

# Washington University Law Review

---

Volume 66 | Issue 4

---

January 1988

## Treating Experts Like Ordinary Witnesses: Recent Trends in Discovery of Testifying Experts Under Federal Rule of Civil Procedure 26(b)(4)

Steven K. Sims  
*Washington University School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Civil Procedure Commons](#), and the [Evidence Commons](#)

---

### Recommended Citation

Steven K. Sims, *Treating Experts Like Ordinary Witnesses: Recent Trends in Discovery of Testifying Experts Under Federal Rule of Civil Procedure 26(b)(4)*, 66 WASH. U. L. Q. 787 (1988).  
Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol66/iss4/6](https://openscholarship.wustl.edu/law_lawreview/vol66/iss4/6)

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

**TREATING EXPERTS LIKE ORDINARY WITNESSES:  
RECENT TRENDS IN DISCOVERY OF  
TESTIFYING EXPERTS UNDER  
FEDERAL RULE OF CIVIL  
PROCEDURE 26(b)(4)**

In 1970, the Supreme Court adopted Federal Rule of Civil Procedure 26(b)(4)<sup>1</sup> to govern discovery of an adverse party's expert information. The provisions of Rule 26(b)(4) were a noticeable departure from past judicial restrictions on expert discovery.<sup>2</sup> Scholarly commentary<sup>3</sup> and

---

1. FED. R. CIV. P. 26(b)(4) [hereinafter Rule 26(b)(4)]. The rule 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.

*Id.*

2. See generally C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2029 (1970). “[S]ome courts had objected to the discovery of expert information on the grounds variously that [it] was privileged, or that it was protected as work product, or that it would be unfair if one party could learn through discovery what the other party has paid the expert for.” *Id.* (footnotes omitted).

The drafters rejected most of these court imposed restrictions. More specifically, the drafters rejected outright both the attorney-client and work product privileges. They ameliorated perceived unfairness by providing for qualified reimbursement in subdivision (b)(4)(C), limiting discovery to testifying experts in subdivision (b)(4)(A), and implying in the committee's notes a possible timing restriction on discovery of testifying experts. See FED. R. CIV. P. 26(b)(4) advisory committee's note.

The doctrine of unfairness “reflect[s] the fear that one side will benefit unduly from the other's better preparation.” FED. R. CIV. P. 26(b)(4) advisory committee's note. See also Schuyler v.

Judge Thomsen's opinion in *Knighton v. Villian & Fassio Co.*<sup>4</sup> provided the impetus for enactment of Rule 26(b)(4). The centerpiece for expert discovery under the rule is subdivision (b)(4)(A), which provides potentially unlimited discovery of *testifying experts*.<sup>5</sup>

## OVERVIEW

Subdivision (b)(4)(A)'s primary purpose is to facilitate effective cross-examination and rebuttal of expert testimony.<sup>6</sup> For this reason, each party may discover through interrogatories the expert's identity, the substantive facts and opinions about which each expert is expected to testify, and a summary of the grounds for each opinion.<sup>7</sup> Further discovery, through depositions and motions to compel production, and the scope or

---

United Air Lines, 10 F.R.D. 111, 113 (M.D. Pa. 1950) (discovery of expert's report would "penalize the diligent and place a premium on laziness"); 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, 191 [hereinafter Graham, *Part Two*] ("The concept of 'unfairness' focuses on the risk of rewarding a lazy examining counsel whose case is aided as a result of the discovery of his adversary's expert.")

3. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 39 WASH. L. REV. 665 (1964). The Advisory Committee's note cites both articles approvingly.

4. 39 F.R.D. 11 (D.Md.1965).

5. Testifying experts are those experts an opponent expects to call at trial. FED. R. CIV. P. 26 (b)(4)(A)(i). Nontestifying experts, retained by the discoverer but not expected to be called, are exempt from discovery under subdivision (b)(4)(B), absent a showing of exceptional circumstances.

6. FED. R. CIV. P. 26 (b)(4) advisory committee's note. The drafters provide a succinct statement of the adverse effects early judicial restrictions had on the trial process:

In cases [where expert testimony is pivotal], a prohibition against discovery . . . produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

*Id.* (citations omitted). See also *Hewlett-Packard Co. v. Bausch & Lomb, Inc.* 116 F.R.D. 533, 536-37 (N.D. Cal. 1987); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 553 F. Supp. 45, 52 (S.D.N.Y. 1982); 4 J. MOORE, J. LUCAS & G. GROTH, *MOORE'S FEDERAL PRACTICE* ¶ 26.66[3] (3rd. ed. 1987).

7. FED. R. CIV. P. 26(b)(4)(A)(i). The interrogatories provided in step one of subdivision (b)(4)(A) are "essentially . . . designed to afford the questioner notice of the basic arguments the responding litigant intends to press at trial." *Hockley v. Zent, Inc.*, 89 F.R.D. 26, 30 (M.D. Pa. 1980). Failure of the discoverer to respond may lead to exclusion of expert testimony at trial. *Id. Accord Rosemount, Inc. v. Beckman Instruments, Inc.*, 727 F.2d 1540, 1549-50 (Fed. Cir. 1984) (testimony on test results in a patent dispute properly excluded when proponent failed to disclose the identity of his testifying expert in response to opponent's interrogatories).

conditions of such discovery is subject to the court's discretion.<sup>8</sup>

The meager "substance and summary" provided under subdivision (b)(4)(A)(i) is often insufficient for effective cross-examination and rebuttal.<sup>9</sup> One scholar argues that, given this insufficiency, the way a court exercises its discretion under subdivision (b)(4)(A)(ii) "will effectively control the ability of counsel to prepare . . ." <sup>10</sup> Not surprisingly, commentators have routinely criticized subdivision (b)(4)(A)(ii) for leaving the courts without any substantive standards to evaluate motions for further discovery.<sup>11</sup> In practice, the discretionary clause seems responsible for an early line of cases perpetuating the work product doctrine in expert discovery.<sup>12</sup> However, this restrictive response to Rule 26(b)(4) met with swift disapproval.<sup>13</sup>

---

8. The rules allow further discovery only upon motion of the discoverer and an affirmative court order. FED. R. CIV. P. 26(b)(4)(A)(ii). Additionally, under subdivision (b)(4)(C)(ii) the court may require the discoverer to pay a fair portion of the fees and expenses reasonably incurred by his adversary in obtaining facts and opinions from the expert. Subdivision (b)(4)(C)(i), on the other hand, mandates that the discovering party pay the expert a reasonable fee for time spent responding to further discovery. These provisions meet the argument that it is unfair to require the testifying expert to disgorge to the discoverer information paid for by the adversary. FED. R. CIV. P. 26(b)(4) advisory committee's note.

