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Discovery of Expert Information Under Rule 1.280 of the Florida Rules of Civil Procedure

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COMMENTARIES

DISCOVERY OF EXPERT INFORMATION UNDER RULE 1.280 OF THE FLORIDA RULES OF CIVIL PROCEDURE*

In 1972 the Supreme Court of Florida adopted new rules of civil procedure, effective January 1, 1973.[1] One of the most important changes implemented was the revision of rule 1.280, "General Provisions Governing Discovery."[2] That revised rule, now patterned after rule 26 of the Federal Rules of Civil Procedure,[3] incorporates specific new procedures for discovery of expert information.[4] Those procedures have already become a source of problems for experts, lawyers, and judges who have had occasion to deal with the new rule.

The problems perceived by practitioners are several. Experts have detected a lack of understanding by attorneys regarding the permissible scope of discovery under the rule;[5] attorneys themselves have indicated that the rule needs clarification;[6] and some judges have noted a possible conflict between operation of the rule and observance of the work-product doctrine.[7] Although sev-

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1. *In re* Florida Bar, 265 So. 2d 21, 22 (Fla. 1972).

2. *Id.* at 26.

3. *Id.* at 28.

4. *Id.*

5. Dr. Robert Gould, Professor of Engineering at the University of Florida, is a metallurgist who has often served as an expert in cases involving his specialty and who operates his own business in automobile accident reconstruction. He said some lawyers with whom he has worked have discouraged him from keeping written records of his work and even from preparing written reports of his findings for the lawyers themselves because the attorneys were not sure that 1.280 discovery would not automatically encompass all such material. According to Dr. Gould, the result of forcing an engineer to work under such conditions would be "chaos" for the engineer, the attorney, and their employer-party. Interview with Dr. Robert Gould, Professor of Engineering, University of Florida, in Gainesville, Fla., Oct. 17, 1973. Dr. Stanley R. Bates, also an experienced expert, has recognized differences of opinion among judges regarding the proper scope and application of rule 1.280. Dr. Bates has also detected some uncertainty among attorneys concerning the proper method of objecting to deposition questions when those questions are believed to exceed the proper scope of such inquiry. Interview with Dr. Stanley R. Bates, Professor of Engineering, University of Florida, in Gainesville, Fla., Oct. 19, 1973.

6. Mr. Robert Stripling, Jr., a trial lawyer practicing in Gainesville, Fla., stated he believes one way rule 1.280 is unclear is in its failure to specify more definitely the detail in which responses to 1.280(b)(3)(A) interrogatories must be prepared to constitute good faith compliance with the rule's requirements. Interview with Mr. Robert Stripling, Jr., Member of The Florida Bar, in Gainesville, Fla., Oct. 29, 1973. Similarly, Mr. Joe C. Willcox, an experienced defense attorney, believes the (b)(3)(A) requirement that a party must state a "summary of the grounds" for each of his expert's opinions is susceptible to many interpretations. Interview with Mr. Joe C. Willcox, Member of The Florida Bar, in Gainesville, Fla., Nov. 2, 1973.

7. The work-product doctrine affords an attorney absolute protection against disclosure of his legal theories, conclusions, and mental impressions on the ground that disclosure of

eral Florida cases have dealt indirectly with the new rule,[8] no definitive ruling by a Florida court has answered the major questions raised by these practitioners.

This commentary will examine rule 1.280 in an effort to clarify some of the provisions that have proved confusing and to provide the practitioner with guidelines for the rule's proper use and scope. The examination will begin with a look at Federal Rule 26, including discussion of the advisory committee note to that rule. The commentary will then explore the provisions for scope of discovery under Florida Rule 1.280, the provision for discovery of expert witnesses, and the provision dealing specifically with non-witness experts.

