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In 1978 and 1979, reports of the *Berkey Photo, Inc. v. Eastman Kodak Co.*[1] trial were the cause of much discussion and much consternation in law offices around the country. Of particular concern to attorneys involved in large and complex antitrust litigation was and is the question of how to best control relationships between counsel and the various experts necessary in any such complex case in order to minimize the potential for the release of confidential or unnecessarily embarrassing information during discovery or at trial. Without hesitation it can be said that the destruction of documents or the intentional withholding of documents responsive to proper discovery requests is not the answer to the dilemma. But, as the *Berkey* case demonstrates, even the most innocuous of preliminary correspondence with an expert can become a devastating "smoking gun" if the circumstances so conspire.[2]

This article is divided into three sections. The first section presents a general overview of the law with regard to discovery of expert information. The following section attempts to respond to four specific questions dealing with the scope of discovery of information given to or received from experts who are retained in connection with litigation. Finally, the article concludes with some recommendations as to measures that may be taken to legitimately protect as much sensitive information as possible.

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1. 603 F.2d 263 (2d Cir. 1979), *pet. for cert. filed*, 48 U.S.L.W. 3224 (No. 79-499 Oct. 2, 1979).

2. Reference is made specifically to the so-called "interim report" of Kodak's economic expert, Professor Merton J. Peck. This letter contained some clearly preliminary observations and might not have carried much weight were it not for the fact that its existence was disclosed in dramatic fashion during cross-examination of Peck after the jury had been made aware of the fact that other documents reviewed by Peck might have been improperly destroyed by Kodak's counsel. For a full discussion of the Peck incident see *id.* at 305-08.

I. DISCOVERY OF EXPERT INFORMATION—GENERAL CONSIDERATIONS

In a general sense, the one conclusion consistently borne out by the cases dealing with the scope of discovery of expert information is that in this area of the law very much is left to the whim, sometimes called "discretion," of each particular judge. Although there is little of what one might call hard and fast law in this area, there are guidelines set by the Federal Rules of Civil Procedure and by judicial precedent that establish some limits, however vague, on the reach of the individual judge's discretion.

The first restraint, and perhaps the only restraint rigidly adhered to, is the language of Rule 26(b)(4)(A) of the Federal Rules of Civil Procedure and its creation of a two-step process in the discovery of expert information.[3] Under Rule 26(b)(4)(A)(i) the only permissible discovery of expert information without a court order is in the form of answers to interrogatories. In response to appropriate interrogatories, a party must identify the experts expected to testify, state the subject matter on which each expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify, and summarize the grounds for each opinion.[4]

Some federal district courts go beyond this and require the disclosure of reports of expert witnesses as an element of pretrial preparation.[5] For example, the United States District Court for the Western District of Pennsylvania has such a rule with regard to expert witnesses in civil cases involving personal injuries.[6] This local rule requires counsel for plaintiff, defendant, and third-party defendant to serve upon each other a narrative written statement of the evidence to be offered at trial and to attach to that statement a "copy of all

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3. FED. R. CIV. P. 26(b)(4)(A) reads:

(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.

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

5. *See* 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, 931 & n.136 [hereinafter cited as Graham].

6. W.D. PA. R. 5(II)(C)(2)(b), (3)(b) & (4)(b).

reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial." Although this local procedure applies specifically only to personal injury actions, it also is to be followed, "insofar as applicable, in all civil jury cases."[7] Apparently, there is no similar requirement for nonjury actions, although a particular judge might certainly request that such a procedure be followed.

In the absence of such local rules, however, there is no discovery beyond the interrogatories permitted by Rule 26(b)(4)(A)(i) without a court order pursuant to Rule 26(b)(4)(A)(ii). This latter rule allows the court, upon motion, to "order further discovery by other means, subject to such restrictions as to scope . . . as the court may deem appropriate."[8] Judicial interpretations and applications of this rule make it clear that no further discovery will be ordered unless and until the moving party has complied with the first step of the procedure, and has sought information through interrogatories.[9]