9. 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, 903-08 [hereinafter Graham, *Part One*].

10. *Id.*

11. WRIGHT & MILLER, *supra* note 2, § 2031 (Supp. 1987). See also Connors, *A New Look at an Old Concern - Protecting Expert Information from Discovery Under the Federal Rules*, 18 DUQ. L. REV. 271, 272 (1980) ("In this area of the law very much . . . [is] left to the whim, sometimes called 'discretion,' of each particular judge.").

One explanation offered for the Advisory Committee's failure to articulate a baseline standard or specific scope restrictions in expert discovery was an alleged East-West rift on the Committee. Graham, *Part One, supra* note 9, at 921-22. According to Graham, the Westerners practiced and advocated full-blown discovery of experts. The Easterners adhered to the various theories of expert information privilege or the unfairness doctrine. The Committee compromised and left the matter to the courts. *Id.*

12. See, e.g., *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, 205 (M.D. Miss. 1972) (motion to compel production of engineering reports, prepared by experts in anticipation of litigation and in response to counsel's queries, must fail because documents are work product and proponent failed to show undue hardship in obtaining same information elsewhere); *Wilson v. Resnick*, 51 F.R.D. 510, 511-12 (E.D. Pa. 1970) (plaintiff's motion to compel production of report prepared by defendant's medical expert denied, absent a showing of substantial need).

13. In essence, courts had attempted to superimpose FED. R. CIV. P. 26(b)(3) (codification of the work product doctrine) [hereinafter Rule 26(b)(3)] onto Rule 26(b)(4), thereby shielding expert information from the discoverer, a practice explicitly rejected by the Advisory Committee. See Graham, *Part One, supra* note 9, at 926 (labelling this analysis "clearly erroneous"). Federal courts later agreed. See, e.g., *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983) ("The weight of authority is . . . that the work product rule does not apply to experts . . . expected to testify."); *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*,

Recently, courts have utilized the flexibility of subdivision (b)(4)(A)(ii) to vastly expand discovery of an adverse party's expert information. This Note will focus on these recent trends of expanded discovery and the convergent issue of discovery limitations.<sup>14</sup> Part I deals with motions to compel production of drafts and preliminary reports prepared by testifying experts. Part II considers motions to compel production of *foundation materials*.<sup>15</sup> Part III shifts the focus to expert depositions. Finally, Part IV examines the propriety of imposing limitations on the process.

## I. PRODUCTION OF DRAFTS AND PRELIMINARY REPORTS

Production of an expert trial witness' final report is routine in most jurisdictions.<sup>16</sup> However, disclosure of the final report alone may fail to satisfy subdivision (b)(4)(A)'s goal of effective cross-examination.<sup>17</sup>

The district court's opinion in *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.*<sup>18</sup> reflects this concern. In *Quadrini*, the court order production of all drafts or preliminary reports prepared by Sikorsky's expert in anticipation of Quadrini's tort action.<sup>19</sup> The court stated that "[d]iscovery of [preliminary] reports . . . can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions ex-

74 F.R.D. 594, 595 n.1 (D. Conn. 1977) (Rule 26(b)(4) governs discovery from experts, not 26(b)(3)); *Herbst v. International Tel. & Tel. Corp.*, 65 F.R.D. 528, 530-31 (D. Conn. 1975) ("Once the traditional problem of [unfairness] has been solved, there is no reason to treat an expert differently than any other witness").

14. Heeding the advice of Wright and Miller that "pre-1970 cases must be resorted to with discrimination and care," this Note will review only post-1970 case law. WRIGHT & MILLER, *supra* note 2, § 2023 (1970).

15. Foundation materials are materials that the expert relied on in preparation for his testimony at trial. See *supra* text accompanying note 39.

16. See, e.g., *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 537 (N.D. Cal. 1987); *Beverage Marketing*, 563 F. Supp. at 1013; *American Steel Products v. Penn Central Corp.*, 110 F.R.D. 151, 153 (S.D. N.Y. 1986). Compare *Baise v. Alewel's Inc.*, 99 F.R.D. 95, 98 (W.D. Mo. 1983) (conditioning production of report on minimal showing of need and satisfaction of reciprocal obligation of discoverer to produce his own report).

In addition to case law, at least six districts have local rules providing for production of expert reports. *Graham, Part One, supra* note 9, at 931 n.136.

17. [T]he final expert report may vary substantially from the expert's draft report often because of direct input from the attorney. The result of the drafting process is to make the final report reflect more closely what the attorney would like the expert to testify to at trial. The drafting process also tends to make the final report more conclusory than the draft report.

*Graham, Part Two, supra* note 2, at 188 (footnote omitted).

18. 74 F.R.D. 594 (D. Conn. 1977).

19. *Id.* at 594.

pressed at an earlier date.”<sup>20</sup> Two subsequent cases fleshed out the exact contours of the *Quadrini* holding.

The first, *In re IBM Peripheral EDP Devices Antitrust Litig.*,<sup>21</sup> involved IBM's motion to compel production of expert documents that IBM claimed were necessary for effective cross-examination.<sup>22</sup> Though cognizant of the *Quadrini* concerns, the court refused to allow IBM to engage in a fishing expedition for every document the experts had ever written.<sup>23</sup> The court deemed the motion to compel overboard and suggested that IBM's intentions were to gain impeachment evidence or facts favorable to its own case.<sup>24</sup> The court found these purposes impermissible under Rule 26(b)(4).<sup>25</sup>

The most recent pronouncement on draft documents came in *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*<sup>26</sup> In 1984, Bausch & Lomb filed a petition for reexamination in the Patent and Trademark Office (PTO), challenging a Hewlett-Packard (H-P) patent.<sup>27</sup> One month later, Bausch & Lomb filed suit against H-P in district court, making the same claim. The central issue in both proceedings was the “state of the art” at the time H-P filed with the PTO.<sup>28</sup> H-P retained an expert, Holmes, to act as consultant throughout both proceedings. Holmes submitted a declaration to the PTO that defended H-P's patent.<sup>29</sup> Bausch & Lomb's arguments at the PTO reexamination hearing were unsuccessful.<sup>30</sup> Thus H-P planned to call Holmes as an expert witness at trial, hoping his analysis of the “state of the art” would again prevail.<sup>31</sup> Pursuant to subdivision

---

20. *Id.* at 595. A number of courts have cited *Quadrini* approvingly. See, e.g., *American Steel Prods. Corp. v. Penn Central Corp.*, 110 F.R.D. 151, 153 n.4 (S.D.N.Y. 1986); *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1015 (S.D.N.Y. 1983); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 41 (N.D. Cal. 1977). But see *Feller v. Board of Educ., State of Conn.*, 583 F. Supp. 1526, 1529-30 (D. Conn. 1984) (motion to compel production of draft report denied because “the need for such extraordinary discovery [had not] been suggested on the record”).

