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**Note**

Discovery of the Nontestifying Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program

In the course of litigation, an attorney generally will find it necessary to employ various experts in preparation for his case. By virtue of their position, these experts are privy to many sensitive details concerning the lawsuit. Counsel, however, may decide not to use the expert at trial for any number of reasons: demeanor or appearance of the expert; the expert's hostility to the client's position; or the existence of less expensive assistance. Nonetheless, the information acquired or opinions formed by a nontestifying expert are protected from discovery under Federal Rule of Civil Procedure 26(b)(4)(B), unless opposing counsel makes a special showing of need.\(^1\)

The Federal Rules of Civil Procedure, however, are silent regarding whether and when discovery of a nontestifying expert's identity is permissible. Consequently, the federal courts have developed conflicting standards for determining when a nontestifying expert's identity can be discovered. Neither of these standards provides adequate protection for counsel, the experts, or, ultimately, the parties.

Nonretaining counsel may want to discover the identity of a nontestifying expert witness for several reasons. Nontestifying expert witnesses may know facts or hold opinions essential to the nonretaining counsel's case or his ability to satisfy the requisite showing of need under Rule 26(b)(4)(B). In addition, because ex parte communications with an adverse expert witness can result in disqualification of counsel, regardless of whether such communications were motivated innocently,\(^2\) it is essential

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2. Motions to disqualify opposing counsel are becoming favored weapons in the arsenals of parties engaged in complex litigation. One author contends that a motion to disqualify is almost certain to be made in a case with multiple parties and issues, in that the possibility of conflict of interest is very great. See Note, The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Court, 45 U. CHI. L. REV. 450, 450 (1979). The complications that result from the current ambiguities involved in expert discovery are proving to be one means by which parties may seek the disqualification of opposing counsel. See infra notes 65-80.
that opposing counsel know the identity of all nontestifying experts. A recent case,\(^3\) in which a nontestifying expert was dissatisfied with his employer and sought the greener pastures offered by opposing counsel, illustrates the dangers that opposing counsel can face when she is ignorant of the identity of the other side's experts. In that case, the retaining party obtained the disqualification of opposing counsel on the ground that opposing counsel had ex parte communications with an adverse, nontestifying expert. This result could have been avoided if the Federal Rules of Civil Procedure required stronger judicial control over the process of expert discovery.

This Note discusses when a nontestifying expert's identity can be discovered under Rule 26(b)(4)(B). It first traces the historical development of expert discovery in federal court and chronicles the criticism leveled at that development. Next, it demonstrates the harmful ramifications of Rule 26(b)(4)'s ("Rule") silence with respect to discovery of nontestifying experts' identities through a short hypothetical. The Note then discusses the conflicting approaches developed by federal courts in an attempt to resolve the uncertainty surrounding discovery of a nontestifying expert's identity. The Note concludes by proposing an amendment to the Rule, which would increase judicial control over the expert discovery process, and thereby alleviate the problems caused by its silence.

**History Leading Up to Adoption of Rule 26(b)(4)**

When the Federal Rules of Civil Procedure originally were adopted in 1938, no rule expressly pertained to expert discovery. It is not clear whether this omission was intentional, or whether the Advisory Committee intended other rules to cover the problems posed by expert discovery.\(^4\) Regardless of intention, by the late 1950's, the lack of guidelines for discovery of experts had created a chaotic situation: some courts allowed discovery of an opponent's expert without qualification,\(^5\) while others al-

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5. Especially in complex cases, some courts had begun to realize that allowing expert discovery rendered substantial benefits, such as improving trial preparation, narrowing issues, and eliminating surprise. Indeed, an entire case often revolved around testimony and facts that experts provided at trial. It became imperative, therefore, that both sides of the issues have access to vital facts. See United States v. Meyer, 398 F.2d 66 (9th Cir. 1968) (access to expert appraiser's estimates of property value in condemnation action vital to fair adjudication of the suit); United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963) (owners of condemned land entitled to access to government expert's method of appraisal and facts considered by expert in determining land value); United States v. Nysco Lab, Inc., 26 F.R.D. 159 (E.D.N.Y. 1960) (action under the Food and Drug Act to halt the interstate sale of mislabelled drug).

Other courts began to allow discovery of expert fact and opinion regardless of the case's complexity, arguing that such discovery was required in all cases in order to prepare fully for
together barred discovery of the expert.  

Those courts allowing discovery of experts concluded that there was no legitimate reason to prevent the opposition from learning through discovery what it would ultimately learn at trial and allowed discovery of expert information on that basis. In short, their view was that discovery at trial and to encourage settlement. See Franks v. National Dairy Corp., 41 F.R.D. 234 (W.D. Tex. 1976); Knighton v. Villian & Fassio e Compagnia Internazionale, 39 F.R.D. 11 (D. Md. 1965) (personal injury); Henlopen Hotel Corp. v. Acea Ins. Co., 33 F.R.D. 306 (D. Del. 1963) (storm damage to beach front property).


Perhaps most indicative of the problems in expert discovery at this time was a series of cases arising out of a patent infringement action, which was pending in the Eastern District of Tennessee in 1946. The defendant in this action sought to depose plaintiff's experts from Massachusetts Institute of Technology and from Case Institute of Technology in Ohio. Plaintiff's counsel, however, advised his experts not to answer any questions regarding information pertaining to the plaintiff's case. The federal district court in Massachusetts found that the defendant had no right to discover the expert from M.I.T. and denied the defendant's motion to compel. Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 684, 687 (D. Mass. 1947). See generally 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2029 (1970). The district court in Ohio, however, reached exactly the opposite result and granted the defendant's motion to compel discovery of the expert from Case. Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 425, 428 (N.D. Ohio 1947), aff'd sub nom. Sachs v. Aluminum Co. of Am., 167 F.2d 570 (6th Cir. 1948); see 8 C. WRIGHT & A. MILLER, supra, § 2029. The Case expert, still refusing to answer in spite of the court's ruling, was held in contempt. The contempt citation was upheld by the Sixth Circuit. Sachs, 167 F.2d at 570; see 8 C. WRIGHT & A. MILLER, supra, § 2029.

Inconsistent rulings with respect to expert discovery disrupted the entire discovery system. Therefore, in 1946, the Advisory Committee proposed an amendment to the Rules that would have banned all pretrial discovery of expert fact and opinion. See Report of Proposed Amendments to Rules of Civil Procedure, 5 F.R.D. 433, 456-70 (1946). This proposed amendment would have banned only the deposition of the opponent's trial expert, and would have apparently allowed other types of discovery, such as interrogatories. The Advisory Committee Note to this Rule observed that "[p]arties who have retained expert witnesses at their own expense are also protected, except as provided in Rule 35." Id. at 460. This is probably a reference to the then newly developed work product doctrine, which was created in Hickman v. Taylor, 329 U.S. 495 (1947). See 8 C. WRIGHT & A. MILLER, supra, § 221, at 220 n.72; 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, 899 n.21 (1976). Application of the work product doctrine to expert discovery was soundly rejected by the commentators, courts, and the Advisory Committee itself in 1970. See infra text accompanying notes 25-35. Based possibly on the inclusion of work product within the expert rule, however, Congress saw fit not to adopt this proposition, and the circuit courts continued to allow or deny discovery as they had before.

simply advanced the time of disclosure. Moreover, these courts believed that the potential unfairness to the retaining party simply did not overcome the opposition’s need to discover the adverse expert’s information. Courts adhering to this view normally allowed discovery of the expert’s facts and opinions without any showing of extraordinary need.

Courts that placed an outright ban on expert discovery did so on the basis of one of three theories: the attorney-client privilege, the work product doctrine, or the so-called “unfairness” doctrine. In *Cold Metal Process v. Aluminum Co. of America*, the Massachusetts district court found that the expert was an agent of plaintiff’s attorney and, therefore, was covered by the blanket of attorney-client privilege. The court reasoned that the assistance of these experts was indispensable to the attorney’s work, and that the communications of the client were often necessarily committed to the experts by the attorney or by the client himself. Because the expert acted as the attorney’s agent and was privy to exchanges of confidential information between client and counsel, the court extended the attorney-client privilege to include the work of the expert.

This analysis was soundly rejected by one commentator. The commentator characterized the expert as the attorney’s employee rather

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9. *Id.* at 118-19.
10. Other courts, however, prohibited discovery of the expert’s opinion, allowing only discovery of the factual bases for that opinion. *Long, supra* note 7, at 118; see, e.g., United States v. 284,392 Square Feet of Floor Space, 203 F. Supp. 75 (E.D.N.Y. 1962); United States v. 19.897 Acres, 27 F.R.D. 420 (E.D.N.Y. 1961); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954); see also Graham, *supra* note 6, at 900. This distinction grew out of the recognition that an expert’s finding of fact constituted information necessary for the adjudication of the case and out of a generalized notion that both the expert and the retaining party had a “property” interest in the expert’s opinion, which could not be violated without just compensation. See *Walsh*, 15 F.R.D. 376.
15. *Id.* at 686. The court held that “it [was] well established that such agents as an attorney uses in his office in the preparation of cases, such as clerks and stenographers, may not be compelled to testify as to interoffice activities or communications because they are covered by the privilege rule.” *Id.*
16. *Id.* (citing 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2301 (3d ed. 1940)).
than as the attorney’s or client’s agent. Because the identities of the employees of a party were discoverable, this commentator asserted that extending the attorney-client privilege to cover expert information would create a new, unnecessary discovery exception. Furthermore, he argued that the scope of the attorney-client privilege included only actual communications between the attorney and client. The privilege never had shielded the knowledge of the client, because a party then could shield from discovery vital facts in a case simply by repeating them to his lawyer. Because the client’s knowledge was not protected then, by virtue of basic agency rules, the knowledge of the expert must also remain unprotected. As experts often contribute vital information to a case, “a party ought not to be permitted to thwart effective cross-examination of [such] a material witness . . . merely by invoking the attorney-client privilege to prohibit pretrial discovery.”

