable time and expense that would be involved in litigating the question of whether exceptional circumstances are present. Because the law is in transition, and thus uncertain on the issue of the burden of proof in exceptional circumstances claims, see *supra* notes 63-68 and accompanying text, the retaining party may make a determination that the tactical "cost" of disclosing the information is substantially lower than the cost of litigating the issue in terms of delay, expense and inconvenience.

111. See Day, *supra* note 94, at 54. Day reported that where the exceptional circumstances requirement was imposed, the two significant factual situations satisfying the test were a change in circumstances precluding the adversary's expert from analyzing the item in question and where a party's expert did not properly understand the purpose of discovery though the item still existed. *Id.*

4. The Rule's ambiguity regarding discovery of the identities of non-testifying experts has resulted in divergent decisions.

Neither Rule 26(b)(4) nor the accompanying Advisory Committee Notes establishes a clear method of discovering the identity of a non-testifying expert,¹¹² and this uncertainty has led courts to adopt one of three approaches to determine the appropriate standard for such discovery. The approach followed by a majority of courts concludes that the standard of relevance established by Rule 26(b)(1)¹¹³ is the "proper showing" contemplated by the Advisory Committee for the disclosure of the identity of the non-testifying expert.¹¹⁴ The minority approach construes "proper showing" to require the discovering party to demonstrate exceptional circumstances to the court before the expert's identity may be revealed.¹¹⁵ Finally, one court has classified identity as a fact or opinion requiring a showing of exceptional circumstances based on a strict reading of the provisions of the text of Rule 26(b)(4)(B) rather than an interpretation of the phrase "proper showing."¹¹⁶

The majority approach is illustrated by the decision in *Baki v. B.F. Diamond Construction Company*.¹¹⁷ The *Baki* court's analysis of the discoverability of the non-testifying expert's identity is a broad reading of Rule 26(b)(1) which permits a party to obtain information about the identity of anyone having knowledge of discoverable facts. The court applied this interpretation of 26(b)(1) to non-testifying experts because such experts may have knowledge of discoverable or potentially discoverable information under 26(b)(4)(B) and treated the absence of the word "identity" in 26(b)(4)(B)

112. See *supra* notes 68-72 and accompanying text.

113. Rule 26(b)(1) reads in pertinent part:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. 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 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 the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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

114. See, e.g., *Baki*, 71 F.R.D. at 181-82; see also, e.g., *Martin v. Easton Publishing Co.*, 85 F.R.D. 312 (E.D. Pa. 1980); *Arco Pipeline Co. v. S/S Trade Star*, 81 F.R.D. 416 (E.D. Pa. 1978).

115. See *Ager*, 622 F.2d 496; see also *Kuster v. Harner*, 109 F.R.D. 372, 375 (D. Minn. 1986); *In re Sinking of Barge "Ranger I,"* 92 F.R.D. at 488-89.

116. See *Ager*, 622 F.2d at 503; Note, *Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 67 IOWA L. REV. 349, 361 (1982).

117. 71 F.R.D. 179.

as an indication that the authority of Rule 26(b)(1) governed the discovery of the identity of the non-testifying expert.¹¹⁸ The *Baki* court also relied on the holding in *Sea Colony, Inc. v. Continental Insurance Company*,¹¹⁹ in which the court separated the identity of the non-testifying expert from the expert's facts and opinions protected by Rule 26(b)(4)(B) and allowed discovery of the identity of the expert.¹²⁰ The *Baki* court thus ordered the retaining party to disclose the names, addresses, and other identifying information of non-testifying experts that had been retained or specially employed in anticipation of litigation or preparation for trial to the discovering party.¹²¹

The minority position is expressed in *Ager v. Jane C. Stormont Hospital and Training School for Nurses*,¹²² which, ironically, is one of the few appellate court decisions on the issue to date. The *Ager* court focused on the Advisory Committee's concern over the unfairness of allowing an opponent to prepare his case from information obtained through the discovery of an adversary's expert and consequently held that the "proper showing" required to compel discovery of the identity of the non-testifying expert was the exceptional circumstances standard of 26(b)(4)(B).¹²³ The *Ager* court identified four significant policy considerations in reaching its decision. The first concern was that the revelation of the expert's identity would result in the loss of the non-discoverable status of the expert's opinions or records provided by the Rule. Second, the court feared that an adversary might compel the retained party's non-testifying expert to testify at trial.¹²⁴ The court's third reason for denying disclosure except under exceptional circumstances was concern about the prejudice that could arise from an adversary revealing to the jury the fact that his opponent retained an expert who would not be called at trial in order to impress upon the jury that the opponent was suppressing adverse evidence.¹²⁵ Finally, the court recognized that the disclosure of the identities of experts could result in a chilling effect on the willingness of experts to consult with attorneys regarding potential litigation.¹²⁶ The court concluded that the discovering party

118. *Id.* at 181-82.

119. 63 F.R.D. 113 (D. Del. 1974).

120. *Id.* at 114. The court stated that the revelation of the identity of the non-testifying expert was not subject to protection under the work product doctrine and suggested the use of a protective order to prevent the disclosure of the information where a valid reason for its nondisclosure was present. *Id.*

121. *Baki*, 71 F.R.D. at 182.

122. 622 F.2d 496.

123. *Id.* at 502-03.

124. *Id.* at 503.