21. 77 F.R.D. 39 (N.D. Cal. 1977).

22. *Id.* at 41.

23. *Id.* at 41-42.

24. *Id.*

25. *Id.* But cf. *Boring v. Keller*, 97 F.R.D. 404, 408 (D. Colo. 1983) (facilitation of impeachment permissible end of motion to compel production of foundation materials).

26. 116 F.R.D. 533 (N.D. Cal. 1987).

27. *Id.* at 534-35.

28. *Id.* at 535.

29. *Id.* at 534-35.

30. *Id.* at 535.

31. *Id.*

(b)(4)(A)(ii), Bausch & Lomb filed a motion to compel production of Holmes' draft declaration.<sup>32</sup>

Despite the fact that Holmes prepared the draft for the reexamination proceeding, not trial,<sup>33</sup> the court granted Bausch & Lomb's motion to compel production.<sup>34</sup> The court reasoned that holding the draft immune from discovery would exalt form over substance given the contemporaneity of the two proceedings, identity of issues, and H-P's use of duplicative expert opinion.<sup>35</sup>

Recognizing that resolution of the issue under Rule 26(b)(4) was questionable, the court also considered H-P's work product claim.<sup>36</sup> The court rejected application of Rule 26(b)(3) in this context, stating that the work product doctrine protects the lawyer's work, not the retained expert's work.<sup>37</sup> Additionally, the court believed draft discovery would encourage experts to formulate their own opinions, thereby enhancing

---

32. *Id.*

33. Rule 26(b)(4) limits discovery to expert information acquired or developed in anticipation of litigation or for trial. H-P's counsel argued that the draft declaration was work product, prepared in anticipation of litigation. See FED. R. CIV. P. 26(b)(3). By arguing the expert did not prepare the document solely for purposes of the PTO reexamination but "with an eye toward litigation," counsel gave added support to the court's conclusion that the Holmes draft was a proper subject of discovery under Rule 26(b)(4). *Hewlett-Packard*, 116 F.R.D. at 538. Conversely, if counsel had failed to argue that the expert prepared the document in anticipation of litigation, it would be freely discoverable under FED. R. CIV. P. 26(b)(1) (the general relevancy standard for discovery of unprivileged matter) because Holmes would be considered an actor or viewer, not an expert, and treated for discovery purposes as an ordinary witness. FED. R. CIV. P. 26(b)(4) advisory committee's note. *Accord* Lee v. Knutson, 112 F.R.D. 105, 108 (N.D. Miss. 1986); *Nelco Corp. v. Slate Elec. Inc.*, 80 F.R.D. 411, 414 (E.D.N.Y. 1978).

34. 116 F.R.D. at 548.

35. *Id.* at 537. The court also deemed disclosure of the draft declaration necessary for effective cross-examination of Holmes at trial. *Id.* at 536-37.

36. *Id.* at 538.

37. *Id.* at 539. The court did not consider and defense counsel did not raise the argument that H-P initially retained Holmes as an engineering consultant for the PTO dispute and only later did Holmes take on the role of expert trial witness. See *supra* note 33. In fact, the court referred to Holmes as an "expert consultant" in one part of the opinion. 116 F.R.D. at 535. Therefore, though H-P's counsel acted "with an eye toward litigation," discovery of the draft declaration would require a showing of substantial need and undue hardship. FED. R. CIV. P. 26 (b)(3). See also *Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983) (stating in dicta: "It is conceivable that an expert could be retained to testify and in addition to advise counsel outside of the subject of his testimony. Under such a circumstance it might be possible to claim a work product privilege if this delineation were clearly made."). In *Hewlett-Packard*, counsel initially retained Holmes for advice outside the litigation setting. It requires no stretch of the imagination to suppose H-P would not have called Holmes to testify at trial had the PTO reexamination favored Bausch & Lomb. Therefore, the argument that he served two roles seems plausible.

the truth-finding process.<sup>38</sup>

Taken together, these cases indicate several courts' willingness to compel production of draft documents prepared by a testifying expert en route to formulating an opinion. *In re IBM Peripheral EDP Devices Anti-trust Litig.* appears to set the outer boundary for these requests at the time the adversary retains an expert in anticipation of litigation. On the other hand, *Hewlett-Packard* represents one court's willingness to allow discovery beyond this boundary.

## II. PRODUCTION OF FOUNDATION MATERIALS

Courts have not limited motions to compel production under subdivision (b)(4)(A)(ii) to documents drafted by testifying experts. Recently, the federal courts have also expanded the discovery of foundation materials,<sup>39</sup> that is, materials relied on by experts in forming opinions.<sup>40</sup> Moreover, efforts to shield this information from opposing counsel may meet with exclusionary rulings at trial.<sup>41</sup> For this reason, the contours of foundation discovery have become increasingly significant to the practitioner.

For example, in *Fauteck v. Montgomery Ward & Co.*,<sup>42</sup> the district court approved the discovery of materials that a testifying expert expects to rely on. In *Fauteck*, an employment discrimination class action, the plaintiffs filed a motion to compel production of Ward's personnel

---

38. 116 F.R.D. at 539-40. Implicit in this rationale is the concern that attorneys shape expert opinion greatly in the latter stages of report-drafting. See *supra* note 17. By requiring disclosure of draft documents, opposing counsel and the fact-finder can assess the degree of attorney influence and the objectivity of the expert's opinion. The court opined: "[We are] not interested in furthering the corruption of the truth finding process by announcing doctrine that has the effect of approving and reinforcing the practice of lawyers formulating and writing opinions that are presented to the outside world as the independent opinions of 'technical experts.'" 116 F.R.D. at 539.