Some courts limited expert discovery on the basis of the work product doctrine recognized in Hickman v. Taylor. In Carpenter-Trant

18. Professor Friedenthal noted, however, that an expert can be an agent if he occupies a “managerial position” in relation to either the attorney or client. Id. at 457. An expert occupying a “managerial position” would have the power to engage legal counsel for the principal, or to make statements by which the principal would be bound. See Stewart Equip. Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (1954) (vice-president and sales manager of corporation justified in refusing to answer questions on attorney-client privilege grounds); see also Parker v. Carroll, 20 Fed. R. Serv. 2d 698 (Callaghan) (D.D.C. 1974) (lawyer/doctor who had examined plaintiff prior to becoming his attorney justified in refusing to answer questions, as the lawyer/doctor rendered legal advice, not medical, at the consultation).


20. Friedenthal, supra note 17, at 460. Professor Friedenthal recognized that sensitive information, such as trial strategy, would often be implicit in an expert’s report. In his opinion, however, this hardly justified an absolute ban because the retaining party could always move for a protective order if the need arose. Id. Moreover, Friedenthal contended that expert reports need not be protected under the attorney-client privilege, for if the reports were completed in anticipation of litigation, they would “ordinarily be privileged without need for any special justification.” Id. (footnote omitted). This apparent reference to the work product doctrine of Hickman v. Taylor, 329 U.S. 495 (1947), is entirely inconsistent with Friedenthal’s rejection of that doctrine as a separate basis for expert privilege.

21. Id.

22. Id.

23. Id. at 464; see RESTATEMENT (SECOND) OF AGENCY § 275 (1957) (knowledge of the agent is knowledge of the principal). Friedenthal recognized that expert reports are communications, just like a letter from client to counsel, and deserve the same degree of protection. Observations and conclusions, however, constitute evidence, which cannot be shielded by the attorney-client privilege. Friedenthal, supra note 17, at 469.

24. Friedenthal, supra note 17, at 464.

25. 329 U.S. 495 (1947). This case arose out of the sinking of the tug, “J. M. Taylor,” on February 7, 1943, during which five crewmen, including plaintiff’s decedent, were drowned. Defendant’s counsel interviewed the four surviving crewmen shortly thereafter, and obtained their signed statements recounting the details of the accident.

After filing suit, plaintiff sought to discover statements of the tug’s crew members taken
Drilling Co. v. Magnolia Petroleum Corp., for example, the district court relied on Hickman in holding that the work product privilege covered expert reports prepared in anticipation of trial. The court reasoned that expert reports clearly were the results of an attorney's "professional activities," and, therefore, should be protected from discovery.

by defendant in connection with the sinking. The defendants refused to produce the statements, arguing that they were privileged under the attorney-client doctrine.

The district court refused to recognize the witness' statements as privileged, and held that discovery should be granted unless such discovery would impede the case's prosecution. Hickman v. Taylor, 4 F.R.D. 479, 482-83 (E.D. Pa. 1945). When the defendant's counsel still refused to produce the statements, the court held the attorney in contempt. Hickman v. Taylor, 153 F.2d 212, 214 (3d Cir. 1945) (en banc).

The Third Circuit, sitting en banc, unanimously held that the production order was improper and reversed the contempt citation. The court found that the work product of an attorney, included all witnesses' statements taken in connection with a client's case. Id. at 222-23. The court concluded that these statements were absolutely immune from discovery and could never be taken from the opposing counsel, thereby creating an extremely broad privilege. Id.

The United States Supreme Court upheld the finding of the Third Circuit, but in doing so, struck a balance between the holdings of the circuit and district courts. Although the Court found that the statements could not be shielded under the attorney-client privilege, the Court held that discovery was nonetheless improper because the opposition in this case was merely trying to forge its way into the defendant's trial strategy. Hickman v. Taylor, 329 U.S. 455, 510 (1947). The Court softened this barrier to discovery by holding that witness statements and other work product of an attorney, which could be hidden in an attorney's files in certain cases in which the original witnesses were no longer available or reached only with difficulty, was held to be discoverable only upon a showing of "necessity or justification." Id.

Federal Rule of Civil Procedure 26(b)(3) codified the Supreme Court's holding in Hickman. In pertinent part, the Rule provides:

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 by or for that other party's representative... only upon a showing of 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.

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


The court stated that the "same protection accorded to lawyers' other work as necessary to 'prepare his legal theories and plan his strategy without undue and needless interference' . . . must be accorded to his technical information and strategy in the use of experts." Thus, the court concluded that expert reports were discoverable only upon a showing of good cause as required by *Hickman.*

It was argued that this rationale should not be extended to protect an expert's observations or opinions because the work product doctrine shielded only the statements of witnesses, not their observations. In other words, while the work product doctrine protects a witness' written statement to an attorney from discovery, it does not prevent the opposing attorney from interviewing the witness in order to obtain the facts underlying his statement. Therefore, in this view, even if the work product doctrine shields an expert's report from opposing counsel, it should not shield the expert's fact findings and opinions. "The opinions and conclusions of an expert are not those which *Hickman* sought to protect . . . [because they] constitute evidence in themselves, and may be the only way in which to establish facts material to the case." Furthermore, shielding an expert's observations and opinions from discovery might prevent full disclosure of facts material to the adjudication of the controversy.

29. *Id.* (quoting *Hickman*, 329 U.S. at 511) (citation omitted).


31. *Friedenthal, supra* note 17, at 470-73.

32. *Id.* at 470.

33. *Id.* at 472-73.

34. *Id.* (footnotes omitted).

35. Another commentator at that time, Jeremiah M. Long, however, recognized that the expert could perform functions that were directly related to trial preparation, and that work product ought to shield the expert from discovery of these matters. Because an "expert, although usually a witness during a trial, often performs functions before trial in assisting counsel to prepare direct and cross examination," he should not be available for discovery on those matters which will not be offered as evidence at trial. Long, *supra* note 7, at 142; see also *Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 F. 563, 565 (2d Cir. 1898) (Concerning an expert, the court noted that "he has been retained by plaintiffs as an expert to assist them in the presentation of their case. As such the witness would seem to come within the privilege . . . as similar to that of counsel. More careful reflection has still further confirmed the impression that assume the role of a witness."). Long accurately described the problem that led to the adoption of §§ 26(b)(4)(A)(ii) and 26(b)(4)(B), which both seek to limit discovery of expert information not to be offered at trial. See *infra* text accompanying notes 52-64. Nonetheless, Long saw the possibility that an expert would function in this advisory capacity as slight, and that the work product doctrine should not afford experts protection from discovery when their work was related to the facts of the case. *Long, supra* note 7, at 142.
The unfairness doctrine, which was based on two rationales, was used by some courts to justify denial of discovery of experts. The first rationale posited that opinions and facts held by an expert constituted "property" of both the expert and the retaining party and, therefore, were not discoverable by opposing counsel. In Lewis v. United Air Lines Transport Corp., for example, a third party sought discovery of an expert hired by United to perform tests on an allegedly defective aircraft engine. The court denied the defendant's motion to compel discovery. "To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money," reasoned the court, "would be equivalent to taking another's property without making any compensation therefor." A substantial minority of courts adopted this argument and refused to allow discovery of the expert when either the expert or the retaining party claimed a property interest in the expert's knowledge.

It was argued that, by placing a premium on the expert's "property," this rationale elevates form over substance, and thereby hinders access to valuable information at the expense of a loosely defined interest. Furthermore, discriminating in favor of one witness at the expense of broader disclosure of relevant facts simply was not warranted in view of justice's penchant for speedy, equitable resolution of disputes.

