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A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained

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A PROPOSED AMENDMENT TO RULE 26(b)(4)(B): THE EXPERT TWICE RETAINED

The Federal Rules of Civil Procedure provide for limited discovery of experts hired for both trial and non-trial purposes.[1] The Rules, however, do not distinguish between discovery of an expert working for his original employer and discovery of an expert whose original employer is no longer involved in the litigation and who is retained by another party to the litigation.[2] Presently, upon the conclusion of litigation by one party to a multi-party suit, the expert who had been retained by the party leaving the litigation, the so-called "free agent" expert, may generally be retained by any other party to the litigation.[3]

The retention of the free agent expert will most frequently occur in areas where multi-party litigation requiring the aid of experts is common. Thus, tort litigation, especially in the products liability and medical malpractice areas, provides the most likely context for free agent retention.[4] This article is premised on the belief that the free agent is frequently hired not to aid his new employer, but rather to keep the free agent from providing another party to the litigation with substantive evidence detrimental to the hiring party's case.[5] In a medical malpractice case, for example, a plaintiff may settle his claim with one defendant at a reduced liability in order to retain the defendant's expert, who has developed

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[1] FED. R. CIV. P. 26(b)(4)(A) & (B) [hereinafter cited as "Rules"].

[2] An expert hired under these circumstances will be referred to as a "free agent" expert in order to distinguish him from all other experts, who will be referred to as "regularly retained." It should be noted that the designations "free agent" and "regularly retained" refer to the circumstances surrounding the expert's retention, rather than to his function. Thus, free agent experts as well as regularly retained experts may be employed as trial or non-trial experts.

[3] *See, e.g.*, Granger v. Smeal Mfg. Co., No. 76-CI-0200 (Cir. Ct. Washington County, Wis. Aug. 29, 1978) (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM).

[4] *See* Part II B 1 *infra* for a fuller discussion of the contexts for employment of the free agent expert.

[5] In one recent multi-party products liability case the plaintiff argued:

> [a]ttorney Gass now objects to our efforts to depose Dr. Weiss as to matters he did on behalf of West Bend Mutual, and he bases his argument on his after the fact relationship with Dr. Weiss. It does not comport with logic that an attorney should thus be able to purchase the concealment of a[n] [expert] witness. . . .

Brief for the Plaintiff at 2, Granger v. Smeal Mfg. Co., No. 76-CI-0200 (Cir. Ct. Washington County, Wis. July 7, 1978) (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM).

This problem also occurs under state discovery rules which differ from the Federal Rules. *See, e.g.*, Williamson v. Superior Court of Los Angeles, 21 Cal. 3d 829, 582 P.2d 126, 148 Cal. Rptr. 39 (1978).

a persuasive theory which might exonerate all defendants.[6] This concealment of information may also take place at the conclusion of trial, since the plaintiff would still seek to retain, and thus conceal, the information possessed by defendant's expert.[7]

This article will focus on whether the hiring of the free agent as a non-trial expert, in order to conceal information from other parties to the litigation, is in keeping with the underlying goals and values of present discovery practice. Part I of this note discusses the discoverability of experts in general, then examines the various rationales underlying the so-called unfairness doctrine supporting the trial/non-trial expert distinction. Part II presents the case for divergent treatment of the free agent and the regularly retained expert. Subpart A of that section will explain the lack of judicial scrutiny in this area, while Subpart B will explore the application of the present trial/non-trial expert discovery distinction to the free agent expert. The analysis in Part II concludes that the existing discovery rules should be modified to discourage the hiring of experts to conceal information. This modification of present discovery is suggested in Part III as an amendment to Rule 26, which presently governs the discovery of experts. Both the analysis of and the proposed amendment to the Federal Rule are equally applicable to many state discovery rules.[8]

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[6] Since defendants in products liability cases frequently condition settlement with particularly diligent plaintiffs' attorneys upon an agreement that plaintiff's counsel refuse to represent subsequent plaintiffs seeking to sue that defendant, it is no surprise that one party might similarly seek to prevent an expert from working for an opposing party. *See* 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 46 A.07[1] at 16A-97 (1978) [hereinafter cited as L. FRUMER & M. FRIEDMAN]. *See also* Sullivan v. Sturm, Ruger & Co., Inc., 80 F.R.D. 489, 490 (D. Mont. 1978); Barkwell v. Sturm Ruger Co., Inc., 79 F.R.D. 444, 445 (D. Alas. 1978).

For an excellent example of one state court's refusal to allow such practice under its discovery rules, *see* Williamson v. Superior Court of Los Angeles, 21 Cal. 3d 829, 582 P.2d 126, 148 Cal. Rptr. 39 (1978).

[7] There are two relevant distinctions between the concealment attempted after settlement and the concealment attempted after trial. First, in the settlement situation, the former plaintiff has a greater opportunity to hire the free agent than does any other party to the litigation since he may retain the expert after the settlement has been finalized but before it has been announced. Second, the settlement situation limits the opportunity for other defendants to learn about the information plaintiff seeks to conceal, since, if the case were to be presented at trial, some of the information would be revealed. Despite these distinctions the analysis presented in this article is equally applicable to both the expert who has become a free agent at the conclusion of the trial and the expert who has become a free agent by virtue of his employer's settlement; the issue of concealment is the same in each.

[8] The following states have copied the federal rule verbatim or with modifications which do not effect either the analysis or the proposed amendment: Alabama (ALA. R. CIV. P. 26(b)(4)(B)); Alaska (ALASKA R. CIV. P. 26(b)(4)(B)); Arizona (ARIZ. R. CIV. P. 26(b)(4)(B)); Colorado (COLO. R. CIV. P. 26(b)(4)(B)); Delaware (DEL. R. CIV. P. 26(b)(4)(B)); Georgia (GA. R. CIV. P. 81A-126(b)(4)(B)); Idaho (IDAHO R. CIV. P. 26(b)(4)(B)); Indiana (IND. R. CIV. P. 26(B)(3)(a)); Iowa (IOWA R. CIV. P. 122(b)(4)(B)); Kansas (KAN. R. CIV. P. 60-226(b)(4)(B)); Kentucky (KY. R. CIV. P. 26.02(4)(B)); Mas-

I. PRESENT DISCOVERY PRACTICE

A. Generally

Presently, the discovery of expert witnesses – both regularly retained and free agent experts – is governed primarily by the general discovery provisions of Rule 26 of the Federal Rules of Civil Procedure. Rule 26(b)(1) provides that parties may obtain discovery of any matter not privileged so long as it is relevant to the subject matter involved in the action.[9] However, the discovery of facts known and opinions held by experts, otherwise discoverable under Rule 26(b)(1), is limited in several important ways.

Discovery of experts "retained or specially employed in anticipation of litigation"[10] turns first on the characterization of the expert as a trial or non-trial expert. Discovery of trial experts is a two-step process under Rule 26(b)(4). First, through interrogatories, a party may require any other party to the litigation to identify his expert trial witnesses, state the subject matter to which they will testify, and submit a summary of the grounds for

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sachusetts (MASS.R. CIV. P. 26(b)(4)(B)); Minnesota (MINN. R. CIV. P. 26.02(4)(B)); Montana (MONT. R. CIV. P. 26(b)(4)(B)); Nevada (NEV. R. CIV. P. 26(b)(4)(B)); North Dakota (N.D. R. CIV. P. 26(b)); Ohio (OHIO R. CIV. P. 26(B)(4)(a)); Washington (WASH. R. CIV. P. 26(b)(4)(B)); West Virginia (W. VA. R. CIV. P. 26(b)(4)(B)); Wisconsin (WIS. R. CIV. P. 804.01(2)(d)(2)); Vermont (VT. R. CIV. P. 26(b)(4)(B)); Virginia (VA. R. CIV. P. 4:1(b)(4)(B)).

[9] Rule 26(b)(1) provides:

> *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 to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[10] Rule 26(b)(4)(B) provides:

> 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.

The phrase "retained or specially employed" is a limitation contained in Rule 26(b)(4)(B) which excludes experts consulted on an informal basis from 26(b)(4)(B) treatment. Nemetz v. Aye, 63 F.R.D. 66, 68 (W.D. Pa. 1974) ("[E]xperts who are consulted by a plaintiff on an informal basis are not subject to discovery."). For a discussion of the possible distinctions between "retained" and "specially employed" see Virginia Electric and Power Co. v. Sun Shipbuilding and Dry Dock Co., 68 F.R.D. 397, 407-08 (E.D. Va. 1975), holding that "the 'in house expert' is to be treated, for purposes of discovery, as an ordinary witness."

each opinion.[11] Second, upon motion, the court may order further discovery as it deems appropriate.[12]

With the exception of a physician's report under Rule 35(b), discovery of non-trial experts is contingent 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."[13] The Rules make no attempt to differentiate between the free agent expert and the regularly retained expert. The discoverability of a free agent expert hired upon the termination of his original employment thus depends on whether he is used as a trial or non-trial expert.[14] The policies set forth as justifications for the disparate treatment of trial and non-trial experts will be evaluated below.