There is no consensus of authority, however, on just how liberal (or how limited) a discovery order pursuant to Rule 26(b)(4)(A)(ii) should be. Some courts allow virtually unlimited discovery of expert information, requiring only that the party seeking discovery in the form of depositions or production of documents must agree to compensate the expert or make some arrangement with the opposing party as to splitting the expert's fee. Thus, in *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.*,[10] the court allowed a request for production of "all reports, memoranda, papers, notes, studies, graphs, charts, tabulations, analyses, summaries, data sheets, statistical or informational accumulations, data processing cards or worksheets, and computer generated documents, including drafts or preliminary revisions" of any of those documents that were prepared in connection with the litigation by or under the direction or supervision of any witness expected to be called as an expert witness at the trial.[11] By way of justification for its broad ruling the court noted the highly technical nature of the lawsuit[12] and stated that expert testimony would be crucial to the resolution of the complex and technical factual disputes in the case, and that effective cross-examination would be essential. Discovery of the reports of ex-

7. W.D. PA. R. 5(II)(D).

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

9. *See, e.g.*, United States v. International Business Machs. Corp., 72 F.R.D. 78, 81 (S.D.N.Y. 1976); United States v. John R.-Piquette Corp., 52 F.R.D. 370, 372 (E.D. Mich. 1971).

10. 74 F.R.D. 594 (D. Conn. 1977).

11. *Id.* at 594.

12. The suit involved a helicopter crash. *See id.*

perts, including the reports embodying preliminary conclusions, could also guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions that had been expressed at an earlier date.[13] Similarly, in *Herbst v. International Telephone & Telegraph Corp.*,[14] the court adopted a very liberal view toward the scope of further discovery of expert information by deposition. The court stated: "All but experts may be freely deposed before trial in keeping with the liberal spirit that pervades the federal rules. 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 any other witness."[15]

On the other hand, there are courts that seem much more willing to limit the scope of discovery under Rule 26(b)(4)(A)(ii). In *Breedlove v. Beech Aircraft Corp.*,[16] the court denied a motion to compel production of documents generated by experts in a products liability case. The court said that the production of experts' reports should be governed by Rule 26(b)(3),[17] which requires a showing of substantial need and undue hardship in obtaining the information elsewhere when a party seeks production of "trial preparation" materials. The court specifically noted that the materials being sought had been prepared by experts in direct response to questions propounded by counsel. To encourage the court to deny the motion, counsel for the party resisting discovery provided both the reports and the questions in response to which they were prepared for the court to inspect in camera without prejudice to any claim of privilege that might be asserted later. In its opinion denying the motion, the court quoted the language of Rule 26(b)(4)(A)(i) concerning the permissible scope of interrogatories and then proclaimed:

> The discovery of expert testimony is specifically limited to information of this type, and (4)(A)(i) does not envisage the production of written docu-

13. *Id.* at 595.
14. 65 F.R.D. 528 (D. Conn. 1975).
15. *Id.* at 530-31.
16. 57 F.R.D. 202 (N.D. Miss. 1972).
17. FED. R. CIV. P. 26(b)(3) reads, in pertinent part:

> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

> ments or reports on which expert opinions professedly rely. Plaintiffs have failed to show unique or exceptional circumstances making it equitable to require the production of expert reports at this stage of the controversy, and they have been unable to demonstrate that they cannot elicit the basis and scope of the expert opinions and supporting data of each such opinion by simply following the rule as set forth in (4)(A)(i).[18]

Similarly, in *Wilson v. Resnick*,[19] the court, in a medical malpractice action, denied a motion for production of an expert's report. The court found that the answers to the interrogatories were sufficient. Furthermore, the court stated that production of experts' reports would not be ordered on a mere allegation that answers to interrogatories were insufficient because "these reports are materials prepared in anticipation of litigation," thus requiring a showing of substantial need (the Rule 26(b)(3) standard) before production would be ordered.[20]

In *United States v. 145.31 Acres of Land*,[21] the District Court for the Middle District of Pennsylvania required a showing of "compelling need" to trigger production of experts' reports under Rule 26(b)(4)(A)(ii). In summarizing its concept of the federal rules as they relate to discovery of an expert's report, the court said:

> Under Rule 34 of the Federal Rules of Civil Procedure, production of an expert's report prior to or during trial may be required as a matter of course only if the report is within the scope of Rule 26(b) unless the document is used to refresh the recollection of a witness, which was not done here. Rule 26(b)(4) provides in relevant portion for discovery of "the substance of the facts and opinions to which the expert is expected to testify and a *summary* of the grounds for each opinion." [emphasis supplied] It thus appears that a party is not entitled as a matter of course to an expert's report itself nor to be informed of its location. Although the Court has the power pursuant to Rule 26(b)(4)(A)(ii) to order discovery beyond these limits, *the need for such discovery was not compelling here.*[22]

