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WRITER'S DIRECT ACCESS

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Via U.S. Postal Service

Peter G. McCabe, Esquire
Secretary, Committee on Rules of
Practice and Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Fed. R. Civ P. 26(a)(2)(B)

Dear Mr. McCabe:

Enclosed is a copy of an article that recently appeared in *The Review of Litigation*. It discusses the rising use of employees as testifying experts in litigation and the Federal Rules of Civil Procedure that affect expert discovery, particularly Federal Rule of Civil Procedure 26 ("Rule 26").

Several provisions of Rule 26 are allowing litigants to gain a strategic advantage over opponents where employees are called to offer expert testimony. Among other things, Rule 26(a)(2)(B) exempts employee experts from producing written expert reports. Conflicting language in subdivisions 26(a)(2)(B), 26(b)(3), and 26(b)(4) is allowing litigants to assert the attorney-client privilege and work product doctrine on behalf of employee experts to shield production of communications, documents, and other information that would be discoverable if the testifying expert were not an employee.

This trend seems to contravene the spirit and intention of the 1970 and 1993 amendments to the Federal Rules that made expert discovery accessible to aid meaningful cross-examination. Despite the inherent inequity of allowing testifying experts to withhold discovery, courts cannot agree whether employee experts are required to submit the written reports mandated by Rule 26(a)(2)(B). In addition, while it is generally accepted that the attorney-client privilege and work product doctrine may not be asserted on behalf of independent (non-employee) experts, the application of these privileges to employee experts also is in dispute.

Because courts have not addressed these issues uniformly, it may be useful for the Advisory Committee to reexamine Rule 26 to determine whether all testifying experts should be subject to the same disclosure requirements. If the motivation behind the amendments to Rule 26 is to remove the element of "unfair surprise" at trial, it would appear that subdivision 26(a)(2)(B) must be amended to clarify that employee experts fall within the purview of Rule 26. Revisions to Rule 26 to address the applicability of certain privileges to employee experts also

Peter G. McCabe, Esq.
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KELLER AND HECKMAN LLP

may be required. Until this is done, the use of employees as testifying experts will continue to impede both the fact-finding process and effective cross-examination.

Thank you for your time and consideration. If you have any questions, please do not hesitate to call.

Sincerely,
Keller and Heckman LLP

A handwritten signature in black ink, appearing to read "G. Mickum IV", written over a horizontal line.

George Brent Mickum IV

Enclosure

Guise, Contrivance, or Artful Dodging?:¹
The Discovery Rules Governing Testifying Employee
Experts

George Brent Mickum IV*
Luther L. Hajek

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1. Language taken from *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co.*, 199 F.R.D. 320, 325 (D. Minn. 2000), discussed *infra* Section VIII.E.2.

* Mr. Mickum, Keller and Heckman LLP; Mr. Hajek, Spriggs & Hollingsworth. The authors gratefully acknowledge the contributions of Paula A. Moore, whose research assistance and editing skills greatly contributed to the final product.

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The technique of playing the cards close to the vest
and hoping by surprise or maneuver at the trial to

carry the day, whether or not right and justice lies on the side of one's client, won't be tolerated. It was and is great sport, but hardly defensible as a system for determining causes according to truth and right. In pretrial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and maneuver as twin allies of the sporting theory of justice. . . .²

I. SUMMARY

This article discusses the rising use of employees as testifying experts in litigation and the Federal Rules of Civil Procedure that affect expert discovery, particularly Federal Rule of Civil Procedure 26 ("Rule 26"). Several provisions of Rule 26 allow litigants to gain a strategic advantage over opponents when employees are called to offer expert testimony. For example, Rule 26(a)(2)(B) exempts employee experts from producing written expert reports. Conflicting language in subdivisions 26(a)(2)(B), 26(b)(3), and 26(b)(4) allows litigants to assert the attorney-client privilege and work-product doctrine on behalf of employee experts to shield production of communications, documents, and other information that would be discoverable if the testifying expert were not an employee.

This disquieting trend contravenes the spirit and intention of the 1970 and 1993 amendments to the Federal Rules of Civil Procedure that made expert discovery accessible to aid meaningful cross-examination.³ Despite the inherent inequity of allowing testifying experts to withhold discovery, courts do not agree whether employee experts are required to submit the written reports mandated by Rule 26(a)(2)(B). In addition, while it is generally accepted that the attorney-client privilege and work-product doctrine may not be asserted on behalf of independent (non-employee)

2. Justice William Brennan, Changes in Trial Tactics, Address Before the American College of Trial Lawyers (Apr. 1958), *in* *Twigg v. Norton Co.*, 894 F.2d 672, 675 (4th Cir. 1990).

3. Prior to the adoption of the 1970 amendments, expert discovery was not available as a matter of right and was only granted on an as-needed basis by the courts. See discussion *infra* Section VII.

experts, the application of these privileges to employee experts is in dispute.

Because courts have not addressed these issues uniformly, reexamination of Rule 26 is needed to determine whether all testifying experts should be subject to the same disclosure requirements. If the motivation behind the amendments to Rule 26 is to remove the element of "unfair surprise"⁴ at trial, then subdivision 26(a)(2)(B) must be amended to clarify that employee experts fall within the purview of Rule 26. Revisions to Rule 26 also may be required to address the applicability of certain privileges to employee experts. Until this is done, there is likely to be an explosion in the use of employees as testifying experts in litigation. This will impede both the fact-finding process and effective cross-examination.

Part I of this article discusses the importance of expert testimony, and it identifies various ways that employee experts are evading discovery and the various interpretations of Rule 26 that impact the ability of a party to obtain expert discovery from an employee expert. Part II discusses the relevant 1970 and 1993 amendments to the Federal Rules of Civil Procedure that made expert discovery uniformly available and gave rise to the issues discussed herein. Part III analyzes the reporting requirements of Rule 26(a)(2)(B) and reviews relevant cases that address whether employee experts are required to produce written reports under the rule. Part IV analyzes the extent to which the attorney-client privilege and the work-product doctrine may be used to shield discovery shared with or created by employee experts and the cases that have addressed these issues. Part V discusses the rulings of a magistrate judge in a single case in the Southern District of Ohio that addressed many of the issues discussed in this article.

PART I

II. BACKGROUND: THE IMPORTANCE AND PROLIFERATION OF EXPERTS IN MODERN LITIGATION

Although difficult to quantify with precision, litigants rely with ever-increasing frequency on expert testimony to prosecute and

4. *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995).

defend claims.⁵ One writer has stated that “[i]n civil litigation, a case presented without the aid of expert information is becoming less common.”⁶ Nearly every federal case involving large damage claims requires expert testimony.⁷ A 1990 Rand Corporation study concluded that expert witnesses appeared in 86% of California trials, with an average of 3.3 experts per trial.⁸ Setting aside any judgment as to whether this trend is good or bad, expert witnesses are an everyday fact of life, particularly in big-case litigation.⁹

The ubiquity of expert testimony is such that barely a week passes without a new decision that applies, extends, or discusses the principles espoused by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰ and the line of cases spawned in its wake.¹¹ Indeed, recent amendments to the Federal Rules of Evidence codify the gatekeeping requirements set forth in those cases.¹²

5. See, e.g., Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 773 (1994) (stating that “expert witnesses have become central figures in modern federal trials”); Maureen Geary, Note, *Riddled With Controversy: Calling Opposing Counsel’s Non-Testifying Expert in Light of the Decision in Oregon v. Riddle*, 63 U. PITT. L. REV. 441, 442 (2002) (stating that “in contemporary litigation, expert testimony is a necessary, if not essential, component of a litigant’s success”).

6. Sheila E. McDonald, *The In-House Expert Witness: Discovery Under the Federal Rules of Civil Procedure*, 33 S.D. L. REV. 283, 283 (1988).

7. Mickus, *supra* note 5, at 773 (citing Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 473 (1986)); Ronald L. Carlson, Essay, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 578 (1986).

8. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119.

9. See, e.g., *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (stating that “the impact of expert witnesses on modern-day litigation cannot be overstated”).

10. 509 U.S. 579 (1993).

11. See *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (recognizing that trial judge must make determination of credibility of expert witnesses); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (stating that the “gatekeeping” obligation set out in *Daubert* “applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge”); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997) (noting that the Federal Rules of Evidence do not displace the “gatekeeper” role of the trial judge).

12. FED. R. EVID. 702 advisory committee’s notes. The 2000 amendment “affirms the trial court’s role as gatekeeper and provides some general standards

But none of this is new. Experts are long-established fixtures of the legal landscape. What *is* new is the increasing use of employees as testifying experts. Why is this taking place? In his concurring opinion in *Herbert v. Lando*,¹³ Justice Powell opined that "discovery techniques . . . have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice."¹⁴ Whether using employees as testifying experts qualifies as a "discovery technique" may be debated, but there is little doubt that use of employees as testifying experts redounds to the "disadvantage of justice." This is especially true when employee experts are permitted to play by a different set of rules that allows them to avoid disclosing the same discovery that non-employee experts are required to produce.

III. WHY IS OBTAINING EMPLOYEE EXPERT DISCOVERY AN IMPORTANT ISSUE?

Aside from assisting a litigant in cross-examination, the ability to obtain discovery from employee experts is essential because of (1) the preponderance of expert testimony, (2) the virtual necessity of expert testimony to assist the trier of fact, and (3) the fact that experts are generally given great deference by juries.¹⁵ Although a party is free to argue that an opposing employee expert is not impartial and may not be persuasive to a finder of fact as an independent witness, the potential advantage gained by circumventing the disclosure requirements of the Federal Rules of Civil Procedure by using employees as experts will continue to present a powerful temptation that may be impossible for lawyers to ignore.

At issue is the ability of one party to prevent another party from obtaining essential discovery. Without access to an expert report and the underlying documents and materials that an expert considered, an opposing party's ability to cross-examine an expert to expose bias, methodological flaws, or substantive inaccuracies in an

that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."

13. 441 U.S. 153, 177 (1979) (Powell, J., concurring).

14. *Id.* at 179.