General Scope of Discovery Under the Federal Rule

Prior to the 1970 amendment to rule 26 of the Federal Rules of Civil Procedure, most federal courts held expert information to be outside the scope of discovery, but differing rationales were used to support this attitude. The minority view placed expert information within the area protected by attorney-client privilege and held it immune from discovery on that basis.[9] A more widely accepted view,[10] expressed in *Alltmont v. United States*,[11] identified an expert's trial preparation material as work-product,[12] thereby justifying strict limitations on its discoverability. The majority of courts[13] believed it was unfair to the party who had expended time and money hiring an expert to permit the opposing party to take advantage of its efforts by the utilization of

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that type would severely hamper the functioning of the adversary system. Factual material obtained by an attorney through his investigation of a case is also immune from discovery under the doctrine, except in instances where production of such information is justified because the information is unavailable to the other party or can be reached by that party only with great difficulty. Hickman v. Taylor, 329 U.S. 495, 511 (1947). Judge John A. H. Murphree, who has not yet had occasion to rule on any portion of 1.280, stated he believes a situation could arise in which application of the new rule might conflict wth the work-product doctrine. Interview with Hon. John A. H. Murphree, Chief Judge, Circuit Court for the Eighth Judicial Circuit, Alachua County, Florida, in Gainesville, Fla., Oct. 19, 1973. Judge R. A. Green, Jr., who *has* ruled on 1.280 discovery motions, noted that some objections to discovery under the rule are based on a claimed invasion of work-product. He also expressed some doubt about the meaning of "exceptional circumstances" as used in 1.280(b)(3)(B). Interview with Hon. R. A. Green, Jr., Judge, Circuit Court for the Eighth Judicial Circuit, Alachua County, Florida, in Gainesville, Fla., Oct. 22, 1973.

8. *See* Schering Corp. v. Thornton, 280 So. 2d 493 (4th D.C.A. Fla. 1973); Raulerson v. Finney, 280 So. 2d 484 (3d D.C.A. Fla. 1973); Buga v. Wiener, 277 So. 2d 296 (4th D.C.A. Fla. 1973).

9. *See, e.g.*, Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940); Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1163-64 (1971).

10. *Id.*

11. 177 F.2d 971 (3d Cir. 1950).

12. *Id.* at 975.

13. Comment, *supra* note 10.

discovery procedures.[14] Sanctioning such activity was viewed by the majority as judicial promotion of laziness,[15] and discovery of experts was therefore permitted only in situations evincing extreme necessity.[16]

In 1947 the United States Supreme Court ruled in *Hickman v. Taylor*[17] that the protective cloak of the attorney-client privilege covered only direct communications between a lawyer and his client.[18] Emphasizing that a lawyer's work-product is not privileged,[19] the Court based its decision to immunize attorneys' mental impressions and legal thories from discovery not upon a doctrine of privilege but rather upon the policy that protection of an attorney's private thoughts is essential to preserve the integrity of the adversary process.[20] Because *Hickman* left material, non-privileged facts within the ambit of discoverability,[21] the later judicial definition of expert witness opinion as "fact"[22] exposed such opinion to discovery "unless some compelling reason [could] be advanced for a contrary conclusion."[23] *Hickman* thus repudiated decisions holding an expert's information not discoverable on a theory of privilege, and it substantially undercut other decisions that had placed expert information within the work-product doctrine. Nevertheless, the primary objection of unfairness remained.

The 1970 amendments to the Federal Rules of Civil Procedure substantially modified rule 26, including new procedures for discovery of expert information that were designed to overcome the unfairness objection.[24] Specifically, rule 26(b)(4)(C) requires the party seeking discovery to pay the expert or the party employing the expert for time spent responding to requests for discovery.[25] Although the provision makes reimbursement mandatory in some instances and discretionary in others,[26] the committee note to 26(b)(4)(C) recommends that where reimbursement is discretionary the court's decision should depend upon the motive of the discovering party. If the discovering

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14. *E.g.*, United States v. 23.76 Acres of Land, 32 F.R.D. 593, 597 (D. Md. 1963); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940).