This reading of Rule 26(b)(3) requirements into a motion for production of an expert's report pursuant to Rule 26(b)(4)(A)(ii) has been sharply criticized by at least one commentator.[23] Others, however, have noted this tendency of some courts to superimpose the requirements of Rule 26(b)(3) on Rule 26(b)(4)(A)(ii) when dealing with expert reports prepared in anticipation of trial and have deemed it a very logical reading of the rules in this area of overlap.[24]

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18. 57 F.R.D. at 204-05.
19. 51 F.R.D. 510 (E.D. Pa. 1970).
20. *Id.* at 511-12.
21. 54 F.R.D. 359 (M.D. Pa. 1972).
22. *Id.* at 360 (emphasis added).
23. *See* Graham, *supra* note 5, at 925-27.
24. *See, e.g.*, Comment, *Discovery of Expert Information Under the Federal Rules*, 10 U. RICH. L. REV. 706, 719-21 (1976) [hereinafter cited as *Discovery of Expert Information*].

The decisions discussed above represent the more extreme views, both liberal and conservative, on the scope of further discovery under Rule 26(b)(4)(A)(ii). They give an idea of the latitude of the discretion vested in the particular judge before whom a motion for further discovery of expert information is made. Given this wide range of discretion, it may be useful to catalogue some of the factors that courts have mentioned as important in their consideration of the scope of Rule 26(b)(4)(A)(ii) discovery.

In *United States v. International Business Machines Corp.*,[25] the court said that documents containing information transmitted by a party to its experts are outside the scope of Rule 26(b)(4)(A) protection. The court in this antitrust action accordingly ruled that "plaintiff is directed to produce documents which were considered by . . . [its economic experts] . . . in arriving at the opinions and conclusions to which they will testify except to the extent that such documents contain information generated by the expert."[26]

In *E. I. DuPont De Nemours & Co. v. Phillips Petroleum Co.*,[27] the court was impressed by the close relationship between counsel and the experts. Although the experts were members of the plaintiff's staff and were, therefore, in-house experts, the court noted that "[t]hese technical experts worked closely with counsel and presumably under direction of counsel. Moreover, there were frequent conferences between counsel and the experts. Reports of their work were sent to counsel marked 'For Information of Counsel.'"[28] Ultimately, the court denied defendant's bid for production of the reports and other materials generated by these experts.[29]

Along a similar line, one commentator discussing the attorney-client privilege as it relates to an accountant retained by counsel has warned that there must be "affirmative action" taken with regard to documents and has suggested "placing them in segregated files as distinguished by indiscriminate mingling with other routine documents without special protection."[30] As noted earlier, in *Breedlove v. Beech Aircraft Corp.*,[31] the court denied a motion for production of documents generated by experts. In so doing, the court emphasized that the

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25. 72 F.R.D. 78 (S.D.N.Y. 1976).

26. *Id.* at 82.

27. 23 F.R.D. 237 (D. Del. 1959).

28. *Id.* at 239.

29. *Id.*

30. Levy, *Limitation Under Federal Law on Confidentiality Involving Accountants, Accountants-Attorneys, and Accountants Retained by Attorneys*, 82 COM. L.J. 5, 8 (1977) [hereinafter cited as Levy].

31. 57 F.R.D. 202 (N.D. Miss. 1972).

reports of the experts were prepared in direct response to questions propounded by counsel.[32]

On the other hand, courts that have allowed very liberal discovery have pointed to factors such as the highly complex and technical nature of the facts[33] and the "liberal spirit" of the federal rules.[34] A review of the cases suggests the following arguments that could be made in opposition to motions for further discovery under Rule 26(b)(4)(A)(ii).

1. The answers to interrogatories pursuant to Rule 26(b)(4)(A)(i) are sufficient and thus further discovery is unnecessary.[35]

2. Reports and other materials generated by experts are trial preparation materials, discoverable only upon a showing of substantial need for the materials and inability to obtain the substantial equivalent by other means without undue hardship.[36]

3. Production of reports and other materials would be unfair in light of the expense and effort required in generating these materials.[37]

This list is, of course, not intended to be complete. There are indications in the cases reviewed of other arguments, including attempts to shield expert information under the attorney work product doctrine or the attorney-client privilege.[38] Some of these arguments, however, have lost much of their vitality due to the specific repudiation of privilege or work-product protection in the Advisory Committee Notes to the 1970 revision of the rules.[39]

II. SCOPE OF DISCOVERY OF EXPERT WITNESS

A. *Discovery of Information in Areas Beyond the Scope of the Expert's Anticipated Testimony*

As currently written, Rule 26(b)(4) does not deal with the problem of the expert who has prepared himself on multiple areas of a case but

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32. *Id.* at 205.