B. The Unfairness Doctrine

Prior to the adoption of Rule 26, courts did not distinguish between discovery of trial and non-trial experts. Discovery was considered a matter of judicial discretion and was generally denied on one of three grounds: attorney-client privilege,[15] attorney

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[11] Rule 26(b)(4)(A)(i). This Rule provides:

> 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.

[12] Rule 26(b)(4)(A)(ii). This Rule provides: "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."

[13] *See* note 10 *supra*.

[14] The retention of a free agent has been held not to be an exceptional circumstance *per se*. Granger v. Smeal Mfg. Co., No. 76-CI-0200 (Cir. Ct. Washington County, Wis. Aug. 29, 1978) (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM). In fact, the court refused to consider the argument that the retention of a free agent presented a situation that was not analogous to the employment of the regularly retained expert.

[15] In Cold Metal Process Co. v. Aluminum Co., 7 F.R.D. 684 (D. Mass. 1974), the court ruled that the attorney client privilege covered the plaintiff's expert since he was acting as the attorney's agent. *Id.* at 687. In Brink v. Multnomah County, 224 Ore. 507, 356 P.2d 536 (1960), the court held that where an appraiser had been employed by a condemnor to observe the property in question and to act as a consultant and advisor to the deputy district attorney representing the condemnor, communications made by the appraiser to the deputy district attorney fell within the lawyer client privilege. *Id.* at 516-17, 356 P.2d at 540. *See also* American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680, 685-86 (D.R.I. 1959); Schuyler v. United Air Lines, Inc., 10 F.R.D. 111, 113 (M.D. Pa. 1950); City and County of San Francisco v. Superior Court, 37 Cal. 2d. 227, 238, 231 P.2d 26, 31-32 (1951).

work product,[16] or the rule of unfairness.[17] The acceptance of Rule 26 marked the rejection of the first two rationales in favor of the "unfairness doctrine."[18] Over the years, three aspects of the "unfairness doctrine" have been articulated by courts and commentators in seeking to limit the discovery of experts: the property problem, the laziness problem, and the discouragement problem. The property and laziness problems are judicially-created doctrines arguing against discovery of experts in general; the discouragement problem has thus far been suggested only by the commentators, but seems to have been in the minds of the Advisory Committee members in drawing the trial/non-trial expert distinction in Rule 26. This section examines these three policy formulations in order to see how they have been integrated into Rule 26(b)(4)(B) and to determine the policies behind the trial/non-trial expert distinction.

1. The Property Problem—One of the earliest judicial attempts to limit discovery of an expert's information occurred in *Lewis v. United Air Lines Transp. Corp.*,[19] where the court held that discovery of another party's expert was akin to taking the party's property without compensation.[20] This aspect of the unfairness doctrine will be referred to as the property problem. The property problem was most frequently articulated in early cases[21] in which

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[16] In Carpenter – Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959), the court held that where the driller's counsel had employed experts to make written reports on technical aspects of the case, requests for production of those reports would be denied as an attempt to acquire production of the counsel's work product. *Id.* at 261. *See also* Ford Motor Co. v. Havee, 123 So. 2d. 572, 574-75 (Fla. Dist. Ct. App. 1960); State Rd. Dep't of Florida v. Cline, 122 So. 2d 827, 828 (Fla. Dist. Ct. App. 1960); Empire Box Corp. v. Illinois Cereal Mills, 47 Del. 283, 294, 90 A.2d 672, 678 (Super. Ct. 1952). *But see* Sachs v. Aluminum Co. of America, 167 F.2d 570, 570 (6th Cir. 1948); United States v. Nysco Labs, Inc., 26 F.R.D. 159, 162 (E.D.N.Y. 1960); Leding v. United States Rubber Co., 23 F.R.D. 220, 221 (D. Mont. 1959).

[17] The unfairness doctrine is a shorthand label for three concerns of commentators and courts regarding the discoverability of experts. These three concerns will be explored in Part I B. Cases which discuss these concerns include United States v. 2001.10 Acres of Land, 48 F.R.D. 305, 308 (N.D. Ga. 1969); McGinnis v. Westinghouse Elec. Corp., 207 F. Supp. 739, 742 (E.D. La. 1962); United States v. 284,392 Square Feet of Floor Space, Etc., 203 F. Supp. 75, 77-78 (E.D.N.Y. 1962); Walsh v. Reynolds Metal Co., 15 F.R.D. 376, 378-79 (D.N.J. 1954); Hickey v. United States, 18 F.R.D. 88, 89 (E.D. Pa. 1952); Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593, 595 (D. Mass. 1941); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940). *But see* United States v. 364.82 Acres of Land, Etc., 38 F.R.D. 411, 415-16 (N.D. Cal. 1965).

[18] Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 48 F.R.D. 485, 503-05 (1969) [hereinafter cited as Advisory Committee Notes].

[19] 32 F. Supp. 21 (W.D. Pa. 1940).

[20] "To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor." Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940).

[21] Cold Metal Process Co. v. Aluminum Co., 7 F.R.D. 684, 686-87 (D. Mass. 1947); Moran v. Pittsburgh-Des Moines Steel Co., 6 F.R.D. 594, 596 (W.D. Pa. 1947); Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593, 595 (D. Mass. 1941).

no distinction was drawn between the trial and non-trial expert. Clearly, however, the concept of the expert as "property" is out of step with modern discovery policy. For example, litigants frequently go to great expense to locate eyewitnesses to important events. Yet there is no precedent permitting a party to silence such witnesses in the face of requests for information simply because the adverse party has not shared the costs of obtaining the witness' testimony.[22] By 1970, courts had largely rejected the property rationale for the limiting of discovery of expert witnesses under the unfairness doctrine.[23]

The property rationale was most soundly rejected with the promulgation of Rule 26. Rule 26(b)(4)(A) explicitly allows discovery of trial experts; similarly, under the "exceptional circumstances" standard of Rule 26(b)(4)(B), limited non-trial expert discovery is permitted. However, the Rules Committee demonstrated the weight they placed on the unfairness doctrine by providing for a scheme of compensation to serve as a condition of discovery. Although under Rule 26(b)(4)(C)[24] compensation of the responding party is not required when trial experts are served with interrogatories,[25] further discovery of trial experts may, in the court's discretion, require reasonable compensation.[26] Such compensation is always required for discovery of non-trial experts.[27] Thus, Rule 26(b)(4)(C) neutralizes the property problem

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[22] *See* Rule 26. *See also* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 483 (1962); Note, *Discovery of Experts: A Historical Problem and a Proposed FRCP Solution*, 53 MINN. L. REV. 785, 798 (1969).

[23] In Leding v. United States Rubber Co., 23 F.R.D. 220 (D. Mont. 1959), the court held that where both parties had expended considerable resources in obtaining information, the property rationale should not be used to hinder the mutual discovery necessary for meritorious trial adjudication. *Id.* at 222. In Henlopen Hotel Corp. v. Aetna Ins. Co., 33 F.R.D. 306 (D. Del. 1963), the court held that the property rationale was inapplicable where the moving party offered to pay a reasonable portion of the resisting party's expert fee. *Id.* at 308. In United States v. Meyer, 398 F.2d 66 (9th Cir. 1968), the court broadly held that any rationale that would deny a litigant the testimony of a witness simply because his opponent reached the expert first and paid for his services was unacceptable. *Id.* at 76.

[24] Rule 26(b)(4)(C) provides:

> 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.

(Emphasis added).

[25] *Id.*

[26] *Id.*

[27] *Id.*

by mandating a fair payment to the party responding to discovery.[28]

2. The Laziness Problem—A second aspect of the unfairness doctrine articulated by the courts is the laziness problem. Like the property rationale, the laziness argument would limit discovery of experts in general, and does not distinguish between trial and non-trial experts. The first expression of this problem appeared in *McCarthy v. Palmer*.[29] In that case the court reasoned that liberal discovery was not intended to be a shield behind which parties who had not hired experts could make use of the preparation of an opponent's expert.[30] Liberal discovery of experts, the court feared, would be detrimental to those parties who have prepared their case in advance, and would aid only those parties who did not retain experts until the last minute. As one commentator has suggested, "discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."[31] Taken to its logical conclusion, the laziness rationale would forbid discovery altogether.