15. *See, e.g.,* *Occulto v. Adamar of N.J., Inc.*, 125 F.R.D. 611, 616 (D.N.J. 1989) (discussing the importance of expert testimony for a jury).

expert's testimony at trial is severely compromised. Furthermore, an employee expert is able to shield earlier opinions, calculations, and other facts, the disclosure of which might otherwise be used to undermine an expert's testimony at trial.¹⁶ Just as important, the ability of a judge or jury to evaluate the reliability of an expert's testimony is greatly diminished by the absence of disclosure requirements.¹⁷ For example, the ability of a fact finder to determine whether an expert is simply "parroting" the testimony of counsel is negatively affected.¹⁸ As one district court noted, "assertive, probing, coherent, and well-informed cross-examination [is] essential to equipping the trier of fact to judge the persuasive power and reliability of such testimony and to determine which of competing expert views should be credited."¹⁹

The 1993 Amendments were enacted to require production of expert discovery, prevent surprise at trial, and afford adequate opportunity to conduct effective cross-examination.²⁰ However, ambiguity in the language of certain subdivisions of Rule 26 has had the opposite effect with respect to employee experts, allowing litigants to sandbag opponents at trial. Whether intentional or not, the exceptions carved out for employee experts should not exist, and Rule 26 needs to be amended to remove this advantage.

16. See *Quadrini v. Sikorsky Aircraft Div.*, 74 F.R.D. 594, 594-95 (D. Conn. 1977) (stating that "[d]iscovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date"); see also *In re Air Crash Disaster*, 720 F. Supp. 1442, 1444 (D. Colo. 1988) (stating that "discovery of all material possessed by an expert relating to the matter at hand develops a record").

17. See *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 396 (N.D. Cal. 1991) (stating that "[w]e are aware that at least some lawyers take professional pride in their ability to indirectly 'control' their experts, e.g., through the timing or sequencing of the data/information they give the experts"). The manipulation of an expert by the attorney clearly threatens the independence of the expert's analysis and conclusions. *Id.* at 393-94.

18. *Id.* at 393-94 (citing FED. R. CIV. P. 26 advisory committee's notes, 1970 amend.). The *Intermedics* court's use of the term "parroting" comes from the court's discussion in *Occulto*, 125 F.R.D. at 614-16.

19. *Intermedics*, 139 F.R.D. at 394.

20. FED. R. CIV. P. 26 advisory committee's notes, 1993 amend.

IV. CLASSIFICATION OF EXPERTS

The 1993 Amendments to the Federal Rules of Civil Procedure define an expert as any person who may be used to present evidence under Article VII of the Federal Rules of Evidence, which governs the admissibility of Opinions and Expert Testimony.²¹ Experts retained in anticipation of litigation who are expected to offer Article VII testimony are controlled by Rule 26(a)(2)(A). This provision requires a party to "disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence."²²

Thus far, only two categories of experts have been mentioned in this article: independent experts and employee experts. Although the language of Rule 26 implicitly recognizes that various categories of experts exist, only employees are specifically identified.²³ For purposes of this article, there are several categories and subcategories of experts. First, the law distinguishes between testifying expert witnesses and non-testifying, or confidential, experts. The former category includes independent experts, employee experts, and treating physicians. These categories are discussed *infra*.

A. *Experts Retained to Assist at Trial*1. Non-Testifying Expert Witnesses²⁴

Parties to litigation frequently retain confidential, or non-testifying, experts to evaluate the facts and circumstances of a case

21. See, e.g., *Hoover v. United States*, No. 01-C-2372, 2002 U.S. Dist. LEXIS 15648, at *1 (N.D. Ill. Aug. 21, 2002) (citing FED. R. CIV. P. 26(a)(2)(A), the rule that an expert is any person who may testify at trial under the rules of evidence).

22. FED. R. CIV. P. 26(a)(2)(A).

23. Treating physicians are discussed in the advisory committee notes for the 1993 amendments, where they are dealt with as percipient witnesses. Still, it may be useful to think of them as "hybrid" expert witnesses who are fact witnesses and expert witnesses by virtue of their expertise, education, or expertise. It is possible that the drafters equated employee experts and treating physicians on this basis.

24. Confidential expert witnesses are also referred to as non-testifying experts. A complete discussion of such expert witnesses is beyond the scope of this article. For a more complete discussion, see Geary, *supra* note 5.

and assess the merit of certain arguments and/or defenses. Such experts provide a broad array of services that may include providing general background information, formulating legal opinions, and conducting testing. Normally, such experts sign a confidentiality agreement before performing any work. Neither the work that confidential experts perform nor the documents they review are normally subject to disclosure, and the identity of such experts generally is not disclosed to an opposing party.

Following an initial review of the work and/or opinions of a confidential expert, it is not unusual for a non-testifying expert to become a testifying expert at the election of the litigating party. This usually occurs after a non-testifying expert has reviewed case materials and offered a preliminary oral opinion that is favorable to the party.²⁵ When this happens, the expert must be disclosed and is required to produce a written report. In addition, discussions with counsel that took place while the expert was a non-testifying expert become fair game for discovery.

Experts who are "retained or specially employed" in anticipation of litigation, but who are not expected to be called as witnesses, are controlled by Rule 26(b)(4)(B). Under this provision, discovery of factual or opinion evidence may be obtained "only as provided in Rule 35(b)^[26] or upon a showing of exceptional circumstances under which it is impracticable for a party seeking discovery to obtain facts or opinions on the same subject by other

25. See W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1346-47 (1999) (suggesting experts understand they will testify only if they render an opinion that is helpful to the case); Mickus, *supra* note 5, at 784 (suggesting counsel would only call an expert to testify if the expert's testimony supported the party's position).

26. FED. R. CIV. P. 35 (pertaining to physical and mental examinations of persons).

means."²⁷ Historically, the "exceptional circumstance" standard has proved sufficiently rigorous to afford adequate protection.²⁸

B. Categories of Testifying Experts

1. Testifying Experts

A testifying expert is a witness who is specially qualified to "assist the trier of fact to understand evidence or to determine a fact in issue."²⁹ Unlike fact witnesses, whose testimony is controlled and limited by Federal Rule of Evidence 602³⁰ (and, to a lesser extent, by Fed. R. Evid. 701),³¹ expert witnesses are governed by Fed. R. Evid. 702, 703, and 705. Compared to fact witnesses, expert witnesses are given greater latitude to offer opinions and testify to a wider array of topics.

27. FED. R. CIV. P. 26(b)(4)(B). This provision raises an interesting question: is an adverse party entitled to discovery from a confidential expert in a situation that would require a non-testifying expert to divulge evidence (in the form of testing, for example) that was not favorable? Certainly, unfavorable information culled or created by a non-testifying expert is unlikely to be shared with a party's testifying expert. Accordingly, discovery from the confidential expert may be the only means of obtaining such information.

28. See *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 994 (D.C. Cir. 1980) (requiring that the information sought must not be available from other sources); *Grindell v. Am. Motors Corp.*, 108 F.R.D. 94, 95 (W.D.N.Y. 1985) (suggesting the burden is not met where the information was discoverable from the retaining party); *Crockett v. Va. Folding Box Co.*, 61 F.R.D. 312, 320-21 (E.D. Va. 1974) (holding that information sought must be material to the cause of action).

29. FED. R. EVID. 702.

30. The general rule of thumb is that a "witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact." FED. R. EVID. 602 advisory committee's notes, 1972 proposed rules (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 10, at 19 (1954)).

31. Fed. R. Evid. 701 pertains to opinion testimony offered by lay witnesses. *But see* discussion of *Duluth Lighthouse for the Blind v. C.G. Bretting Mfg. Co.*, *infra* at Section VIII.E.2 (noting that Fed. R. Evid. 701 is interpreted expansively so as to permit the admission of an opinion if it is based upon relevant historical facts that the fact witness has perceived and if it would help the fact finder's determination).

2. Independent Experts

For purposes of this article, an independent expert is an expert who is not an employee of a party litigant. Frequently, independent experts come from academia or private practice. The distinguishing feature of independent experts is that they are separate and apart from a party litigant and are, thus, ostensibly capable of offering testimony that is untainted by any bias due to a relationship with the litigant. However, it is not unusual for an independent expert to testify on behalf of a given litigant on multiple occasions, thus fairly calling into question his or her independence from that litigant.

3. Employee Experts

For purposes of this article, an employee expert is an individual employed by a party litigant who (1) is identified by the party as a testifying expert in litigation, and/or (2) intends to provide testimony under Fed. R. Evid. 701, 703, or 705.³² Rule 26(a)(2)(B) specifically recognizes this category of experts, creating an apparent exception for employee experts who do not regularly testify.

4. Treating Physicians

Notably, while the definition of the term "expert" refers to persons who will testify under Fed. R. Evid. 702, it does not distinguish between witnesses who are retained to offer opinion testimony and witnesses who are not retained but who nonetheless may offer opinion testimony that arguably falls within the rubric of Fed. R. Evid. 702.³³ The treating physician is an example of the latter.³⁴

32. An employee expert may, or may not, also be identified as a fact witness.

33. *Hoover*, 2002 U.S. Dist. LEXIS 15648, at *9 (citing FED. R. CIV. P. 26(a)(2) advisory committee's notes, 1993 amend.).

34. FED. R. CIV. P. 26(a)(2) (stating that "[f]or convenience, this rule and revised Rule 30 continue to use the term 'expert' to refer to those persons who will testify under Rule 702 . . . a treating physician, for example, can be deposed or called to testify at trial without any requirement of a written report").

The Advisory Committee Notes to the 1970 Amendments to Rule 26(b)(4) state that the rule only addresses retained experts. The amendment does

not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to the transactions or occurrences that are part of the subject matter of the lawsuit. Such a witness should be treated as an ordinary witness.³⁵

Applying the 1970 Amendments, a number of courts have held that "a treating physician who offers testimony as an occurrence witness, rather than as a retained expert, should be considered 'an actor or viewer' and 'treated as an ordinary witness.'"³⁶ On the other hand, courts have recognized that the treating physician exemption is not universal. Where a treating physician's "proposed opinion testimony extends beyond facts made known to him during care and treatment," the treating physician is "specially retained" per Rule 26(a)(2)(B).³⁷

"[A]n expert need not be identified as an expert if he was 'a viewer or actor with regard to the disputed question.'"³⁸ To determine whether an expert needs to be identified before trial, "Rule 26 focuses not on the status of the witness, but rather on the substance of the testimony."³⁹ Under the Federal Rules, a party is required to identify an expert if his or her "testimony does not come

35. FED. R. CIV. P. 26(b)(4) advisory committee's notes, 1970 amend.

36. *Hoover*, 2002 U.S. Dist. LEXIS 15648, at *6 (quoting *Patel v. Gayes*, 984 F.2d 214, 217 (7th Cir. 1993)).