33. *See, e.g.*, Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594, 595 (D. Conn. 1977).

34. Herbst v. International Tel. & Tel. Corp., 65 F.R.D. 528, 530 (D. Conn. 1975).

35. Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972); United States v. 145.31 Acres of Land, 54 F.R.D. 359 (M.D. Pa. 1972); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970).

36. FED. R. CIV. P. 26(b)(3). *See* Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970). *See also Discovery of Expert Information, supra* note 24, at 719-21.

37. FED. R. CIV. P. 26(b)(4)(A)(ii), 26(b)(4)(C). *But see* Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594 (D. Conn. 1977); Herbst v. International Tel. & Tel. Corp., 65 F.R.D. 528 (D. Conn. 1975).

38. *See, e.g.*, Breedlove v. Beech Aircraft Corp., 57 F.R.D. at 205.

39. *See* Advisory Committee Notes, 48 F.R.D. 487, 504-05 (1970).

will only testify as to one area. Literally speaking, the rule only distinguishes between experts expected to testify at trial and experts not expected to testify at trial. Therefore, if interpreted strictly, an expert who will testify on any subject at trial could be subject to the more pervasive discovery permitted under Rule 26(b)(4)(A) as to all work that he has done related to the case. On the other hand, the expert who will not testify at all at trial is subject to discovery only under Rule 26(b)(4)(B) which requires "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."[40]

It is interesting that as originally proposed Rule 26(b)(4) would have spoken specifically to this issue. A preliminary draft of the 1970 amendments allowed free discovery by any means of an adverse party's expert but included the provision that "[d]iscovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial."[41] As finally adopted, there is free discovery of trial experts only through interrogatories and further discovery by other means is only available upon court order, subject to whatever restrictions the court may impose. Noting the lack of guidance given to the court by the rule, one commentator states that although the Advisory Committee Note is silent as to the reason for that provision, "apparently it is thought that 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."[42]

The leading case on this subject agreed with that analysis. In *Bailey v. Meister Brau, Inc.*,[43] the plaintiff had retained an economic expert, Professor James Lorie, to examine two issues—(1) the value of Meister Brau stock involved in the case, and (2) the value of Black Company. Lorie's testimony at trial was to be limited to the value of the Meister Brau stock. The defendant moved for leave to depose Lorie on the question of the value of Black Company and the court found itself confronting the issue of whether Lorie should be treated as a "trial expert" or a "nontrial expert" for the purposes of the discovery motion. In discussing the issue the court first noted that neither Rule 26(b)(4)

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

41. Preliminary Draft of Proposed Amendments to Rules Relating to Deposition and Discovery, November 1967, *reprinted in* 43 F.R.D. 211, 225-26 (1967).

42. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2031 & n.78 (1970). For a discussion of changes between the proposed draft and the final version, see Graham, *supra* note 5, at 915-16.

43. 57 F.R.D. 11 (N.D. Ill. 1972).

nor the Advisory Committee Note to the 1970 amendments addressed the issue of whether a party is entitled to discovery of the opposing party's expert about matters other than those which the expert is expected to testify at trial.[44] The court then went on to adopt the view that where the expert is not expected to testify as to matters upon which the opposing party seeks to depose him, the purpose behind the greater discovery permitted by Rule 26(b)(4)(A) would not be served.[45] After determining that the defendant had failed to meet the 26(b)(4)(B) burden of showing exceptional circumstances, the court accordingly denied the motion to depose Lorie about the value of Black Company.[46]

In 1973, the District Court for the Southern District of New York considered a very closely related matter and came to the same conclusion. In *Inspiration Consolidated Copper Co. v. Lumbermens Mutual Casualty Co.*,[47] the court was dealing with a motion for production of documents generated by plaintiff's expert accounting firm. The firm, Price Waterhouse, actually occupied several different roles with respect to the plaintiff. First of all, the firm was plaintiff's regular auditor for many years. Secondly, it was specially employed to assist in preparing a claim for damages in anticipation of litigation against Lumbermens. In this latter capacity, Price Waterhouse prepared a report in 1968 based on Inspiration's records and a report in 1970 based on metallurgical data supplied by Lumbermens' accountants. Both reports dealt with the same subject matter, *i.e.*, Inspiration's loss of profits resulting from an excavator collapse in 1960. The court, however, noted specifically that the 1970 report was written without reference to the 1968 file, was based on different data, and was thus not "derived" from the 1968 matter.[48]

At trial, Price Waterhouse was expected to testify as an expert only in regard to the 1970 report. Defendant, however, moved the court to compel production of documents relating to both the 1968 report and the 1970 report. The court noted that "the Advisory Committee's Notes on Rule 26(b)(4) are not helpful on the interpretation to be given to an expert who wears two hats."[49] It also noted that it was considering a slightly different question than the one presented in *Bailey v. Meister Brau, Inc.*, because the subject matter of both reports was the same—loss of profits.[50] The court, left then to its own resources, relied

44. *Id.* at 13-14.