The Advisory Committee responded to the laziness problem by setting up a system under which each party must label its experts as trial or non-trial experts before discovery can begin. As a practical matter this approach forces parties to prepare their own case in advance, since the opponent's trial expert is not discoverable until the deposing party has declared which of its own experts will

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[28] "These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum." Advisory Committee Notes, *supra* note 18, at 505 (citing Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940)). By giving clear notice of the conditions for discovery of experts, the Rules go a long way towards protecting whatever reliance interest a party may have in its expert's work product. This reliance interest should continue to be respected; any change in free agent discovery should be effected prospectively.

[29] 29 F. Supp. 585 (E.D.N.Y. 1939), *aff'd* 113 F.2d 721 (2d Cir.), *cert. denied*, 311 U.S. 680 (1940).

[30]

> While the Rules of Civil Procedure were designed to permit liberal . . . discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness.

Id. at 586.

It is clear that the words "penalize the diligent" are not part of the laziness problem. It would seem that the *McCarthy* court was foreshadowing the development of the property concept articulated one year later in Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940). *See* Part I B 1 *supra*. For cases which follow the *McCarthy* rationale, see Smith v. Hobart Mfg. Co., 188 F. Supp. 135, 136 (E.D.Pa. 1960); Schuyler v. United Air Lines, Inc., 10 F.R.D. 111, 113 (M.D. Pa. 1950).

[31] Note, *supra* note 22, at 785.

testify.[32] The present Rules do not preclude parties who have not retained experts or do not plan to use their experts at trial from conducting discovery. They do, however, subject to the discretion of the court, preclude a party from designating a trial expert subsequent to discovery.[33] As for non-trial experts, the "exceptional circumstances" standard of Rule 26(b)(4)(B) allows discovery of non-trial experts only where it is impracticable for the party seeking discovery to obtain the needed information by other means. This trial/non-trial expert distinction reflects in part the belief that it is a greater inequity for a lazy party to discover non-trial expert information than it is for that party to discover trial expert information. The theory supporting this belief is that a trial expert's information will be revealed at trial and therefore discovery only advances the time of disclosure. Since the non-trial expert's information will remain undisclosed unless discovery is allowed, discovery of that work is deemed the greater offense.

3. The Discouragement Problem—Although the third aspect of the unfairness doctrine, the discouragement problem, has not received judicial articulation, it has been discussed by several commentators.[34] This problem essentially involves the conflict between two important interests, encouraging parties to hire ex-

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[32] The Advisory Committee Notes, *supra* note 18, at 504, support this analysis:

> Discovery is limited to trial witnesses and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case on his opponent's experts.

[33] *See* Friedenthal, *supra* note 22, at 488; Graham, *Discovery of Experts*, 1976 U. ILL. L.F. 895, 904 (1976).

[34] *See* Graham, *Discovery of Experts*, 1977 U. ILL. L.F. 169 (1977); Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 282 (1968); *Developments in the Law – Discovery*, 74 HARV. L. REV. 940, 1032 (1961); Note, *Discovery of Experts, supra* note 21, at 797-98. Of the articles noted, only the Graham article has discussed the problem in great depth. His conclusions are:

> Discovery of an expert witness retained or specially employed by an opponent not expected to be called at trial raises a conflict between the principle of full disclosure of all relevant facts, data, and opinions and the principle of encouraging a party to seek expert advice free from all fear that a retained expert who fails to be of assistance will become available to the opponent. Various considerations support the belief that a party should be free to consult an expert without any fear of the expert subsequently disclosing information to an opponent. A party obviously hopes that the time, money, and effort extended to locate and prepare an expert will not result in valuable expert assistance for an opponent. Moreover, in the process of consulting the expert a person may disclose facts and discuss litigation strategy as part of the team preparation effort for trial. Any disclosure of such information to an opponent would be extremely damaging, and any attempt to isolate or restrict successfully the disclosure by the expert to only the information previously possessed would be an impossibility. Rules of procedure governing the discovery of expert witnesses must protect a party from an expert witness previously consulted walking into the opponent's arms.

Graham, *supra*, at 194-95.

perts and allowing liberal disclosure of experts' findings. On the one hand, liberal discovery of expert conclusions arguably discourages expert retention due to the fear that the expert might uncover and be forced to disclose to the opposition information detrimental to his employer. Further, parties would be less likely to be candid with their experts and more likely to hire experts who would commit themselves to taking a favorable position even before making a preliminary evaluation of the task. On the other hand, full disclosure of information is needed to narrow and to simplify issues at trial and to educate parties as to the merits of their claims and defenses. Litigants who would not feel free to employ experts for educational purposes would be less informed as to the merits of their case.

In promulgating Rule 26, the Advisory Committee was faced with the task of balancing the interest in full disclosure of all relevant information against the interest in encouraging parties to seek expert advice. In striking that balance, the Committee decided that since the adversary system functions best with educated litigants, parties should be allowed to hire experts to educate them on the merits of their case without fear that they would be forced to turn detrimental information over to an opposing party.[35] Thus, the Advisory Committee provided for the trial/non-trial expert distinction, according to which trial experts are subject to liberal discovery while discovery of their non-trial counterparts is much more limited. Since the information possessed by a trial expert is usually beneficial to his party's case, and since the discovery of trial experts only advances the time at which such information is revealed,[36] liberal discovery of trial experts is a sensible rule. Moreover, this liberal discovery eliminates surprise at trial and improves the quality of cross-examination.[37] Where detrimental information exists, it may, in the absence of "exceptional circumstances," be shielded from exposure at trial simply by designating the expert a non-trial expert.[38] In short, the goal of Rule 26(b)(4)(B) is to encourage the

[35] Advisory Committee Notes, *supra* note 18, at 503-04; Note, *supra* note 34, at 282.

[36] United States v. 38 Cases, More or Less, Mr. Enzyme, 35 F.R.D. 357, 364 (W.D. Pa. 1964); Bergstrom Paper Co. v. Continental Ins. Co., 7 F.R.D. 548, 550 (E.D. Wis. 1947); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425, 428 (N.D. Ohio 1947); Note, *supra* note 34, at 282. *See also* Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it. . . .").

[37] Advisory Committee Notes, *supra* note 18, at 503-04; 4 MOORE'S FEDERAL PRACTICE ¶ 26.66 [1] at 26-479 (2d ed. 1976); Note, *supra* note 34, at 282.

[38] In the case of the regularly retained expert, this does not deny information to the trial process, since other experts are generally available to provide the same information. Friedenthal, *supra* note 22, at 483-84. Exceptional circumstances are found only in cases

retention of unbiased experts at the earliest stage of litigation in order to educate parties on the merits of their case.[39]

Having isolated the policy reasons for distinguishing between trial and non-trial expert discovery, this article will next consider the present treatment of free agent experts, and whether such treatment is consistent with those policies.[40]

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where it is impracticable for the discovering party to obtain information in any other manner. Rule 26(b)(4)(B), *supra* note 10. *See* Inspiration Consol. Copper Co. v. Lumbermens Mut. Cas. Co., 60 F.R.D. 205, 210 (S.D.N.Y. 1973); Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 14 (N.D. Ill. 1972).