39. See *supra* note 15.

40. See, e.g., *American Steel Prods. Corp. v. Penn Central Corp.*, 110 F.R.D. 151, 153 (S.D.N.Y. 1986) ("The document request . . . essentially seeks production of all documents relied upon by the expert in forming his opinions and any preliminary and final reports that have already been prepared respecting the subject matter of this action."); Cf. *Hubbard v. Rubbermaid, Inc.*, No. B-76-261 (D. Md. Oct. 17, 1979) (WESTLAW, DCTU database) (notice of deposition included direction to expert to bring "any and all documentary evidence, treatises, statistical compilations, studies, analyses, or any other documents or statistics upon which the deponent has relied or expects to rely . . . in reaching an expert opinion . . .").

41. See, e.g., *Corby v. Schneider Tank Lines, Inc.*, 741 F.2d 1015, 1019 (7th Cir. 1984) (Defendant's practice of withholding witness statement from expert until after the plaintiff's deposition of expert "fundamentally unfair"; ordered that Defendant's expert not refer to the statement nor include details of statement in his opinion testimony.).

42. 91 F.R.D. 393 (N.D. Ill. 1980).



records.<sup>43</sup> The court granted the plaintiffs' motion even though Ward had not yet encoded the information or provided a database to its expert.<sup>44</sup> The court rejected Ward's argument that disclosure was premature and unfair and emphasized that discovery would materially advance the litigation and facilitate effective cross-examination of the defense expert.<sup>45</sup>

In *Heitmann v. Concrete Pipe Machinery*,<sup>46</sup> a Missouri district court resolved a potential conflict between subdivisions (b)(4)(A)(ii) and (b)(4)(B). The plaintiff in *Heitmann* sought production of a report prepared by Concrete Pipe's nontestifying expert<sup>47</sup> and relied upon by the company's testifying expert.<sup>48</sup> Concrete Pipe argued that the court should grant the plaintiff's motion only on a subdivision (b)(4)(B) showing of exceptional circumstances because the company had no intention of calling the report writer at trial.<sup>49</sup> The court held the company lost the subdivision (b)(4)(B) protection when it voluntarily transmitted the report to its testifying expert, who then relied on the report.<sup>50</sup>

*Eliassen v. Hamilton*<sup>51</sup> extended the *Heitmann* rationale. In *Eliassen*, the court affirmed a magistrate's order that compelled production of a nontestifying expert's report reviewed but rejected by the plaintiff's trial expert.<sup>52</sup> The court stated: "Rule 26(b)(4)(A)(ii) should not be limited to documents relied upon by the testifying expert in reaching opinions. Documents considered but rejected . . . [may] in fact . . . be even more important for cross-examination than those actually relied upon . . ."<sup>53</sup>

The rationale of *Eliassen*, if followed in other districts, would force counsel to screen all data transmitted to a testifying expert, whether used as foundation material or not. Similar concerns arose from a recent line

---

43. *Id.* at 398.

44. *Id.* at 398-99.

45. *Id.* at 398. To prevent abuse of the discovery process, however, the court imposed a reciprocal disclosure obligation on the plaintiffs and required them to pay 50% of the compilation costs incurred by Ward. *Id.* at 399.

46. 98 F.R.D. 740 (E.D. Mo. 1983).

47. Nontestifying experts are experts retained by the discoveree but who are not expected to testify at trial. *See supra* note 5.

48. 98 F.R.D. at 741.

49. *Id.* Subdivision (b)(4)(B) prohibits discovery of nontestifying experts absent a showing of exceptional circumstances.

50. *Id.* at 743. The court also cited the plaintiff's need for the report to enhance effective cross-examination of Concrete Pipe's testifying expert. *Id.*

51. 111 F.R.D. 396 (N.D. Ill. 1986).

52. *Id.* at 397 nn.1-2, 399-400 n.5.

53. *Id.* at 400 n.5 (citations omitted).

of cases that addressed the issue of discoverability of attorney work product provided to trial experts.<sup>54</sup>

In the seminal case of *Boring v. Keller*,<sup>55</sup> the plaintiff's attorney learned that a defense expert had reviewed an unedited deposition summary prepared by defense counsel.<sup>56</sup> The plaintiff filed a motion to compel production of the document.<sup>57</sup> The court held the work product immunity waived when the testifying expert utilized counsel's summary as foundation material, even though the court recognized that a deposition summary is opinion work product.<sup>58</sup>

In effect, *Boring* turned Rule 26(b)(4) on its head. The Advisory Committee intended Rule 26(b)(4) to remove work product protection from expert discovery.<sup>59</sup> Ironically, the *Boring* court used subdivision (b)(4)(A)(ii) to allow discovery of core work product. However, other courts were quick to repudiate *Boring's* free-wheeling approach to foundation discovery.<sup>60</sup>

The strongest rebuff came from the Third Circuit in *Bogosian v. Gulf Oil Corp.*<sup>61</sup> In *Bogosian*, class representatives petitioned for a writ of mandamus directing the district court to vacate its order compelling production of opinion work product shown to class experts.<sup>62</sup> Consistent

---

54. See generally Note, *Interaction Between 26(b)(3) and 26(b)(4) of the Federal Rules of Civil Procedure: Conflict and Confusion in the Federal Courts*, 9 AM. J. TRIAL ADVOC. 319 (Fall 1985).

55. 97 F.R.D. 404 (D. Colo. 1983).

56. *Id.* at 404.

57. *Id.* at 405.

58. *Id.* at 407. The mental impressions of an attorney are normally absolutely privileged. FED. R. CIV. P. 26 (b)(3). The court, however, believed plaintiff's counsel needed the material to impeach the expert witness. 97 F.R.D. at 408. The *Boring* court gained additional support from an earlier case, which stated in dicta: "there will be hereafter powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).

59. See *supra* note 2.

60. See, e.g., *Guadalupi v. St. Therese Hosp.*, No 82-C-2083 (N.D. Ill. Nov. 21, 1985) (WESTLAW, DCTU database) ("[I]n order to obtain [work product] . . . [Defendant] must meet Rule 26(b)(3)'s substantial need and undue hardship requirements, and, even if [defendant] meets such requirements, [he] is not entitled to 'core work product,' that is, attorney's mental impressions, conclusions, opinions and legal theories."); *Baise v. Alewel's, Inc.*, 99 F.R.D. 95, 97 (W.D. Mo. 1983) ("[I]tems . . . not work product gain no special protected status merely because they are sent to an expert, but conversely, attorney work product does not lose its special status merely because it is transmitted to an expert.").

61. 738 F.2d 587 (3rd Cir. 1984).