45. *Id.* at 14. The court noted that such a holding was consistent with the Advisory Committee's purpose of allowing the discovery of expert opinions in order to permit improved cross-examination and rebuttal of expert testimony. *Id.*

46. *Id.*

47. 60 F.R.D. 205 (S.D.N.Y. 1973).

48. *Id.* at 208 n.1.

49. *Id.* at 210.

50. *Id.* at 210 n.5.

heavily upon policy considerations in coming to its conclusion that production would be compelled only as to documents involving the 1970 report. One of the most important factors considered by the court was the availability of the information from other sources.[51] Since there was no exceptional showing that would have justified exposing communications between the attorney and his expert, it followed that discovery about matters beyond the scope of the expert's anticipated testimony was not warranted.[52] The court concluded that an independent accountant can serve two functions for purposes of Rule 26(b)(4)(B), that of a general auditor who is subject to normal discovery, and that of an expert retained specifically for litigation. In the latter case, discovery respecting preparation of the claim is limited by Rule 26(b)(4)(B) if the expert is not going to testify at trial.[53]

Commentators seem to agree that further discovery under Rule 26(b)(4)(A)(ii) should be limited to the subject matter on which the expert is expected to testify at trial. As noted earlier, the *Bailey v. Meister Brau, Inc.* court referred to commentaries that "suggested" that discovery under 26(b)(4)(A) should be limited to the subject matter of the expert's testimony.[54] Since the decisions in *Bailey* and *Inspiration Consolidated Copper Co.*, other commentators have accepted these cases as logical and important qualifications to Rule 26(b)(4).[55]

In conclusion, it can be said with some degree of reliability that courts will probably restrict discovery under Rule 26(b)(4)(A)(ii) to the subject matter on which the expert is expected to testify. This is consistent with the history of the 1970 amendments to Rule 26 and with the underlying policy of the rule to permit effective cross-examination and rebuttal of expert testimony while not allowing the opponent to make his own affirmative case by relying on his adversary's experts.

B. *Discovery of Information from Other Members of an Expert's Professional Firm*

There is very little case law and no commentary dealing with the situation in which an expert witness is a member of a professional firm

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51. *Id.* at 210 ("In proper cases there are ample means of discovery available to the opposing party, including audit and inspection by his own accountants of his adversary's records, so that discovery of the opinion of the accountant for the opposing party is not necessary").

52. *Id.* ("It is easy enough for the moving party to obtain his own expert opinion based on the facts and figures discovered from the plaintiff's books and records").

53. *Id.*

54. The court cited 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 254 n.78 (1970) and Note, *Discovery of Experts: A Historical Problem and a Proposed FRCP Solution*, 53 MINN. L. REV. 785, 803-04 (1969).

55. *See* Graham, *supra* note 5, at 930 n.133; Annot., 33 A.L.R. FED. 403, 440-41 (1977); *Discovery of Expert Information*, *supra* note 24, at 718-19 & n.66.

and discovery is sought of work done by other members of the firm. The case most nearly on point is *Seiffer v. Topsy's International, Inc.*,[56] which involved alleged securities violations. Topsy's auditors, Touche, Ross & Co., were third-party defendants in a third-party action brought by the underwriters, Bear, Stearns & Co. A member of the law firm representing Touche Ross & Co. asked Mr. John Van Camp, a Touche, Ross & Co. partner, to assist in the litigation at hand. Mr. Van Camp had not been involved in the particular audits that were the basis of the action and was not expected to testify at trial. He acted simply as an expert who was assisting counsel in the preparation of the case. When the underwriters filed a motion to depose Van Camp, Touche, Ross & Co. filed a motion for a protective order asking that the deposition not be allowed since Van Camp was an expert specially employed in anticipation of litigation under Rule 26(b)(4)(B). The court was thus presented with the question of whether an *individual partner* in an accounting firm could be considered an expert *independently from the firm itself.*