[39] In order to understand the accepted rationale of the Advisory Committee better, it is important to understand what other options were open to them. Rule 26, as a balance between the need for full disclosure of relevant information and the need to encourage parties to seek expert advice, clearly places greater weight on the latter value. In light of the later cases this value judgment was "a rather conservative" one, C. WRIGHT, FEDERAL COURTS 401 (3d ed. 1976), and was not universally received with enthusiasm. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2029 at 250, n.57 (1970). More liberal disclosure of expert information was, of course, the committee's other option. Those who favored this course argued that the problem with the "exceptional circumstances" formulation was that it did not respond to the need for information in fair trial adjudication, but rather depended on whether it was "practicable" for the party seeking discovery to retain its own expert and to give him adequate opportunity to form an opinion. Further, since a discovering party would not know what facts the opposing experts had discovered or what opinions they had formed, it would rarely be possible for the discovery party to make the required showing of "exceptional circumstances." *Id.*, § 2032 at 256. Also criticized was the drafters' principal concern — the discouragement problem. As already suggested, this argument postulates that discoverability of non-trial experts will discourage their retention and reduce the information available to each party. The problem with this line of reasoning is that it assumes that the parties have a choice *not* to retain an expert. In the vast majority of cases in which experts are hired, they are indispensible. Often the plaintiff cannot meet his burden of proof without an expert. Similarly, the defendant cannot hope to refute this burden without his expert. This was recognized in the Advisory Committee Notes, *supra* note 18, at 503, where the Committee stated, "Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative." Thus, to the extent that the hiring of experts is not entirely a matter of choice, the discouragement rationale for limiting discovery is less persuasive. *See* Note, *supra* note 34, at 282. An alternative would be to put the burden of showing abuse on the answering party rather than on the party seeking information, as Rule 26(b)(4)(B) does. *See* Friedenthal, *supra* note 22, at 488. A freer flow of information would, in theory at least, (1) assist in discovering truth and preventing perjury; (2) cut down on the number of false, fraudulent, and sham claims and defenses; (3) provide a simple, convenient, and inexpensive way of obtaining facts otherwise obtainable only with great difficulty or not at all; (4) educate parties as to the merits of their claims and defenses, thus encouraging settlements out of court; and (5) narrow and simplify issues for trial. Under a more liberal approach to discovery, a higher correlation between settlement and validity of claim would result.

[40] Although it would be logical at this point to seek further refinement of the trial/non-trial expert distinction by examining what constitutes "exceptional circumstances" and by analogizing to the disclosure provisions of the ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as CODE], neither source provides substantial guidance. Cases involving the Rule 26(b)(4)(B) "exceptional circumstances" standard merely restate the rule without providing sufficient analysis. This has been noted by both the courts and the commentators. *See* Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122, 1137 (S.D. Tex. 1976); Graham; *supra* note 33, at 932. *See generally* Annot., 33 A.L.R. Fed. 403, 465-76 (1977).

Similarly, the CODE provides little guidance. ABA CODE OF PROFESSIONAL RESPONSIBILITY E.C. 7-27 is vague, requiring only that "a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce." D.R. 7-102(A)(5) states that an attorney cannot "[k]nowingly make a false statement of law or fact." With respect

II. THE CASE FOR DIVERGENT TREATMENT OF THE FREE AGENT EXPERT AND THE REGULARLY RETAINED EXPERT

A. The Nonlaw of the Free Agent Expert: Lack of Judicial Scrutiny

The distinction between the free agent expert and the regularly retained expert has yet to be recognized by either the commentators or the courts.[41] Judges automatically apply the same

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to disclosure, however, the rule provides only that an attorney cannot "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." D.R. 7-102(A)(3). Although it is the duty of an attorney appearing in a pending case to advise the court of decisions adverse to his client's contention that are known to him and unknown to his adversary, ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 146 (1935), this too is uninstructive, as it applies to precedental cases rather than to expert information. It has been suggested by one scholar who favors greater disclosure of information that this prohibition of the concealment of legal precedent should be extended to experts' work product as well. Judge Marvin Frankel, in the 31st Annual Benjamin Cardozo Lecture, proposed a reformation of D.R. 7-102. In part it provides:

> (1) In his representation of a client, unless prevented from doing so by a privilege reasonably believed to apply, a lawyer shall (a) Report to the court and opposing counsel the existence of relevant evidence or witnesses where the lawyer does not intend to offer such evidence or witnesses; (b) Prevent, or when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.

Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057-58 (1975). The key words in this formulation have been borrowed from the Securities and Exchange Commission's rule 10b-5. See 17 CFR § 240.10b-5 (1974). As Frankel explains, "that should serve not only for respectability; it should also answer the complaint that the rule would impose impossibly stringent standards. The morals we have evolved for business clients cannot be deemed unattainable by the legal profession." Frankel at 1058. The question, however, is not whether they are attainable but whether they are desirable. For instance, it may be argued that if non-trial expert information is discoverable then it increases the chances that parties will go only to experts whose testimony can be bought. While as a proposition this may be accurate, it is not a good reason for denying discovery. In this situation the goal is to combat the abuse, not to refuse to adopt a worthy rule for fear that some may be moved toward improper hiring practices. It is no secret that under the present discovery system there are "experts for hire." The solution is stiffer penalties for experts' and attorneys' misconduct, not lower standards.

Lastly, there is authority suggesting that plaintiffs and defendants be accorded different discovery treatment. See New York County Comm. on Profesional Ethics, Opinions, No. 309 (1933); C. CURTIS, ITS YOUR LAW 17 (1954). This view suggests that a plaintiff, saddled with the burden of proof, must disclose all relevant information, while the defendant may ignore facts not requested in discovery. This argument was rejected by the drafters of Rule 26(b)(4)(B) with regard to regularly retained experts; the argument is of no greater persuasiveness in the free agent context.

[41] One commentator has, however, suggested that there is authority to the effect that the hiring of free agents is unethical. Graham, *supra* note 34, at 195 n.55. The language he cites is from Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941):

> But there are cases where the tender of compensation should have no such effect. An expert employed by one of the parties ought not to be compelled to furnish expert testimony to the other just because the latter offers him compensation. It is his privilege, if not his duty, to refuse compensation from one of the

discovery rules to each.[42] There are several reasons for this, the most obvious of which is that, because no detailed analysis of the policies underlying Rule 26(b)(4)(B) has been made, there is no reason to doubt the logic of applying the same rules to each. Attorneys and judges have been said to look least to the reasons and policies underlying procedure and evidence.[43]

Due to the constraints of time and pressure, the legal profession tends to rely on recent cases and rules of thumb.[44] As a result of this practice, trial courts rarely get the sophisticated policy arguments needed to support an innovative change in the law. Appellate courts, which are more receptive to arguments based on underlying principles counseling legal change, rarely review discovery issues. Discovery rulings are not final orders and therefore are not generally appealable.[45] After final judgment they are reviewable on appeal, but the matter is frequently moot. Further, the broad discretion vested in trial courts over discovery matters will bar reversal except under very unusual circumstances.[46] Though occasionally there will be review of discovery orders under a Rule 37 sanction procedure,[47] this is rare.[48]

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parties when he has already accepted employment from the other, and such refusal ought not of itself to result in his being ordered to testify.

Id. at 595.

Graham misconstrues this statement; *Boynton* was not a free agent case. The court in *Boynton* was considering the discoverability of another party's regularly retained expert. Taking the same position as the majority of courts in 1941, the *Boynton* court held that whether one party could compel discovery of another's expert witness was a matter of court discretion. The court, relying on the property rationale discussed in Part I B 1, held that "as a discretionary matter, under the circumstances of the instant case, the defendant should not be permitted to obtain from an expert witness an opinion for which the plaintiff has to pay." *Id.* at 595.

[42] *See, e.g.*, Granger v. Smeal Mfg. Co., No. 76-CI-0200 (Cir. Ct. Washington County, Wis. Aug. 29, 1978) (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM). *But see* Sullivan v. Sturm, Ruger & Co., Inc., 80 F.R.D. 489, 491 (D. Mont. 1978); Barkwell v. Sturm Ruger Co., Inc., 79 F.R.D. 444, 446 (D. Alas. 1978).

[43] 1 J. WIGMORE, EVIDENCE xiii-xiv (3d ed. 1940).

[44] *Id.*

[45] *See, e.g.*, Browning Debenture Holders Committee v. DASA Corp., 524 F.2d 811, 817 (2d Cir. 1975); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967).

[46] *See* Huff v. N.D. Cass Co. of Ala., 468 F.2d 172, 176 (5th Cir. 1972); Stubbs v. United States, 428 F.2d 885, 888 (9th Cir. 1970); Mellon v. Cooper-Jarrett, Inc., 424 F.2d 499, 501 (6th Cir. 1970).

[47] Under Rule 37 the court may impose the following sanctions on a party who attempts to thwart or evade a full and candid discovery: imprisonment for contempt of court, Rule 37(b)(1); the entry of an order that designated facts be taken as established, Rule 37(b)(2)(A); the entry of an order refusing the disobedient party the right to support or oppose designated claims or defenses, Rule 37(b)(2)(B); striking out pleadings or parts of pleadings, Rule 37(b)(2)(C); rendering judgment by default, *id.*; dismissal of claims or defenses, *id.*; or assessment of costs and attorneys' fees, Rule 37(a)(4).

[48] *See* Hickman v. Taylor, 329 U.S. 495, 500 (1947); Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578, 579-80 (D.C. Cir. 1970). *But cf.* Cromaglass Corp. v. Ferm, 500 F.2d 601, 604-05 (3d Cir. 1974).