62. *Id.* at 588. Defendant's motion to compel production of approximately 115 documents, alleged by the plaintiffs to contain counsel's mental impressions and thought processes, met with the district court's approval. *Id.* at 590-91.

with *Boring*, the district court had subordinated Rule 26(b)(3)'s work product protection to Rule 26(b)(4) discovery.<sup>63</sup> The court of appeals disagreed with this construction of Rule 26(b)(3).<sup>64</sup> The court held that the marginal value of disclosure failed to outweigh the strong policy against core work product discovery.<sup>65</sup>

In summary, production of foundation materials has undergone an expansive trend similar to that of draft reports discussed in Part I. Memoranda, data, and other materials, with the possible exception of work product, that an expert actually considered or expected to rely on are freely discoverable.

### III. DEPOSITIONS

Subdivision (b)(4)(A)(ii) is most commonly used to order an adverse testifying expert to appear for a deposition.<sup>66</sup> The likelihood of a court-ordered deposition may hinge on the sufficiency of answers to interrogatories provided under subdivision (b)(4)(A)(i).<sup>67</sup>

The Federal Rules of Civil Procedure leave the scope of deposition questioning, like that of motions to compel production, to the court's discretion.<sup>68</sup> Debate over the appropriate scope of an expert deposition is traceable to *Knighton v. Villian & Fassio Co.*,<sup>69</sup> a case predating the 1970

---

63. *Id.* at 590-91.

64. Specifically, the district court found that the proviso to Rule 26(b)(3) that it is "[s]ubject to the provisions of subdivision (b)(4)" compelled the discovery order. *Id.* at 594. The court of appeals construed the proviso as limiting only the first sentence of the rule (governing ordinary work product) and not the second, which sets up an absolute bar to discovery of core work product. *Id.*

65. *Id.* at 595. The court modified the production order and allowed redaction of the memorandum to protect legal theories and the attorney-expert dialectic. See *infra* notes 127-29 and accompanying text. The court deemed disclosure of the facts sufficient for purposes of cross-examination. The court refused to inquire into counsel's role in assisting the expert's opinion formulation. *Id.* *Contra* *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 539-40 (N.D. Cal. 1987). For a discussion of this court's opposing viewpoint, see *supra* note 38.

66. WRIGHT & MILLER, *supra* note 2, § 2031 (Supp. 1987). Attorneys utilize depositions for various reasons. These include: 1) inquiring about the expert's background, experience and education; 2) assessing the value of a case and prospects for settlement; and 3) learning about the opinions the expert is expected to give at trial. *Id.*

67. See Clough, *Rx for Defense-Aggressive Use of the Amended Federal Rules of Civil Procedure*, 38 INS. COUNS. J. 354, 357 (1971) (court less likely to order an expert deposition when answers to interrogatories contain sufficient detail for purposes of cross-examination). See also *infra* notes 99-102 and accompanying text. On the other hand, studies of actual pretrial practice indicate that the parties often agree informally to mutual expert depositions. See Graham, *Part Two*, *supra* note 2, at 184.

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

69. 39 F.R.D. 11 (D. Md. 1965).

amendments. In *Knighton*, the court rejected the concept that a deposition might serve as a preliminary cross-examination.<sup>70</sup> The court prohibited questioning intended to uncover impeachment material or *auxiliary* facts and opinions.<sup>71</sup>

The status of the *Knighton* limitations is unclear because subdivision (b)(4)(A)(ii) is devoid of any express scope restrictions and the Advisory Committee's note remains silent on the issue.<sup>72</sup> The restrictive analysis appears to be judicially disfavored for impeachment material discovery.<sup>73</sup> On the other hand, early cases and commentary restrictively interpreted subdivision (b)(4)(A)(ii) to prevent discovery of auxiliary facts or opinions during an expert deposition.<sup>74</sup>

One response to unfairness arguments is to limit deposition inquiries to expected testimony.<sup>75</sup> Whether the limitation is appropriate continues to trouble the courts. In *Hubbard v. Rubbermaid, Inc.*,<sup>76</sup> for example, the court considered the defendant's request to depose the plaintiffs' expert and inquire about interviews with class members. The court reaffirmed *Knighton's* prohibition on discovery of auxiliary facts or opinions.<sup>77</sup> However, the court granted the defendant's motion because the expert relied on the interviews to shape his opinion.<sup>78</sup>

In *Weekley v. Transcraft, Inc.*,<sup>79</sup> the Northern District of Indiana espoused a different viewpoint. In *Weekley*, a products liability action, the

70. *Id.* at 13.

71. *Id.* at 13-14. Auxiliary facts are those upon which the testifying expert did not rely. Auxiliary opinions are those which counsel does not expect the expert to relate. *Id.*

72. For a discussion of the drafter's possible intentions, see *infra* notes 88-91 and accompanying text.

73. See, e.g., *Norfin, Inc. v. International Business Mach. Corp.*, 74 F.R.D. 529, 533 (D. Colo. 1977) ("In fact, one of the purposes of [a deposition] is to obtain information for use on cross-examination and for the impeachment of witnesses.") (quoting *United States v. International Business Mach. Corp.*, 66 F.R.D. 215, 218 (S.D.N.Y. 1974)).

74. See *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 14 (N.D. Ill. 1972) (motion for leave to take expert's deposition denied because discoverer sought information beyond expert's expected testimony); *Inspiration Consol. Copper Co. v. Lumberman's Casualty Mut. Co.*, 60 F.R.D. 205, 210 (S.D.N.Y. 1973) (same); *WRIGHT & MILLER*, *supra* note 2, § 2031. Considering the specific language "subject to such restrictions as to scope . . . as the court may deem appropriate" found in subdivision (b)(4)(A)(ii), the authors state: "It is thought the court may wish to restrict the deposition to the opinions that the expert is expected to give on direct examination at trial, and in this way prevent the discovering party from using the deposition to establish his own affirmative case." *Id.*

75. See *supra* note 2.

76. No. B-76-261 (D. Md. Oct. 17, 1979) (WESTLAW, DCTU database).

77. *Id.*

78. *Id.*

79. 113 F.R.D. 683 (N.D. Ind. 1987).

plaintiffs retained a metallurgist to analyze allegedly defective welds and offer his expert opinion.<sup>80</sup> The plaintiffs admitted the defendant's right to depose their expert but requested, as a precondition, an order that the defendant partially reimburse them for expert fees and expenses.<sup>81</sup> The court refused the plaintiffs' request because the defendant sought to learn only the nature of the claim and prepare for effective cross-examination.<sup>82</sup> The court added, however, that should the defendant attempt to use the plaintiffs' expert or test results for its case-in-chief, the defendant must reimburse the plaintiffs.<sup>83</sup> Hence, *Weekley* implicitly disavowed *Knighton's* prohibition of questioning intended to uncover auxiliary facts or opinions.<sup>84</sup>

The recent trend of expanded discovery of experts' draft reports, foundation materials, and in expert depositions inevitably leads to the question of what, if any, limitations courts do or should impose on discovery of trial experts.