The underwriters contended that since Touche, Ross & Co. was a party and since Van Camp was a partner in that firm, he should also be considered a party subject to deposition. In disagreeing, the court noted that Rule 26 "overrides and limits the more general provisions of the remaining discovery machinery described in Rules 27 through 37."[57] Ultimately the court concluded that Van Camp, even though a partner in the accounting firm, had to be considered a Rule 26(b)(4)(B) expert and thus the court refused to allow his deposition to be taken.[58]

This is one area where the impact of Rule 612 of the Federal Rules of Evidence[59] may be very significant. Rule 612 mandates the produc-

56. 69 F.R.D. 69 (D. Kan. 1975).

57. *Id.* at 72.

58. *Id.* at 72 & n.3.

59. FED. R. EVID. 612 provides as follows:

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

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases

tion of all documents used to refresh the witness' memory while on the witness stand and allows the court to compel production of all documents reviewed by a witness prior to testifying. This rule takes no note of the author of the documents. Therefore, a report prepared by the partner of an expert witness but reviewed by the expert witness prior to trial is presumably subject to discovery if the court should decide, in its judgment, that production is "necessary in the interests of justice."[60] The court is apparently limited in its discretion under Rule 612 to allowing access "only to those writings which may fairly be said to have an impact upon the testimony of the witness."[61] Therefore, work reviewed by the trial expert should only be subject to discovery if it is relevant to the subject matter on which the trial expert will testify.

In light of this it is reasonable to assume that if the trial expert reviews work done by his partners or associates that is relevant to the subject matter on which he will testify, the court would not be abusing its discretion in compelling production of those writings by authority of Rule 612. On the other hand, work done by a trial expert's partner or associate and not reviewed by the trial expert should be immune from discovery under evidentiary Rule 612 and arguably also under procedural Rule 26(b)(4). The primary purpose of both of these rules is to ensure that the opposing party will have an adequate opportunity and means to conduct effective cross-examination and rebuttal of an expert witness' testimony. That purpose would not be served by permitting discovery of work done by a trial expert's partner or associate, unless that work has a direct relationship to the subject matter about which the trial expert is expected to testify. To conclude otherwise would be to invite a party to use Rule 612 and Rule 26(b)(4) as vehicles by which that party can make his own case through discovery of his opponent's expert information.[62]

C. *Discovery of Materials Prepared by Counsel and Transmitted to the Expert Witness*

Another unsettled question concerns the status of materials prepared by counsel and passed to an expert who is expected to testify at

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when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

60. *Id.*

61. *See* Advisory Committee Notes on Proposed Rule 612, *reprinted in* 28 U.S.C. app. FED. R. EVID. 612 (1976).

62. *But see* United States v. International Business Machs. Corp., 81 F.R.D. 625 (S.D.N.Y. 1979) (expert witness required to produce "client studies" which had been prepared by persons employed in the firm of the witness, even though the witness did not intend to rely on those studies in his testimony).

trial. Where the expert is not expected to testify at trial and has been specifically retained by counsel to assist in rendering legal services to the client, it is likely that a claim of attorney-client privilege or attorney work product protection will be recognized by the court.[63]

The more interesting question arises when the expert is expected to testify at trial. It has been held in an antitrust action that special protection under Rule 26(b)(4) is afforded only to information and materials *generated by* the expert, and not to information flowing to the expert from the client.[64] The basis for this conclusion is the Advisory Committee's Note to Rule 26(b)(4) which describes the section as "a new provision dealing with discovery of information (including facts and opinions) *obtained by a party from an expert* retained by that party in relation to litigation or *obtained by the expert* and not yet transmitted to the party."[65]

If information transmitted to the trial expert is not protected under Rule 26(b)(4), it can only be withheld from the adversary if it is protected under some other rule or for some other reason. The attorney-client privilege and the work product doctrine may be potential theories for shielding such material. However, Rule 612 of the Federal Rules of Evidence, which mandates production of writings used by a witness to refresh his memory while testifying and which allows the court to compel production of all writings referred to by a witness *prior to testifying*, can be invoked by the court or the discovering party to counter these arguments. Rule 612 has been specifically held to override the attorney-client privilege or the work product doctrine in the case of writings referred to by a party during his deposition.[66]

As to materials referred to by a witness *prior to testifying*, it is very unlikely that the work product doctrine will be considered a valid objection to discovery if the trial expert has actually relied on these materials in forming the opinions on which he will testify and if the court, in its discretion, decides pursuant to Rule 612 that the adversary should be entitled to see all materials reviewed by the witness prior to testifying. This conclusion is based largely on language from *Berkey Photo, Inc. v. Eastman Kodak Co.*[67] The court in that case was considering a motion to compel production of notebooks personally prepared by Kodak's attorney, John Doar, in anticipation of trial. Some of

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63. *See* Levy, *supra* note 30, at 3 (citing United States v. Schmidt, 360 F. Supp. 339 (M.D. Pa. 1973)). *See also* Annot., 33 A.L.R. FED. 403, 431 (1977).