15. *See* McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D.N.Y. 1939), *aff'd*, 113 F.2d 721 (2d Cir.), *cert. denied*, 311 U.S. 680 (1940).

16. *See, e.g.*, Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940).

17. 329 U.S. 495 (1947).

18. *Id.* at 508.

19. *Id.*

20. *Id.* at 510-11.

21. *Id.* at 513.

22. *See* Franks v. National Dairy Prods. Corp., 41 F.R.D. 234 (W.D. Tex. 1966).

23. *Id.* at 237. In medical malpractice cases, contentions of negligence alleged through expert testimony are considered facts and are not therefore protected from discovery. Bynum v. United States, 36 F.R.D. 14 (E.D. La. 1964); Miller v. United States, 192 F. Supp. 218, 220 (D. Del. 1961).

24. FED. R. CIV. P. 26(b)(4).

25. *See* FED. R. CIV. P. 26(b)(4)(C).

26. *Id.* The court must require the party seeking discovery to pay the expert for time spent responding to requests for information. Also, in the case of an expert witness, the court may require, and in the case of a nonwitness expert, the court must require, the party seeking discovery to reimburse the other party a reasonable amount for expenses incurred by the latter in obtaining facts and opinions from the expert.

party is simply learning about the other party's case, no reimbursement is warranted. On the other hand, the committee recommends reimbursement when the discoverer is attempting to use the other party's information to develop his own case.[27] The 26(b)(4)(C) provision is prefaced by the phrase, "Unless manifest injustice would result,"[28] allowing courts to disregard the reimbursement requirement in cases involving indigents.[29]

Thus, the reimbursement provision in 26(b)(4)(C) largely disposes of the old objection that discovery of expert information is unfair to the party employing the expert. Because the new Florida provision, 1.280(b)(3)(C), is closely patterned after 26(b)(4)(C) of the Federal Rules,[30] Florida has also done much to counter the fundamental unfairness argument against expert discovery. The remainder of Florida's new discovery rule is aimed at minimizing specific difficulties inherent in the discovery of expert information.

SCOPE OF DISCOVERY UNDER 1.280

To be discoverable under Florida Rule 1.280, expert information must consist of facts known and opinions held by experts and be discoverable under the general scope provision of the rule.[31] That general provision permits discovery of "any matter, not privileged, that is relevant to the subject matter of the pending action,"[32] and it states that information, although possibly inadmissible as evidence at trial, is nevertheless discoverable as long as it is reasonably calculated to lead to the discovery of admissible evidence.[33]

Two recent federal cases have construed similar language in Federal Rule 26. In *Lindberger v. General Motors Corp.*[34] the court allowed discovery of relevant information claimed to be inadmissible as evidence but not falling into the narrow categories of doctor-patient, attorney-client, or state secret privilege traditionally recognized under the rules of evidence.[35] Although reasoning that *any* disclosure of such traditionally privileged information would intrude upon the relationship protected by the privilege, the court believed that inadmissible information *not* fitting the recognized categories should warrant no immuity from pretrial discovery. Such non-privileged information could in no way harm any confidential relationship; it could detrimentally affect only the fairness of a trial, and this potential damage would be negated by its exclusion at the time of trial.[36]

In *Gillman v. United States*[37] the court refused to allow discovery of a

27. FED. R. CIV. P. 26 (Advisory Comm. Note on Amendments).
28. FED. R. CIV. P. 26(b)(4)(C).
29. FED. R. CIV. P. 26(b)(4) (Advisory Comm. Note on Amendments).
30. *Compare* FED. R. CIV. P. 26(b)(4)(C), *with* FLA. R. CIV. P. 1.280(b)(3)(C).
31. FLA. R. CIV. P. 1.280(b)(3).
32. FLA. R. CIV. P. 1.280(b)(1).
33. *Id.*
34. 56 F.R.D. 433 (W.D. Wis. 1972).
35. *Id.* at 434-35.
36. *Id.* at 435.
37. 53 F.R.D. 316 (S.D.N.Y. 1971).