37. *Soll v. Provident Life & Accident Ins. Co.*, No. 00-3670 Section "N" (4), 2002 U.S. Dist. LEXIS 12568, at *5 (E.D. La. July 5, 2002); *see also Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996) (finding physician's testimony went "far beyond any personal observations that he might have made during the course of [treatment]," thus requiring a 26(a)(2)(B) report); *Hoover*, 2002 U.S. Dist. LEXIS 15648, at *6 (holding that when a physician is asked to offer an opinion that goes beyond information acquired as a result of the treating relationship, the physician must submit a report as required by Rule 26(a)(2)(B)).

38. *Patel v. Gayes*, 984 F.2d 214, 217 (7th Cir. 1993) (citing *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986)).

39. *Id.* at 218 (citing *Nelco Corp. v. Slater Elec., Inc.*, 80 F.R.D. 411, 414 (E.D.N.Y. 1978)).

from his personal knowledge of the case,⁴⁰ . . . or if his knowledge was 'acquired or developed in anticipation of litigation or for trial.'"⁴¹

V. THE ADVANTAGES OF USING AN EMPLOYEE EXPERT

Some of the benefits of using an employee expert in litigation are obvious. First, normally there is no question about an employee's allegiance.⁴² Second, using an employee as a testifying expert can result in enormous cost savings. The hourly rate for independent experts generally starts in the range of \$300 an hour and heads upwards from there. Monthly bills for expert services to prepare Rule 26(a)(2)(B) reports and offer deposition and trial testimony may easily run into five figures. In lengthy litigation, the cost for an expert economist to analyze sales data, prepare a Rule 26(a)(2)(B) report and a rebuttal report, be deposed, and testify can easily run into six figures.⁴³ However, while the cost benefit of using a salaried employee as a testifying expert is undeniable, saving money may not be the primary objective of a litigant who chooses to rely on an employee to provide expert testimony.

A. *Strategic Reasons for Using Employee Experts*

The primary reason for the increasing use of employees as experts appears to be tactical, as opposed to practical, in nature. If the Federal Rules governing expert discovery applied equally to all experts, the use of employee experts would merit little, if any, discussion. If full disclosure were required of all experts, it is questionable whether the use of employee experts would be as widespread.

40. *Id.* (citing *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 728 (9th Cir.), *cert. denied*, 479 U.S. 918 (1986)).

41. *Id.* (quoting *Grinnell Corp. v. Hackett*, 70 F.R.D. 326, 331 (D.R.I. 1976)).

42. This issue alone favors requiring employee experts to adhere to the same discovery requirements as independent experts.

43. A typical professional expert charges hundreds of dollars an hour and earns well over the six-figure mark each year. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURT ROOM* 19-20 (Basic Books 1991).

1. Employee Experts Do Not Have to Prepare Rule 26(a)(2)(B) Reports

The Federal Rules specifically permit testifying employee experts to be used for strategic advantage. For reasons that are not explained in court decisions or the Advisory Committee Notes, this one category of experts is allowed to evade the discovery requirements imposed on traditional, independent experts. Pursuant to its language, the application of 26(a)(2)(B) is limited to "a witness who is retained or specially employed to provide expert testimony in the case or *whose duties as an employee of the party regularly involve giving expert testimony.*"⁴⁴ It is difficult to imagine precisely what the drafters of 26(a)(2)(B) had in mind when the exception for employees whose duties do not regularly "involve giving expert testimony" was created. Frankly, with the possible exception of serial litigation (i.e., tobacco and asbestos litigation), it is difficult to imagine an employee whose duties would regularly require him or her to testify as an expert witness. It is certainly possible that the Advisory Committee viewed employee experts as more akin to treating physicians in the sense that they are likely to be fact witnesses. Still, it is difficult to imagine that the drafters did not anticipate that employee experts might be called to offer testimony under Fed. R. Evid. 701, 703, and 705. Accordingly, the exemption appears to be inconsistent with the objectives of Rule 26.

2. Employee Experts May Enjoy Privileges Under the Work-Product Doctrine and the Attorney-Client Privilege

The use of employee experts also allows litigants to shield work-product and attorney-client communications that would otherwise be discoverable. The general rule of thumb is that the attorney-client privilege and the work-product doctrine may not be invoked to shield discovery shared with or generated by independent testifying experts. However, the linguistic tension among subdivisions 26(a)(2)(B), 26(b)(3), and 26(b)(4) has spawned a dispute over the assertion of these privileges to employee experts. The cause of the problem appears to be the language in Rule

44. FED. R. CIV. P. 26(a)(2)(B) (emphasis added).

26(a)(2)(B) that was added as part of the 1993 Amendments. The 1993 Amendments require independent testifying experts to submit expert reports that contain not only their opinions but also "the data or other information *considered* by the witness."⁴⁵ These provisions were added to promote the exchange of information, avoid surprise at trial, and aid meaningful cross-examination.⁴⁶ In addition to the reporting requirement, Rule 26(a)(2)(B) precludes litigants from asserting work-product and attorney-client privileges to prevent disclosure of documents and other information disclosed to an expert.⁴⁷ Whether the same rules apply to employee testifying experts is currently in dispute.

Thus, either wittingly or unwittingly, the Federal Rules have created loopholes that allow litigants to conceal: (1) documents and information, (2) the role played by an employee expert in the prosecution or defense of a case, and (3) an expert's potential bias.⁴⁸

B. *Discovery Available Under the Federal Rules for Employee Experts*

Although employee experts may not be required to prepare Rule 26(a)(2)(B) reports, the Federal Rules provide that a party may serve interrogatories to obtain discovery of an employee expert.⁴⁹ They also allow an employee expert to be deposed.⁵⁰ While practitioners opposing disclosure requirements for employee experts are likely to argue that their opponents are fully protected because depositions and interrogatories are available, when pressed, most

45. FED. R. CIV. P. 26(a)(2)(B) (emphasis added). The word "considered" replaced the words "relied upon" in the 1993 Amendments.

46. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules*, in 48 F.R.D. 487, 503-04 (1970) [hereinafter *Proposed Amendments*].

47. See, e.g., *Karn*, 168 F.R.D. at 639 (holding that Rule 26(a)(2)(A)-(B) mandates disclosure of all materials reviewed by an expert).

48. See Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, in 164 F.R.D. 97, 97 (1996) (observing that Rule 26(a)(2) "presents a series of issues that have serious evidentiary implications and are only beginning to percolate through the courts").

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

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

litigators would agree that interrogatories are an inadequate method of discovering comprehensive information from a testifying expert. Most practitioners would also agree that deposing a testifying expert without a written report that sets forth opinions and identifies the information considered by the expert places the deposing party at a disadvantage.⁵¹ Notably, the Federal Rules now recognize and codify the importance of an expert report to a meaningful deposition: Rule 26(b)(4)(A) prohibits an expert deposition from taking place before a Rule 26(a)(2)(B) report has been submitted.⁵²

Indeed, it is difficult to argue that an attorney deposing an expert without a report that sets forth the expert's opinions and data considered by an expert is not disadvantaged. This disadvantage is compounded when an opponent refuses to produce work product that discloses an expert's participation in planning the prosecution or defense of a case. The attorney who does not appreciate the inherent unfairness in this scenario probably does not try many cases and is, therefore, unlikely to be moved by Justice Powell's admonition against exploiting discovery techniques to the detriment of justice.⁵³

VI. HYPOTHETICAL APPLICATIONS OF THE FEDERAL RULES PERTAINING TO EMPLOYEE EXPERTS

The following hypothetical illustrates how subdivisions of Rule 26 may be used to limit discovery in connection with an employee expert. Your case is before a federal district court and involves multiple expert scientists and economists. Complying with the court's Rule 16 scheduling order to identify lay and expert witnesses, your opponent, the plaintiff, identifies seven testifying experts, three of whom are high-level corporate employees from the company's research and development division.⁵⁴ Several days

51. The extent of the disadvantage probably depends on the skill of the attorney taking the deposition and familiarity with the subject matter.

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

53. See *Herbert*, 441 U.S. at 179 (Powell, J., concurring) (stating that "as the Court now recognizes, the situation has reached the point where there is serious 'concern about undue and uncontrolled discovery'").

54. For a discussion of the applicability of the rules to a former employee expert, see discussion of *Monsanto Co. v. Aventis CropScience, N.V.*, 214 F.R.D. 545 (E.D. Mo. 2002), *infra* at Section IX.D.

before expert reports are due, Plaintiff informs you that it will not produce Rule 26(a)(2)(B) reports for its employee witnesses. On the date expert reports are due, Plaintiff produces Rule 26(a)(2)(B) reports for its four independent experts. It produces very brief, written reports for two of its employee experts that do not comply with Rule 26(a)(2)(B). One report consists of five short sentences that express broad, sweeping opinions. In support of these opinions, the report references close to 10,000 documents. Plaintiff refuses to produce a written report for its last employee expert despite having identified him as a testifying rebuttal expert.

Plaintiff argues it is not required to submit reports for any of its employee experts because none regularly provide expert testimony. Because there is no requirement that employee experts must submit reports, Plaintiff argues that conformity of the two reports with the requirements of Rule 26(a)(2)(B) is unnecessary. Plaintiff contends you are limited under the Federal Rules to propounding interrogatories and taking deposition testimony.

Motions to compel proper written reports for Plaintiff's three testifying employee experts are prepared and filed. The court agrees with Plaintiff's argument and rules that the plain language of Rule 26(a)(2)(B) does not require employee experts to produce reports. Accordingly, the court moots your argument that the two reports fail to comply with the requirements of Rule 26.

Plaintiff also produces a privilege log that identifies nearly 200 documents that were either (1) authored by the employee experts and given to counsel or (2) provided to the employees by counsel. The dates on the documents reveal that the employee experts have been involved in the case for an extensive period of time. Plaintiff refuses to produce any of these documents, asserting the attorney-client and/or the work-product privileges. You move to compel.

Although the court rules that work-product documents used by the two employee experts in the preparation of their expert reports must be produced, it does not clarify whether Plaintiff is required to produce work product shared with these employees that dealt with issues other than those raised in the two deficient reports. The court also fails to provide any guidance regarding the employee expert who did not provide a written report yet is expected to offer expert testimony.