38. Id. at 23. The court did note, however, that when the expert had made changes in the engine, he should be required to state what those changes were. Similarly, if he performed any tests on the engine that could not be repeated because of his examination, the court indicated that it would require him to divulge the results of these tests. Id. The court's stance is entirely consistent with the "exceptional circumstances" requirement adopted by the Advisory Committee when promulgating Rule 26(b)(4)(B). See Fed. R. Civ. P. 26(b)(4)(B).
40. Long, supra note 7, at 133.
41. Id. Indeed, Long argued that, as far as the possible monetary loss to the expert is concerned, no special compensation was required because ordinary witnesses are routinely obliged to travel considerable distances and to take time off from work in order to testify. Experts, by virtue only of their advanced training, should receive no greater consideration than any other witness. Id. In addition, Long indicated that even the courts that recognized the "property" argument also realized that experts' conclusions and underlying facts were subject to discovery in cases of extreme need. Long, supra note 7, at 134; see Walsh v. Reynolds Metals Co., 15 F.R.D. 376, 378-79 (D.N.J. 1954). This tendency, even among courts that favored more restrictive measures, indicated that the rules are a product of the view that the public interest in justice is paramount to considerations of fairness to attorneys, witnesses, or parties. Evidence, therefore, cannot be withheld, nor does a property right exist in evidence, whether expert or not, which supercedes the interests of the court in using it in ascertaining the truth.
The power of the court to order parties seeking discovery to pay experts a reasonable fee for their services also undercut the validity of the property interest theory. If the court ordered compensation, the expert could not claim that he was robbed of his product, and the retaining party could not claim that it had provided the opposition with free information. Instead of recognizing the great benefits to be derived from expert discovery and the court's inherent power to mold the judicial process to limit inequities, the property interest theory focused on the possible harm to the retaining party. Critics of this doctrine stated that rather than ban expert discovery, courts generally should have allowed this discovery, limiting the process as necessary to avoid harm.

It also was argued in general that mutual pretrial discovery of experts and their conclusions is essential for effective cross-examination at trial. One commentator asserted that "Unlike two eyewitnesses who disagree, two experts who disagree are not necessarily basing their testimony on their views of the same objective features. Instead they may rely on entirely separate data, since the theoretical bases underlying their respective approaches may differ radically." If an attorney does not have a fair idea of the basis upon which the expert's opinion rests, he cannot, this commentator argued, cross-examine effectively. Especially in technical cases, it is too late to develop effective cross-examination at trial because such examination often relies heavily on advice and tests from one's own expert. Hence, the benefits to justice that accrue because of pretrial expert discovery outweigh potential unfairness.

The second rationale of the unfairness doctrine propounded the view that expert discovery would allow one side to take advantage of the work done by opposing counsel and would encourage the discovering party to refrain from retaining his own experts. This rationale, how-

. . . . Discovery of expert information takes away no property right without compensation, for the right to order discovery is reciprocal and the court has the power to order compensation.

Long, supra note 7, at 135.

42. FED. R. CIV. P. 26(b)(4)(A)(ii); see infra notes 51-61.

43. Long, supra note 7, at 135.


45. Just as the attorney interviewing a witness to an automobile accident will want to know the witness' exact location, what he was doing at the time of the accident, and anything else relevant to the witness' perspective in order to prepare an effective trial examination of that witness, an attorney faced with the prospect of examining an adverse expert at trial will want to know of any tests that were run and other related information in order to attack the sufficiency and outcome of the examinations.

46. In Schuyler v. United Air Lines Inc., 10 F.R.D. 111 (M.D. Pa. 1950), for example, the plaintiff sought to discover United's expert who had prepared reports in anticipation of litigation. United resisted discovery, arguing that allowing the opposition access to its experts was unfair, in light of the fact that the plaintiff was fully capable of employing its own witness. The court agreed with this argument, noting that allowing discovery would tend to encourage
ever, ignored the courts’ broad powers to condition discovery, and to postpone discovery until both parties had retained their own experts. 

**Rule 26(b)(4)**

In the wake of the criticism leveled at the prevailing judicial treatment of expert discovery, the Advisory Committee proposed the Rule.  The Rule divides experts that have been consulted in anticipation of litigation into two categories. Experts that are expected to testify at trial are governed by section 26(b)(4)(A). The information these experts possess, along with the theories that they will present at trial, can be discovered through interrogatories. The identity of these experts is also freely discoverable. Experts that are not expected to be called at trial are governed by section 26(b)(4)(B) of the Rule. The information in their possession, including facts, observations, and theories, cannot be discovered, parties to jockey for position, with each waiting for the other to begin trial preparation. *Id.* at 114. This, the court held, would lead to unfortunate delay in bringing the case to trial, and would severely prejudice the party that was diligent enough to have begun trial preparation far in advance.

48. The Rule, as adopted, provides in pertinent part:

26(b)(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)(i) 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.

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

49. *Id.*
50. *Id.*
except on a showing of "exceptional circumstances." The identity of these experts, in contrast to the testifying expert, is not freely discoverable. The Rule itself makes no comment on the discovery of the 26(b)(4)(B) expert's identity, but the Advisory Committee's Note indicates that such information may be had upon the "proper showing."

The following hypothetical situation illustrates how the Rule functions.\(^\text{51}\) Suppose that Lawyer \(P\), during intermission at the opera, discusses with his companion, Doctor \(I\), a difficult case that Lawyer \(P\) has recently accepted. The lawyer's client has sustained a severe spinal cord injury during the course of an operation, which was apparently necessary to remove a life-threatening tumor entwined about his spinal column. Doctor \(I\) initially indicates that he feels the surgeon who performed the operation was not negligent. As a general thoracic surgeon, however, Doctor \(I\) does not consider himself an expert in this field, and suggests that the lawyer contact a colleague, Doctor \(N\), a neurosurgeon.

Lawyer \(P\) contacts Doctor \(N\), and arranges an examination of the plaintiff. After the exam, Doctor \(N\) prepares a report for the lawyer, which also indicates a finding of no negligence. Doctor \(N\), however, states in the report that he would have consulted with an oncologist before attempting such risky surgery, and refers Lawyer \(P\) to a medical school professor who is highly skilled in cancers of nerve tissues, Doctor \(E\).

\(^{51}\) Hypotheticals such as this one have been used often by authors to explain the functioning of the Rule and to highlight their proposed solutions to the problems created by the Rule's ambiguity. See Note, Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B), 67 IOWA L. REV. 349, 358 (1982); Note, supra note 36, at 533-34.

The author of the latter Note above assails the Rule for its inability to control the use of experts in multi-party litigation. Stated simply, in multi-party cases, usually mass torts, the necessity of showing exceptional circumstances to discover a nontestifying expert as required by Rule 26(b)(4)(B) can be circumvented if one of a class of plaintiffs either drops out of the litigation or settles his case. Because that plaintiff is no longer a party to the suit, the prohibitions of 26(b)(4)(B) no longer apply to any experts he has employed. Because that one plaintiff's case probably will be substantially similar to others in a mass tort action, defense counsel will have great interest in discovering these "recycled" experts. The author of the Michigan Note contends that the restrictions of 26(b)(4)(B) should be applicable to experts, even if their employers have dropped out of the lawsuit. Note, supra note 36, at 550. The present discussion relates to a much broader problem with the Rule; namely, the discovery of the identity of nontestifying experts. This question has much larger ramifications, for identity discovery reaches the entire spectrum of expert usage and is not merely confined to multi-party situations.

The solution proposed in this Note, however, is also a sufficient remedy for the multi-party "free agent" expert problem. By forcing all parties to disclose to one another and to the court whether experts have been retained, the court can more easily ascertain which experts a party may or may not discover. See infra text accompanying notes 138-45. With the identities of all the experts disclosed, a party would be able to move for protective orders to prevent discovery of a particular expert if substantial prejudice would result. Therefore, requiring disclosure of the identities of all the experts and allowing motions for protective orders also functions to relieve the prejudicial effects of the multi-party free agent scenario.
Doctor E examines the plaintiff and prepares a report. Doctor E's report clearly states that any neurosurgeon should have consulted with an oncologist before performing this surgery, and that the defendant was negligent in not having done so.

With this information, the lawyer files suit against the defendant, Doctor D, alleging negligence in not meeting the general standard of care required for a physician of her training. As the case proceeds through discovery, the defendant's lawyer seeks to depose any expert whom Lawyer P intends to call at trial and seeks to discover the names, addresses, and qualifications of all parties whom Lawyer P has contacted in relation to the suit.

Lawyer P directs Doctor E, who will testify at trial, not to appear at any depositions unless subpoenaed, and in that case, not to answer any questions relating to information gathered or conclusions formed for this litigation. Lawyer P also refuses to disclose to the defense the identities of the other experts consulted in the course of his investigation. The defense moves to compel, which forces the court to make an exhaustive ruling on the scope of the Rule.

Initially, the court should deny the defense's request to depose the testifying expert. Under the Rule, two levels of discovery are available. The first, governed by subsection 26(b)(4)(A)(i), allows the opposition to discover only through interrogatories the testifying, adverse expert witness' identity, the subject matter on which he will testify, and his opinions. This limitation attempts to strike a balance between the competing interests in the adversarial trial system by preventing the exposure of the witness to an exhaustive deposition unless circumstances warrant it, while still allowing the opposition access to material necessary for the preparation of cross-examination. Further discovery of the adverse expert witness beyond the interrogatory stage is permitted at the court's discretion. It is not exactly clear what the discovering party must show before further discovery is permitted, and unfortunately the Advisory Committee Note is silent on the topic. Some courts have filled this gap by requiring a showing of substantial need before authorizing a deposition or an exchange of reports. See Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 205 (N.D. Miss. 1972) (reports of experts in product liability action not discoverable because plaintiffs failed to show "unique or exceptional circumstances"); United States v. 145.31 Acres, 54 F.R.D. 359 (M.D. Pa. 1972) (defendants in condemnation case not entitled to production of expert appraiser's report because need for discovery was not compelling), aff'd mem., 485 F.2d 682 (3d Cir. 1973); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970) (discovery of report itself available only upon showing of substantial need). These cases deal with requests for discovery of

54. Id. Rule 26(b)(4)(A)(ii); see 4 J. Moore, J. Lucas & G. Grotheer, supra note 52, ¶ 26.66[3]; 8 C. Wright & A. Miller, supra note 6, § 2031; Graham, supra note 6, at 922-23.