detailed investigative report compiled by a board of hospital doctors inquiring into the suicide of one of the hospital's former patients. In so ruling, the court balanced the plaintiff's need for the information against the danger that fear of discovery of the dialogue among board members might deter such boards from being convened.[38] The court distinguished, however, between recommendations for improvements in hospital procedures, which were deemed privileged, and relevant facts surrounding the suicide, which the court thought should be available to the plaintiff.[39] Like the court in *Lindberger,* the *Gillman* court weighed the purpose of the federal discovery rule[40] against the public interest in protecting certain confidential information.[41]

Only one Florida case has interpreted the general scope provision of Florida Rule 1.280. In *Buga v. Wiener,*[42] a medical malpractice suit resulting in a verdict for the defendant doctor, the Fourth District Court of Appeal held that the trial court erred in sustaining an objection to plaintiff's interrogatory calling for a listing of textbooks recognized by the defendant as authoritative in his field. The court termed such information "reasonably calculated to lead to admissible evidence" under 1.280(b)(1).[43]

The Florida court's ruling in *Buga,* like the rulings of the federal courts in *Lindberger* and *Gillman,* indicates a willingness to look to the purpose of discovery in passing on specific requests for disclosure. All three cases evince a judicial desire to find information relevant and not privileged wherever possible, with public policy the primary factor weighing against pretrial disclosure of the information. The practitioner seeking to prevent or limit discovery on the strength of the 1.280(b)(1) general proscription is therefore advised to base his arguments on sound public policy grounds rather than the hope that the court will label the information privileged or irrelevant.

In addition to the provision concerning scope of discovery in general, limitations on the discovery of documents and tangible things prepared in anticipation of litigation are set forth in 1.280(b)(2). This provision limits discovery of such items to instances where the party seeking discovery needs the material to prepare his case and is unable to obtain the substantial equivalent of the material by other means and without undue hardship.[44]

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38. *Id.* at 318. For a similar treatment of the same problem, see Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, *enforcing mem.,* 51 F.R.D. 187 (D.D.C. 1970).

39. Gillman v. United States, 53 F.R.D. 316, 319 (S.D.N.Y. 1971). The report involved in the case was not expert information because no board member was to be called as a witness and none had been retained by either party in preparation for litigation. *Id.* at 318 n.1.

40. The Committee Note explains that the aim of Federal Rule 26 is the achievement of a fair and liberal exchange of relevant information designed to produce a complete evaluation of issues at trial. FED. R. CIV. P. 26 (Advisory Comm. Note on Amendments).

41. Comment, *Civil Procedure: Self Evaluative Reports—A Qualified Privilege in Discovery?,* 57 MINN. L. REV. 807, 824-25 (1973).

42. 277 So. 2d 296 (4th D.C.A. Fla. 1973).

43. *Id.* at 297.

44. This limitation also governs requests to produce documents and other items under FLA. R. CIV. P. 1.350, which restricts such requests to documents that constitute "matters within the scope of Rule 1.280(b)." Because of this, the old "good cause" requirement of

Furthermore, discovery of trial preparation material is made specifically subject to the special provisions in 1.280(b)(3) regarding expert material.[45] Provision (b)(3) reemphasizes the important point that only expert material acquired or developed "in anticipation of litigation" is discoverable. Accordingly, the advisory committee note to Federal Rule 26 makes the point that an expert inadvertently acquiring information by his own participation in the transaction leading to trial should be treated as an ordinary witness.