The court rules that documents allegedly disclosing attorney-client communications must be produced for an *in camera*

inspection. Following its review, the court orders that a small portion of the documents must be disclosed but prohibits discovery of numerous documents that disclose the employee experts' involvement in the case, particularly those generated early in the case.⁵⁵

PART II

VII. THE DEVELOPMENT OF THE EXPERT-DISCOVERY PROVISIONS IN THE FEDERAL RULES

"The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition."⁵⁶ However, the ability to obtain expert discovery is a relatively recent development, and meaningful expert discovery was not mandated under the Federal Rules until the enactment of the 1970 Amendments. The *Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules* noted that whereas the changes from 1938 to 1970 "were relatively few and narrowly focused . . . to remedy specific defects," the 1970 Amendments made substantial changes to the discovery rules.⁵⁷

Prior to 1960, courts were reluctant to require discovery from experts for a number of reasons, including the perceived "fear that one side [would] benefit unduly from the other's better preparation."⁵⁸ Courts also refused to permit expert discovery based on a variety of theories, including the belief that (1) expert discovery was privileged,⁵⁹ (2) such discovery was protected as work

55. If these results seem unrealistic, see *infra* Section X.

56. *Proposed Amendments, supra* note 46, at 487.

57. *Proposed Amendments, supra* note 46, at 487. The Rules were amended in 1946, 1963, 1966, 1970, 1983, 1987, 1993, and 2000. This article focuses on the important changes to the expert-discovery provisions that took place in 1970 and 1993.

58. FED. R. CIV. P. 26(b)(4) advisory committee's notes, 1970 amend. This reasoning harkens back to language from Justice Jackson's concurring opinion in *Hickman v. Taylor*, 329 U.S. 495, 516 (1947). "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or *on wits borrowed from the adversary*." (Emphasis added.)

59. See, e.g., *Am. Oil Co. v. Penn. Petroleum Prods. Co.*, 23 F.R.D. 680, 685-86 (D.R.I. 1959) (observing that the subjective conclusion of an expert is privileged and not subject to discovery).

product,⁶⁰ and (3) it was financially unfair to allow a party to benefit from the work of an expert paid by the opposing party.⁶¹

During the 1960s, courts started allowing expert discovery on a case-by-case basis to prevent unfair surprise at trial.⁶² In *Seven-Up Bottling Co. v. United States*,⁶³ after acknowledging the general predisposition against expert discovery,⁶⁴ the court nevertheless ruled that expert discovery should be allowed:

It would, though, appear that the underlying factor which causes the courts to treat expert testimony somewhat differently from testimony of other witnesses is that the party has an investment in the witness. Somehow it is believed that he has bought and paid for the witness and that the other party should not share in his property. We cannot accept this "oath helper" approach to discovery. It is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or to the most resourceful litigant.⁶⁵

Subsequently, courts across the country gradually began to allow expert discovery on a case-by-case basis, particularly in litigation where expert testimony was considered paramount to the

60. See, e.g., *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257, 262 (D. Neb. 1959) (holding that "reports which an expert has submitted to council in preparation of the case for trial" are work product).

61. See, e.g., *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 378-79 (D.N.J. 1954) (explaining that there is a property right in the conclusions of an expert and that they "are not normally discoverable to a private party who does not pay for them").

62. 8 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 2029 (2d ed. 1994).

63. 39 F.R.D. 1 (D. Colo. 1966).

64. *Id.* at 2 (citing *Hoagland v. Tenn. Valley Auth.*, 34 F.R.D. 458 (E.D. Tenn. 1963)); see also *Maginnis v. Westinghouse Elec. Corp.*, 207 F. Supp. 739, 744 (E.D. La. 1962) (denying discovery regarding an expert's conclusions but allowing discovery as to the relevant facts upon which the conclusions were based); *Stovall v. Gulf & S. Am. S.S. Co.*, 30 F.R.D. 152, 154-55 (S.D. Tex. 1961) (requiring a showing of "good cause" before a party may acquire the adverse party's expert report).

65. *Seven-Up Bottling*, 39 F.R.D. at 2.

case. In some cases, courts based decisions on the need for expanded discovery to allow for effective cross-examination and rebuttal at trial.⁶⁶ Other courts held that an expert's knowledge was not privileged.⁶⁷ In *United States v. Meyer*, the Ninth Circuit held that: (1) relevant information was not immune from discovery because the party had paid an expert to acquire it, (2) discovery may be used to prepare for effective cross-examination of witnesses, (3) opinions, as opposed to facts, were subject to discovery, and (4) opinions and information were subject to discovery over objections that they were work product.⁶⁸ Rife disagreement over the correct standard made amending the rule a necessity.

A. *The 1970 Amendments to the Expert Discovery Provisions*

Subdivision (b)(4) of Rule 26 was added to the Federal Rules in 1970. This new provision expressly permitted discovery of expert opinions before trial, thereby repudiating the view that expert work product was immune from discovery.⁶⁹ According to the Advisory Committee, Rule 26(b)(4) was adopted to deal "with discovery of information *including facts and opinions* obtained by a party from an expert retained by that party in relation to litigation or obtained by

66. See, e.g., *Franks v. Nat'l Dairy Prods. Corp.*, 41 F.R.D. 234, 237-38 (W.D. Tex. 1966) (noting that discovery of an expert report is necessary to the effective cross-examination of the expert, the preparation of rebuttal evidence, and the evaluation of settlement negotiations); *United States v. 23.76 Acres*, 32 F.R.D. 593, 598 (D. Md. 1963) (holding that the disclosure of expert data, opinion, and material is necessary to avoid unfairness and to secure the just, speedy, and inexpensive determination of every trial); see also *United States v. 48 Jars*, 23 F.R.D. 192, 198 (D.D.C. 1958) (concluding that there is a necessity for discovery of expert opinions).

67. See *United States v. Meyer*, 398 F.2d 66, 73 (9th Cir. 1968) (holding that there is no fact-opinion distinction in the Rules that would justify a privilege exclusion of expert opinion); see also *United States v. McKay*, 372 F.2d 174, 176-77 (5th Cir. 1967) (holding that the report of an expert was not attorney work product); *Levine v. St. Luke's Hosp.*, 47 F.R.D. 362, 363 (E.D. Pa. 1969) (holding that the report of an expert is not privileged and is subject to discovery) (citing *Redfern v. Am. President Lines, Ltd.*, 228 F. Supp. 227, 231 (N.D. Cal. 1963)); *Maginnis*, 207 F. Supp. at 739 (granting motion to compel production of report, but allowing for removal of expert opinions from the report).

68. *Meyer*, 398 F.2d at 73.

69. FED. R. CIV. P. 26(b)(4) advisory committee's notes, 1970 amend.

the expert and not yet transmitted to the party.”⁷⁰ The new provision was adopted to address the dramatic reliance on experts at trial, particularly in the areas of food and drug, patent, and condemnation law.⁷¹ Agreeing with the sentiment expressed throughout the country, the Advisory Committee agreed that it was fundamentally unfair to permit a party to shield expert opinions from discovery until trial:

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.⁷²

Responding to these concerns, the 1970 version of Rule 26(b)(4) opened the door to expert discovery.⁷³

70. *Id.* (emphasis added).

71. See, e.g., *United States v. Nysco Labs., Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960) (regarding food and drugs); *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D. Del. 1959) (regarding patents); *Cold Metal Process Co. v. Aluminum Co.*, 7 F.R.D. 425, 426 (N.D. Ohio 1947), *aff'd*, *Sachs v. Aluminum Co.*, 167 F.2d 570 (6th Cir. 1948) (regarding patents); *United States v. 50.34 Acres of Land*, 13 F.R.D. 19, 21 (E.D.N.Y. 1952) (regarding condemnations).

72. FED. R. CIV. P. 26(b)(4) advisory committee's notes, 1970 amend.

73. *Proposed Amendments, supra* note 46, at 494-95. Rule 26(b)(4) stated:

(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:

1. Discovery from Employee Experts

Rule 26(b)(4) divided the universe of experts into testifying experts, who were subject to the requirements of subsection 26(b)(4)(A), and non-testifying experts, who were subject to subsection 26(b)(4)(B).⁷⁴ The opinions of testifying experts, whether independent experts, consultants, or employees, were discoverable

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

74. *Proposed Amendments*, *supra* note 46, at 494-95; *see also* McDonald, *supra* note 6, at 288-89 (outlining the differences between testifying and non-testifying experts).

under subsection 26(b)(4)(A).⁷⁵ The Advisory Committee also helpfully noted:

It should be noted that [sub-section 26(b)(4)] does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.⁷⁶

Accordingly, so-called “fact experts” who possessed first-hand knowledge of the matters at issue in the litigation, but who would not be called to offer expert opinion testimony, were dealt with as ordinary witnesses under Rule 26(b)(1).⁷⁷

The clarity and apparent good intentions of the rule unraveled in section 26(b)(4)(B), which dealt with non-testifying experts. Confusion arose from language that limited the application of the rule to experts who were “retained or specially employed” for litigation. It did not contain any provisions for non-testifying experts who were not “retained or specially employed” for litigation.⁷⁸ One author has noted the existence of “a significant amount of fog” surrounding such language.⁷⁹

The Advisory Committee Notes provided guidance on two categories of experts potentially affected by the Rule: employees and consultants.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the

75. *Proposed Amendments, supra* note 46, at 494-95.

76. FED. R. CIV. P. 26(b)(4) advisory committee's notes, 1970 amend.

77. *Proposed Amendments, supra* note 46, at 495. This is the same language that appears in the current version of Rule 26(a)(2)(B).

78. *Proposed Amendments, supra* note 46, at 495; see also James R. Pielemeier, *Discovery of Non-Testifying “In-House” Experts Under Federal Rules of Civil Procedure 26*, 58 IND. L.J. 597, 602 (1983).

79. Pielemeier, *supra* note 78, at 597.

case), but who is not expected to be called as a witness. . . .

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.⁸⁰

Yet this guidance provided little clarity and actually seemed to confuse the issue. The first paragraph is vague because the meaning of the term "general employee" is unclear. While it might cover an employee whose duties usually do *not* involve testifying as an expert, the language is not specific. The second paragraph creates additional confusion by suggesting an additional expert category: "informally consulted" experts from whom no discovery could be taken.