It is not exactly clear what the discovering party must show before further discovery is permitted, and unfortunately the Advisory Committee Note is silent on the topic. Some courts have filled this gap by requiring a showing of substantial need before authorizing a deposition or an exchange of reports. See Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 205 (N.D. Miss. 1972) (reports of experts in product liability action not discoverable because plaintiffs failed to show "unique or exceptional circumstances"); United States v. 145.31 Acres, 54 F.R.D. 359 (M.D. Pa. 1972) (defendants in condemnation case not entitled to production of expert appraiser's report because need for discovery was not compelling), aff'd mem., 485 F.2d 682 (3d Cir. 1973); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970) (discovery of report itself available only upon showing of substantial need). These cases deal with requests for discovery of
a prerequisite for discovery through depositions or access to reports.\textsuperscript{55}

The limitation in subsection 26(b)(4)(A)(i), however, extends only to facts and opinions "acquired or developed in anticipation of litigation or for trial."\textsuperscript{56} Thus, defendant’s attorney may depose freely Doctor $E$ regarding his qualifications, opinions, and testimony regarding other cases, and any other relevant material that was not developed specifically for the hypothetical case.\textsuperscript{57}

The hypothetical defense interrogatory that seeks to discover the identity of all persons contacted in relation to this suit poses equally difficult problems because this request would require disclosure of the iden-

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\textsuperscript{55} See In re IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39 (N.D. Cal. 1977); United States v. John R. Piquette Corp., 52 F.R.D. 370, 371 (E.D. Mich. 1971) (The Rule creates liberal standards for expert discovery.). Two courts have held that an expert report is not subject to the substantial need requirement of Rule 26(b)(3) because such reports are governed by 26(b)(4), which stands apart from the work product rule and is subject only to the general relevance requirement of 26(b)(1). See In re IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39, 41 (N.D. Cal. 1977); United States v. IBM Corp., 72 F.R.D. 78, 81 (S.D.N.Y. 1976). In addition, under 26(b)(4)(C), the discovering party will be required to defray part of the cost of any report he discovers and the entire cost of any deposition he demands.

\textsuperscript{56} FED. R. CIV. P. 26(b)(4)(A)(i).

\textsuperscript{57} See id. Rule 26(b)(4) advisory committee note; 4 J. MOORE, J. LUCAS & G. GROTHEER, \textit{supra} note 52, \S 26.66[2]; 8 C. WRIGHT & A. MILLER, \textit{supra} note 6, \S 2029. The requirement that an expert be "specially employed" for the purposes of litigation, and that his information and opinions must be prepared "in anticipation of litigation or for trial," seems to be a precaution against a party’s hiding material facts from discovery by naming a material fact witness and expert. See FED. R. CIV. P. 26(b)(4) advisory committee note.

Applying this portion of the rule has been difficult in cases in which the expert is an employee of the party resisting discovery. A bit of detached reflection yields the obvious result: the employee is a regular facts witness until the point at which he was "specially retained" for litigation, and, thereafter, an expert subject to the limitations set forth in the Rule. See Congrove v. St. Louis S.F. Ry., 77 F.R.D. 503 (W.D. Mo. 1978) (expert doctor viewed the accident that gave rise to the cause of action, so his knowledge of those facts freely discoverable because it could not have been prepared in anticipation of litigation); Inspiration Consol. Copper Corp. v. Lumbermen Mut. Casualty Co., 60 F.R.D. 205 (S.D.N.Y. 1973) (While an insurance company could discover fully an accountant’s statement of loss incurred from elevator collapse because the report was prepared in the ordinary course of business, it could not discover documents that the accountant had prepared for settlement negotiations.); In re Brown Co. Sec. Litig., 54 F.R.D. 384 (E.D. La. 1972) (in securities fraud action, employees of a firm hired to express its opinion on the fairness of a proxy solicitation and consequent merger discoverable as to those opinions, but not as to opinions prepared for trial); Duke Gardens Found., Inc. v. Universal Restoration, Inc., 52 F.R.D. 365 (S.D.N.Y. 1971) (expert hired prior to instigation of suit freely discoverable).
tity of the nontestifying expert, Doctor \( N \), and of the nontestifying informally consulted expert, Doctor \( I \). Rule 26(b)(4)(A)(i) states that certain expert information is discoverable only if such information is developed in anticipation of litigation.\(^58\) Courts have interpreted this limitation as prohibiting discovery of experts who are only "informally consulted."\(^59\) Such experts, not having been consulted in anticipation of litigation, simply do not fall within the requirements of the Rule. Neither the Rule nor the Advisory Committee's Note, however, give any indication of what must be shown to indicate that the expert was only informally consulted.\(^60\) Hence, it is unclear whether Lawyer \( P \) must disclose the name of Doctor \( I \), whom he consulted at the opera.

Likewise, the Rule does not expressly prohibit the discovery of the identity of a nontestifying, formally-retained expert; rather, the Rule protects only information and conclusions of the nontestifying expert.\(^61\) In fact, the Advisory Committee's Note indicates that discovery of the nontestifying expert's identity is available upon a proper showing.\(^62\) This "proper showing" clause has provided a rich field for the cultivation of

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60. FED. R. CIV. P. 26(b)(4)(B) advisory committee note; F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.11 (2d ed. 1977); 4 J. MOORE, J. LUCAS & G. GROTHER, supra note 52, ¶ 26.66[4]; 8 C. WRIGHT & A. MILLER, supra note 6, § 2032; Graham, supra note 6, at 932-33. The opposition can discover the nontestifying expert witness' opinions only after showing that "exceptional circumstances" exist that necessitate the discovery. FED. P. CIV. P. 26(b)(4)(B). The Advisory Committee and the courts indicate that the information to be discovered must be vital to the resolution of the dispute, and that the party seeking discovery must be unable to obtain the information elsewhere. See id. advisory committee note. In Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122 (S.D. Tex. 1976), defendants in an antitrust action sought to discover the opinions of various experts who had created a computer model of the Texas beer market at plaintiff's request in anticipation of this litigation. Although these experts were not slated to testify at trial, the court held that exceptional circumstances existed for their discovery because plaintiff's trial expert, an economist, would rely heavily on the computer model at trial, and defendants had no way of fully comprehending that testimony without discovering the model's creators. Id. at 1138. The court, however, denied defendant's request to discover the expert's alternative and prototype models because the defense had failed to show the need for this discovery.
61. 4 J. MOORE, J. LUCAS & G. GROTHER, supra note 52, ¶ 26.66[4]; 8 C. WRIGHT & A. MILLER, supra note 6, § 2032; Graham, supra note 6, at 932-33. The opposition can discover the nontestifying expert witness' opinions only after showing that "exceptional circumstances" exist that necessitate the discovery. FED. P. CIV. P. 26(b)(4)(B). The Advisory Committee and the courts indicate that the information to be discovered must be vital to the resolution of the dispute, and that the party seeking discovery must be unable to obtain the information elsewhere. See id. advisory committee note. In Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122 (S.D. Tex. 1976), defendants in an antitrust action sought to discover the opinions of various experts who had created a computer model of the Texas beer market at plaintiff's request in anticipation of this litigation. Although these experts were not slated to testify at trial, the court held that exceptional circumstances existed for their discovery because plaintiff's trial expert, an economist, would rely heavily on the computer model at trial, and defendants had no way of fully comprehending that testimony without discovering the model's creators. Id. at 1138. The court, however, denied defendant's request to discover the expert's alternative and prototype models because the defense had failed to show the need for this discovery.
62. FED. R. CIV. P. 26(b)(4)(B) advisory committee note.
various interpretations by courts and commentators. The issue of the discoverability of a nontestifying expert’s identity might not seem an extremely weighty one at first glance, but the problems that have grown out of this issue have had disastrous consequences for counsel and the parties to litigation. The dangers posed to counsel and client by the Rule’s current ambiguity are illustrated forcefully by a recent case from the federal district court in Nevada. In that case, a rather unscrupulous expert tired of his then present employ and sought the opposition’s counsel in order to strike a better deal for himself. The opposing counsel, unfortunately, was not aware at first that the person he was dealing with was actually his opponent’s 26(b)(4)(B) witness. If he had known this, counsel could have spared himself and his client the time and trouble caused by his ultimate disqualification.

The MGM Case

In American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas, Inc., the plaintiff (“AMPICO”) brought an insurance fraud action against the hotel-casino (“MGM”). The plaintiff alleged that MGM fraudulently had overstated its losses resulting from a 1981 fire in order to defray the cost of a new addition to the hotel.