This "anticipation of litigation" requirement has been strictly applied by at least one federal district court. In *Duke Gardens Foundation, Inc. v. Universal Restoration, Inc.*[46] the court determined that knowledge of three experts concerning the condition and design of a greenhouse was not within the "anticipation" provision of Federal Rule 26[47] because the men had gained the information in their normal roles as structural analysts before any trial was envisioned.[48]

The remainder of section (b)(3) deals with discovery of information from two different classes of experts. Subsection (b)(3)(A) relates to discovery of the expert expected to appear as a *witness* at trial, while subsection (b)(3)(B) pertains only to discovery of information in possession of the *non-witness* expert. The next section of this commentary focuses on discovery of the expert witness under (b)(3)(A), and the succeeding section treats (b)(3)(B) and the non-witness expert.

THE EXPERT WITNESS

The advance preparation necessary for effective cross-examination of an expert witness makes the need for discovery particularly acute with respect to his information.[49] Rule 1.280(b)(3)(A) articulates a policy of controlled discovery that recognizes the particular discovery needs in the expert witness area but reduces the chance that one side will benefit unduly from the other's preparation.

Under 1.280(b)(3)(A) initial discovery of expert witness information is to be conducted through the use of interrogatories without intervention of the court. The discovering party may require his adversary to identify any expert expected to be called as a witness and to state the subject matter on which the expert will testify. The party employing the expert is further required "to state the substance of the facts and opinions to which the expert is expected to testify" and to give a summary of the basis for each opinion.[50] The require-

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1.350 has been removed. See FED. R. CIV. P. 34(a) (Advisory Comm. Note on Amendments).

45. *See* FLA. R. CIV. P. 1.280(b)(2), which defers to subdivision (b)(3) in the case of expert trial preparation material.

46. 52 F.R.D. 365 (S.D.N.Y. 1971).

47. *Id.* at 367.

48. *Id.*

49. FED. R. CIV. P. 26 (Advisory Comm. Note on Amendments).

50. *See* FLA. R. CIV. P. 1.280(b)(3)(A). Mr. Robert Stripling, Jr., attorney, noted the (b)(3)(A) requirement that interrogatories be answered by "the other party" means the ex-

ment that discovery be limited to facts and opinions that will be the subject of the expert's testimony at trial should alert the practitioner to the fact that no discovery of the testifying expert's *previous* opinions is permitted.[51]

In practice, initial discovery of expert witness information is often still carried on by oral deposition of the expert himself.[52] Though such a procedure is certainly permissible if agreed upon by the parties, it is clearly not required. The scope of information one party is required to disclose in such an initial deposition should not be greater than that specified for answering interrogatories.[53] The practicing attorney should note, therefore, that the limit on scope of expert witness discovery is not waived by failing to insist upon the other party's use of interrogatories.[54]

Courts have taken the position that the substance of an expert's expected testimony must be spelled out with reasonable particularity, and identification of the expert should include his name, present address, current occupation, and specialty.[55] Obviously a party cannot answer an interrogatory served before he has decided who his expert witness will be, but he is under a duty to supply the information once that decision is made.[56]

Under (b)(3)(A) discovery of expert testimony beyond initial interrogatories is obtainable only upon motion to the court.[57] There is wide judicial discretion to prevent abuses in this area,[58] and courts have generally been restrictive in permitting discovery beyond the initial stage. For example, in

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pert himself is not required to sign or verify the accuracy of the answers. In fact, the answers are almost always framed by the party's attorney, who uses the expert's report as the basis for their preparation. This means the answers to (b)(3)(A) interrogatories are often ineffective for impeaching the expert's testimony at trial, for there is legitimate room for difference between the expert's exact opinion or conclusion and the answering attorney's paraphrased interpretation of that opinion. Interview with Mr. Robert Stripling, *supra* note 6.

51. Comment, *supra* note 9, at 1166.

52. Interview with Dr. Stanley R. Bates, *supra* note 5.

53. *See* Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 204 (N.D. Miss. 1972).

54. *Id.* at 204-05.

55. *See, e.g.,* Rupp v. Vock & Weiderhold, Inc., 52 F.R.D. 111, 113-14 (N.D. Ohio 1971).