Another rarely allowed avenue of review of discovery matters is by way of interlocutory appeal under 28 U.S.C. § 1292(b).[49] Generally, however, discovery questions do not satisfy the rigid criterion of that statute, which requires the issue to be "a controlling question of law as to which there is substantial ground for difference of opinion."[50] Further, the trial judge must find that the granting of interlocutory review may materially advance the ultimate termination of litigation. Even in those few cases where the trial court does so certify, the appellate court has discretion to accept or reject the certification.[51] Although writs of mandamus and prohibition are at times employed for this purpose,[52] use of this procedure to review a discovery order continues to be the exception rather than the rule.[53] The Supreme Court has stated that it is "unwilling to utilize [these writs] as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes."[54]

If a challenge to the applicability of Rule 26(b)(4)(B) to the free agent situation were to arise, the realities of settlement and of appellate review therefore suggest that it would be likely to surface at the trial court level.[55] Several factors reduce the likelihood of the question ever being litigated, however. First, even at the trial court level, only a small number of cases go through to adjudication. The great bulk of all civil controversies are settled. Second,

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[49] *See* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 481 (4th Cir. 1973); Baker v. F and F Inv., 470 F.2d 778, 779 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

[50] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[51] *See* United States v. Salter, 421 F.2d 1393, 1394 (1st Cir. 1970).

[52] *See* Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964); Colonial Times, Inc. v. Gasch, 509 F.2d 517, 519 (D.C. Cir. 1975); Heathman v. United States District Court for the Central District of California, 503 F.2d 1032, 1033 (9th Cir. 1974).

[53] *See* Kerr v. United States District Court for the Northern District of California, 425 U.S. 949, 949 (1976); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 283-84 (2d Cir. 1967) and cases cited therein.

[54] *Ex parte* Fahey, 332 U.S. 258, 260 (1947).

[55] This was recognized at an early stage in the interpretation of the discovery rules in Maryland where the State Court of Appeals made it clear that the task of fitting the new procedure into the legal system would rest largely with the trial courts. *See* Roberts v. Roberts, 198 Md. 299, 303, 82 A.2d 120, 122 (1951); Hallman v. Gross, 190 Md. 563, 574-75, 59 A.2d 304, 309 (1948).

parties often grant informal discovery of non-trial experts without requiring a showing of the Rule 26(b)(4)(B) "exceptional circumstances" formula.[56] When one considers the small percentage of cases that are not settled, the percentage of these in which discovery is not formally or informally granted, and the rarity with which these cases receive appellate treatment, it is no surprise that the free agent issue has not yet received treatment by the courts or commentators. The discussion below deals with the free agent's status as it affects the trial/non-trial expert distinction.

B. The Trial/Non-Trial Distinction: Applications to the Free Agent Expert

1. Contexts for Employment of the Free Agent Expert—Free agent experts will most often be employed in areas where multiparty litigation involving experts is frequent. Thus, the most likely context for retention of the free agent would seem to be tort litigation, especially in the medical malpractice and products liability areas. Antitrust actions may provide another context in which this situation will arise. Cases where a free agent is hired may take a variety of forms. There may be multiple plaintiffs, multiple defendants, or both. The party concluding litigation, the party who thereafter retains the free agent, and the party who opposes free agent discovery may each be a plaintiff or defendant. Further variations are inevitable, since although the free agent may be designated either a trial or non-trial expert by his original employer, this is in no way binding on the new employer, who may choose to use the expert in a manner different from that suggested by the original employer. Still another situation is posed by the expert who is not retained by a second employer. Thus, the attempt to compel discovery of an expert whose employer is no longer involved in the litigation sets up a multitude of possible situations and accompanying problems which will be discussed in detail in the following sections.

2. Litigation Strategies Underlying Employment of the Free Agent—There are three possible reasons for the retention of the free agent expert. The first is to educate the party in a general fashion concerning the merits of his case, hereinafter referred to

[56] Graham suggests that in thirty percent of the non-trial expert cases, disclosure beyond the acquisition of the expert's identity occurs. Moreover, Graham claims that this is the majority practice in Hawaii, Louisiana, Missouri, New Mexico, Oregon, Puerto Rico, and West Virginia. Graham, *supra* note 34, at 193 n.51. *See also* von Kalinowski, *Use of Discovery Against the Expert Witness*, 40 F.R.D. 43, 49 (1966).

as the "educational retention." Second, the party may engage in "offensive retention" to obtain information that can be used at trial against the opposing party. Third, a party may seek to obtain and conceal information that an opposing party could use at trial, hereinafter referred to as the "concealment retention."[57]

In a case where one of several defendants concludes his litigation with a sole plaintiff, the free agent expert's potential knowledge at the time of his reemployment falls into four pertinent categories: (1) information suggesting the plaintiff was at fault; (2) information suggesting the settling defendant was not culpable; (3) information suggesting another defendant was to blame; and (4) information suggesting an individual not before the court is at fault. The use to which this information might be put depends, of course, on who retains the free agent. A frequent motivation for the hiring of a free agent as a non-trial expert is to conceal detrimental information.[58] Since expert reports are rarely inconclusive, at least one party presumably will have an incentive to conceal such information. Moreover, since the most important distinction between the regularly retained non-trial expert and his free agent counterpart is that the free agent expert is often hired to conceal information, the extent to which information is generally concealable by parties is highly relevant.

Concealment most often occurs when a settling party who may yet remain subject to suit, either on a related direct claim or on a claim for indemnification or contribution, seeks to limit access to whatever damaging material his opponent's experts have uncovered. A settling party may, for example, restrict the discovery that would otherwise be allowed after settlement by insisting on a nondisclosure provision in the settlement agreement.[59] Further, it is clear that an expert may bind himself by a provision which forbids his working for another party to the litigation after his em-

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[57] Since it will not usually be possible for a court to discern a party's intent at the time of retention, it will be necessary to infer intent from the use of the expert as a trial or non-trial expert. Where the free agent expert is retained as a trial expert the retention should be assumed to be an "offensive retention" since the expert will be used at trial.

[58] *See* notes 4 and 5 *supra*.

[59] This often allows plaintiff and defendant to come to a mutually satisfactory settlement. For example, the plaintiff may settle with a defendant on terms favorable to the defendant upon the condition that the defendant does not provide another party with any damaging information he has uncovered. Since upon settlement a former party is no longer subject to discovery, any sharing of information is purely voluntary and a former party could, for whatever reason (settlement included), simply decide not to respond to another party's request for information. Alternatively, however, he may turn over – or even sell – the work product to another party. L. FRUMER & M. FRIEDMAN, *supra* note 5, § 46A.06[4] at 16A-89. *But see* Williamson v. Superior Court of Los Angeles, 21 Cal. 3d 829, 582 P.2d 126, 148 Cal. Rptr. 39 (1978).

ployer settles.[60] However, should the former expert's work be subpoenaed, the settlement agreement could no longer control.[61] Unless he is subpoenaed, however, an expert is never bound to produce information just because there is a demand for it. Thus, an expert may accept compensation for his promise not to reveal such information unless subpoenaed. It may be argued that there should be no right to limit access to information where a party has attempted to do so without a showing of reasonable grounds to fear a future related suit. Yet this approach would bring the court into the settlement process, and force it to evaluate the chances of future suit. Fortunately, this is unnecessary because even in the case where a party needlessly limits access due to a mistaken belief of multiple exposure, chances are good that the unavailable information is of limited use in any suit other than one against the limiting party. Still, it is foreseeable that in some cases the information would also be useful in a suit against another party to the litigation. Since a rule regulating a party's disposition of its work product cannot simultaneously protect a party against future related suits and also allow the information to be available for use against other parties to the litigation, one or the other value must take precedence. Two factors favor allowing parties to protect themselves against future related suits. First, because of the added expense such agreements entail for the limiting party,[62] it is

[60] This "freedom of contract" rationale is supported by Graham, *supra* note 34, at 195, who suggests that when a party contracts with an expert who may not meet the retaining party's expectations, an agreement may be entered into to prevent the expert from later working for another party to the litigation:

> If the party making initial contact is aware of the possibility of a court compelling disclosure of the identity of an expert who for any reason fails to meet expectations, a carefully drafted agreement should contain an exclusivity provision preventing the expert from consulting with any other party to the litigation.

Id.

By comparison, an agreement between parties preventing the settling party's expert from working for any other party to the litigation should not be binding; it would be inconceivable that two parties to a suit could, by their own agreement and without the consent of the expert, prevent him from working for a third party to the litigation.