#### IV. LIMITATIONS

Policy arguments aside, Rule 26(b)(4) suggests three ways to limit discovery. First, the court may predicate further discovery of testifying experts on a party's willingness to reimburse his opponent.<sup>85</sup> Second, advanced methods of discovery are available only by discoverer's motion and court order.<sup>86</sup> Finally, some scholars believe the discretionary scope provision in subdivision (b)(4)(A)(ii) implicitly incorporates the *Knighton* prohibition against discovery of auxiliary facts and opinions.<sup>87</sup>

At first glance, the Advisory Committee's expressed purpose to enhance cross-examination supports an incorporation theory.<sup>88</sup> Further examination of the Committee's note, however, undermines this

---

80. *Id.* at 683.

81. *Id.* at 684. *See also supra* note 116.

82. *Id.* at 685.

83. *Id.*

84. Moreover, in voluntary expert depositions, which operate without court intervention, a majority of practitioners employ no special questioning restrictions other than the general relevancy standard. *See Day, Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota*, 31 S.D.L. REV. 40, 50 (1985).

85. *See supra* note 8.

86. *See supra* note 1. One court has interpreted the court order requirement as an intentional safeguard against discovery of facts and opinions for purposes other than cross-examination. *In re IBM Peripheral EDP Devices Antitrust Litig.* 77 F.R.D. 39, 41 (N.D. Cal. 1977).

87. *See supra* note 74.

88. *See supra* note 6. Restricting discovery to an expert's expected testimony at trial arguably

interpretation. First, the Committee adopted only *Knighton's* procedural framework, making no mention of its substantive limitations.<sup>89</sup> Second, the Advisory Committee's note suggests that courts should order reimbursement for fees and expenses when the discoverer seeks information favorable to his own case.<sup>90</sup> Finally, the 1966 proposal for Rule 26(b)(4) explicitly incorporated the *Knighton* prohibition; the 1970 amendment omitted this qualifier.<sup>91</sup>

*Herbst v. International Telephone & Telegraph Corp.*,<sup>92</sup> unlike *Knighton*, suggests unlimited expert discovery. The *Herbst* court held that "[o]nce the traditional problem of [unfairness] has been solved, there is no reason to treat an expert differently than any other witness."<sup>93</sup> The court remedied unfairness concerns by requiring the discoverer to shoulder a proportionate share of the adversary's fees and expenses.<sup>94</sup>

Even if reimbursement cures unfairness, the *Herbst* court erroneously treated an expert trial witness as an ordinary witness. Experts accumulate relevant information through intensive education, training, and experience. They are not actors or viewers in the events underlying litigation.<sup>95</sup> They have no obligation to disclose their knowledge. Rather, expert witnesses own a limited commodity—information—and expect a fair return for providing it to the tribunal.

In addition, unlimited discovery would have a negative impact on the truth-finding process. In complex litigation, expert testimony is often

---

serves the goal of effective cross-examination. See *Knighton v. Villian & Fassio Co.*, 39 F.R.D. 11, 13 (D. Md. 1965).

89. FED. R. CIV. P. 26(b)(4) advisory committee's note.

90. *Id.*

91. See Graham, *Part One*, *supra* note 9, at 909. In the context of expert depositions, at least one court has agreed with the argument that the Committee failed to incorporate *Knighton* into Rule 26(b)(4). *Weekley v. Transcraft, Inc.*, 113 F.R.D. 683, 685 (N.D. Ill. 1987). See *supra* notes 79-84 and accompanying text for a discussion of *Weekley*.

92. 65 F.R.D. 528 (D. Conn. 1975).

93. *Id.* at 530-31. Cf. WRIGHT & MILLER, *supra* note 2, § 2029 ("In view of all that can be said for treating expert information like any other information it is surprising that the amendment does not go farther along these line than it does.") (footnote omitted).

94. *Id.* Professor Graham concurs in the proposition that qualified reimbursement adequately addresses notions of unfairness. Graham, *Part Two*, *supra* note 2, at 192. He states: "If any unfairness results . . . straightforward and adequate relief is available pursuant to Rule 26(b)(4)(C)(ii) which requires the examining party to pay a fair share of the fees and expenses the opposing party incurred in securing the expert's testimony." *Id.* (footnote omitted).

95. If an expert does have firsthand knowledge as an actor or viewer in events underlying a legal action, the information is freely discoverable under Rule 26(b)(1) and Rule 26(b)(4) is inapplicable. See *supra* note 33.

outcome determinative.<sup>96</sup> Therefore, the best experts facilitate an effective truth-finding process. Subjecting experts to extensive discovery, however, might discourage their participation in the system.<sup>97</sup> Moreover, expanding expert discovery will perpetuate the already lengthy and expensive pretrial process, a result contrary to the purposes of the Federal Rules.<sup>98</sup>

In order to reach some middle ground between a highly restrictive analysis and unlimited discovery, judges and commentators have suggested various limitations on expert discovery. One approach would allow additional discovery only if discovery already conducted, via interrogatories or otherwise, is insufficient for effective cross-examination.<sup>99</sup> A shortfall of this test is the fact that interrogatories will rarely be sufficient.<sup>100</sup> More importantly, as one scholar noted: “[r]eliance upon a purported examination of sufficiency is merely another verbalization of Rule 26(b)(4)(A)(ii) that similarly fails to provide a predictable standard for decision-making.”<sup>101</sup> In either case, decisions on further discovery are left to the court’s discretion.<sup>102</sup>

---

96. See FED. R. CIV. P. 26(b)(4) advisory committee’s note. Notable examples include patent, condemnation, or food and drug cases. *Id.*

97. See, e.g., *Norfin, Inc. v. International Business Mach. Corp.*, 74 F.R.D. 529, 531-32 (D. Colo. 1977) (disregarding expert’s threat to discontinue participation if required to disclose information in violation of contractual obligations to other clients). Professional experts, who routinely sell their services, might be more willing to undergo multiple depositions and production of all foundation materials and documents prepared contemporaneously with litigation than leading engineers or academicians. Some courts have considered the burden extensive discovery may place on testifying experts. See, e.g., *Mutual Fire, Marine & Inland Ins. Co. v. Jenckes Mach. Co.*, No. 85-0586-S (D. R.I. 1986) (WESTLAW, DCTU database) (“The prophylaxis of the rules fairly balances the discoverer’s need to know with the legitimate protection of the discoveree’s experts, requiring the [discoverer] to learn what it will face in the manner least onerous to the [experts].”)