Notwithstanding the efforts of the drafters, the amended version of Rule 26 failed to address an employee expert who aided his employer in a lawsuit and had knowledge and technical expertise relevant to the case, but would not testify.⁸¹ Not surprisingly, courts

80. FED. R. CIV. P. 26(b)(4)(B) advisory committee's notes, 1970 amend.

81. See Pielemeier, *supra* note 78, at 601-02 (stating that "[n]on-testifying-regularly-employed-in-house experts are not clearly within the explicit language of the rule's subdivision"). Courts had equal trouble determining the applicability of the rule to "informal consultants," going so far as to establish a test for determining whether an expert was "specially retained or employed" or "informally consulted." McDonald, *supra* note 6, at 290-91 (citing *Ager v. Jane C. Stormont Hosp. & Training Sch.*, 622 F.2d 496, 498 (10th Cir. 1980)). Under the *Ager* court's test, in determining whether an expert is specially retained or informally consulted, a court should consider:

- (1) the manner in which the consultation was initiated;
- (2) the nature, type and extent of information or material provided to, or determined by, the expert in connection with his review;
- (3) the duration and intensity of the consultative relationship; and
- (4) the terms of the consultation if any (e.g., payment, confidentiality of test data or opinions, etc.).

dealing with employee experts were split as to the proper application of the rule.⁸² Some ruled that employees assisting in litigation should be considered "retained or specially employed" for that purpose and, thus, subject to Rule 26(b)(4)(B).⁸³ Those courts interpreted the language "retained or specially employed" as referring to any employee asked by a party's attorneys to assist with the preparation of the case.⁸⁴ One court noted that if Rule 26(b)(4)(B) were not applied to employee experts, the rule "would encourage economic waste by requiring an employer to hire independent experts to obtain the protection of Rule 26(b)(4)(B)."⁸⁵ This interpretation appears contrary to the Advisory Committee's guidance with respect to "general employees."⁸⁶

Despite the seeming fairness of applying Rule 26(b)(4)(B) to employee experts, not all courts were persuaded. Some held that employee experts who did not testify could not be considered retained or specially employed for the litigation and, therefore, should be subject to discovery as ordinary witnesses under Rule 26(b)(1).⁸⁷ Under this interpretation, the term "retained or specially

Ager v. Jane C. Stormont Hosp. & Training Sch., 622 F.2d 496, 501 (10th Cir. 1980).

82. Pielemeier, *supra* note 73, at 602.

83. See *In re Shell Oil Refinery*, 132 F.R.D. 437, 442 (E.D. La. 1990) (holding that the experts were "retained or specifically employed" and thus subject to Rule 26(b)(4)(B)); *Marine Petroleum*, 641 F.2d at 993 n.49 (recognizing a prior court's holding "that an in-house expert may be specially assigned by his employer to anticipated litigation"); *Seiffer v. Topsy's Int'l, Inc.*, 69 F.R.D. 69, 72 (D. Kan. 1975) (holding that "Van Camp [was] an expert who was 'specially employed' by Touche in anticipation of litigation and that falls within the express terms of Rule 26(b)(4)(B)"); *In re Sinking of Barge "Ranger I,"* 92 F.R.D. 486, 489 n.5 (S.D. Tex. 1981) (holding that "[i]t may be possible for a party's regular employees to be specifically employed in anticipation of litigation or preparation for trial"); see also *Kiser v. Gen. Motors Corp.*, Civ. A. No. 98-3669 Section "L"(3), 2000 U.S. Dist. LEXIS 10479, at *7-*8 (E.D. La. 2000) (following *Shell Oil*, 132 F.R.D. 437).

84. See, e.g., *Seiffer*, 69 F.R.D. at 72 (observing that Van Camp was not considered simply a general employee because he was asked to assist with the case).

85. *Shell Oil*, 132 F.R.D. at 441.

86. See FED. R. CIV. P. 26(b)(4)(B) advisory committee's notes, 1970 amend. (stating that Rule 26(b)(4)(B) excludes experts who are general employees of the party).

87. See *Dallas v. Marion Power Shovel Co.*, 126 F.R.D. 539, 542 (S.D. Ill. 1989) (stating that "an in-house expert's opinion, as well as his knowledge of underlying facts, are discoverable"); *Kan.-Neb. Natural Gas Co. v. Marathon Oil*

employed" referred only to the manner in which an independent expert was compensated.⁸⁸ This view is supported in the Advisory Committee Notes, which state that an employee "not specially employed on the case" should not be considered an expert.⁸⁹ Based on this reasoning, and because an employee is, by definition, not impartial, courts adopting this view concluded that no employee could be considered an "expert" under Rule 26(b)(4)(B).⁹⁰ In the years following adoption of the 1970 Amendments, courts continued to wrestle with the correct interpretation of the phrase "retained or

Co., 109 F.R.D. 12, 16 (D. Neb. 1983) (arguing that "retained or specifically employed" means something more than just assigning an employee to a litigation problem, and the depositions are thus discoverable); *Va. Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 406 (E.D. Va. 1975) (explaining that the reports of an expert in trade or science who is neither retained nor specifically employed, and who will continue to be employed without regard to the pendency of the claim, fits in the 26(b)(1) category and are discoverable).

88. *Va. Elec. Power*, 68 F.R.D. at 407.

The Court believes that 'specially employed' refers only to the manner by which the services of the expert are obtained; that is to say, that the expert is put on the payroll for the specific purpose of deriving facts and opinions for use in trial preparation or anticipated litigation. The distinction between 'retained' and 'specially employed' is the difference between hiring the expert as an independent contractor and hiring him as an employee *pro hac vice*.

89. FED. R. CIV. P. 26(b)(4)(B) advisory committee's notes, 1970 amend. (explaining that "[s]ubdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness").

90. *See Va. Elec. Power*, 68 F.R.D. at 407. The court stated:

The Court perceives [the committee notes] to imply that though one be an expert, if his contact with the case is not in his capacity as an impartial observer, but is instead as one going about his duties as a loyal employee, then he "should be treated as an ordinary witness."

See also Kan.-Neb. Natural Gas, 109 F.R.D. at 16 (stating, "I am persuaded that the use of the terms 'retained or specially employed' implies something more than simply the assignment of a current employee to a particular problem raised by current litigation").

specially employed," failing to reach any consensus on how it should be read.

2. Work Product

The work-product doctrine of *Hickman v. Taylor*⁹¹ was formally codified with the addition of Rule 26(b)(3) in the 1970 Amendments.⁹² Following the 1970 Amendments, courts were divided as to whether the work-product doctrine was waived for materials shared with experts, but not relied upon by the experts in formulating their opinions. The rule stated:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party 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.⁹³

91. 329 U.S. 495 (1947).

92. See FED. R. CIV. P. 26(b)(3) advisory committee's notes, 1970 amend. (requiring a showing of necessity or justification before production can be had); see also *Hickman v. Taylor*, 329 U.S. 495 (1947) (deciding that FED. R. CIV. P. 26(b)(3) does not require production as of right of oral and written witness statements secured by adverse party in preparation for possible litigation).

93. FED. R. CIV. P. 26(b)(3).

This provision has not been modified since it was adopted.⁹⁴

Prior to the 1993 Amendments, the majority view set forth in *Bogosian v. Gulf Oil Corp.*⁹⁵ was that opinion work product was not discoverable based on the high level of protection afforded such materials under Rule 26(b)(3). Still, to allow for effective cross-examination of an expert, some courts allowed discovery of work product if an expert based his or her opinion on it. The frequently cited *Intermedics, Inc. v. Ventritex, Inc.*⁹⁶ decision established a middle ground approach that balanced the interests and harms to each party if discovery of opinion work product were permitted. The result was that litigants could not predict with any assurance whether opinion work product used to prepare an expert would, or would not, be protected. However, even prior to the 1993 Amendments, there was wide agreement among courts that "fact work product" must be disclosed.⁹⁷

B. *The 1993 Amendments to the Expert Discovery Provisions*

Continuing the trend favoring disclosure established by the 1970 Amendments, the 1993 Amendments significantly increased a litigant's ability to obtain expert discovery. The changes to the rules

94. See FED. R. CIV. P. 26(b)(3) advisory committee's notes, 1970, 1980, 1983, 1993, and 2000 amends. (showing no change between the original rule and the rule today).

95. 738 F.2d 587 (3d Cir. 1984); see also *Hamel v. Gen. Motors Corp.*, 128 F.R.D. 281 (D. Kan. 1989) (holding that plaintiff was not entitled to discovery of opinion work product that had been shared with defendant's expert witness absent a showing of substantial need or inability to procure the expert's opinion through other discovery tools); *Hydramar, Inc. v. Gen. Dynamics Corp.*, 119 F.R.D. 367, 369 (E.D. Pa. 1988) (holding that defendant's documents, which were prepared in anticipation of litigation, are entitled to work-product protection under FED. R. CIV. P. 26(b)(3)); but see *William Penn Life Assur. Co. v. Brown Transfer & Storage Co.*, 141 F.R.D. 142, 143 (W.D. Mo. 1990) (agreeing with the dissent in *Bogosian*, 738 F.2d 587).

96. *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 391-92 (N.D. Cal. 1991).

97. See, e.g., *Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120, 122 (E.D.N.Y. 1988) (noting that the work-product privilege has not been held to apply to the discovery of facts known by experts).

in 1993 are well documented.⁹⁸ While the expert discovery permitted under the 1970 Amendment was certainly a step in the right direction, a litigant's ability to obtain meaningful expert discovery was not made mandatory until the 1993 Amendments. Rather, "[t]he information disclosed under the former rule in answering interrogatories about the 'substance' of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness."⁹⁹

Rule 26(a)(2)(A) requires a litigant to disclose the identity of any person who may be used at trial to present expert testimony.¹⁰⁰ More importantly, the expert reporting requirement of Rule 26(a)(2)(B) also was adopted. The current version of Rule 26(a)(2) (which is virtually identical to the 1993 version)¹⁰¹ states:

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

98. See, e.g., Joseph, *supra* note 48 (containing an in-depth analysis of the changes made to the Federal Rules of Civil Procedure relating to disclosure in 1993).

99. FED. R. CIV. P. 26(a)(2)(B) advisory committee's notes, 1993 amend.

100. The timing of this initial disclosure generally will be mandated by the court in a scheduling order under FED. R. CIV. P. 16(b):

and in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. In the absence of such a direction, the disclosures are to be made by all parties at least ninety days before the trial date or the date by which the case is to be ready for trial.

FED. R. CIV. P. 26(a)(2) advisory committee's notes, 1993 amend.