56. 4 J. MOORE, FEDERAL PRACTICE ¶26.66[3] (Supp. 1972). The FLA. R. CIV. P. 1.280(b)(3)(A) stipulation that a party who responds to interrogatories is required to identify any expert he "expects to call" as a witness at trial can place attorneys — especially defense attorneys — in a precarious dilemma. A defense attorney's decision to use his own expert witness at trial is often dictated by opposing counsel's determination of the same question. Hence, while a defense attorney may have an expert whom he has consulted about a particular case and whom he will call as a defense witness *if* plaintiff calls an expert to testify, he may not "expect" to use his expert as a witness until he is informed that plaintiff's expert will take the stand. The defense attorney is thus placed in the awkward position of (1) risking judicial criticism for noncompliance with (b)(3)(A) by not divulging key information until he is sure he must, or (2) being certain he is acting in good faith at the expense of a possibly unnecessary disclosure of important information. Although rule 1.280(d) specifies no particular sequence for conducting discovery, it does give the court discretion to consider the factors described above in delaying one party's discovery in the interest of justice. Interview with Mr. Joe C. Willcox, *supra* note 6.

57. *See* FLA. R. CIV. P. 1.280(b)(3)(A).

58. FED. R. CIV. P. 26 (Advisory Comm. Note on Amendments).

Breedlove v. Beech Aircraft Corp.[59] the plaintiff argued that the federal counterpart of Florida Rule 1.280(b)(3)(A)[60] authorized discovery of written reports prepared by defendant's experts to inform defense counsel of the various features and workings of the airplane propeller involved in the lawsuit.[61] The plaintiff contended that without access to the reports he would be handicapped in cross-examining defendant's expert witnesses at trial.[62] In denying plaintiff's request, the district court declared that production of such written reports would be ordered only if unique or exceptional circumstances would prevent plaintiff from eliciting the "basis and scope of the expert opinions and supporting data" to which he was entitled by the rule.[63]

At least one Florida court has also shown an unwillingness to order discovery beyond the interrogatory stage when the burden of producing additional material would be unreasonable or oppressive for the complying party. In *Schering Corp. v. Thornton*[64] the plaintiff's request for discovery was denied,[65] although further delineation of the "unreasonable burden" test was left for case-by-case determination.[66] This indicates that other Florida courts might also be expected to follow the *Breedlove* example of restraint in ordering further discovery under 1.280(b)(3)(A).[67]

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59. 57 F.R.D. 202 (N.D. Miss. 1972).

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

61. Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 204 (N.D. Miss. 1972).

62. *Id.*

63. *Id.* at 204-05.

64. 280 So. 2d 493 (4th D.C.A. Fla. 1973).

65. *Id.* at 494. In this case the court quashed the trial court's order denying defendant drug company's motion for a protective order under FLA. R. CIV. P. 1.310(b). If defendant's motion had been denied it would have been required to spend over $4,000 worth of man-hours to produce the requested information, and the court believed in that particular case it would be "unreasonable and unduly oppressive to expect the complying party to bear the burden of such." *Id.*

66. *Id.*

67. Mr. Robert Stripling, Jr., was plaintiff's attorney in Lamb v. International Harvester Corp., No. 419-70 (3d Cir. Ct. Fla., filed Aug. 31, 1970), which, although settled before going to trial, presented a classic 1.280 discovery problem. That case was a personal injury action involving an allegedly defective driveshaft, and in the course of investigation the driveshaft was lost by plaintiff's insurance company before defendant's experts could examine it. Because of the unavailability of the driveshaft the court granted defendant's 1.280(b)(3)(A) motion for further discovery in the form of deposition of plaintiff's expert, who had examined the driveshaft before it was lost. After an extensive deposition lasting almost four hours, defendant moved to require plaintiff to produce the report plaintiff's expert had made to Mr. Stripling as well as "all other notes and memoranda, including all measurements of the driveshaft and all other measurements made and recorded in writing by the [expert] in the course of his investigation of this matter . . . for its inspection, photographing and copying upon the grounds that said items sought to be produced constitute or contain material relevant and material to the issues in this cause and are not privileged and that . . . said driveshaft and said motor vehicle are no longer available for inspection." Lamb v. International Harvester Corp., No. 419-70, *Motion To Produce* (3d Cir. Ct. Fla., filed July 11, 1973).