98. The Federal Rules of Civil Procedure are to be “construed to secure the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1.

99. See, e.g., *Delcastor, Inc. v. Vail Associates*, 108 F.R.D. 405, 410 (D. Colo. 1985) (denied the plaintiff’s motion to depose adversary’s expert when production of the expert’s report sufficiently guaranteed effective cross-examination); *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. 301, 304 (E.D. Pa 1983) (allowed deposition of the plaintiff’s expert because answers to interrogatories were general and conclusory and the written report was not detailed, and both were insufficient to advise the defendant of the factual basis for the plaintiff’s expert opinion).

100. See *supra* text accompanying note 9.

101. *Graham, Part One, supra* note 9, at 929-30. The author explained further that a court inclined toward full-blown discovery will tend to find the answer to interrogatories insufficient, while a court favoring limited discovery will tend to find the answers to interrogatories sufficient. *Id.* at 930.

102. Similarly, allowing each court to impose whatever showing of need it deems wise as a precondition on the movant under Rule 26(b)(4)(A)(ii) is subject to criticism. See, e.g., *Mutual Fire, Marine & Inland Ins. Co.*, No. 85-0586-S (D. R.I. Feb 18, 1986) (WESTLAW, DCTU database)

Professors Friedenthal and Long and Judge Thomsen's opinion in *Knighon* suggested other limitations on expert discovery.<sup>103</sup> As stated previously, the Advisory Committee ostensibly rejected Thomsen's restrictive analysis.<sup>104</sup> However, Thomsen's approach gains some support in the context of depositions.<sup>105</sup> Friedenthal and Long, unlike Thomsen, disfavored a scope restriction. Rather, they advocated the procedural safeguards of timing and mutuality to prevent unfairness.<sup>106</sup>

The complementary concepts of timing and mutuality require reciprocal disclosure of expert information shortly before trial.<sup>107</sup> Time constraints guarantee independent preparation.<sup>108</sup> The Advisory Committee's note hints at a timing restriction to prevent the affirmative use of discovered expert information.<sup>109</sup> However, Professor Graham observes that "[j]udicial decisions granting or denying motions for further discovery generally have ignored the restrictions of mutuality and timing."<sup>110</sup>

Timing has received short shrift by the courts. However, Graham's claim as to mutuality is incorrect. In a long line of cases, the courts have imposed reciprocal disclosure obligations on parties seeking discovery of trial experts. Judicial decisions have required the simultaneous exchange of information through interrogatories,<sup>111</sup> stayed depositions until the

---

(requiring a showing of "good cause" to gain approval of further discovery); *Feller v. Board of Educ., State of Conn.*, 583 F. Supp. 1526, 1529-30 (D. Conn. 1984) (extraordinary circumstances not shown, requiring further discovery).

103. See *supra* notes 3-4 and accompanying text.

104. See *supra* notes 88-91 and accompanying text.

105. See *supra* notes 74-77 and accompanying text.

106. Graham, *Part One*, *supra* note 9, at 904-05.

107. *Id.*

108. *Id.* at 904. The premise is that time restraints will preclude a party from relying on its opponent's expert information by forcing independent investigation and preparation. Moreover, Professor Long feared "that a party granted discovery of an adversary's expert before being required to select his own expert would lead to the expert witness eventually selected more likely taking questionable positions in response to discovered testimony." *Id.* at 905 n.50.

109. FED. R. CIV. P. 26(b)(4) advisory committee's note.

110. Graham, *Part Two*, *supra* note 2, at 192. The timing restriction suggested by Friedenthal and Long may be impracticable given judges and practitioners' concern over delays in discovery. *Id.* If parties were unaware of an opponent's expert information until shortly before trial, the court could face a deluge of last minute motions for further discovery.

111. *United States v. John R. Piquette Corp.*, 52 F.R.D. 370 (E.D. Mich. 1971). In a government condemnation proceeding, the court ordered both parties to proceed with interrogatories pursuant to subdivision (b)(4)(A)(i) and stated in pertinent part:

[T]he mutual and simultaneous exchange of the factual information and opinions of the parties' respective experts, in the manner provided for in the rules (i.e., interrogatories and



movant engages its own expert,<sup>112</sup> and conditioned motions to compel production on mutual disclosure.<sup>113</sup>

Mutuality is an effective device to control perceived unfairness and deter the advocacy of questionable positions at trial.<sup>114</sup> Though some scholars have suggested reimbursement is an adequate prophylaxis,<sup>115</sup> a mutual disclosure requirement offers a distinct advantage. Whereas the deep-pocket will gladly pay a proportionate share of the often substantial fees and expenses incurred by an opponent,<sup>116</sup> the average plaintiff may be unable to justify the cost of exhaustive discovery of an adverse expert. On the other hand, a reciprocal disclosure obligation is equitable because each party, regardless of financial means, must be willing to disclose its own expert information in return for that of its adversary. Moreover, reciprocity has proven an equitable solution in the analogous context of medical report discovery.<sup>117</sup>

---

then further discovery, if necessary), will best facilitate a clarification of the issues and prepare all counsel for orderly and expeditious presentation at trial.

*Id.* at 373.

112. *Rupp v. Vock & Weiderhold, Inc.*, 52 F.R.D. 111, 113 (N.D. Ohio 1971) (subdivision (b)(4)(A)(ii) empowers courts to stay the deposition of an adverse expert until the movant engages its own expert and complies with subdivision (b)(4)(A)(i)); *Kozar v. Chesapeake & Ohio Ry. Co.*, 320 F. Supp. 335, 375 (W.D. Mich. 1970) (denied the defendant's motion to take deposition of adversary's expert trial witness where the defendant declared the intention to forego retention of an expert until after the deposition).

113. *Baise v. Alewel's, Inc.*, 99 F.R.D. 95, 98 (W.D. Mo. 1983); *Fauteck v. Montgomery Ward & Co.*, 91 F.R.D. 393, 399 (N.D. Ill. 1980).