[61] Settlement agreements are not binding on a court; the court may, upon a proper showing, order the expert to appear for deposition or to be available as a trial witness. *See* MOORE, *supra* note 37, ¶ 26,66[1] at 26-469; Graham, *supra* note 33, at 935-36. Although the majority of American jurisdictions allow subpoenaing of an adverse party's expert, MOORE, *supra*, it is clear that there is no consensus as to what "proper showing" is necessary to compel testimony. *See* Annot., 77 A.L.R.2d 1182, 1191-211 (1961).

[62] Experts will demand greater fees if their freedom to contract is to be limited. Similarly, a party to the suit who made such agreement would demand compensation in the settlement figure. It is unlikely that these payments will become ritualistic and inexpensive as the value of such a provision is positively correlated with the chances of future suit. Thus, cases where a party might enter into such an agreement because it was inexpensively obtained are the very cases where such an agreement is least likely to deny litigants needed information. T. PAINE, COMMON SENSE (1776).

unlikely that these agreements would take place in the absence of reasonable grounds to fear future suit. Second, as discussed earlier,[63] in cases in which an extreme hardship would result, the subpoena is always available to override the settlement agreement.[64] Thus, the settlement agreement is not a sure way of limiting access to a party's work product.

3. Discovery of the Free Agent Expert: Variations on a Theme—In the absence of an agreement to limit disclosure, the discoverability of the free agent is determined by his designation as a trial or non-trial expert.[65] Discoverability therefore often turns on the issue of which employer's designation should control. The designation given to the expert by the original employer arguably should not be used since it would deny discovery of a free agent trial expert simply because his former employer had not planned to put him on the stand. Similarly, it would allow discovery of a non-trial free agent expert on the grounds that his previous employer had intended to call him to testify. It may be argued, however, that once an expert has been named as a trial witness and is therefore subject to discovery, a settlement and rehiring of the expert as a non-trial expert by a second employer should not deprive a party of discovery. This argument is unsound since an original employer who has designated his expert as a trial witness may at the last moment revoke this designation and

[63] *See* note 61 *supra*.

[64] The ability to subpoena pretrial discovery is of far greater value than the trial subpoena and should therefore be granted only upon a greater showing of need. There are several reasons this pretrial subpoena is of greater utility than its trial counterpart.

First, a party seeking discovery, but being able to compel only a trial appearance, may be reluctant to call the opposition's expert for fear that the expert has become client-oriented and will tend to testify in his employer's interest. *See* Friedenthal, *supra* note 22, at 484; Graham, *supra* note 33, at 934. A second fear is that since an expert compelled to testify generally must do so without compensation, MOORE, *supra* note 37, ¶ 26,66[1] at 26-469; Friedenthal, *supra* note 22, at 479-80, he is likely to be hostile to the subpoenaing party. Although the general rule is that the court has the right to compel answers only to questions within the existing knowledge of the expert, the reality of the situation is that "whenever an expert is subpoenaed . . . he is forced to make adequate preparation to prevent his appearing foolish by being unable to respond to all questions concerning his expertise." People *ex rel.* Kraushaar Bros. and Co. v. Thorpe, 296 N.Y. 223, 225, 72 N.E.2d 165, 166 (1947); Friedenthal, *supra* note 22, at 481; Graham, *supra* note 33, at 934-36.

It would seem likely that an expert would react to being subpoenaed with the same hostility that many people express when called for jury duty. In the interest of seeing the accused get a fair trial, however, the state makes it possible to be excused from jury duty. The subpoenaed expert has no such option and his hostility may be vented on the party who brought him into court. Although discovery is apt to create similar hostility, it affords an opportunity to gain whatever benefit is available without the incidental damage suffered at trial. Thus, it is the extreme situation where an attorney will put his adversary's expert on the stand without knowledge of his testimony. *See* Friedenthal, *supra* note 22, at 469.

[65] *See* notes 10-14 and accompanying text *supra*.

thereby prevent discovery.[66] "To the extent that an original employer can withdraw his expert's designation, there is no reason to prevent the free agent's employer from doing the same. Thus, the discoverability of the free agent should be determined by the designation given by the *new* employer.

a. Free Agent Trial Expert. Discoverability of the free agent designated as a trial expert is desirable for the same reasons that discovery of the regularly retained trial expert has been found appropriate.[67] Liberal discovery of the regularly retained trial expert is allowed because it eliminates surprise at trial, improves the quality of cross-examination, and reveals only that information beneficial to the discovered party which would be disclosed later at trial.[68] These reasons, which have been used to justify liberal discovery of regularly retained experts, are equally applicable to the free agent trial expert. Therefore there is no reason to suggest an alternative standard of discoverability of the free agent trial expert.

b. Free Agent Non-Trial Expert. By contrast, this convergence of policies supporting equal discoverability of free agent and regularly retained trial experts is not present in the case of non-trial experts. Discovery of the regularly retained non-trial expert is severely limited in order to encourage parties to educate themselves without the fear of uncovering information that would later be used against them.[69] In the vast majority of cases, however, the non-trial free agent expert is not hired to educate his client. At the stage in the proceeding where parties are settling, it is to be expected that all parties have already been generally educated regarding the merits of their case.[70]

The need to protect the "educational retention" in this situation is of relatively low priority. Further, the regularly retained non-trial expert is usually a fungible expert; at the time of hiring he knows no more about the case than any other expert in his

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[66] *But see* Williamson v. Superior Court of Los Angeles, 21 Cal. 3d 829, 582 P.2d 126, 148 Cal. Rptr. 39 (1978).

[67] *See* notes 36 & 37 and accompanying text *supra*.

[68] *Id.*

[69] *See* Part I B 3.

[70] An exception to this generalization would be the case of a poor plaintiff with a claim against both a distributor and manufacturer. Finances may force him to settle the less lucrative of the two claims in order to finance the costs of the other. In this situation, it is the very act of settlement with one party which permits the plaintiff to make his "educational retention" of the expert. However, this does not work a hardship on the plaintiff since any expert he retains other than the free agent will be discoverable only in accordance with the regular discovery procedure of Rule 26. Further, discovery of the free agent will be an option open to all parties to the litigation. Thus, the plaintiff is not disadvantaged by his early settlement.

field. The free agent, however, by virtue of his having already worked in the litigation, is hired for the unique information he possesses; he is no longer a fungible expert.

Where the free agent is denominated as a non-trial expert, the appropriate discovery rule should discourage "concealment retentions" by mandating liberal discovery of the non-trial free agent expert. As for a "lazy" party, he should not be rewarded by extending the protection provided for "educational retentions" to situations where, but for his laziness, the hiring party would already be educated on the merits of his case.[71] Discovery of the "concealment retention" is thus in accord with the underlying values expressed in Rule 26(b)(4)(B).[72]

The most difficult situation in which to justify liberal discovery is that in which no concealment is attempted. For example, where an employer retains a free agent as part of an "offensive retention," but finds the expert's information detrimental to his case and subsequently designates the expert a non-trial expert, liberal discovery would seem to result in unfairness to the employer. While discovery in this situation might seem disadvantageous to the retaining party, the situation would be no different if another party had retained the expert. In either case discovery would take place and the information would be revealed. Moreover, although the retaining party would have paid the expert, this cost would be shared by the discovering parties.

Notwithstanding current discovery practice, liberal discovery of non-trial free agents should be the rule. Rule 26(b)(4)(B), by not mandating free discovery, implies that to some extent the

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[71] Discovery of the free agent *trial* expert does not foreclose a party truly in need of an "educational retention" from retaining one, since liberal discovery of the free agent trial expert will not change the discovery standard for the party's regularly retained experts. This is true regardless of whether the regularly retained expert is employed before or after the employment of the free agent. If the regularly retained expert is a non-trial expert, discovery will still proceed only under the "exceptional circumstances" standard of Rule 26(b)(4)(B).