The court denied the motion without official comment, but Mr. Stripling believed the reason for the denial was that the deposition had produced all the information con-

Courts have also shown strict adherence to the specified *mechanics* of requesting and ordering further discovery. Thus, in *Wilson v. Resnick*[68] the court believed the answers to plaintiff's interrogatories in that case were adequate, but said it would not have ordered the production of a written report — even had the answers been inadequate — in the absence of the required motion by plaintiff.[69] Such action by the court on the mere allegation that answers to the interrogatories were insufficient "would defeat the entire procedure" set forth by the rule.[70]

Similarly, in *Raulerson v. Finney*[71] a Florida court indicated its determination to closely follow the mechanics of the discovery provisions unless both parties agreed to a departure.[72] That court quashed the lower court's initial interlocutory order directing plaintiff and defendant to produce "any and all witness statements they have in their possession concerning the issues in this cause."[73] While not quarreling with the trial court's goal of expediting litigation, the court believed the lower tribunal had taken an impermissible "short cut" that ran counter to the 1.280(b)(3)(A) objective of providing for specific discovery requests and responses by litigants themselves prior to any judicial intervention.[74] Based on *Raulerson* and *Wilson,* the practitioner is advised to expect courts to require a *motion* for post-interrogatory discovery rather than a mere allegation that answers to interrogatories were insufficient.[75]

The judicial attempt to strictly control additional discovery of expert information, as illustrated by *Breedlove, Schering, Wilson,* and *Raulerson,* is a proper exercise of discretion. Without such conservative applications of discovery provisions as examples, attorneys' fears of over-liberal discovery of expert information under rule 1.280 could legitimately be heightened, and the result would be a conscious frustration of the aims of the rule.

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tained in the report that might have been used at trial and granting of the broadly framed motion would have been an unnecessary invasion of the expert's own "privacy or work-product." Interview with Mr. Robert Stripling, Jr., *supra* note 6.

68. 51 F.R.D. 510 (E.D. Pa. 1970).

69. *Id.* at 511 (dictum).

70. *Id.*

71. 280 So. 2d 484 (3d D.C.A. Fla. 1973).

72. *Id.* at 485.

73. *Id.* at 484.

74. *Id.* at 485.

75. The following is a suggested format for a motion to compel further discovery under FLA. R. CIV. P. 1.280(b)(3)(A):

[Defendant/Plaintiff] moves the Court to permit [Defendant/Plaintiff] to take the deposition of [name, address, and occupation of other party's expert], whom [Plaintiff/Defendant] plans to call as an expert witness at trial, concerning factual material, opinions, and conclusions held by said expert witness relating to [circumstances of case], on the grounds that such information in possession of said expert witness is relevant and material to the issues in this cause and is not privileged and that such information is unavailable to [Defendant/Plaintiff] by reason of [situation] and that such deposition is essential for [Defendant/Plaintiff] to gain information necessary to adequately prepare to effectively cross-examine said expert witness at trial, without which effective cross-examination no fair adjudication of issues in this cause can be had.

THE NONWITNESS EXPERT

The limitations placed upon discovery of information acquired through an expert who is not to serve as a trial witness are much greater than those imposed on discovery of an expert witness. In the case of the non-witness preparation for cross-examination is unnecessary, and a greater potential exists for taking unfair advantage of the other party's pre-trial efforts. As a result, rule 1.280(b)(3)(B) limits such discovery to facts or opinions held by a non-witness expert retained or "specially employed" by the other party solely in preparation for trial.[76] This limitation is similar to the "anticipation of litigation" rule respecting expert trial preparation materials in general.[77] While that rule restricts discovery of expert facts and opinions to those acquired or developed in anticipation of litigation, this limitation means that names of non-witness experts and materials obtained from them are not discoverable by any method where the experts were only consulted informally or were regularly employed by the party against whom discovery is sought.[78] The practitioner is advised that this limitation proscribes discovery from such non-witness experts even where their information is itself developed in anticipation of litigation. The distinction is a fine one, but it should be carefully noted.