101. Under the 1993 amendments, initial disclosures under Rule 26(a) were discretionary. The 2000 amendments removed the ability of local courts to opt out of the disclosure requirements, making these disclosures mandatory.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a *witness who is retained or specially employed* to provide expert testimony in the case or *whose duties as an employee of the party regularly involve giving expert testimony*, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.¹⁰²

The rule requires a testifying expert to provide all materials “considered” in forming an opinion, not just those that were relied upon in forming the opinion or drafting the report.¹⁰³ On this point, the Advisory Committee Notes state:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.¹⁰⁴

102. FED. R. CIV. P. 26(a)(2)(A)(B) (emphasis added). An expert required by subdivision (a)(2)(B) to submit a written report may be deposed only after the report has been served. FED. R. CIV. P. 26(b)(4)(A).

103. See, e.g., *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (D.C. Cir. 2001) (noting that the Federal Rules of Civil Procedure make documents and information disclosed to a testifying expert discoverable, whether or not the expert relies on the material in preparing his or her report).

104. FED. R. CIV. P. 26(a)(2) advisory committee's notes, 1993 amend.

Special note should be taken of the fact that the “retained or specially employed” language of Rule 26(b)(4)(B) was replicated in Rule 26(a)(2)(B). But the new provision also added the following modifying language: “whose duties as an employee of the party regularly involve . . . giving expert testimony.”¹⁰⁵ Presumably, this new language was intended to clarify the scope of discovery regarding employee experts. On this point, the Advisory Committee Notes state:

The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report. By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702.¹⁰⁶

This language appears to group employee experts and treating physicians in the same category. Perhaps the drafters consciously linked witnesses who possessed factual knowledge about a case with witnesses, who, based on their educational or vocational expertise, could also be considered as experts. If this is so, the Advisory Committee Notes do not make the distinction clear.

105. *Id.*

106. *Id.* Based, in part, on this comment, many courts have held that treating physicians are not required to provide expert reports. *See, e.g., Patel*, 984 F.2d at 217-18 (noting that if a physician acquires his opinion through treatment of his patient, and not in anticipation of litigation, he is not considered an expert witness); *Hoover*, 2002 U.S. Dist. LEXIS 15648, at *6 (noting that reporting requirements do not apply to a physician testifying solely as a treating physician). However, if the treating physician goes beyond his treatment of the patient and gives expert opinions regarding her diagnosis, recent decisions suggest that a report will be required. *See, e.g., Zarecki*, 914 F. Supp. at 1573 (holding that a treating physician is offering expert testimony when that testimony goes beyond any observations made during the course of treatment, such as conclusions as to the cause of the injury and the foreseeability of the injury).

Whether the rule and the accompanying Notes provide sufficient guidance to determine whether employee experts are required to submit expert reports is discussed *infra*.

PART III

VIII. THE REPORTING REQUIREMENT OF RULE 26(A)(2)(B) APPLIED TO EMPLOYEE EXPERTS

As indicated above, although a major purpose for requiring written reports is to avoid surprise at trial,¹⁰⁷ the language of Rule 26 clearly excludes certain categories of experts, including employees. The vagueness of some of the Rule's language—"whose duties as an employee of the party regularly involve giving expert testimony"—also should be noted. It is unclear, for example, how frequently an employee must testify before he or she becomes an employee who "regularly" gives testimony. Nevertheless, the plain meaning of the rule's language exempts most employees from the reporting requirement, despite the unfairness of the result. Few courts have addressed this issue directly. Those that have confronted the issue have reached different conclusions, in some cases characterized by analysis that seems more driven by the conclusion that the court wanted to reach. The primary cases are discussed below.

A. *The Majority View: Employee Experts Who Give Expert Opinions Must Provide Expert Reports*

1. *Day v. Consolidated Rail Corp.*

The earliest case to address whether employee experts were required to comply with Rule 26(a)(2)(B) is *Day v. Consolidated Rail Corp.*¹⁰⁸ Its holding has been cited with approval and its

107. See *Sylla-Sawdon*, 47 F.3d at 284 (stating that the purpose of the 1993 Amendment to Rule 26 is "the elimination of unfair surprise to the opposing party and the conservation of resources"); FED. R. CIV. P. 26 advisory committee's notes, 1993 amend. (noting that former interrogatory answers regarding expert testimony were "sketchy and vague"); see also *KW Plastics v. U.S. Can Co.*, 199 F.R.D. 687, 690 (M.D. Ala. 2000) (citing advisory committee's notes).

108. *Day v. Consol. Rail Corp.*, No. 95 Civ. 968, 1996 U.S. Dist. LEXIS 6596 (S.D.N.Y. May 15, 1996).

reasoning adopted by a number of courts.¹⁰⁹ In *Day*, the plaintiff sought to exclude the testimony of two of the defendants' testifying experts.¹¹⁰ The two experts, one of whom was an employee of one of the defendants, Conrail, submitted expert reports, but the district court found the reports to be "manifestly inadequate" under Rule 26(a)(2)(B).¹¹¹ Conrail argued that no employee expert report was required because the employee's duties did not "regularly involve giving expert testimony," and he was not "retained or specially employed to provide expert testimony in the case."¹¹² The court rejected Conrail's argument, stating:

The principal difficulty with this argument is that even if the quoted language is perhaps susceptible to several alternative interpretations, the reading proposed by defendant would create a distinction seemingly at odds with the evident purpose of promoting full pre-trial disclosure of expert information. The logic of defendant's position would be to create a category of expert trial witness for whom no written disclosure is required - - a result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulable policy.¹¹³

Discussing the historical development of the rule, the *Day* court noted that the 1970 Amendment failed to distinguish between testifying employee experts and independent experts:

109. See, e.g., *KW Plastics*, 199 F.R.D. at 689 (stating that "[r]ather than reinvent the wheel, the court quotes from the persuasive opinion in *Day*"); *Minn. Mining & Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 461 (D. Minn. 1998) (stating that "the Court finds the rationale of the *Day* case . . . to be highly applicable"); *Fund Comm'n Serv. v. Westpac Banking Co.*, No. 95 Civ. 968, 1996 U.S. Dist. LEXIS 6596, at *3 (S.D.N.Y. May 14, 1996) (granting a motion to preclude plaintiff from presenting expert evidence at trial for failure to comply with FED. R. CIV. P. 26(a)(2)).

110. *Day*, 1996 U.S. Dist. LEXIS 6596, at *2.

111. *Id.*

112. *Id.* at *3-*4.

113. *Id.* at *4 (citations omitted).

The implausibility of defendant's position on this point is underscored by the language of the relevant Advisory Committee Notes both for the current version of the rules and for its predecessor. Thus, in commenting on the 1970 amendments, which first defined a broad scope of required written disclosure concerning trial experts' anticipated testimony, including summaries of their opinions, and the grounds for them, the Advisory Committee made no suggestion that the rule applied only to certain trial experts, and instead emphasized that broad disclosure was required concerning "those experts whom a party expects to call as trial witnesses." The only distinction was between that category of experts and those "who have been retained or specially employed by the party but who are not expected to be witnesses."¹¹⁴

Importantly, the 1970 version of Rule 26(b)(4)(B) made no distinction between independent expert and employee experts who would testify.¹¹⁵ The 1970 version of the rule did, however, discuss "*witnesses who would not testify*."¹¹⁶ Thus, the first distinction between employee experts and independent experts arises with the 1993 Amendments. Based on the history of Rule 26, the *Day* court opined that "the 1993 amendments retain that distinction [between independent experts and employee experts who do *not* testify], and, as noted, have in fact broadened the scope of disclosure required for trial experts."¹¹⁷ This expansion was intended to counteract the ineffectiveness of interrogatories in obtaining discovery of opposing experts.¹¹⁸

The *Day* court recognized that the rule "appears to imply that some category of experts may be exempt from the report requirement."¹¹⁹ However, in the court's view, that exemption was

114. *Id.* at *4-*5 (citations omitted).

115. *Proposed Amendments, supra* note 46, at 494-95.

116. *Proposed Amendments, supra* note 46, at 494-95 (emphasis added).

117. *Day*, 1996 U.S. Dist. LEXIS 6596, at *5.

118. *Id.* (quoting the advisory committee's notes that observe that interrogatory answers regarding experts frequently were too "sketchy and vague").

119. *Id.* at *5-*6.

intended to apply only to experts testifying as fact witnesses (such as treating physicians).¹²⁰ The court determined that the language of the rule itself posed no obstacle to finding that a report was required:

In a case such as this, in which it appears that the witness in question -- that is, Mr. Heide -- although employed by the defendant, is being called solely or principally to offer expert testimony, there is little justification for construing the rules as excusing the report requirement. Since his duties do not normally involve giving expert testimony, he may fairly be viewed as having been "retained" or "specially employed" for that purpose. Moreover, although defendant might argue that Mr. Heide is not receiving extra compensation for that performance -- the record is silent on the matter -- the rules contain no disclosure exemption for experts who are not monetarily compensated.¹²¹

The *Day* court reached its decision based primarily on the development of the Rule and the policy considerations that led to its being adopted in the first place. For all intents and purposes, the decision essentially ignores the language of the rule that exempts expert witnesses "whose duties as an employee of the party regularly involve giving expert testimony."¹²² Thus, while standing for the proposition that employee experts must submit a report, the *Day* court's analysis failed to address the plain meaning of the Rule's language. The fairness of the result and its conformity with the historical development of the Rule trumped the specific language of Rule 26(a)(2)(B).

120. *Id.* (citing 4 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.04[4] (2d ed. 1995)); see also FED. R. CIV. P. 26(a)(2)(B) advisory committee's notes, 1993 amend. (limiting the requirement to those "retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve the giving of expert testimony"); *Patel*, 984 F.2d at 218 (stating that "Rule 26 focuses not on the status of the witness, but rather on the substance of the testimony"); *Zarecki*, 914 F. Supp. at 1573 (requiring expert report from treating physician where the treating physician developed professional opinion testimony for trial).

121. *Day*, 1996 U.S. Dist. LEXIS 6596, at *6-*7.