64. United States v. International Business Machs. Corp., 72 F.R.D. 78, 81-82 (S.D.N.Y. 1976). *See also* Annot., 33 A.L.R. FED. 403, 431 (1977).

65. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Note to Rule 26, 48 F.R.D. 487, 503 (1970) (emphasis added).

66. Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972).

67. 74 F.R.D. 613 (S.D.N.Y. 1977).

the expert witnesses that Kodak expected to call at trial had been permitted to refer to these notebooks as an additional source of factual information in developing the opinions on which they were to testify. The magistrate to whom the discovery motions had been referred by the court ordered the notebooks to be produced. There is no question but that these notebooks contained highly sensitive information. According to Doar's affidavit they consisted of his synthesis of the facts and factual issues and represented his "legal analysis, mental impressions and . . . legal judgment as to what facts were needed to be understood, mastered, and possibly presented in the trial of the Berkey case."[68]

Ultimately, the district court did not compel discovery of the Doar notebooks. Two major considerations played an important part in its decision. First of all, the court questioned whether the Doar notebooks could really be said to have had a significant impact on the expert's opinions. Apparently, the experts had only referred to the notebooks when trying to get a grasp of the overall factual and historical picture in order to put into context the specific questions to which they were asked to respond. As a second consideration, the court noted the highly sensitive nature of the notebooks and commented that "given the current development of the law in this quarter, it seems fair to say that counsel were not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel."[69]

Although it refused to compel production of these materials, the court sternly warned that in the future it would be very unwise for counsel to rely upon the work product doctrine for protection of materials submitted by counsel to a trial expert. The court proclaimed:

> In this spirit, this court notes now, with hindsight, that there is not a compelling rationale for the view that counsel may (1) deliver work product to an expert or other witness to be "useful to the client," but then (2) withhold the material from an adversary who seeks to exploit the facts of this assistance in cross-examining the witness. From now on, as the problem and the pertinent legal materials become more familiar, there should be a sharp discounting of the concerns on which defendant is prevailing today. To put the point succinctly, 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.[70]

In the final analysis, the court's reasoning is consistent with the policies underlying Rule 612 of the Federal Rules of Evidence and Rule

68. *Id.* at 614.
69. *Id.* at 617.
70. *Id.*

26(b)(4) of the Federal Rules of Civil Procedure. Under these rules the court is granted the discretionary authority to limit discovery in order to promote fairness, but it is clear that a party will not be permitted to hide behind these rules when attempting to prepare its witnesses with materials that it does not wish the adversary to see.

D. *Applicability of Rules 612 and 705 of the Federal Rules of Evidence*

Rule 612 has already been discussed in relation to the questions concerning materials prepared by counsel and materials prepared by other members of an expert witness' firm. It is clear that this rule can have a significant impact on the scope of discovery of expert information. In pertinent part the rule provides that

> If a witness uses a writing to refresh his memory for the purpose of testifying, either—(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness.[71]

As has already been indicated above, Rule 612 has been held to override the attorney-client privilege and the work product doctrine as to materials referred to by a witness while testifying.[72] In addition, the district court in *Berkey* has warned that the work product doctrine will not protect writings prepared by counsel and passed to a trial expert if the materials are referred to by a witness prior to testifying.[73] Therefore, depending on the predisposition of the particular judge, Rule 612's grant of discretionary authority to compel production of any writing used prior to trial in preparation for testifying may have a significant impact on the scope of discovery of expert information.

Rule 612 should not, however, be construed so as to allow discovery of materials which do not relate specifically to the subject matter on which the expert will testify.[74] Thus, Rule 612 should not have a significant bearing on the question of discoverability of work done by a trial expert on areas of the case as to which he will not testify.

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71. FED. R. EVID. 612.
72. Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972).
73. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977).
74. As the Advisory Committee noted:

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

Notes of Advisory Committee on Proposed Rules, *reprinted in* 28 U.S.C. app. FED. R. EVID. 612 (1976).