Problems arose during the discovery phase of the lawsuit. One of MGM’s vice-presidents, George Morris, was primarily responsible for the details surrounding the reconstruction of the hotel and of the new addition. After the hotel reopened, Morris and MGM’s chief executive officer prepared MGM’s response to AMPICO’s conflicting view of the cost of reconstruction. After AMPICO instituted its suit, Morris re-


65. No. CV-LV-82-26 HEC (D. Nev. filed Jan. 15, 1982). A subsequent countercomplaint was filed by MGM against AMPICO, No. CV-LV-82-96 HEC (D. Nev. filed Feb. 16, 1982), and the cases were consolidated.


signed as vice-president of MGM, but immediately entered into an agreement to continue his old duties at an hourly pay rate and to assist MGM's attorneys in the preparation of their case.  

Subsequently, Morris' relationship with MGM soured. He instructed his attorney, Bongiovanni, to contact plaintiff's chief attorney, Cozen, and inquire whether plaintiff would be interested in Morris' services. Cozen was extremely wary of Bongiovanni initially because he did not know whom the outside attorney represented. Wary of possible ethical violations, Cozen warned Bongiovanni that if his client in some way had been involved in the MGM litigation, disclosure of his identity might make it impossible for the witness to remain in the suit. 

Ultimately, a meeting was arranged between Cozen, Bongiovanni, and Morris. At this meeting, Morris' identity and the existence of the consulting agreement between Morris and MGM were revealed. Cozen became concerned that his meeting with Morris might violate certain canons of the Code of Professional Responsibility, which prohibit ex parte contacts with persons already represented by counsel. Morris assured Cozen that he was not represented by MGM's attorneys, and that, in any event, he intended to terminate his consulting agreement with MGM. 

After researching the relevant law, Cozen concluded that he had an absolute right to interview Morris to gain facts material to the litigation. This conclusion was premised on Cozen's belief that Morris was not an expert within the meaning of either Rule 26(b)(4)(A) or

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68. Brief for Appellee, supra note 67, at 6-7. By this time, Morris was an expert specially retained for litigation. Information that he had acquired before being named as MGM's expert, however, remained freely discoverable under Rule 26(b)(1). See supra notes 19, 67. Contrary to plaintiff's assertion, plaintiff did not have a right to interview Morris on any and all relevant matters, because Morris' position as MGM's expert shielded that information which was developed in anticipation of litigation. FED. R. Civ. P. 26(b)(4)(B); see also supra text accompanying notes 56-57.


70. Brief for Appellant at 7, American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., Nos. 83-2674, 83-2728 (9th Cir. Dec. 3, 1984), withdrawn, Nos. 83-2674, 83-2728 (9th Cir. July 11, 1985). Apparently, Cozen was not concerned that he might inadvertently make contact with a nontestifying expert, but rather that he was being "set up" by MGM. Id. at 8.


72. Brief for Appellant, supra note 70, at 12.

26(b)(4)(B) because Morris had not been retained specially for litigation until late in the process.\textsuperscript{75} Morris' consulting agreement with MGM notwithstanding, Cozen contacted Morris on several more occasions after the first meeting.\textsuperscript{76} In these subsequent meetings, Cozen and Morris discussed various aspects of the case, which apparently included matters of material fact and information that Morris had prepared for trial as MGM's expert.\textsuperscript{77}

Once MGM discovered that these meetings had taken place, it immediately moved to disqualify Cozen as plaintiff's counsel, alleging that he had violated the provisions of the Rule and the Code of Professional Responsibility.\textsuperscript{78} The United States District Court for Nevada disqualified Cozen's firm from representing plaintiff in this action, stating in a brief written order that "Mr. Cozen invaded the MGM/Morris confidences and this was not only unfair but improper as well . . . ."\textsuperscript{79} The court recognized that Cozen firmly believed that Morris was nothing more than a fact witness; "however, it was not for Cozen to decide whether Morris was a 26(b)(4)(A) or 26(b)(4)(B) witness. He should have first sought a determination by proper motion to the court. In failing to do so," the court concluded, "he acted at his own peril."\textsuperscript{80}

\textsuperscript{75} American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., Nos. CV-LV-82-26 HEC, CV-LV-82-96 HEC, slip op. at 4-6 (D. Nev. Dec. 9, 1983) (order disqualifying counsel); Brief for Appellant, supra note 70, at 12.
\textsuperscript{76} American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Inc., Nos. CV-LV-82-26 HEC, CV-LV-82-96 HEC, slip op. at 4-6 (D. Nev. Dec. 9, 1983) (order disqualifying counsel); Brief for Appellant, supra note 70, at 12.
\textsuperscript{77} Brief for Appellee, supra note 67, at 12.
\textsuperscript{78} Id. at 25.
\textsuperscript{79} Id. at 5 (D. Nev. Dec. 9, 1983) (order disqualifying counsel).
\textsuperscript{80} Id. at 6. Once the district court's order was entered, Cozen immediately sought an interlocutory appeal to the Ninth Circuit, which upheld the district court's order in an opinion issued on Dec. 4, 1984. \textit{See} American Protection Ins. Co. v. MGM Grand Hotel-Las Vegas, Nos. 83-2674, 83-2728, slip op. at 5182 (9th Cir. Dec. 4, 1984). Before the Ninth Circuit could enter its mandate, which would have put Cozen's disqualification into effect, \textit{see} \textit{Fed. R. App. P.} 41(a), the United States Supreme Court issued its opinion in Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985). In essence, the Court held in this case that orders disqualifying counsel in civil cases are not "collateral orders" subject to interlocutory appeal under 28 U.S.C. 1291 (1982). \textit{Koller}, 105 S. Ct. at 2762-63; \textit{see also} \textit{Note}, supra note 2.

The Court's decision in \textit{Koller} forced the Ninth Circuit to withdraw its opinion upholding Cozen's disqualification in the \textit{MGM} case because the circuit courts no longer have subject matter jurisdiction to entertain such appeals. American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas, Inc., Nos. 83-2674, 83-2728 (9th Cir. July 11, 1985). Thus, \textit{Koller} thrust the entire Cozen matter back onto the district court. Unfortunately for Cozen, his firm remains disqualified, and he must wait for a resolution of the entire lawsuit before gaining another chance to appeal his disqualification. The \textit{Koller} decision, as will be seen, makes the current status of Rule 26(b)(4)(b) even more dangerous, for it is now impossible to appeal a civil disqualification immediately. Instead, counsel must now wait until the end of the litigation before attacking their disqualification—a process that can take years.
The court, however, did not indicate whether it would have permitted Cozen to discover the identity of MGM's nontestifying experts. Other federal courts have encountered this problem of discovery of a nontestifying expert's identity, and have reached conflicting conclusions.\(^1\) This conflict stems from the ambiguity of Rule 26(b)(4)(B): although the Rule itself does not state whether the identity of a nontestifying expert is discoverable,\(^2\) the Advisory Committee Note indicates that the opposition can discover this information upon a proper showing.\(^3\) The courts have divided into two distinct camps over the question of what constitutes a "proper showing."\(^4\)

Conflicting Judicial Solutions

Some courts have decided that this provision requires counsel to make the same exceptional circumstances showing that is required for discovery of nontestifying expert information itself. These courts reason, essentially, that there is little difference between discovery of the expert information and his identity. Therefore, they conclude, a nontestifying expert's identity deserves the same level of protection as his information. Other courts, however, feel that the nontestifying expert's identity is not as sensitive as his information. These courts recognize that knowledge of the expert's identity may be crucial in many situations. Therefore, these courts allow discovery of the identity when counsel can show that the information is relevant in the lawsuit.

Exceptional Circumstances Requirement

The Tenth Circuit decided the leading case supporting the requirement of exceptional circumstances in *Ager v. Jane C. Stormont Hospital & Training School for Nurses.*\(^5\) In that case, the plaintiff brought a medical malpractice action on behalf of his minor child, alleging that defendant's carelessness was the proximate cause of his child's permanent

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\(^2\) FED. R. CIV. P. 26(b)(4)(B).

\(^3\) *Id.* advisory committee note.


\(^5\) 622 F.2d 496 (10th Cir. 1980).
disability. After plaintiff filed suit, defendant served a set of interrogatories that sought to discover the identities of all persons whom plaintiff had contacted regarding the action. Plaintiff refused to provide any information regarding his nontestifying experts on the basis that a showing of exceptional circumstances was necessary to force such a disclosure.

Initially, the Tenth Circuit noted that the Rule divides experts into four categories: experts who will be called to testify at trial, experts who will not be called at trial, experts informally consulted, and experts whose information was not acquired in anticipation of trial. The court limited its discussion to experts of the second and third categories, however, because the identities of testifying witnesses are always discoverable, and the case did not involve experts who had not been consulted in anticipation of trial. Thus, the court was presented with two issues: first, when has an expert been informally consulted; and second, what constitutes a proper showing necessary for the discovery of the nontestifying expert's identity.