122. FED. R. CIV. P. 26(a)(2)(B).

2. *Minnesota Mining & Manufacturing Co. v. Signtech USA, Ltd.*

The *Day* decision was followed in 1998 by *Minnesota Mining & Manufacturing Co. v. Signtech USA, Ltd.*,¹²³ which adopted much of the analysis and reasoning of the *Day* opinion. In *Signtech*, the plaintiff refused to produce expert reports for six employee experts. Defendant Signtech moved to compel production.¹²⁴

The plaintiff argued that employees were not subject to the reporting requirement of Rule 26 and that Signtech was limited to deposing its experts.¹²⁵ In opposition, Signtech acknowledged that Rule 26 was limited in its application, but argued that the employee experts should be required to submit reports for the policy reasons set forth in the Advisory Committee Notes to the 1993 Amendment:

[T]o literally construe this Rule, as 3M is doing, is at odds with the purpose of discovery under the Federal Rules, the 1993 Amendments to the Federal Rules, and the specific case law. . . . A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and *the rule should be applied in a manner to achieve these objectives.*¹²⁶

Among those objectives, Signtech argued, was avoidance of unfair surprise at trial.¹²⁷

123. *Signtech*, 177 F.R.D. at 460-61.

124. *Id.* at 459. The decision does not discuss the subject areas of the experts' expected testimony.

125. *Id.*

126. *Id.* at 460 (emphasis in original) (partially quoting the advisory committee's notes to the 1993 amendment).

127. *Id.* (citing *Sylla-Sawdon*, 47 F.3d at 284 ("affirming the purpose of the 1993 amendments to Rule 26 as 'the elimination of unfair surprise to the opposing party and the conservation of resources'"), and commenting on problems with the earlier rule being of little help in preparing for the deposition of a witness); see also *Signtech*, 177 F.R.D. at 460 (discussing *Day*, 1996 WL 257654, at *2, and stating, "although Rule 26(a)(2)(B) reports are not required from 'hybrid' fact/expert witnesses, true expert witnesses must provide such reports"); Sullivan

Finding the *Day* opinion to be "instructive and compelling,"¹²⁸ the *Signtech* court cited from it extensively and required plaintiff's employee experts to submit written reports. "While there are merits to both arguments, the Court finds the rationale of the *Day* case out of the esteemed Southern District of New York to be highly applicable here."¹²⁹ Supporting its conclusion, the court also determined that the witnesses were testifying solely as experts, not as hybrid fact/expert witnesses.¹³⁰ This determination ostensibly justified the court's decision because a hybrid witness would not have been required to produce a report that encompassed all of the expert's testimony.

3. *KW Plastics v. United States Can Co.*

KW Plastics v. United States Can Co. involved an action for breach of contract to enjoin misappropriation of trade secrets.¹³¹ There, the Middle District of Alabama addressed the same employee expert issues and fell in line with the *Day* and *Signtech* decisions.¹³² The defendant offered its controller and vice president to testify about damages incurred by the company due to the alleged

v. Glock Inc., Civ. A. No. WMN-95-2652, 1997 U.S. Dist. LEXIS 16635 (D. Md. Sept. 29, 1997) (holding that disclosure of identities of non-hybrid expert witnesses was not sufficient without an accompanying expert report; plaintiff's counsel could seek discovery of such documents before experts could testify at trial); Fund Comm'n Serv. v. Westpac Banking Co., No. 95 Civ. 968, 1996 U.S. Dist. LEXIS 6596, at *3 (S.D.N.Y. May 14, 1996) (granting motion to preclude the plaintiff from presenting expert evidence at trial for failure to comply with FED. R. CIV. P 26(a)(2)); R.C.M. Executive Gallery Corp. v. Rols Capital Co., No. 93 Civ. 8571, 1996 U.S. Dist. LEXIS 639, at *4-*5 (S.D.N.Y. Jan. 25, 1996) (granting a preclusion of an expert witness where plaintiffs failed to timely submit experts and provide expert reports); Ferriso v. Conway Org., No. 93 Civ. 7962, 1995 U.S. Dist. LEXIS 14328, at *7-*8 (S.D.N.Y. Oct. 3, 1995) (precluding an expert from testifying about issues outside the parameters of expert report); 251 CPW Housing Ltd. v. Paragon, No. 93 Civ. 0944, 1995 U.S. Dist. LEXIS 2025, at *10-*11 (S.D.N.Y. Feb. 21, 1995) (granting a preclusion of expert witness where plaintiffs failed to provide proper expert discovery as directed by the court).

128. *Signtech*, 177 F.R.D. at 460.

129. *Id.* at 461.

130. *Id.* See also discussion *supra* at section VII.B (discussing the advisory committee's notes from the 1993 amendment and the non-distinction between experts and hybrid fact/expert witnesses).

131. *KW Plastics*, 199 F.R.D. 687.

132. *Id.* at 688-90.

misappropriation of trade secrets.¹³³ The plaintiff moved to exclude defendant's testimony via a motion *in limine* on grounds that the witness had not filed an expert report.¹³⁴

Consistent with previously discussed decisions, the *KW Plastics* court determined the purpose of Rule 26(a)(2)(B) was "to minimize unfair surprise and prejudice"¹³⁵ and held that the expert was required to submit an expert report:

More generally, the court finds that the Federal Rules of Civil Procedure require disclosures *from every witness who testifies under Rule 702 of the Federal Rules of Evidence*, regardless of whether the expert is an employee of the defendant corporation.¹³⁶

Regarding the Rule's ambiguous language, the court agreed with the reasoning from *Signtech*:

In this instance, the court finds that the text of Rule 26(a)(2)(B) fairly supports the position that expert reports must be filed for corporate employees whose testimony is proffered solely or principally for their expert opinions.¹³⁷

Addressing the language of the rule exempting employees, the *KW Plastics* court noted that the dictionary definition of "employed" is "put to use or service" with reference to a particular purpose.¹³⁸ When an employee is asked to be an expert witness, the court reasoned that a company "typically authorizes the employee to perform special actions that fall outside of the employee's normal scope of employment."¹³⁹ Accordingly, the court concluded "that U.S. Can has 'specially employed' [the witness] by designating him as an expert opinion witness, who will testify as to U.S. Can's alleged damages arising out of KW's alleged tortious activity and

133. *Id.* at 688.

134. *Id.*

135. *Id.* at 690 (citing FED. R. CIV. P. 26(a)(2)(B) advisory committee's notes, 1993 amend.).

136. *KW Plastics*, 199 F.R.D. at 688 (emphasis in original).

137. *Id.* at 689.

138. *Id.* at 690 (citing AMERICAN HERITAGE DICTIONARY (1985)).

139. *Id.*

breach of contract.¹⁴⁰ Although the *KW Plastics* court addressed the employee language of the rule directly, similar to the *Day* and *Signtech* opinions, the specific language of Rule 26(a)(2)(B) dealing with the duties of an employee whose employment regularly involves giving expert testimony was given little, if any, consideration.¹⁴¹

4. *Applera Corp. v. MJ Research, Inc.*

In *Applera Corp. v. MJ Research, Inc.*¹⁴² the court relied on recent amendments to Fed. R. Evid. 701 to limit expert testimony disguised as lay opinion testimony.¹⁴³ Plaintiff renewed a deferred motion *in limine* to preclude defendants from offering any expert testimony on grounds that defendants failed to identify testifying experts and failed to submit expert reports in violation of the court's scheduling order.¹⁴⁴ Defendants argued they were not required to submit expert reports because neither of their experts was retained or specially employed to provide expert testimony in the case and neither had duties that regularly involved giving expert testimony.¹⁴⁵ Agreeing with the plaintiff's argument, the court held that the defendants' experts were precluded from providing any evidence under Fed. R. Evid. 701, 702, or 705.¹⁴⁶

The court held that to the extent the defendants' experts intended to offer testimony under Fed. R. Evid. 702, 703, or 705, such testimony fell within the purview of Fed. R. Civ. P. 26(a)(2)(A) and identification of the experts was required under the court's scheduling order. In this regard, the court noted that the defendants' decision not to identify experts appeared "to have been a calculated decision, but one of high risk given [defendants'] representation that [their experts'] testimony 'is likely to be opinion testimony based on the [experts'] scientific and technical expertise . . . , which squarely

140. *Id.*

141. FED. R. CIV. P. 26(a)(2)(B); *KW Plastics*, 199 F.R.D. 687.

142. 220 F.R.D. 13 (D. Conn. 2004).

143. *But see* discussion *infra* Section IV.B.2 (discussing the characteristics of an independent expert).

144. *Applera Corp.*, 220 F.R.D. at 18. The court's scheduling order required disclosure of any person who was to present testimony pursuant to Fed. R. Evid. 702, 703, or 705.

145. *Id.*

146. *Id.* at 19.

runs up against Fed. R. Evid. 701(c)'s limitation on the scope of lay opinion testimony."¹⁴⁷ Continuing, the *Applera* court stated: "[I]n fact, the amendments to Fed. R. Evid. 701 in 2000 were designed to prevent exactly what [defendants] now [attempt] to do—call expert witnesses in the guise of laypersons to offer opinion testimony . . ."¹⁴⁸

5. *Prieto v. Malgor*

The most recent decision involving employee experts, and the only one to issue from a court of appeals, is *Prieto v. Malgor*.¹⁴⁹ There, the widow of a man arrested and beaten by police sued the officers individually and sued Miami-Dade County for battery and use of excessive force.¹⁵⁰ At trial, the county called a police employee responsible for training officers on the use of force during police procedures to testify as an expert on the use of such force.¹⁵¹ Plaintiff's counsel objected to the testimony because the police employee had not provided an expert report as required by both Rule 26(a)(2)(B) and the corresponding Local Rule 16.1(K).¹⁵² The county argued no report was required because the expert was an employee who was exempt from the requirement.¹⁵³ However, during a colloquy at the trial, the plaintiff's attorney waived the objection by agreeing to accept the expert's affidavit at trial.¹⁵⁴

147. *Id.* at 19 (citation to exhibit omitted).

148. *Id.* (citing the advisory committee's notes to Rule 701, which state that:

By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in FED. R. CIV. P. 26 . . . by simply calling an expert witness in the guise of a layperson. . . . The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

FED. R. EVID. 701 advisory committee's notes, 2000 amend.).

149. 361 F.3d 1313 (11th Cir. 2004).

150. *Id.* at 1316.

151. *Id.*

152. *Id.* at 1316-17.

153. *Id.* at 1317.

154. *Prieto*, 361 F.3d at 1319.