125. *Id.*

126. *Id.* While the *Ager* court restricted its discussion of the chilling effect on expert witnesses to medical consultative experts, a commentator has suggested that the alleged chilling effect has more widespread application. See Note, *supra* note 12, at 222-23.

would carry a "heavy burden" in demonstrating the existence of exceptional circumstances for the discovery of the non-testifying expert's identity.¹²⁷

Both of the above approaches have been the subject of criticism by commentators. The *Baki* approach is attacked on the grounds that omitting mention of the discovery of a non-testifying expert's identity does not indicate that the provisions of Rule 26(b)(1) should apply but supports the minority position that such identities are not discoverable.¹²⁸ The commentator contends that Rule 26(b)(4) establishes a general bar of discovery of the expert's facts and opinions and carves out limited exceptions based on the expert's role in the trial, and since the drafters of the Rule expressly mandated the disclosure of *testifying* experts only, it follows that the identity of *non-testifying* experts could not be discovered freely.¹²⁹

The *Ager* approach has been criticized on the basis that the policy considerations identified by the court do not justify imposition of exceptional circumstances in light of other available means of protecting the expert.¹³⁰ First, the court's concern that the disclosure of the expert's identity would result in wholesale subversion of the protections of the Rule regarding facts and opinions is not realistic since most attorneys are reluctant to contact an adversary's expert without the knowledge or consent of retaining counsel.¹³¹ Second, a retaining party can protect an expert by seeking a protective order under Rule 26(c)¹³² and thus prevent any future improprieties arising from the disclosure of the expert's identity, and, in relation to factual data, the name of the expert has little evidentiary value.¹³³ Third, a commentator

127. *Ager*, 622 F.2d at 503 (citing *Hoover*, 611 F.2d at 1142 n.13).

128. See Note, *supra* note 82, at 517.

129. *Id.*

130. See Note, *supra* note 116, at 363.

131. *Id.*

132. Rule 26(c) reads in pertinent part:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

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

133. See Note, *supra* note 116, at 365, 369.

suggests that an adversary will rarely wish to call an opponent's expert since many experts have become "client-oriented" and would be unable or unwilling to testify for the opponent.¹³⁴ Finally, it has been suggested that the chilling effect on consultative experts would not be as substantial if the *Ager* decision were properly limited to medical consultants.¹³⁵

Once again, it is also important to note that the dispute over the standard of exceptional circumstances for disclosing the identity of the non-testifying expert is given little consideration in practice. Survey results have reported that approximately 50% of the responding attorneys require a showing of mere relevance to obtain the non-testifying expert's identity, and such discovery is allowed on the basis that the disclosure of the expert's identity is not nearly as disadvantageous to the retaining party as disclosure of the expert's facts and opinions. There is also the consideration that the client might gain an important benefit if this request is granted.¹³⁶ Finally, the judges surveyed reported that nearly one half would require only a showing of relevance, and, despite the *Ager* ruling, only one judge in fifteen would impose the exceptional circumstances upon a party seeking the identity of an adversary's non-testifying expert.¹³⁷ An exceptional circumstances requirement for the discovery of a non-testifying expert's identity is clearly more trouble than it is worth.

5. The standard employed to determine whether an expert is formally or informally consulted is difficult to apply.

The absence of provisions in Rule 26(b)(4) for discovery of informally consulted experts serves as a clear prohibition of discovery of such experts.¹³⁸ Neither the text of the Rule nor the Advisory Notes provide any guidance in differentiating retained from informally consulted experts, however, and difficulties have arisen regarding the definition of the terms "retained" or "specially employed" for the purpose of determining when an expert has been retained or merely informally consulted. Prior to the *Ager* decision, two definitions were used to distinguish retained from informally consulted experts. The first, referred to as the "beneficial-assistance" approach, focused on the argument that an expert has not been retained or specially employed if the consulting party believes the expert's opinion would not benefit his case.¹³⁹ A party may decide, for example, that a consulted expert is not of assistance based on his insufficient credentials, unattractive de-

134. *Id.* at 369, 371.

135. *Id.* at 370.

136. See Day, *supra* note 94, at 55.

137. See Day & Dixon, *supra* note 39, at 397, 412.

138. See Advisory Notes, *supra* note 3, at 504.

139. See Note, *supra* note 116, at 353.

meanor, or excessive fees and thus not retain him for further assistance in preparing for trial.¹⁴⁰ The second definition, known as the "consideration-tendered" approach, identified payment in exchange for the expert's services as the determinative factor in concluding whether or not the expert was retained or specially employed under the Rule.¹⁴¹

The *Ager* court rejected both the beneficial-assistance and consideration-tendered definitions and created a multifactor analysis for determining the status of the expert as a retained or informally consulted expert.¹⁴² The court held that the status of each expert must be determined *ad hoc* and outlined the following factors for analysis:

- (1) the manner in which the consultation was initiated;
- (2) the nature, type, and extent of information or material provided to, or determined by, the expert in connection with his review;
- (3) the duration and intensity of the consultative relationship;
- (4) the terms of the consultation if any (*e.g.* payment, confidentiality of test data or opinions, etc.).¹⁴³

The court justified the application of this multifactor analysis by noting that circumstances existed where, under the beneficial-assistance definition, a consulting party could retain an expert regardless of his assistance to that party and, under the consideration-tendered definition, the requisite payment to the expert could occur yet the consultation remain informal.¹⁴⁴

The *Ager* decision intended to establish a consistent method of distinguishing retained from informally consulted experts, but the court instead perpetuated the difficulties in making the distinction. The court failed to define the phrase "duration and intensity of the consultative relationship," and the court similarly neglected to discuss whether each of the identified factors should be given equal weight or whether some factors were more determinative than others.¹⁴⁵ The uncertainty of the decision thus might have a chilling effect of its own by discouraging attorneys and experts from discussing cases with each other for fear that the expert might later be determined to be classified as a retained expert and subject to discovery.¹⁴⁶ This case-by-case approach creates a situation more analogous to a guessing game than a workable federal discovery procedure.

140. See Graham, *supra* note 2, at 939 n.182.

141. See Note, *supra* note 116, at 353.

142. *Ager*, 622 F.2d at 501.

143. *Id.*; see also Healy v. Counts, 100 F.R.D. 493 (D. Colo. 1984); Comment, Healy v. Counts: *Discovering Informally Consulted Experts Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 33 S.D.L. REV. 340, 342-46 (1988).

144. *Ager*, 622 F.2d at 502. *But see* USM Corp. v. American Aerosols, Inc., 631 F.2d 420 (6th Cir. 1980) (the court did not expressly use a multifactor analysis to determine the expert's status and did not consider the factors of duration, intensity, or manner of initial consultation in defining retained or specially employed).