[72] For example, the exceptional circumstances test would be met if one party went so far as to retain all the experts in a specialized field or even all those experts likely to agree with an opposing party. *See* Friedenthal, *supra* note 22, at 484. *Cf.* Bolich v. Rubel, 67 F.2d 894, 895 (2nd Cir. 1933) (in a case where the Commissioner of Internal Revenue sought to investigate the records of a taxpayer, discovery was justified "because all the facts are in the taxpayers hands."). *Bolich* was cited with approval in United States v. McKay, 372 F.2d 174, 176 (5th Cir. 1967). Further, where the condition of certain items have been altered and only one party's experts have viewed them in their unaltered state, discovery by the other party should be mandated. *See* Nemetz v. Aye, 63 F.R.D. 66, 68 (W.D. Pa. 1974); Walsh v. Reynolds Metal Co., 15 F.R.D. 376, 378 (D.N.J. 1954); Colden v. R.J. Schofield Motors Co., 14 F.R.D. 521, 522 (N.D. Ohio 1952); Friedenthal, *supra* note 22, at 484; Note, *supra* note 34, at 281-82. *See also* Hickman v. Taylor, 329 U.S. 495, 511 (1947); *cf.* Russo v. Merck & Co., 21 F.R.D. 237, 239 (D.R.I. 1957) (in an action for damages which alleged the presence of poisons in the blood plasma manufactured by the defendant, the plaintiff was entitled to discover the methods employed in the production of defendant's blood plasma since they were solely within the defendant's knowledge.).

"concealment retention" is to be tolerated. The Rule rightly condones the concealment of the future report of an expert hired generally to educate a party.[73] It should not, however, condone a hiring for the express purpose of a present concealment. Generally the results of the expert's work are known by the hiring party in advance of employment and the expert's services are procured to conceal that information. In essence, the hiring party seeks to assert a similar right of concealment as to work done by the expert for the original hiring party without the presence of the educational rationale given for that right. The right to conceal information in this situation is clearly inconsistent with the spirit of Rule 26.[74]

c. Unretained Free Agent Expert. The unretained free agent might seem the most likely case for liberal discovery, since there is no party resisting disclosure.[75] This observation overlooks, however, the earlier suggestion that the expert who is no longer tied to a party is under no duty, in the absence of a subpoena, to respond to discovery.[76] At issue in such cases is the need on the one hand for availability of information to promote meritorious trial adjudication and the expert's right on the other hand to be free of the burdensome annoyance of non-party discovery. Where the party seeking discovery has not sought to retain the free agent, the expert's privacy interest is arguably the greater concern, since his information is available simply upon payment of a

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[73] The information sought to be uncovered by an opposing party from a free agent expert is usually that information gathered for the first employer. Once this information is disclosed there is no reason to prohibit the retaining party from concealing the expert's future product so long as the expert does not appear at trial. However, since at the time of retention it may be unclear whether the free agent will be a trial or non-trial expert, the timing of discovery for all free agents should be the same.

[74] In Barkwell v. Sturm Ruger Co., Inc., 79 F.R.D. 444 (D. Alas. 1978), an expert who had conducted substantial research on gun safety mechanisms and who had performed services for the plaintiff's counsel in other cases was retained as an independent consultant by the defendant. The plaintiff sought discovery of the information which had been gathered by the expert prior to his being hired by the defendant. The court ruled that because the expert's information was acquired prior to his retention by the defendant the material was discoverable without regard to his status as an expert. *Id.* at 446. The identical fact situation produced similar results in Sullivan v. Sturm, Ruger & Co., Inc., 80 F.R.D. 489 (D. Mont. 1978). There the court held:

> [w]hile [the expert's] knowledge and opinions that plaintiffs seek to discover were developed for litigation, they were not developed for this law suit, and more importantly, were not developed for the use of the defendant because [the expert] was not in defendant's employ at the time. Consequently, defendant cannot shield [the expert] from deposition on these matters because 26(b)(4)(B) is not applicable.

Id. at 491.

[75] The federal rules are silent as to the discovery of an expert whose knowledge of relevant information at issue in the case makes him a desirable witness for one party to the litigation. *See* Graham, *supra* note 33, at 936.

[76] *See* notes 61-64 and accompanying text *supra*.

reasonable retainer. Moreover, while it may frequently be the case that the expert's inconvenience is not great, inconvenience is directly proportional to the number of parties requesting information. For example, in a series of suits arising out of a mass air disaster, the plaintiff's expert, in the first settled case, is likely to be deluged with requests for information. The same would be true for experts involved in cases dealing with mass produced consumer goods, such as cars, drugs, and children's toys. Thus, the unretained free agent should not be discoverable. Those few cases where this will work an unjustifiable hardship may be handled by subpoenaing the expert's appearance at trial.[77]

d. Recalcitrant Free Agent Expert. Where the free agent expert refuses an offer of employment, a difficult situation is posed. In such cases there may be both a legitimate need for, and deprivation of, important information. Yet the importance of this information is not the paramount consideration; as indicated earlier, this information may be concealed by agreement between the expert and his original employer.[78] Although a rule denying discovery in this situation might seem likely to deny parties important trial information, it would seldom work that way in practice: an expert with a valuable product is most unlikely to refuse a fair offer of compensation for what would amount to limited additional work. Indeed, the expert in possession of important information may even seek to take advantage of his bargaining power to drive an unconscionable bargain. However, the fear of being subpoenaed and of being forced to divulge his information without payment[79] is arguably enough of an incentive to encourage the expert to bargain in good faith.

e. Court Appointed Free Agent. There is, perhaps, another variation on the free agent theme. Since Federal Rule of Evidence 706 allows the court on its own motion, or on the motion of any party, to appoint expert witnesses,[80] it would seem logical to discuss the appropriate discovery standard for the court appointed expert who later becomes a free agent. Such an occurrence, however, would be extremely unlikely. The expert in question is appointed by the court and the settlement of individual parties to the litigation should not affect his involvement in the litigation, since all

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[77] As discussed in note 64 *supra*, a trial subpoena is not as valuable as pretrial discovery. However, where a party refuses to retain a willing expert it would seem that mandating liberal discovery of the expert would invade the expert's right of privacy.

[78] *See* notes 59-61 and accompanying text *supra*.

[79] The majority American rule is that experts, like lay witnesses, are not paid for subpoenaed testimony. MOORE, *supra* note 37, ¶ 26,66[1] at 26-469.

[80] FED. R. EVID. 706(a).

parties to the suit are entitled to review the expert's findings, take his deposition, and call him as a witness.[81] However, should the court excuse the expert before the conclusion of the trial and should the expert be retained by another party to the litigation, the problem of concealment retention would not be presented because the opposition would have had prior opportunity to depose him. Thus, the application of Rule 26(b)(4)(B), which will allow the retaining party to treat the expert as a non-trial expert and to conceal his future work product, is in line with protecting the Rule's "discouragement foundation." Of course, should the expert appear at trial, he would again be subject to Rule 26(b)(4)(A) discovery.

4. Timing of Discovery of the Free Agent Expert—Since an expert's work is cumulative, the work performed for each employer will not be easily severed. Therefore, any discovery procedure should ideally take place soon after the free agent expert has been retained and before he starts work for his new employer. The easiest way to accomplish this is for the retaining party to notify the court and all other parties to the litigation that a free agent expert has been retained. The court would then set a free discovery period, after which the expert would start work for the new employer. Further discovery would not take place unless the free agent was later designated as a trial expert. At that point additional discovery would proceed under Rule 26(b)(4)(A). As the Rules now stand, there are, of course, no provisions to implement this procedure. A proposal for revision of Rule 26 is discussed in the next part.

III. A PROPOSED AMENDMENT TO RULE 26

This article has dealt with free agent expert discovery in light of the value choices underlying Rule 26. The promulgation of Rule 26(b)(4)(B) reflects a decision to give greater weight to the need for parties to hire experts than to the need for disclosure of information.[82] This value judgment is followed here in the proposed

[81] *Id.*

[82] As discussed earlier, there was wide support for giving greater weight to the need for disclosure of information. *See generally* Part I B 3 *supra*. Added support for that view may be drawn from the cases decided subsequent to the 1970 recodification; the courts at times have strained Rule 26 in order to meet the need for greater disclosure of information. In Pearl Brewing v. Jos. Schlitz Brewing Co., 415 F. Supp. 1122 (S.D. Tex. 1976), for example, the court had before it a defendant's motion for discovery in an antitrust action. The information sought was the detailed structure of a computerized model of the Texas beer market developed by the plaintiff's experts. Under Rule 26(b)(4)(B), the key to this

case should have been whether the defendant could make a showing of "exceptional circumstances" under which it would have been impracticable to obtain facts or opinions on the same subject by other means. Instead, the court's opinion opened with a long discussion of the background and interpretation of Rule 26(b)(4)(B), concluding that since no effort had been made by any court to define "exceptional circumstances," these discovery controversies were to be resolved on a case by case basis. *Id.* at 1137. The court evaluated 26(b)(4)(B), the "unfairness doctrine," "competing equitable and legal considerations," and the facts of the case, and then concluded that granting discovery "would not be unfair to the plaintiffs," *id.* at 1137-38, adding that the plaintiff did not dispute that for defendants to properly understand the system they would have had to expend an "inordinate amount of time, money, and resources" and doing so "might delay the conclusion of discovery in the case." *Id.* at 1138. In essence, the court decided that meritorious adjudication demanded disclosure of the information, and then paid lip service to the rule. *See* Annot., *supra* note 40, at 468-69 for a similar interpretation.