The district court below held that a party informally consults with an expert only if there is no consideration tendered for the expert's services. Other courts have held that an expert has been consulted informally when the consulting party derives no valuable assistance from the expert. The Ager court, however, refused to adopt either the "consideration tendered" or the "beneficial assistance" approach in favor of a more exhaustive case by case analysis, which enables a court to consider a variety of factors.

First, the manner in which the consultation was initiated would indicate to the court whether the parties considered their relationship to be formal or informal. Thus, a conversation during intermission at the

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86. Id. at 498.
87. Id. The exact interrogatories were as follows:
   1. Have you contacted any person or persons, whether they are going to testify or not, in regard to the case and treatment rendered by Dr. Dan Tappen?
   2. If the answer to the question immediately above is in the affirmative, please set forth the name of said person or persons and their present residential and/or business address.
   3. If the answer to question #1 is in the affirmative, do you have any statements or written reports from said person or persons?

Id.
88. Id. at 498-99.
89. Id. at 500-01; see 8 C. WRIGHT & A. MILLER, supra note 6, § 2029.
90. Ager, 622 F.2d at 500.
93. Ager, 622 F.2d at 501.
opera with a doctor suggests an informal consultation, while an office visit suggests a formal consultation.

Second, the nature, type, and extent of information or material provided to or by the expert in the course of his review of the case would effect the determination. The more detailed and sensitive the data that the expert receives and the more exhaustive his analysis, the more formal the consultation.

Third, the Ager court held that the duration and intensity of the consultative relationship would effect the balance. A brief, one-time examination might be informal, while a series of detailed tests might not. Finally, the court found that the terms of a consultation agreement relating to payment or confidentiality of data would be strong evidence of formality.

The court then turned to the second issue of what constitutes a proper showing necessary for discovery of a nontestifying expert's identity. Recognizing that substantial contrary authority existed, the Ager court found that the identity of a nontestifying witness is not discoverable unless the opposition makes a showing of exceptional circumstances mandating such discovery.

Noting that Rule 26(b)(4)(B) was developed largely around the doctrine of unfairness, the court stated that certain policy considerations supported its conclusion that the nontestifying expert's identity should receive the same protection afforded his facts and opinions. First, the

94. Id.
95. Id.
96. Id. Thus, the court held,

while we recognize that an expert witness' lack of qualifications, unattractive demeanor, excessive fees, or adverse opinions may result in a party's decision not to use the expert at trial, nonetheless, there are situations where a witness is retained . . . prior to the discovery of such undesirable information or characteristics. On the other hand, a telephonic inquiry to an expert's office in which only general information is provided may result in informal consultation, even if a fee is charged, provided there is no follow-up consultation.

Id. at 502.

There are several advantages to this multifactor analysis. First, it allows a court to find a formal consultation even if the expert is not paid. This discourages parties from hiding their experts by not paying them fees. Note, supra note 51, at 357; see Sullivan v. Sturm, Ruger & Co., 80 F.R.D. 489, 490-91 (D. Mont. 1978); Note, supra note 84, at 406; Note, supra note 36, at 547. In addition, it allows the court to determine the expert's role according to the circumstances of the case and not according to an inflexible rule that can lead to illogical results. The "beneficial assistance" test places the discovering party in an impossible position because he must prove that he received beneficial assistance from an expert whose identity he did not know, and without ever having seen the allegedly helpful reports. In addition, the "consideration tendered" rule would ban discovery of any information obtained for free, regardless of its importance to the lawsuit. Ager, 622 F.2d at 502; Note, supra note 51, at 357.

97. Ager, 622 F.2d at 502; see supra note 63 & accompanying text.
98. Ager, 622 F.2d at 502.
The court reasoned that the identity of the 26(b)(4)(B) expert must be protected because once it is disclosed, "the protective provisions of the rule concerning facts known and opinions held by such experts are subverted." This reasoning is dubious, at best. Disclosure of the expert's identity is not the equivalent of disclosure of the expert's information. Opposing counsel still must show the court exceptional circumstances in order to discover the opinions of the nontestifying expert once his identity is disclosed. Arguably, discovery of the identity makes this step easier to take, but the MGM ruling should serve as an adequate warning to counsel who contemplate ex parte contacts with adverse experts. Moreover, the nontestifying expert probably would avoid contact with opposing counsel, because such contact might violate an exclusivity clause in a contract with retaining counsel, might damage the expert's professional reputation, or might violate a code of ethical conduct for that profession. Thus, discovery of an expert's identity does not necessarily endanger the information in the expert's control.

Second, the court reasoned that, by requiring a stronger showing to discover the identity of the nontestifying expert, it would be more difficult for opposing counsel to compel him to testify. While this contention has merit, one must remember that a showing of exceptional circumstances is always necessary in order to gain access to the nontestifying expert's information, and that requiring the same showing to discover identity in order to protect information is redundant. Moreover,

99. Id. at 503.

100. See supra note 79. In addition, the district courts have always had a great deal of discretion on discovery problems. Connors, A New Look at an Old Concern—Protecting Expert Information from Discovery under the Federal Rules, 18 DUQ. L. REV. 271, 272 (1980); Note, supra note 51, 351-52 n.15; Note, Discovery of Experts: A Historical Problem and A Proposed FRCP Solution, 53 MINN. L. REV. 785, 793 (1969). Part of this power arises from the rarity with which discovery orders are reviewed, as such orders normally are not appealable. It is possible to certify the discovery order as collateral under 28 U.S.C. 1292(b) (1977), but this rarely occurs, as the courts of appeal have not shown a great interest in reviewing discovery orders. Note, supra note 36, at 544-45. Even if the order reaches the appellate level, the controversy often becomes moot because of a settlement. Id.

For a discussion of another example of a court's broad power in discovery matters, Campbell Indus. v. M/V Gemini, 619 F.2d 24 (9th Cir. 1980), see infra note 111.

101. Graham, supra note 6, at 933; Graham, supra note 64, at 195; Note, Legal Protection of the Confidential Nature of the Physician-Patient Relationship, 52 COLUM. L. REV. 383, 397-98 (1952); Note, supra note 51, at 363-64; Note, Medical Practice and the Right to Privacy, 43 MINN. L. REV. 943, 946 (1959); Note, supra note 36, at 547.

102. Ager, 622 F.2d at 503; see Kaufmann v. Edelstein, 539 F.2d 811 (2d Cir. 1976) (Nontestifying experts can be compelled to testify at trial at the courts discretion, regardless of Rule 26(b)(4)(B)); Graham, supra note 64, at 201.

103. Thus, in Kaufmann v. Edelstein, upon which the Ager court relied heavily, the court found that a nontestifying expert could be compelled to testify upon a strong showing of the following considerations: first, the degree to which the expert is called to recite facts rather than opinions; second, if opinions are to be offered, the degree to which previously formed opinions will be examined; third, the possibility that the expert is uniquely qualified, and that
the adversary who succeeds in compelling the expert to testify might not gain an unfair advantage because the expert is likely to be "client-oriented" or to express contrary opinions.\(^\text{104}\) Therefore, an independent "exceptional circumstances" requirement to protect identity in order to avoid disclosure of information is superfluous because counsel must already show exceptional circumstances to discover expert information.

Third, the Ager court found that, if the identity of the nontestifying expert was easily discoverable, the retaining party could be prejudiced because the opposing party could introduce the name of the absent experts at trial to create an inference that the retaining party had attempted to hide these experts from the jury.\(^\text{105}\) This contention completely overlooks the retaining party's ability to ask for a ruling on the admissibility of such evidence or for a jury instruction forbidding the consideration of this evidence during jury deliberations.\(^\text{106}\) In light of the court's ability to take precautions to avoid prejudice, the possibility of injury from such use of the expert's identity does not outweigh the benefits derived from the information.\(^\text{107}\)

Finally, the Ager court argued that disclosure of a nontestifying expert's identity is likely to have a "chilling effect" on the accessibility of experts in the future because many experts do not wish to be known as plaintiff or defendant experts.\(^\text{108}\) While the chilling effect on discovery created by open disclosure of the nontestifying expert's identity might be felt by a party seeking to procure experts, it could be no worse than that already caused by the discovery of testifying witnesses allowed under Rule 26(b)(4)(A). This provision allows not only the identity of the witness to be discovered, but his information and opinions as well.\(^\text{109}\) Because it is not normally determined at the initial consultation whether the expert will testify, the expert does not know in advance of discovery or trial what he eventually will be required to disclose. In light of the potential disclosure that the expert can be called upon to make under Rule 26(b)(4)(A), requiring disclosure only of his identity under no other experts with comparable knowledge can be called; and finally, the inconvenience to the expert and others that is caused by his testimony. Kaufmann v. Edelstein, 539 F.2d 811, 822 (2d Cir. 1976). Thus, expert testimony will not be compelled without a strong showing of need.

\(^{104}\) See Note, supra note 51, at 369; Note, supra note 36, at 551.

\(^{105}\) Ager, 622 F.2d at 503.

\(^{106}\) See C. Mccormick, Law of Evidence § 52 (2d ed. 1972 & Supp. 1978) (A party, anticipating the opposition's attempt to introduce evidence of the expert's absence in order to construe that evidence as an admission, can move to strike or for an advance ruling on the evidence's admissibility.); Note, supra note 51, at 371 n.137.