145. See Note, *supra* note 116, at 357-58.

146. *Id.* at 358-59.

6. The divergence in the interpretation and application of Rule 26(b)(4) has led to unfair results in the context of ex parte contacts.

The discovery of expert witnesses is restricted to the procedures specified in Rule 26(b)(4), and discovering parties are generally prohibited from engaging in ex parte contact with an adversary's expert as a means of discovery. Ex parte contacts are dangerous due to the inherent unfairness of allowing an opponent to discuss the case with the retained expert outside the presence of the retaining party's attorney, thus allowing the opponent to gain knowledge of the case at the expense and to the detriment of the retaining party. As noted above,¹⁴⁷ federal trial courts have considerable discretion in regulating discovery, and this discretion extends to attempts to remedy the alleged harm caused by ex parte contacts. However, recent cases have pointed out that the divergent interpretations and applications of the Rule can work an injustice on the discovering party, and in such situations, a court has little opportunity to mitigate the damage.

The first case to deal specifically with the ex parte problem was *Campbell Industries v. M/V GEMINI*,¹⁴⁸ which involved a dispute over the warranty coverage of repairs on a tuna boat manufactured and sold by plaintiff Campbell Industries (Campbell) and owned by defendant Gemini Enterprises (Gemini). Campbell retained Nathaniel Torbert (Torbert) in July of 1974 to inspect the M/V GEMINI, and on the basis of Torbert's report, decided to call him as an expert witness at trial.¹⁴⁹ In February of 1977, Gemini's affidavit in support of a motion to allow Torbert's deposition revealed that while Torbert was still retained by Campbell, Gemini's counsel had made several ex parte contacts with Torbert and that Torbert had expressed a desire to testify for Gemini.¹⁵⁰ The district court denied Gemini's motion to depose Torbert and sanctioned Gemini's "flagrant violation" of Rule 26(b)(4)(A)'s requirement of court approval for further discovery by precluding Gemini from using any of Torbert's testimony at trial.¹⁵¹ The Ninth Circuit upheld the ruling, citing the broad discretion of the district court

147. See *supra* notes 79-83 and accompanying text.

148. 619 F.2d 24 (9th Cir. 1980).

149. *Id.* at 26. The boat involved was a 1500-ton tuna purse seiner which required repair. Gemini took the boat to Campbell in 1972 and 1973 for the necessary repairs under the warranty agreement, and Campbell made all warranty repairs but also charged Gemini for non-warranty repairs to the boat. Campbell sued in November of 1973 when Gemini refused to pay for the non-warranty repairs, and Gemini counterclaimed alleging defective construction. The issue involving expert testimony was the difference in the value of the boat as represented by Campbell and the value as actually constructed. In the pre-trial discovery order of April, 1976, Campbell listed Torbert as a testifying expert and Gemini listed him as a non-expert fact witness. *Id.* at 25-26.

150. *Id.*

151. *Id.*

to remedy discovery abuses and noting that the district court properly denied Gemini the fruits of its misconduct without prejudicing Gemini's case.¹⁵²

This result is fair at first blush, since the Rule clearly requires the discovering party to seek court approval before proceeding beyond the interrogatory stage in the questioning of a testifying expert. However, in light of the inability of courts to determine the proper standard for further discovery under Rule 26(b)(4)(A) and the disregard for the Rule's two-step procedure in actual practice,¹⁵³ the decision punished Gemini for actions that may have been, in practice, acceptable for the discovery of the trial expert. While the court may have been aware of such a practice in the jurisdiction, the court was constrained to apply the Rule as written.¹⁵⁴

A second case, *American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas*,¹⁵⁵ involved the attempts of an unscrupulous expert witness to instigate a bidding war between the retaining party and an opponent for the expert's services at trial.¹⁵⁶ The litigation concerned allegations by American Protection Insurance Co. (AMPICO) that the MGM Grand Hotel-Las Vegas (MGM) inflated claims from a fire in 1981 in order to defray the expenses of building a new addition to the hotel.¹⁵⁷ George Morris was the MGM vice-president responsible for preparing the claim and supervising the reconstruction of the hotel and was identified by MGM as its sole testifying trial expert in response to AMPICO's interrogatories.¹⁵⁸ Morris tired of working with MGM and sought to enter a \$1,000,000 personal service contract with AMPICO to assist in the litigation by having his personal attorney elicit the participation of Steve Cozen, lead counsel for AMPICO.¹⁵⁹ After Cozen learned through negotiations that Morris was a key member of MGM's trial "team," Cozen researched the Code of Professional Responsibility and Rule 26(b)(4) and concluded that Morris was merely a fact witness not subject to the protections of the Rule and obtained information from Morris regarding the validity of the fire claims.¹⁶⁰

Once these contacts between Morris and Cozen were revealed, counsel for MGM immediately moved the court to disqualify Cozen from the case for violations of Rule 26(b)(4) and the Code of Professional Responsibility.¹⁶¹ The court disqualified Cozen and his firm from representing AMPICO in the litigation based on violations of the Rule and noted that despite Cozen's

152. *Id.* at 26-27.

153. *See supra* notes 85-104 and accompanying text.

154. *See Eliassen v. Hamilton*, 111 F.R.D. 396, 401-02 (N.D. Ill. 1986).

155. No. CIV-LV-82-26 HEC (D. Nev. Dec. 9, 1983).

156. *See Note, supra* note 12, at 215.