If the nonwitness expert information desired is a report of an examining physician, it is obtainable only as provided by rule 1.360(b).[79] Other nonwitness expert information is discoverable only "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."[80]

Courts have interpreted the "exceptional circumstances" requirement quite literally, demanding a good deal more than simply a strong need. For example, in *Bailey v. Meister Brau, Inc.*[81] the defendant requested leave to depose plaintiff's expert, contending that there were present "exceptional circumstances" required by the federal counterpart of 1.280(b)(3)(B)[82] to substantiate such a request.[83] It was claimed that defendant was unable to obtain the expert's opinion by any other means.[84] The court's denial of the request was expressed in the following manner:[85]

The above format must, of course, be tailored to the type of further discovery desired, including production of reports, test results, charts, and photographs.

76. *See* FLA. R. CIV. P. 1.280(b)(3)(B).

77. See text accompanying notes 45-48 *supra*.

78. 4 J. MOORE, FEDERAL PRACTICE ¶26.66[4] (Supp. 1972).

79. *See* FLA. R. CIV. P. 1.280(b)(3)(B) reference to FLA. R. CIV. P. 1.360(b). FLA. R. CIV. P. 1.360(b) provides that a party who has been ordered to submit to a physical or mental examination may obtain a detailed report of the results of that examination in exchange for a similar report of any examination of the same condition made of the examined party on his own volition.

80. FLA. R. CIV. P. 1.280(b)(3)(B).

81. 57 F.R.D. 11 (N.D. Ill. 1972).

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

83. Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 14 (N.D. Ill. 1972).

84. *Id.*

85. *Id.*

> The Rule clearly contemplates a showing that a party has found opinions by others on the subject to be unavailable before he may obtain discovery from his opponent's retained expert who is not expected to be called to testify on the same subject. Defendants have made no attempt to show that they are without sufficient funds or information to obtain other opinions . . . .

The denial clearly shows that a party must try and fail to obtain its own expert opinions before its request for discovery of its adversary's nonwitness expert will be considered.

Finally, some courts, like those that have balanced public policy against individual need for discovery in determining what material should be labelled "privileged,"[86] have applied a similar balancing test to identify the exceptional circumstances needed to permit discovery of nonwitness expert information.[87] Circumstances not compelling enough to override the strong public policy reasons for keeping certain nonwitness expert information confidential do not qualify as the "exceptional circumstances" required to bring about pretrial discovery of that information.[88]

CONCLUSION

Florida's recent adoption of a discovery rule similar to rule 26 of the Federal Rules of Civil Procedure recognizes that the need for discovery of expert information outweighs the risk of its abuse. Though liberal pretrial discovery is encouraged by the rule, restrictions on the scope and methods of expert discovery meet the unfairness objection regarding disclosure of such materials. The rule invests the courts with discretion in interpreting and applying its provisions. Until a body of case law dealing with Florida's new rule develops, uncertainty will persist as to the Florida courts' utilization of this discretion. Federal decisions construing the federal rule and the few Florida cases dealing with 1.280 indicate that the specific limitations of 1.280 will be strictly adhered to unless reasonableness and common sense warrant extension of discovery in a manner prescribed by the rule. Such an approach by the bench – exercising discretion only as necessary to achieve a just adjudication of issues in each case – should foster appreciation for the rule's flexibility and confidence that good faith compliance with the rule will not produce unfair results.

R. SCOTT CROSS

86. See text accompanying note 43 *supra*.

87. *See, e.g.*, Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971); Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970).

88. *Id.*