\(^{107}\) For discussion of benefits deriving from the discovery of the nontestifying expert's identity, see infra text accompanying notes 137-45.

\(^{108}\) Ager, 622 F.2d at 503.

\(^{109}\) See supra notes 52-55 & accompanying text.
26(b)(4)(B) would not seem capable of deterring any more experts than already occurs.

Moreover, the exceptional circumstances requirement in *Ager* could hinder a party's ability to determine which experts had or had not been retained by the opposition. This would be especially problematic in fields with only a few experts. If opposing counsel could not discover the identity of the nontestifying expert, she literally would be blindfolded in a minefield, for an innocent encounter with any of the retained experts might lead to the attorney's disqualification or other sanctions.

Just as the unfairness doctrine could not prevent the ultimate recognition of liberal expert discovery in general, it should not be construed to mandate a showing of exceptional circumstances before a nontestifying expert's identity can be discovered. A court certainly must be aware of potential unfairness to the retaining party, particularly when discovery of

111. *See supra* text accompanying notes 65-80. This is especially true when the adverse expert is dissatisfied with his current employer, and decides to "jump ship" as in the *MGM* case. *Id.* Moreover, the adverse counsel could seek to disqualify the opposition counsel by collusively arranging for a 26(b)(4)(B) witness to contact the opposition without disclosing his identity.

In a case similar to *MGM*, the Ninth Circuit has demonstrated its willingness to fashion broad remedies to punish violations of the Rule. The case of Campbell Indus. v. M/V Gemini, 619 F.2d 24 (9th Cir. 1980), involved a lawsuit between the manufacturer of a ship (Campbell) and its owner (Gemini), regarding the vessel's alleged unseaworthiness. During the course of the litigation, Campbell retained an expert and named him as a testifying trial expert under Rule 26(b)(4)(A). Approximately one month before trial, Gemini moved to take the opposing expert's deposition, as is allowed upon the proper showing under Rule 16(b)(4)(A)(ii). The affidavit that Gemini submitted with its motion, however, revealed that Gemini had had ex parte contacts with the opposing expert on several occasions. It was at these meetings, apparently, that the expert had revealed information damaging to his employer's case and had expressed a willingness to testify on behalf of Gemini. The district court denied the motion for deposition, and as a sanction for Gemini's "flagrant violation" of the Rule, ordered that Campbell's erstwhile expert be precluded from giving any testimony at trial. *Id.* at 26.

The Ninth Circuit upheld the disqualification of the trial expert. "A district court," it noted, "is vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial." *Id.* at 27. This discretion includes the power to exclude the testimony of experts altogether, and to exclude the testimony of witnesses whose use at trial is in bad faith or would cause unfair prejudice. *Id.* The court concluded that the district court was well within its discretion in prohibiting the testimony of the expert, which thereby denied Gemini the fruits of its misconduct. *Id.*

*Gemini*, although not dealing specifically with nontestifying experts or identity discovery, is an example of courts' intolerance of discovery abuses. Although the record in this case is unclear on the point, it seems possible that Gemini's initial contacts with Campbell's expert could have been entirely innocent, in that Gemini may have neglected to ascertain through discovery what testifying experts Campbell had retained. In this sense, Gemini would have been in the same position as a party confronted with his opponent's nontestifying experts, because it would not have been readily apparent whether an expert had been contacted or hired by the opposition already. Thus, in *Gemini*, as in *MGM*, it possibly was counsel's ignorance of the opposition's "team roster" and of the penalties for invading those confidences that brought about the severe sanctions from the court.
the expert's identity alone could alert the opposition to a secret trial strategy. Cases such as these, however, will be rare, and a court can always issue a protective order if necessary.112

Furthermore, the benefits to be derived from discovery of the non-testifying expert's identity clearly outweigh any potential unfairness. First, discovery of this information will advance trial preparation, in that knowledge of the expert's identity is necessary to determine whether an expert report exists.113 Second, discovery of the non-testifying expert's identity will help prevent the kind of unfairness experienced by plaintiff and plaintiff's counsel in _MGM_.114 On balance, requiring counsel to show exceptional circumstances for discovery of the non-testifying expert's identity, when so many benefits derive from that discovery, is unwarranted.

The _Ager_ court's conclusion rests in part on its failure to understand fully the relationship of Rule 26(b)(4) with Rule 26(b)(1).115 In the _Ager_ court's view, section 26(b)(4)(B) is not subject to 26(b)(1)'s general relevance requirement because it has its own exceptional circumstances requirement. Thus, the court reasoned that the Advisory Committee's requirement of a proper showing for discovery of the expert's identity must relate back to the stricter showing of exceptional circumstances and not to 26(b)(1)'s mere relevance requirement.116

**General Relevance Requirement**

Other courts, however, have approached the problem from a different perspective than _Ager_ and have found Rule 26(b)(1)'s relevance requirement to control all of Rule 26(b) cases except when express provisions state otherwise.117 For example, in _Baki v. B.F. Diamond Construction Co._,118 a Jones Act admiralty case, the plaintiff sought to

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112. Courts have broad discretion under Rule 26(c) to issue protective orders, and also have considerable authority to enforce those orders under Rule 37. See 8 C. WRIGHT & A. MILLER, _supra_ note 6, § 2281, at 753-54.


114. _See supra_ notes 78-80.

115. Federal Rule of Civil Procedure 26(b)(1) provides:

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

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the . . . identity and location of persons having knowledge of any discoverable matter . . . .

_FED. R. CIV. P. 26(b)(1)._ 116. _Ager_, 622 F.2d at 503; _see_ FED. R. CIV. P. 26(b)(4)(B) advisory committee note.

117. _See supra_ note 63.


compel answers to his interrogatories requesting the identities of defendant's 26(b)(4)(B) experts. The defendant refused to answer, relying on a predecessor of *Ager*, which also had required exceptional circumstances for such discovery.

The *Baki* court, however, found that the exceptional circumstances requirement did not extend to the discovery of the nontestifying expert's identity:

Rule 26(b)(1) requires that the identity and location of persons having knowledge of any discoverable matter be supplied. . . . Such a broad umbrella encompasses the category of experts, who have been retained or specially employed in anticipation of litigation or preparation for trial and who are not expected to be called as witnesses at trial [i.e., a 26(b)(4)(B) expert], since they may have knowledge of matter discoverable or potentially discoverable under the provisions and requirements of Rule 26(b)(4)(B).

The court reasoned that section 26(b)(4)(B) does not specifically mention the discoverability of the identity of the nontestifying expert because the authority to discover the expert's identity is already given in section 26(b)(1). Thus, *Baki* held that, in order to discover the nontestifying expert's identity, only the general relevance requirement of Rule 26(b)(1) must be satisfied.

The *Baki* court's approach also receives support from at least one commentator. Although this commentator did not mention *Baki* specifically, he criticized the *Ager* court for failing to consider the overriding policy favoring full trial preparation. In light of this fundamental policy, the author concluded, "it seems more appropriate that courts allow discovery of retained experts' identities under rule 26(b)(4)(B) whenever relevant to the litigation . . . ." Allowing discovery of expert identity upon a showing of mere relevance to the litigation is precisely the approach taken in *Baki*.

*Baki* would thus seem to have solved the problem created by the ambiguity of Rule 26(b)(4)(B) regarding discovery of a nontestifying expert's identity. Counsel, seeking to discover this information, will argue with great force that the nontestifying expert's identity is relevant, especially in light of the *MGM* case. Because the showing of relevance could be made with comparative ease, counsel should easily be able to discover the identity of the nontestifying expert.

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121. *Id.* at 280.
122. *Id.* at 181-82.
123. *Id.* at 182.
124. *Id.*
125. See Note, supra note 51, at 372.
126. *Id.* (emphasis added).
127. See supra text accompanying note 124.
128. See supra text accompanying notes 65-80.
Baki, however, is a sufficient response to the ambiguities of Rule 26(b)(4)(B) only when counsel is already aware of the possibility of harm posed by nontestifying experts. When counsel, as in the MGM case,129 is unaware that the opposition has engaged experts or that an apparent fact witness has been designated as an expert, the possibility of harm to both counsel and client looms large.130

Thus, neither of the two current interpretations of the Advisory Committee's Note's proper showing requirement is acceptable. As the discussion of the Ager case made clear, requiring exceptional circumstances for the discovery of expert identity is not necessary to protect the expert's information because counsel must already meet the high standard to gain discovery of information. Placing the exceptional requirement on discovery of identity, when such information can be crucial, seems unwarranted. The Baki analysis, although not as egregiously flawed as Ager, still requires an affirmative act by counsel in order to discover nontestifying expert identity. As seen above, this is unaccept-

129. See supra text accompanying notes 65-80.
130. A recent study has indicated that in 72% of the cases in which experts were employed, opposing counsel sought to discover all or some of the nontestifying experts. See Graham, supra note 64, at 193. With such a large majority of cases involving discovery of nontestifying experts, the scenario played out in the MGM case seems certain to occur with greater frequency. Even if the possibility of unauthorized ex parte contact is remote, the amendment proposed by this Note is justified because the injury incurred in only one of these types of cases is staggering. In the MGM case, for example, the main litigation involved a dispute over allegedly fraudulent insurance claims of some $40 million. With the possibility of punitive damages taken into account, Cozen's firm could have earned millions of dollars if it had not been disqualified. The harm to the plaintiff has been equally severe. In addition to losing its counsel of choice, AMPICO has spent tens of thousands of dollars in pursuing the disqualification issue through the appellate system. The delay fostered by the disqualification has also been enormous. Although the fire giving rise to the cause of action took place in 1981, at the time of this writing, the parties have yet to complete discovery on substantive issues, or to set the case for trial.