157. *Id.*

158. No. CIV-LV-82-26 HEC (D. Nev. Dec. 9, 1983).

159. *Id.*

160. *Id.*

161. *See Note, supra* note 12, at 217.

well intentioned inquiry into Morris' status as an expert, the issue was one for the court to decide.¹⁶² The court resisted imposing further sanction on Cozen, recognizing the absence of willful, dishonest or corrupt action by Cozen and stated that disqualification from the case was a most heavy penalty for what the court considered "merely an error of judgment."¹⁶³

Regardless of the court's apparent leniency, the harm done to Cozen and AMPICO by Cozen's disqualification in this case was irreparable. The litigation involved over \$40 million in disputed claims, and the disqualification order deprived Cozen and his firm of what would have amounted to millions of dollars in fees, stripped AMPICO of its selected and prepared trial counsel, cost AMPICO thousands of dollars in appealing the disqualification order, and substantially delayed the trial.¹⁶⁴ The unfairness of this result is compounded by the fact that the disqualification order was not immediately appealable, and Cozen and AMPICO were prevented from challenging the order until the conclusion of the trial on the merits.¹⁶⁵ This result is telling of the problems created by the divergence of the interpretation and application of 26(b)(4), as Cozen thoroughly inquired into the Rule and was unable to obtain sufficient guidance to ascertain the acceptable limits of contact with the testifying trial witness. The rule's failure to provide such guidance imperiled the discovering party, and the rule as written prevented the court from remedying the harsh result without fear of reversal on appeal.

Two other cases warrant consideration in exposing the deficiencies of the rule regarding ex parte contacts. In *Durflinger v. Artiles*,¹⁶⁶ the plaintiffs in a wrongful death action had retained an expert as a consultant and decided not to use him as a testifying expert at trial.¹⁶⁷ The defendants sought to obtain a copy of the expert's reports and to call the expert at trial, but the court considered this a circumvention of the provisions of Rule 26(b)(4)(B) requiring the demonstration of exceptional circumstances and upheld the trial court's ruling prohibiting the defendants from using the expert's testimony or information at trial.¹⁶⁸ The court did note that under different circumstances the trial judge might not have been required to exclude the testimony of the expert consulted in violation of the discovery rules¹⁶⁹ but

162. *Id.*

163. No. CIV-LV-82-26 HEC (D. Nev. Dec. 9, 1983). The court similarly prohibited Morris from participating further in the litigation, noting that Morris purposely created a bidding war between the litigants for his invaluable knowledge and was willing to "sell his soul for the highest price." *Id.*

164. See Note, *supra* note 12, at 226 n.130.

165. *Id.* at 217 n.80.

166. 727 F.2d 888 (10th Cir. 1984).

167. *Id.* at 891.

168. *Id.*

169. *Id.*

failed to mention what those circumstances might be. The result of these varied practices regarding the exceptional circumstances requirement¹⁷⁰ and the failure of the court in this case to provide guidance for the future is that a discovering party is reduced virtually to flipping a coin to determine whether the court or fellow practitioners in his jurisdiction will take a liberal or conservative approach to the exceptional circumstances requirement in conducting discovery.

The second case, *Steele v. Seglie*,¹⁷¹ involved a medical malpractice action in which the plaintiff contacted and retained three doctors in preparation for litigation against defendants Dr. Seglie and Mount Carmel Hospital and decided not to retain the doctors based on their adverse opinions of the merits of the case. Copies of the doctors' reports were inadvertently sent to the defendants, who then sought to retain the doctors without knowledge that the doctors had been retained by the plaintiff.¹⁷² The doctors agreed to testify for the defendants. Defendants sought a motion to depose the experts, and, despite the fact the experts were by definition retained non-testifying experts, the court granted the motion based on the plaintiff's failure to object to the motion.¹⁷³ The only restriction the court imposed on the defendants was that counsel and the experts refrain from mentioning the fact that the experts had been previously retained by the plaintiff to prevent the inference that the plaintiff was hiding adverse testimony from the jury.¹⁷⁴

Based upon the *Ager* ruling and the requirements of Rule 26(b)(4)(B), the court should not have allowed the disclosure of the identity or the substance of the testimony of the plaintiff's retained non-testifying experts.¹⁷⁵ Here, the inconsistency of approaches to the discovery of expert witnesses in practice and in federal trial and appellate courts allowed experts normally protected from an adversary to be quickly and easily converted to the cause of that adversary.

7. The present structure of Rule 26(b)(4) may permit a consulting party to deprive an adversary of access to experts

The dangers of a practice which may be referred to as "shielding" reveal that the current interpretation of the Rule may, ironically, subvert the

170. See *supra* notes 105-11 and accompanying text.

171. Civ. No. 84-2200 (D. Kan. March 27, 1986).

172. *Id.*

173. *Id.* The apparent reason for the failure by plaintiff's counsel to object was that he was unsure what procedure was proper or improper under the Rule. *Id.*

174. *Id.*

175. See *supra* notes 108-32 and accompanying text.

unfairness principles the Rule was designed to remedy.¹⁷⁶ The problems created by shielding point out the unintended effects of the current structure and application of the Rule and thus warrant consideration in an analysis of the "fairness" of the current interpretations of Rule 26(b)(4). First, an interpretation of the Rule which prevents the discovery of facts known and opinions held by experts prior to the date on which they were retained by a party would encourage parties to hire experts and refrain from using them at trial solely to keep the experts out of the reach of the opponent.¹⁷⁷ This would allow a party to shield from the opposition several experts with desirable testimonial traits and to narrow the field of qualified experts available to the opposition.¹⁷⁸

Shielding concerns are also present in the context of requiring the discovering party to show exceptional circumstances before discovering facts and opinions of an adversary's retained expert. One commentator has stated that because of the stringent requirements of the discovery of non-testifying experts, the first party to find and "buy" an expert would be able to suppress unfavorable facts or opinions by simply refusing to call the expert at trial.¹⁷⁹ Another disturbing aspect of the exceptional circumstances requirement's protection of non-testifying experts is that a retaining party may conceal information which, if disclosed, would demonstrate the factual inadequacy of the retaining party's claim.¹⁸⁰ Finally, the *Ager* approach

176. Another commentator defines the practice of retaining or specially employing an expert for the purpose of preventing his testimony as "sheltering." Comment, *Gimme Shelter? Not If You Are a Non-Witness Expert Under Rule 26(b)(4)(B)*, 56 U. CINN. L. REV. 1027, 1030 (1988). The commentator identifies three elements of sheltering: retention, bad faith, and prevention of testimony. *Id.* The retention element is a given, for an expert must be retained or employed for 26(b)(4)(B) to apply at all. The bad faith element can be analyzed and remedied through the provisions of Rules 26(g) and 37 and the applicable sections of the MODEL RULES OF PROFESSIONAL CONDUCT. Therefore, the discussion of this approach will be limited to the prevention of testimony element.