Discovery of the *identity* of a non-trial expert has also been liberalized in some jurisdictions. The first court to deal with this problem ruled that the "exceptional circumstances" test of Rule 26(b)(4)(B) applied. *See* Perry v. W.S. Darley and Co., 54 F.R.D. 278, 280 (E.D. Wis. 1971). This view conforms with the Advisory Committee's assertion that "a party may on a proper showing require the other party to name experts retained or specially employed. . . ." Advisory Committee Notes, *supra* note 18, at 504. Despite the intent of the Advisory Committee and the *Perry* decision, the court in Sea Colony Inc. v. Continental Ins. Co., 63 F.R.D. 113, 114 (D. Del. 1974), allowed discovery of a non-trial expert's identity. The court based its decision on the fact that (b)(4)(B) embraced only discovery of "facts known or opinions held by an expert" and concluded that the expert's identity fit neither category. This view was cited as the better authority in Baki v. B.F. Diamond Construction Co., 71 F.R.D. 179 (D. Md. 1976), in which discovery was allowed in a similar situation. *Baki* also expanded the *Sea Colony* ruling, which had revealed only the name of the expert. In *Baki*, the court held that "*names* and *addresses*, and other identifying information" of non-trial experts "may be obtained through properly framed interrogatories without any special showing of exceptional circumstances in the absence of some indication that such information . . . is irrelevant, privileged, or for some other reason should not be disclosed." *Id.* at 182 (emphasis added). The court reasoned that the 26(b)(1) requirement that the identity and location of persons having knowledge of any discoverable matter be supplied, was not limited to non-experts. In fact, such a broad umbrella encompasses even non-trial experts, "since they may have knowledge of matter discoverable or potentially discoverable under the provisions and requirements of Rule 26(b)(4)(B)." *Id.* at 181-82.

The covert liberalization of Rule 26 to meet the need for greater disclosure of information has also gained a foothold in the two-step process of 26(b)(4)(A)(i) and (A)(ii). *See* notes 11 & 12 *supra*. Although certain information is discoverable without leave of court under (A)(i), additional discovery under (A)(ii) is available only upon a showing of "good cause." In Herbst v. International Tele. and Tele. Corp., 65 F.R.D. 528, 530-31 (D. Conn. 1975), the court did not discuss good cause. The court ruled that "once the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than [sic] any other witness. . . ." This rationale, as applied to the deposing of an expert in *Herbst*, was held also to reach the production of documents in Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594, 595 (D. Conn. 1978). Both cases have been cited with approval. *See In re* IBM Peripheral EDP Devices Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977). Finally, 26(b)(4)(A) has also seen liberalization with regard to the definition of identity. In Clark v. General Motors Corp., 20 F.R. Serv. 2d 679, 683-84 (D. Mass. 1975), the court ruled that although the trial expert provisions, 26(b)(4)(A)(i), did not say anything about qualifications, such information was assumed to be a part of the expert's identity.

While these rulings are admittedly limited, they must be seen in proper perspective. If a court does not follow the *Pearl Brewing* rationale and instead stays within 26(b)(4)(B), it cannot divulge a non-trial expert's findings. However, by giving the expert's name, identifying information, and qualifications, the court may reveal a great deal about the party's case. A plaintiff retaining an engineer, a doctor, or an anesthesiologist in a medical malpractice case gives some indication of how he plans to focus his case. Moreover, knowing which particular doctor, engineer, or anesthesiologist has been retained will prove still more valuable to the defendant. Experts are often associated with certain "schools of thought." Knowing which expert was picked to conduct a study will help one ascertain the kind of information the attorney is looking for. Further, the fact that the attorney has chosen to use one of several experts' reports may indicate what the expert has found or on which of several theories the attorney will proceed.

extension of Rule 26 to meet the free agent situation.[83] The following proposed addition to Rule 26 would allow discovery of the free agent to the maximum extent consistent with the underlying values expressed in the Rule. It would thus allow liberal discovery at the time of hiring to discourage "concealment retentions," yet still permit the retaining party to conceal the future work product of his non-trial free agent:

> 26(b)(4)(C)[84] Where the employer of an expert has settled or otherwise concluded litigation, the former expert who is retained by another party to the litigation shall be discoverable in the following manner:
>
> (i) The retaining party shall inform the court and all other parties to the litigation within two weeks of such retention.
>
> (ii) The court shall then set a date by which time any party seeking discovery shall conduct interrogatories and/or depositions. This date may, in the court's discretion, be extended.
>
> (iii) After such date has passed, future discovery shall proceed under 26(b)(4)(A) or (B), depending on the expert's designation by the subsequent employer as a trial or non-trial expert.

The major benefit obtained under this rule is the proscription of the "concealment retention."[85] Obviously, the freer flow of in-

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[83] If, however, the formulation of Rule 26(b)(4)(B) had placed the burden of showing abuse on the party seeking discovery, *see* note 39 *supra*, a separate rule for free agent discovery would be unnecessary since the "concealment retention" would not pass muster under the unfairness standard of that rule.

[84] Rules 26(b)(4)(A) and (B) would remain unchanged, while the existing Rule 26(b)(4)(C) would be relabeled Rule 26(b)(4)(D).

[85] Courts may achieve results similar to this proposal by ruling that a free agent expert poses an exceptional circumstance *per se*. *Cf.* State v. Leach, 516 P.2d 1383, 1384 (Alas. Sup. Ct. 1973) (unique character of eminent domain procedures in condemnation cases constitute an exceptional circumstance *per se*). This alternative is particularly appropriate in those jurisdictions which allow the jury to consider the proportionate liability of an already settled joint tortfeasor in awarding damages against the remaining defendant. For example, in Wisconsin the non-settling defendant is entitled to be credited with the greater of either the amount of the settlement or the percentage of the damages found by the jury which are attributed to the settling party because of his percentage of negligence. *See* Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963). The result of such a rule is that the claimant steps into the shoes of the settling defendant. He attempts to attribute the causal negligence to the non-settling defendants while the defendants attempt to convince the jury that most of the causal negligence should be attributed to the settling defendant. Where the settling defendant's experts have been retained by a non-settling defendant the alignment of interests is askew. The experts who have built the case that the plaintiff is propounding are in the employment of the other side. If the retained free agents were discoverable as an exceptional circumstance *per se* the incongruity of the situation would be greatly reduced.

A court may also allow discovery of the work product produced by the free agent for the first employer by ruling that it was not produced by the resisting party in "anticipation of litigation" as required by 26(b)(4)(B). *See* note 74 *supra*.

formation should, in theory at least, achieve the following goals: (1) assist in discovering truth and preventing perjury; (2) cut down on the number of false, fraudulent, and sham claims and defenses; (3) provide a simple, convenient, and inexpensive way of obtaining facts otherwise obtainable only with great difficulty or not at all; (4) educate the parties as to the merits of their claims and defenses, thus encouraging settlements out of court; and (5) narrow and simplify the issues at trial. Thus, with the proposed change there will be a higher correlation between settlement and validity of claim.

One detrimental side effect of this rule may be a limiting of the parties' options in negotiating a settlement. It is generally thought that the greater the range of issues parties are free to negotiate, the better the opportunity for a satisfactory settlement. Since under this amendment a party defending against a multi-party suit would no longer be able to take advantage of the "concealment retention," it may be argued that his incentive to settle would be decreased.

IV. CONCLUSION

The present Rule 26(b)(4)(B) does not distinguish between discovery of the free agent expert and the regularly retained expert. When one considers the small percentage of cases which are not settled, the percentage of these in which discovery is not formally or informally granted, and the rarity with which these cases receive appellate treatment, it is understandable that this issue has not yet received recognition by either the courts or the commentators. Nevertheless, the discouragement rationale, which mandates the trial/non-trial expert discovery distinction for regularly retained experts, suggests a more liberal rule when applied to the free agent. The liberalization of this rule must both discourage the "concealment retention" and protect the "discouragement foundation" of Rule 26. The proposed Rule 26(b)(4)(C) meets both objectives by allowing liberal discovery of the free agent at the time of hiring to discourage "concealment retentions" yet still permits the retaining party to conceal the future work product of his non-trial free agent.

— *Andrew J. Miller*