Rule 705 should not have a significant bearing on any of the questions presented.[75] The Advisory Committee Notes reveal that this rule was designed primarily to govern presentation of expert testimony at trial and not to affect the scope of discovery of expert information. In particular, the rule was designed to eliminate the need for the hypothetical question as a basis for presenting an expert opinion and to shift to the cross-examiner the responsibility of bringing out the underlying data supporting the expert opinion. The Advisory Committee Notes specifically refer to Rule 26(b)(4) of the Federal Rules of Civil Procedure as the means by which the cross-examiner should be able to prepare for his interrogation of the witness.[76] There are no cases in which Rule 705 has been discussed in relation to the question of the scope of discovery of expert information pursuant to Rule 26(b)(4) or evidentiary Rule 612. Thus, it can be concluded that Rule 705 will probably not serve to expand the scope of discovery allowed under Rule 26(b)(4) or Rule 612.

III. PRECAUTIONARY MEASURES

Since the scope of discovery under Rule 26(b)(4) and Rule 612 is left up to the discretion of the court, there is no way to absolutely insure that a particular item prepared by an expert or submitted to an expert will not be subject to discovery. The court may, in its discretion, choose to order virtually unlimited discovery of expert information pursuant to Rule 26(b)(4)(A)(ii).[77] The *Quadrini* example does not appear, however, to be the general rule. For the most part, courts tend to balance the interests of a party in maintaining the confidentiality necessary to obtaining good expert advice and testimony against the interest of the opposing party in terms of adequate preparation for cross-examination and rebuttal of expert testimony.

The factors that courts have considered in the past were discussed in an earlier section of this article. In summary, the courts appear to take note of the fact that the nature of the litigation may make it necessary for a party to reveal sensitive information to its experts and most courts do not appear anxious to penalize the party for using the expert. Rather, the courts are often influenced in their decisions on the

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

76. Notes of Advisory Committee on Proposed Rules, *reprinted in* 28 U.S.C. app. FED. R. EVID. 612 (1976).

77. *See, e.g.*, Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594 (D. Conn. 1977).

scope of discovery by precautions taken by a party and its counsel to preserve the integrity and confidentiality of information flowing to and work generated by experts. Thus, the following suggestions are in order:

(1) If at all possible, the expert should be an outside expert, not an in-house expert, and should understand that he is being retained specifically in preparation for litigation.

(2) Counsel, rather than client, should retain the expert so as to emphasize the point that the expert is assisting in the rendition of legal services.

(3) Work done by the expert should be in response to specific questions presented by counsel.

(4) Information received by the expert should be maintained in separate, confidential files and not intermingled with the expert's ordinary business files.

(5) Reports or other materials generated by the expert should be sent directly to counsel and appropriately marked "For Information of Counsel" or something to that effect.

All of these suggestions are obviously designed to emphasize the confidential and sensitive nature of the information flowing to and from the expert.

In some courts, it will be helpful to be very liberal in answers to interrogatories concerning the expert's expected testimony. This has persuaded some courts in the past that the adversary already has adequate information to prepare for cross-examination and rebuttal of the expert.[78] Since many courts are willing to restrict the scope of discovery under Rule 26(b)(4) to the subject matter on which the expert will testify, it may be helpful to carefully identify materials generated by the experts according to the area of the case with which the expert will deal. Therefore, the following suggestions may be considered:

(1) Reports or other materials generated by the expert should clearly indicate the question in response to which they were prepared.

(2) Such reports could also indicate what sources of information were consulted in their preparation.

(3) Perhaps even greater segregation could be achieved by retaining different members of the expert firm for different areas of preparation.

As to materials prepared by counsel and passed to the expert, the best advice is that if the expert will testify on a subject to which the

78. *See, e.g.*, Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970).

materials prepared by counsel are related then counsel should be very careful to eliminate as much sensitive information as possible from the materials and should make the decision, before passing any such materials to the expert, that the beneficial impact on the expert's testimony is greater than any possible detrimental effect of allowing the adversary to see the materials. If materials are so sensitive that their disclosure must be avoided, counsel should not permit them to be reviewed by a trial expert.

In conclusion, it bears reiteration that none of these measures can guarantee that an individual judge will not exercise his discretion in such a way as to permit extraordinarily broad discovery of expert-related information. Nonetheless, these measures, and other measures conceived by imaginative counsel, can at least reduce the risk that sensitive and otherwise non-responsive information will be unnecessarily disclosed.