177. See *Eliassen*, 111 F.R.D. at 403.

178. This was the issue in *Green ex rel Green v. Maness*, 69 N.C. App. 403, 316 S.E.2d 911 (1984), where the defendant in a medical malpractice action was held to have prevented the plaintiff from obtaining medical testimony and obstructed plaintiff's trial preparation. Comment, *supra* note 176, at 1031. The plaintiff's attorney consulted with a neonatologist regarding the circumstances of the birth of plaintiff's child and obtained the expert's opinion that the child suffered from oxygen deprivation during delivery. *Green*, 69 N.C. App. at 404, 316 S.E.2d at 913. Plaintiff's attorney, however, failed to retain the neonatologist as well as another expert referred to plaintiff's attorney by the neonatologist and with whom plaintiff's attorney reviewed the case; both experts were then retained by the defendant. *Id.* at 408, 316 S.E.2d at 914. The defendant then denied deposition requests and prohibited any discovery of the experts. The appellate court upheld the trial court's finding that the defendant retained the experts with an intent to deprive the plaintiff of the specially developed information and compelled the discovery of the experts. 69 N.C. App. at 411-12, 316 S.E.2d at 914.

179. Note, *Discovery of Expert Information*, 47 N.C.L. REV. 401, 406 (1969).

180. In *Locтите Corp. v. Fel-Pro Inc.*, 30 Fed. R. Serv. 2d (Callaghan) 1587 (N.D. Ill. 1980), plaintiffs sought recovery from defendants in a patent infringement action after their expert's testing of the defendant's product revealed the presence of one of the plaintiffs'

requiring exceptional circumstances for the discovery of the identity of experts contributes to this problem, since the inability of a discovering party to obtain the name of the non-testifying expert would preclude the revelation of other potentially discoverable information, regardless of whether such information was disadvantageous to the retaining party. These practices were apparently neither foreseen nor intended by the drafters of Rule 26(b)(4), and the Rule must be amended to reflect these developments.

The representative cases and empirical data demonstrate that the conflicting interpretations and applications of Rule 26(b)(4) make discovery under the Rule not merely confusing but dangerous. While intentional circumventions of the discovery process should certainly not go unpunished, courts are now sanctioning parties who conduct well intentioned but misguided discovery, and the drafters' and courts' inability to provide such guidance is the root of the problem. Innocent litigants seeking discovery of the facts known and opinions held by expert witnesses are forced to walk blindfolded through a minefield. This was clearly not the intention of the drafters in creating a rule designed to prevent unfairness and to promote preparation in the discovery process—Rule 26(b)(4) must be amended.

III. A PROPOSED AMENDMENT OF RULE 26(B)(4).

A commentator suggests that the two primary justifications for proposing an amendment to the Federal Rules of Civil Procedure are to improve the operation of the Rule and to bring the Rule in line with cases and practices in the federal courts.¹⁸¹ A critical analysis reveals that both justifications are present for the amendment of Rule 26(b)(4). As noted in Part II of this Note, the failure of the Rule to establish a clear and applicable procedure for the discovery of expert witnesses has resulted in confusion in the courts, rejection of the rule in practice, and unfair results in a variety of contexts. The lack of an accessible appeal process has prevented the resolution of

patented chemicals; later tests by this same expert, before litigation, proved to the contrary. See Comment, *supra* note 60, at 315. Plaintiffs concealed this adverse information by designating the expert as non-testimonial to prevent disclosure of the meritlessness of their claim. The court stated that "facts which raise the suspicion that plaintiff may be proceeding with litigation without adequate basis in fact to maintain it are exceptional circumstances within the meaning of Rule 26(b)(4)(B)," and held that a non-testifying expert in exclusive possession of facts comprising the basis of the suit loses the protection of the Rule when such protection deprives an opponent the opportunity to determine the factual basis of the claim. *Loctite*, 30 Fed. R. Serv. 2d at 1597; see also *Barkwell v. Sturm, Ruger & Co., Inc.* 79 F.R.D. 444 (D. Alaska 1978); *Sullivan v. Sturm, Ruger & Co., Inc.*, 80 F.R.D. 489 (D. Mont. 1978). Fortunately, the *Loctite* court saw through the plaintiffs' scheme and prevented the abuse of Rule 26(b)(4)(B)'s protections; however, there is a very real possibility that many such cases have gone undetected.

181. See Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 Nw. U.L. REV. 894, 895, 904-05, 935 (1980).

many of the problems discussed in this Note, and federal courts have been precluded from implementing changes in the operation of the rule. As stated by the court in *Eliassen v. Hamilton*:¹⁸² "[Rule 26(b)(4)] is undoubtedly a harsh rule. It may be a bad rule. We could join in the voices already criticizing it as a bad rule. But this would not help defendants, because good or bad, it is the rule, and we must apply it as written."¹⁸³ The rule cries out for amendment.¹⁸⁴

Several commentators have proposed amendments to the rule. Professor Graham's attempt fails in several respects to remedy the problems presented by the current rule.¹⁸⁵ Graham's proposed amendment properly disposes of the two-step procedure of 26(b)(4)(A) that has been rejected in practice but ignores the need to provide for the discovery of the identity of non-testifying experts without a showing of exceptional circumstances. The proposed amendment also suffers by simply reiterating the language of 26(b)(4)(B) regarding the definition of exceptional circumstances without indicating how the requirement of impracticability can be met.

There are significant flaws in the proposal offered by another commentator.¹⁸⁶ While the proposed amendment is to be applauded for incor-

182. 111 F.R.D. 396 (N.D. Ill. 1986).

183. *Id.* at 401-02 (citations omitted).