114. *See supra* notes 2, 108. Professor Graham warned that imposition of timing and mutuality requirements would delay discovery until the eve of trial and hamper counsel's preparation process. *Graham, Part Two, supra* note 2, at 191-92. However, these two procedural devices are not interdependent. The traditional notion of timing discovery a short time before trial is unwise. Separate implementation of the mutual disclosure requirement, however, will not delay the discovery/preparation process. To ensure timeliness, the courts could set a reasonable deadline for the accumulation of expert information by both parties. Thereafter, the first party to pursue discovery would trigger the reciprocal disclosure obligation.

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

116. *See, e.g., Weekley v. Transcraft, Inc.*, 113 F.R.D. 683, 685 (N.D. Ind. 1987) (a husband and wife incurred expert fees of \$15,232.75 for testing of defective welds and expenses of \$9,894.35 to purchase the defendant's tractor-trailer so their expert might conduct the tests).

117. *FED. R. CIV. P.* 35(b)(2). Rule 35 allows a court-ordered physical or mental examination, upon motion, of any person whose mental or physical condition is in controversy and provides that the person examined or a party representing the person may discover the resultant report or the examiner, subject to the following condition:

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the party examined waives any privileges he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

Finally, the actual practice of the federal bar, at least during voluntary discovery, differs markedly from the bifurcated subdivision (b)(4)(A) procedures. In the most comprehensive study to date, Professor Graham surveyed judges and practitioners to determine the conduct of expert discovery under the Federal Rules.<sup>118</sup> He concluded discovery of experts actually approaches that of ordinary witnesses and, therefore, the Court should amend Rule 26(b)(4) to comport with actual practice and the drafters' intentions.<sup>119</sup> Additionally, the survey revealed that examining parties rarely discovered information favorable to their case-in-chief and, when they did, the resultant prejudice was insubstantial.<sup>120</sup> From this, Graham suggests that the Advisory Committee's concerns over unfairness were exaggerated.<sup>121</sup>

Graham's survey and conclusions appear flawed in several respects. First, the survey primarily reflects voluntary discovery between the parties.<sup>122</sup> Graham does not attempt to separate undisputed expert discovery from fully litigated discovery. The Federal Rules of Civil Procedure are more than a manual for the practitioner. They must also serve the federal judge faced with a hard case. The court should not amend Rule 26(b)(4) in accordance with routine practice at the expense of future parties with legitimate reasons for resisting unlimited expert discovery.

Second, Graham maintains that amending Rule 26(b)(4) to allow unlimited discovery would satisfy the intentions of the drafters of the Federal Rules of Evidence. However, these drafters clearly indicated that Rule 26(b)(4) provides sufficient discovery of trial experts to carry out effective cross-examination.<sup>123</sup> Thus, the intentions of the Rule 705 Advisory Committee seem contrary to Graham's proposed amendment. Courts should give controlling weight to the Rule 26(b)(4) Advisory Committee until its rationale for restricted discovery is discredited.

Ultimately, Professor Graham's proposal rests on the observation that concerns of unfairness under Rule 26(b)(4) are exaggerated. However,

---

*Id.*

118. Graham, *Part Two*, *supra* note 2.

119. *Id.* at 202. Here, Graham refers to the drafters of the Federal Rules of Evidence, namely Rule 705, which places the burden of uncovering the facts and assumptions underlying expert testimony on the cross-examiner. See Graham, *Part One*, *supra* note 9, 896-97. He notes that adequate pretrial discovery of the trial expert is essential to accomplishment of Rule 705's purpose. *Id.* at 897.

120. Graham, *Part Two*, *supra* note 2, at 191.

121. *Id.* at 192.

122. *Id.* at 184.

123. FED. R. EVID. 705 advisory committee's note.

the survey reveals that affirmative use of an adversary's expert information is not uncommon.<sup>124</sup> Moreover, the author himself refuses to abrogate the unfairness doctrine. Rather, he views reimbursement as sufficient protection against potential discovery abuse.<sup>125</sup>

The recent trends toward equalizing discovery of expert and ordinary witnesses has negative implications, not only for the truth-finding and pretrial processes,<sup>126</sup> but also for the attorney-expert working relationship.<sup>127</sup> Negative effects on the attorney-expert working relationship are most apparent in the context of motions to compel production. In *Hewlett-Packard* and *Fauteck*,<sup>128</sup> for example, the line between legal reasoning and engineering or statistical reasoning, respectively, is highly attenuated. By granting unrestricted discovery, courts undermine future counsel's attempts to translate technical opinions into valid legal arguments. Such discovery forces the attorney to work independently of the trial expert to avoid discovery of mixed work product. Similarly, the *Eliassen* decision, requiring production of any material considered but rejected by the testifying expert,<sup>129</sup> forces counsel to carefully screen all information before dissemination to the expert. Logically, foundation materials rejected by the trial expert would be most helpful to the examining party's case and present the greatest threat of unfairness.

## V. CONCLUSION

Discovery of an adverse party's expert information is essential to effective cross-examination, prevention of surprise, and the narrowing of issues at trial. However, unlimited discovery is unnecessary to achieve these goals. Moreover, unlimited discovery presents opportunities for unfairness and threatens to weaken adversarial effectiveness and the truth-finding process. The drafters likely took these variables into account in adopting a limited form of expert discovery. Imposition of a

---

124. See *Graham, Part Two, supra* note 2, at 191. Furthermore, federal courts remain attentive to concerns of unfairness. See, e.g., *Weekley v. Transcraft, Inc.*, 113 F.R.D. 683, 685 (N.D. Ind. 1987); *Fauteck v. Montgomery Ward & Co.*, 92 F.R.D. 393, 399 (N.D. Ill. 1980).

125. See *Graham, Part Two, supra* note 2, at 192. For a discussion of the weakness of the reimbursement remedy, see *supra* text accompanying notes 115-17.

126. See *supra* notes 96-98 and accompanying text.

127. See *supra* note 65; *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3rd Cir. 1984).

128. *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533 (N.D. Cal. 1987) (discussed *supra* notes 26-38 and accompanying text); *Fauteck v. Montgomery Ward & Co.*, 91 F.R.D. 393 (N.D. Ill. 1980) (discussed *supra* notes 42-45 and accompanying text).

129. *Eliassen v. Hamilton*, 111 F.R.D. 396 (N.D. Ill. 1986) (discussed *supra* notes 51-54 and accompanying text).

mutuality requirement would, however, solidify the bifurcated approach of subdivision (b)(4)(A). Nevertheless, Rule 26(b)(4) is an effective means of balancing the conflicting interests presented by expert discovery and should be retained.

*Steven K. Sims*