Equally disturbing is the fact that in some districts, courts allow discovery of the nontestifying expert without the required showing of exceptional circumstances. A local rule of the Western District of Pennsylvania directs a party to file with the court a statement including the names and addresses of all experts and physicians consulted in connection with the case, and to authorize all other parties to interview these experts, examine his pertinent records, and to obtain reports in connection with the case. W.D. PA. R. 5 II C(2)(c); see also Graham, supra note 64, at 193 n.52. While the Pennsylvanian local rule does require automatic disclosure of the nontestifying expert's identity, which would be required by the proposed amendment, it also forces disclosure of the nontestifying expert's information without any showing of exceptional circumstances. Moreover, from the language of the local rule, the information of any expert contacted in connection with the case, regardless of the formality of the contact, must be disclosed. This "shotgun" approach to expert discovery must be avoided because of the delicate nature of the information involved and of the employer-employee relationship. The proposed amendment is superior to the Pennsylvanian approach, in that it requires only the disclosure of the nontestifying expert's identity in order to prevent prejudice. Any further discovery of the nontestifying expert is conditioned upon the proper showing of exceptional circumstances.
able, in that counsel might not be aware that nontestifying experts exist in a given case and might innocently contact them, or the unscrupulous expert may contact unsuspecting counsel in an attempt to sell his information to the highest bidder.

Proposed Solution

If the 1970 amendment that created Rule 26(b)(4)(B) had reflected a greater concern for judicial scrutiny of expert discovery, the problems stemming from identity discovery could have been avoided. In order to foster a more efficient and fair system of discovery, articles by Mr. Long and Professor Friedenthal, which have had profound influence on the development of current attitudes toward expert discovery,131 offer several suggestions. These general objectives provide a good framework within which to suggest certain modifications to expert discovery.

According to Long, the key to fairness in discovery was reciprocity. When the parties are in a similar position with respect to each other's experts, discovery should be encouraged; when they were not, discovery should be conditioned or limited so that parties obtain advantages equally.132 Long's approach would have required the parties to determine in advance whether they were going to engage experts for the litigation, and, if so, to complete their examinations far enough in advance of discovery to allow the court to peruse the written reports of the experts. Upon reading the experts' reports, the court would be able to determine if discovery of an expert was likely to cause prejudice, and accordingly order depositions or exchanges of reports as necessary to maintain reciprocity.133

For Friedenthal, timing of discovery was paramount.134 Therefore, absent a showing of good cause to limit discovery, Friedenthal would have allowed discovery of testifying experts a short time before trial after it was clear which experts would testify and which would not.135 By requiring parties to list their experts in advance, the court would be able to prevent opposing parties from hiding potential fact witnesses, and would also prevent parties from attaining evidence from nontestifying experts.136 Although neither writer set forth a specific set of proposals regarding expert discovery, nor foresaw the exact dimensions of the problem posed by discovery of the 26(b)(4)(B) witness,137 the gist of their

131. Graham, supra note 6, at 900, 905.
132. Long, supra note 7, at 153; see also Graham, supra note 6, at 905.
133. Long, supra note 7, at 153.
134. Friedenthal, supra note 17, at 487.
135. Id.
136. Id.
137. Both Long and Friedenthal wrote some nine years before the 1970 Amendment was adopted.
general proposals suggests a more reciprocal, timely, and automatic expert discovery than the Rule provides today.

In order to alleviate the problems described above, the following amendment to the Rule, which has its roots in the writings of Long and Friedenthal, should be adopted:

26(b)(4)(D). Timing of expert discovery. Before discovery is to commence, the court shall require both parties to set forth in writing the identities of all experts they have contacted in anticipation of litigation or in preparation for trial, regardless of whether these experts are to testify at trial or not, and shall require parties to update that information as necessary. After the exchange of this information, the parties may then, pursuant to section (b)(4)(A)(i) of this Rule, send interrogatories to those experts who qualify, and may petition the court for further discovery under section (b)(4)(A)(ii). Contact by opposing counsel with an expert qualifying under section (b)(4)(B) of this rule without the court’s approval is expressly prohibited, and is cause for sanctions under Rule 37.138

The effects of the proposed amendment would be threefold. First, by expressly prohibiting unauthorized contact with nontestifying experts, the parties who retain them should not be fearful of exposing the identities of the experts that they have retained. Similarly, opposition counsel will be deterred from surreptitiously seeking to contact these experts once their identities are disclosed, for fear of the extremely heavy penalty to be paid for such an infraction. The proposed rule thus codifies the holding in the MGM case,139 in that it explicitly states that any ex parte contact with the nontestifying expert without court authorization could result in disqualification.

Third, by forcing each side to prepare a “team roster,” the litigation as a whole will benefit from better trial preparation and smoother discovery. Forced disclosure of the nontestifying expert’s identity will allow the opposition to determine more easily whether nontestifying experts have been retained in the first place, and whether they have rendered any reports that are germane to the suit. Without this information, it is impossible for opposing counsel to make the necessary showing of exceptional circumstances to discover these experts and their reports, as a party cannot discover what it does not know exists. In this sense, the proposed amendment fills an obvious gap in the original rule, which allowed discovery of nontestifying experts without creating a mechanism for a party to learn whether such experts had actually been retained.

In addition, the proposed amendment provides a uniform rule to be followed by all circuits, as opposed to allowing the various circuits either to adopt or reject the proposed amendment. The courts that have ad-

138. FED. R. CIV. P. 37 (providing sanctions for failure to make or cooperate in discovery).
139. See supra notes 65-80 & accompanying text.
dressed the issue are in substantial disagreement over the topic of identity
discovery, as evidenced by the *Ager*\textsuperscript{140} and *Baki*\textsuperscript{141} decisions. The addition of this rule would add much needed uniformity in an area where prejudice to retaining and opposing parties has proven great.

Most importantly, however, the amendment would enable all parties to be certain that their attempts to consult experts would not harm their own case, because both sides would know whom they could and could not contact. As the Rule now stands, parties operate at their own peril in seeking experts for assistance in preparing a suit. If an attorney contacts an expert who has been previously retained by the opposition, there is an inherent danger that the expert will either reveal confidential information to the attorney inadvertently or that the unscrupulous expert will play both sides of the litigation against each other in order to secure the best possible deal for himself. Furthermore, opposing counsel who makes ex parte communications with an expert will be disqualified, even if counsel's motive was innocent.\textsuperscript{142} Thus, the current Rule leaves unanswered vital questions regarding counsel's ability to contact experts.

It might be argued that this proposed amendment contravenes the general policy underlying the Federal Rules of Civil Procedure, which leaves the discovery process primarily up to the parties involved in the lawsuit.\textsuperscript{143} This policy notwithstanding, the Rules always have recognized that expert discovery is one area in which the guiding hand of the court is necessary to avoid prejudice. The Rules set forth in detail when and how a testifying\textsuperscript{144} or nontestifying expert may be discovered.\textsuperscript{145} Expert discovery has thus proven to be one area in which the Rules have allowed courts extraordinary powers over the normally autonomous discovery process.

The problem with discovery of the nontestifying expert's identity is caused by ambiguity within the Rule itself.\textsuperscript{146} By clearing up this ambiguity, questions regarding the interpretation of the "proper showing" requirement would be conclusively resolved, and parties would know exactly what to expect from a situation in which identity discovery was at issue.

**Conclusion**

If adopted, the proposed amendment to the Rule would remove the uncertainty presently surrounding discovery of a nontestifying expert's

\textsuperscript{140} See *supra* notes 85-116 & accompanying text.
\textsuperscript{141} See *supra* notes 118-30 & accompanying text.
\textsuperscript{142} See *supra* notes 65-80 & accompanying text.
\textsuperscript{143} FED. R. CIV. P. 26(a).
\textsuperscript{144} See id. Rule 26(b)(4)(A)(i), (ii); see also *supra* text accompanying notes 51-57.
\textsuperscript{145} See *Fed. R. Civ. P.* 26(b)(4)(B); see also *supra* text accompanying notes 59-61.
\textsuperscript{146} See *supra* notes 62-64 & accompanying text.
identity by establishing firm guidelines for all courts to follow. All parties to litigation would benefit from this amendment because it would enable them to avoid the risk of disqualification and, by the same token, to rest assured that the opposition would not approach their experts. As any football fan knows, it is impossible to tell the players without a program. The proposed amendment would allow the litigation's players and observers to know exactly who plays for whom.

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