184. See *United States v. John R. Piquette Corp.*, 52 F.R.D. 370, 371 (D.C. Mich. 1971) ("The 1970 amendment may resolve much of the disagreement on [the subject of expert discovery], but even this advance is objected to . . . as not going far enough."); Day & Dixon, *supra* note 39, at 397; Graham, *supra* note 93, at 200; Note, *supra* note 12, at 228.

185. Graham proposed the Rule be amended to read:

(4) Trial Preparation: Experts. Subject to the provision of Rule 35(b), discovery of facts and data known and opinions held by experts, and the grounds for each opinion, 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) 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 also discover with respect thereto.

(B) A party may discover facts, data, opinions, and grounds thereof held by an expert who has been retained, specially employed, or consulted either formally or informally, by another party or by, or for, the other party's representative and who is not expected to be called as a witness at trial, upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts, data, or opinions on the same subject by other means.

Graham, *supra* note 94, at 200. Graham left subdivision (C) of the Rule substantially unchanged, reflecting only an elimination of the two-step procedure of subdivision (A) in determining fee division under subdivision (A). The second sentence of subdivision (A) of the above proposed amendment deals with the special problem of discovery of "second-tier" experts which is outside the scope of analysis of this Note. For a thorough discussion, see *id.* at 196-99.

186. That commentator suggests this provision be added to the current structure of Rule

porating the mutuality considerations suggested by Professor Friedenthal and Mr. Long,¹⁸⁷ it simply ignores the empirical data revealing the inadequacy of the interrogatory as a discovery device and fails to eliminate the two-step procedure of 26(b)(4)(A).¹⁸⁸ The author does, however, appropriately revise the Rule to allow for discovery of the identity of non-testifying experts without a showing of exceptional circumstances and seeks to prevent the dangers of ex parte contacts resulting from disclosure of such experts' identities by explicitly prohibiting ex parte contacts. The requirement that the parties update the identities of experts after the initial listing indirectly amends the provisions of Rule 26(e)(1), which currently requires a party to supplement a response to discovery requesting the identity of trial witnesses only.¹⁸⁹

An amendment proposed by Professor Day reflects the inadequacy of the interrogatory and consequently eliminates the two-step procedure in favor of more wide-open discovery of the testifying expert. The proposal strikes a proper balance between the necessity of trial preparation and unfairness to a retaining party by favoring liberal discovery subject to restrictions only where necessary to protect the retaining party or expert from prejudice as determined by the court.¹⁹⁰ Professor Day's only deficiency is in his failure

26(b)(4):

Timing of expert discovery. Before discovery is to commence, the court shall require both parties to set forth in writing the identities of all experts they have contacted in anticipation of litigation or in preparation for trial, regardless of whether these experts are to testify at trial or not, and shall require parties to update that information as necessary. After the exchange of this information, the parties may then, pursuant to section (b)(4)(A)(i) of this Rule, send interrogatories to those experts who qualify, and may petition the court for further discovery under section (b)(4)(A)(ii). Contact by opposing counsel with an expert qualifying under section (b)(4)(B) of this rule [sic] without the court's approval is expressly prohibited, and is cause for sanctions under Rule 37.

Note, *supra* note 12, at 228. The reference to Rule 37 is to the court's ability to impose sanctions upon parties or counsel violating the rules of discovery or orders of the court pursuant to such rules.

187. See *supra* notes 25-32 and accompanying text.

188. Arguably, the amendment of the Rule regarding the two-step requirement of 26(b)(4)(A) was outside the scope of that author's Note.

189. FED. R. CIV. P. 26(e)(1). The proposed requirement is arguably unnecessary based on a broad reading of 26(e)(2) or may be ordered by the court or agreed to by the parties under 26(e)(3). FED. R. CIV. P. 26(e). In addition, under a broad reading of *Baki v. B.F. Diamond Const. Co.*, 71 F.R.D. 179 (D. Md. 1976), the non-testifying expert's identity would be treated the same as any other person having knowledge of discoverable facts and thus fall under 26(e)(1)(A).

190. Day's proposed amendment to Rule 26(b)(4)(A) reads:

(A) 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 whom the other party expects to call as an expert witness at trial by any means otherwise permitted by these rules. Discovery of such experts shall be subject to the provisions of subdivision (b)(4)(C) of this rule concerning fees and expenses and to such restrictions regarding the scope of

to apply his insight to the other problems presented by the current Rule by suggesting further amendments.¹⁹¹ Finally, the provisions of an experimental change in the rules governing expert discovery in California¹⁹² also contribute to the following amendment of the Rule.

A. *The Proposed Amendment*

In order to correct the current deficiencies of the Rule and establish an improved procedure for the discovery of expert witnesses, Rule 26(b)(4) of the Federal Rules of Civil Procedure should be amended to read as follows:

(4) Trial Preparation: Experts. Upon the setting of a trial date, any party may make a demand for simultaneous discovery of the identities, facts known, and opinions held by experts otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or trial only as follows:

(A) A party may discover the identity, 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 whom the other party expects to call as an expert witness at trial by any means otherwise permitted by these rules. Discovery of such experts shall be subject to the provisions of subdivision (b)(4)(D) of this rule concerning fees and expenses and to such restrictions regarding the scope of discovery which, upon motion pursuant to subdivision (c) of this rule, the court may order.

(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), by consent of the retaining party, or upon a showing that (i) it is impossible for the party seeking discovery to obtain or duplicate the expert's facts, data, or opinions as a result of a change in circumstances which deprives the discovering party the opportunity to develop the requested facts, data, or opinions; or (ii) the expense and/or delay of obtaining or replicating the requested item, material, or information is socially or judicially prohibitive. A party may discover the name and other identifying information of an expert otherwise qualifying under this subsection upon a showing of relevance under subsection (b)(1) of this rule.

(C) The identity, facts known, or opinions held by an expert who has been consulted by a party but not retained or specially employed by

discovery which, upon motion pursuant to subdivision (c) of this rule [governing protective orders], the court may order.

Day & Dixon, *supra* note 39, at 398; *see also* Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301 (E.D. Pa. 1983); Comment, Dennis v. BASF Wyandotte Corporation: *Further Discovery of Testimonial Experts Under Federal Rule of Civil Procedure 26(b)(4)(A)(ii)*, 33 S.D.L. Rev. 331 (1988).

191. In recognition of Professor Day's achievement of proposing an amendment upon which no improvements can be made, the proposed amendment of 26(b)(4)(A) is adopted in the amendment offered by this Note.

192. CAL. CIV. PROC. CODE § 2034(a), (c) (West 1984 & Supp. 1987).

that party shall not be discoverable unless the discovering party demonstrates that the expert's facts and opinions would be discoverable under subsection (B)(i) or (ii) of this rule were the expert retained.

(D) 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) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A) of this rule the court may require, and with respect to subdivisions (b)(4)(B) and (C) 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.

B. Effect of the Proposed Amendment of Rule 26(b)(4)

The first effect of the proposed amendment of the Rule is the textual incorporation of the principles of mutuality suggested by Friedenthal and Long but ignored by the advisory committee in drafting Rule 26(b)(4) in 1970.¹⁹³ The advisory committee overestimated the potential benefit of discovering an adversary's expert and the tendency of attorneys to rely on discovery to prepare the case-in-chief, failing to recognize that experts will often simply disagree at trial and thus not be helpful to the discovering party at all.¹⁹⁴ The advisory committee's concern over the unfairness of allowing a discovering party to build his case from the discovery of an adversary's expert, while well intentioned, is no longer a justification for placing such stringent restrictions on the discovery of experts.¹⁹⁵

A policy of full discovery should be implemented instead, and the mutuality principle of the proposed amendment will accomplish this goal by providing each party an opportunity to prepare adequately for the cross-examination of experts and eliminate the unfairness of the present discovery process by requiring a party to prepare his own case before discovery of an adversary's expert. The express requirement of mutuality would reflect the approach taken in practice,¹⁹⁶ and would also serve to protect against the danger that a party will manufacture adverse expert testimony after the discovery of his adversary's expert. Finally, the fear that a party will be inextricably bound by the initial listing of experts under this provision and precluded from retaining and using a newly found expert's testimony is eliminated if the retaining party supplements his discovery responses in compliance with Rule 26(e)(1).¹⁹⁷

193. See *supra* notes 29-31 & 43 and accompanying text.

194. See Graham, *supra* note 94, at 190-91.

195. See *id.*

196. See Day & Dixon, *supra* note 39, at 392; see also CAL. CIV. PROC. CODE § 2034(a), (c) (West 1984 & Supp. 1987).

197. See generally Weiss v. Chrysler Motors Corp., 515 F.2d 449, 457 (2d Cir. 1975); Tabachnik v. G.D. Searle & Co., 67 F.R.D. 49, 55 (D. N.J. 1975).

Absent from the proposed amendment are the timing considerations suggested by Friedenthal and Long.¹⁹⁸ The empirical data reveal that retaining counsel do not consistently require an adversary to determine the experts the adversary expects to call at trial before allowing the adversary to conduct discovery of the retained expert. A timing requirement is not enforced by litigants because there may be an incentive to allow such prior discovery to achieve an early settlement of the case.¹⁹⁹ Because the mutuality provision in the amended rule requires initial mutual disclosure subject to the tactical decisions of retaining counsel, the timing considerations advocated by Friedenthal and Long would add nothing to the operation of the rule and are therefore rejected in the proposed amendment.

The proposed amendment would eliminate the two-step procedure for the discovery of testifying experts under 26(b)(4)(A) and allow a discovering party to obtain information about the testifying expert through any other means allowed under 26(b)(1). This revision recognizes the inadequacy of the interrogatory as a discovery device and resolves the dilemma of determining a standard for permitting further discovery under 26(b)(4)(A) by doing away with the two-step procedure of the current rule. This provision, as amended, would ensure that discovering parties have adequate preparation for cross-examination and trial and reduces the possibility of unfairness to the retaining party by requiring the discovering party to compensate the retaining party and expert for fees and expenses reasonably incurred in responding to the discovery request under 26(b)(4)(D). The amended version of 26(b)(4)(A) would bring the rule in line with practice and thus give practitioners the guidance needed to plan discovery strategies and to develop a concept of the case based on what information may be obtained under this provision. Finally, the amended provision would permit the retaining party to restrict the scope of discovery through motion to the court under Rule 26(C).

The exceptional circumstances requirement of Rule 26(b)(4)(B) has been revised to resolve the divergence of interpretations regarding what constitutes a showing of exceptional circumstances by incorporating the two primary approaches from case law. The changed circumstances and prohibitive cost approaches have been "codified" in the proposed amendment to establish the standard for discovery of the facts known or opinions held by the non-testifying expert.

This revision would reduce the confusion surrounding the discovery of non-testifying experts by giving discovering parties an articulated standard that must be satisfied. The proposed amendment would continue to impose the modified exceptional circumstances requirement on discovering parties

198. See *supra* note 31 and accompanying text.

199. See Day & Dixon, *supra* note 39, at 392-93.

since discovery of the facts and opinions of the non-testifying expert is virtually the exclusive province in which unfairness to the retaining party will occur. The revised provision recognizes, however, that the exceptional circumstances requirement is often not enforced by retaining parties in practice, and thus allows the retaining party to disclose such information by agreement with the adversary if such disclosure would secure an advantage for his client.

The proposed amendment resolves the conflict in the courts concerning the proper showing for discovery of the identity of a non-testifying expert by adopting the *Baki* approach requiring only a showing of relevance to discover the identities of such experts. Obtaining the name of the expert would give the discovering party a starting point for determining what discoverable material may exist and would assist the discovering party in making the showing of impracticability as established in revised Rule 26(b)(4)(B).²⁰⁰ This revision would reveal information to the discovering party that would otherwise remain hidden and is therefore consistent with the policy of allowing full discovery before trial. The revision would prevent the retaining party from shielding experts from an adversary by merely consulting the experts and not calling the experts at trial, and the disclosure of the identities of the experts that have been consulted by the retaining party would eliminate many of the dangers associated with ex parte contacts by explicitly notifying the discovering party that the experts have been previously contacted by the retaining party.

Despite the required disclosure of the identities of non-testifying experts under the revised Rule, a retaining party still has sufficient opportunity to protect his expert from any alleged unfairness imposed by this requirement. First, the fear that ex parte contacts are the inevitable result of the disclosure of the non-expert's identity is no longer warranted in light of the seriousness with which courts have viewed ex parte contacts in the cases that have presented the issue.²⁰¹ The revised Rule clarifies many of the current ambiguities of the present Rule, and the limitations on acceptable discovery practices would provide sufficient guidance for discovering parties. Few discovering parties would be willing to spend time and money improperly discovering expert witnesses since the discovering party may be precluded from using the testimony at trial, may be disqualified from the case without an opportunity to immediately appeal the order, and may be subject to sanctions under Rule 37 for violating discovery orders.

A retaining party also may take one or more of several affirmative steps to protect his expert. An obvious step is to seek a protective order from the court to limit the scope of discovery or to prevent the disclosure of the

200. See Note, *supra* note 116, at 367.

201. See *supra* notes 147-75 and accompanying text.

non-testifying expert's identity if such disclosure is irrelevant, privileged, or otherwise worthy of protection.²⁰² A retaining party may also have his expert commit to an exclusivity agreement to prevent the expert from discussing the subject matter of the litigation with anyone but the retaining party or counsel, and retaining counsel could further govern the expert's disclosures by employing the expert directly rather than through the client. In addition, there are a myriad of techniques for structuring the development and communication of information for testimony through deposition, trial testimony, or production of documents that will reduce the danger of information slipping into the wrong hands as the case is prepared for litigation. For example, an attorney could control the expert's sources of information by selecting the materials from which the expert will form his opinion, discouraging the expert from preparing written reports, and refraining from giving the expert the work product of retaining counsel.²⁰³ The disclosure of merely the identity of the non-testifying expert poses no threat to the retaining party, and, even if the disclosure did cause a problem, the retaining party has ample opportunity to prevent or remedy any harm.

The inclusion of an express provision governing the discovery of informally consulted experts is designed to remedy the confusion in the courts over whether a complete ban of discovery of such experts is warranted under the Rule. Despite the clear statement in the advisory committee notes that neither the identity nor facts or opinions of the informally consulted expert must be revealed, at least one court has allowed the disclosure of the identity and information of such experts upon a showing of need.²⁰⁴ The proposed amendment recognizes that an informally consulted expert may become the only expert with knowledge of certain facts and thus makes such an informally consulted expert subject to discovery upon a demonstration of need under the provisions of revised Rule 26(b)(4)(B)(i) or (ii). The revision adopts the suggestions of Professor Graham by considering any expert who satisfies the modified exceptional circumstances test a retained expert who is subject to the discovery provisions of retained but non-testifying experts.²⁰⁵ If the amendment were adopted, a party would not be discouraged from searching for expert witnesses for fear that the consulted expert would be subject to routine discovery and would not allow a consulting party to shield an expert of limited or no assistance from a discovering party upon a demonstration of compliance with the provisions of revised Rule 26(b)(4)(B)(i) or (ii). Finally, there is no unfairness to the retaining party as a result of this disclosure since the consulting party

202. See Note, *supra* note 116, at 365.

203. See Daniels, *supra* note 1, at 64, 66-67; see also Connors, *supra* note 50, at 287-88; Daniels, *Protecting Your Expert During Discovery*, A.B.A. J., Sept. 1985, at 50-54.

204. See *supra* notes 71-74 and accompanying text.

205. See Graham, *supra* note 2, at 940.

invested little if any expense in consulting the ineffective expert. Rule 26(b)(4)(C) has been changed only in title and in the elimination of reference to the two-step procedure of the current Rule.

The proposed amendment also recognizes the policy of discovery rules favoring extrajudicial discovery practices by eliminating the two-step procedure of Rule 26(b)(4)(A) and by simplifying the showing of exceptional circumstances of Rule 26(b)(4)(B). Finally, the proposed amendment clarifies several ambiguities of the present Rule and provides more practical guidance for practitioners and judges required to interpret and apply the Rule. When combined with the advantages of full discovery encouraged by the proposed amendment, the revisions would reduce the areas of dispute at trial, promote settlement, avoid surprise, and encourage parties to prepare for trial independently.²⁰⁶

CONCLUSION

The current interpretation and application of Federal Rule of Civil Procedure 26(b)(4) is inadequate to govern the discovery of expert witnesses. The Rule's overwhelming concern with preventing unfairness to the retaining party has imposed too many limitations on the discovering party and prevented adequate preparation for cross-examination and trial. The Rule contains ambiguities that have resulted in divergent interpretations in the federal court system and a rejection of the requirements of the Rule in practice. The current structure and interpretation of the Rule force a discovering party to pursue blindly information in the discovery of expert witnesses while allowing a retaining party further to shield expert testimony from discovery. The current provisions of the Rule also imperil even the most innocent of discovering parties by clouding distinctions between experts and fostering conflicting or nonexistent standards for discovery resulting in sanctions against the discovering party for ex parte contacts with an adversary's expert.

Rule 26(b)(4)'s inability to govern the discovery of expert witnesses necessitates an amendment of the Rule. The amendment proposed in Part III.A. suggests a policy of full disclosure to be implemented by requiring mutuality of disclosure, eliminating the two-step process of 26(b)(4)(A), clarifying the exceptional circumstances requirement of 26(b)(4)(B), and permitting the discovery of the identity of non-testifying experts and the discovery of informally consulted experts where absolutely necessary. The proposed amendment strikes the balance between the competing policies of adequate trial preparation and unfairness to the retaining party by favoring preparation for trial and suggesting methods of reducing the possible un-

206. See Graham, *supra* note 94, at 191.

fairness to the retaining party. In light of the positive effect the proposed revisions would have upon the current operation of the Rule, Federal Rule of Civil Procedure 26(b)(4) should be so amended.

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