Despite ruling that the plaintiff had waived her objection, the Eleventh Circuit went to extraordinary lengths to address the requirements of Rule 26(a)(2)(B).¹⁵⁵ The *Prieto* court noted that the county conceded that the police employee's "normal duties" involved giving expert testimony, and the court found that the expert's role was not akin to that of a "fact expert" or treating physician.¹⁵⁶ Accordingly, there was no reason why the expert should have been exempt from the reporting requirement of the rule.¹⁵⁷ Ultimately, the *Prieto* court agreed with the *Day* court's reasoning. It agreed that the language of Rule 26 should not be interpreted to "create a category of expert trial witness for whom no written report is required."¹⁵⁸

Because the Eleventh Circuit specifically ruled that plaintiff's attorney waived the objection to the lack of report by accepting the expert's affidavit during trial,¹⁵⁹ the concurring opinion of Judge Cox noted that it was unnecessary for the court to address the Rule 26 issue and characterized the majority's discussion as "pure dicta."¹⁶⁰ While Judge Cox is probably correct, because the Eleventh Circuit's analysis focuses so explicitly on the need for testifying employee experts to provide Rule 26(a)(2)(B) reports, the decision will be difficult for courts in the Eleventh Circuit to ignore.

Although some may argue that it was necessary to address the Rule 26 issue to reach the waiver issue, such an argument is tenuous at best. It seems more likely that the Eleventh Circuit deliberately addressed the issue to provide interpretive guidance and obviate future disputes. Litigants outside the Eleventh Circuit who wish to shield their employee experts undoubtedly will argue that the *Prieto* analysis is dicta that need not be followed by the lower courts. Litigants in the Eleventh Circuit, however, will have to act more cautiously.

155. *Id.* at 1315-21.

156. *Id.* at 1318 (stating that "[w]e begin by noting that if [the expert's] normal duties as an employee involve giving expert testimony").

157. *Id.* at 1319.

158. *Id.* at 1318 (quoting *Day*, 1996 U.S. Dist. LEXIS 6596, at *4).

159. *Prieto*, 361 F.3d at 1319-20.

160. *Id.* at 1320-21.

B. *The Minority View: Employee Experts Who Do Not Frequently Provide Expert Testimony Are Not Required to Provide Expert Reports*

1. *Navajo Nation v. Norris*

The seminal case supporting the view that employee experts are not required to submit reports is *Navajo Nation v. Norris*.¹⁶¹ In addition to advocating strict interpretation of the language in Rule 26(a)(2)(B), the *Navajo* decision highlights many of the problems employee experts create under Rule 26 and some of the questionable tactics that Justice Powell criticized in *Herbert v. Lando*.¹⁶²

In *Navajo*, the plaintiffs sought to use employees to testify as experts on tribal customs and tradition.¹⁶³ When the plaintiffs failed to provide expert reports for those witnesses, the defendants moved to strike the plaintiffs' experts.¹⁶⁴ The defendants argued that the plaintiffs' refusal to produce expert reports contravened Rule 26(a)(2)(B) and the spirit of the 1993 Amendment.¹⁶⁵ Supporting their argument and highlighting the strategic disadvantage they faced in the litigation, the defendants also challenged the plaintiffs' answers to interrogatories regarding the proposed testimony of the defendants to establish that the plaintiffs essentially managed to avoid producing any expert discovery in the case.¹⁶⁶

The defendants propounded interrogatories requesting: (1) the identities of each expert that plaintiffs intended to call at trial, and (2) the subject matter about which each expert expected to testify.¹⁶⁷ The plaintiffs refused to answer these interrogatories, arguing that the court's scheduling order did not require disclosure of its experts until a later date.¹⁶⁸ The plaintiffs also refused to reveal the subject matter on which its experts would testify.¹⁶⁹ The

161. 189 F.R.D. 610 (E.D. Wash. 1999).

162. *Herbert*, 441 U.S. at 179 (suggesting discovery techniques may be exploited to the disadvantage of justice).

163. *Navajo*, 189 F.R.D. at 611.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Navajo*, 189 F.R.D. at 611.

169. *Id.*

defendants informed the court they were unable to identify any experts on the date required under the discovery order because they had no idea what evidence the plaintiffs' experts intended to offer at trial.¹⁷⁰

Departing from the approach taken by the *Day* and *Signtech* courts, the *Navajo* court held that the plaintiffs were not required to provide Rule 26(a)(2)(B) reports for their employee experts.¹⁷¹ The court held that the Rule 26 reporting requirement for employee experts extends only to "those [employees] who regularly testify."¹⁷² Continuing, the court stated, "Given the plain language of this specific category, by implication, those employees who do not regularly testify for the employer but are doing so in a particular case need not provide the report."¹⁷³

Despite struggling with the "retained or specially employed" language, the *Navajo* court criticized the reasoning of the *Day* opinion, stating:

The Magistrate Judge circumvented this plain language by characterizing the employee-expert as belonging to the other category of experts required to provide a report—those "retained or specially employed to provide expert testimony in the case." By doing so, the Magistrate Judge simply rewrote the rule to say that employee-experts must provide the report required by FRCP 26(a)(2)(B). That is not what the rule explicitly states. It explicitly identifies two categories of experts from whom reports are required; one comprising non-employees of a party especially retained or employed for the particular case and one comprising employees of a party who regularly testify for the employer party.¹⁷⁴

In passing, the *Navajo* court also noted that the *Day* reasoning would require "a report of every employee-expert," a

170. *Id.*

171. *Id.* at 613.

172. *Id.* at 612.

173. *Navajo*, 189 F.R.D. at 612.

174. *Id.*

result the court seemed to find appropriate.¹⁷⁵ Despite apparent misgivings about the result, the *Navajo* court felt obliged to give credence to the drafters' decision to impose "the report obligation only on the two specific categories of expert witnesses explicitly identified in FRCP 26(a)(2)(B),"¹⁷⁶ noting that, "[t]hose who drafted FRCP 26(a)(2)(B) could simply have required reports for all employee experts if that is what they had intended."¹⁷⁷ The failure of the *Day* and *Signtech* decisions to explain why this was not done rendered those decisions unfit as legal precedent in the *Navajo* court's view: "This court finds that the absence of such an explanation together with the plain language of the rule make those cases unpersuasive as contrary to the plain language of FRCP 26(a)(2)(B)."¹⁷⁸

While the court recognized that strict interpretation of the rule resulted in an odious outcome, the court felt constrained to apply the rule as it was written.¹⁷⁹ In a postscript, the court seemed to advocate adopting local court rules to require employee experts to provide discovery.¹⁸⁰

2. *Duluth Lighthouse for the Blind v. C.G. Bretting Manufacturing Co.*

Duluth Lighthouse for the Blind v. C.G. Bretting Manufacturing Co.,¹⁸¹ decided shortly after the *Signtech* decision,

175. *Id.* (stating that "[w]ere this court drafting the rule without the usual comment from others as part of the rule-making process, such an approach would be given consideration").

176. *Id.*

177. *Id.* at 613.

178. *Navajo*, 189 F.R.D. at 613.

179. *Id.*

180. *Id.* This comment is based on the advisory committee notes, which state: "By local rule, order, or written stipulation, the requirement of a written report may be waived for particular experts or imposed upon additional persons who will provide opinions under Rule 702." FED. R. CIV. P. 26(a)(2)(B) advisory committee's notes, 1993 amend. Based on this language, it does not appear necessary for a court to wait for a local rule; rather, if it deems necessary, it may order that experts, including employee experts, submit expert reports. At least one court has adopted this approach and requires in its scheduling orders that an employee rebuttal expert in a patent case submit an expert report. *See Applera*, 220 F.R.D. at 18-19.

181. 199 F.R.D. 320 (D. Minn. 2000).

also adopts the minority view. The plaintiff sought to introduce the testimony of its former chief executive officer ("CEO") to prove damages caused by the delivery of defective products by defendant Bretting Manufacturing.¹⁸² This expert witness was not identified by the deadline imposed by the court for disclosing expert testimony.¹⁸³ The expert was deposed and he produced a report following his deposition.¹⁸⁴ Defendant moved to exclude the expert's testimony based on Lighthouse's failure to identify the former CEO as a witness and its failure to produce a timely expert report.¹⁸⁵

The *Duluth* court held that the former CEO was a "lay expert witness" under Fed. R. Evid. 701 and, thus, was not subject to Rule 26(a)(2)(B).¹⁸⁶ The *Duluth* court reasoned that, since the former CEO would testify based on his personal perceptions and memory, he was primarily a fact witness and not a witness who was "specially retained to provide that testimony."¹⁸⁷ "As a consequence, notwithstanding [the defendant's] view, that the Lighthouse has blindsided it with respect to [the CEO's] testimony, we find no violation of the applicable expert disclosure requirements."¹⁸⁸ The Court allowed discovery to be reopened on a limited basis.¹⁸⁹

Rejecting the *Signtech* reasoning, the court aligned itself with the *Navajo* court:

Even if we concluded that [the CEO] was not a Rule 701 lay expert, however, we are not persuaded that the Court, in *Signtech*, reached a correct result. While we agree with the Court, in *Signtech*, that it is undesirable for litigants to elude the automatic expert disclosure requirements by guise, contrivance, or

182. *Id.* at 321-22. Compare with *KW Plastics*, 199 F.R.D. 687 (involving a vice president and comptroller offering damages testimony required to produce report). See discussion *supra* Section VIII.A.1.

183. *Duluth*, 199 F.R.D. at 322.

184. *Id.*

185. *Id.* at 322-23.

186. *Id.* at 323. But see discussion *supra* Section VIII.B.

187. *Duluth*, 199 F.R.D. at 324.

188. *Id.* at 323; see also *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 265 (2d Cir. 1995) (permitting a company president to testify as a Rule 701 lay witness on estimated lost profits where he had knowledge of the company's sales over a period of years).

189. *Duluth*, 199 F.R.D. at 326-27.

artful dodging, we are not empowered to modify the plain language of the Federal Rules so as to secure a result that we think is correct.¹⁹⁰

Echoing the strict constructionism of the *Navajo* decision, the court asserted:

We think it self-evident that, had it been the intention of the drafters to include all employee-experts within the disclosure requirements of the Rule, they would not have taken such pains to make clear that only those employees who are "specially employed to provide such testimony," or whose duties "regularly involve the giving of such testimony," are subject to the automatic disclosure requirements.¹⁹¹

In reaching its decision, the *Duluth* court indicated that its conclusion was supported by the then-proposed 2000 Amendments to Fed. R. Evid. 701.¹⁹² The Advisory Committee Notes expressly allow owners or officers of a business to testify as lay witnesses regarding lost profits or damages suffered by the business.¹⁹³ This argument suggests that, under the 2000 Amendments, employee experts offering opinion testimony may not be excluded for failing to

190. *Id.* at 324-25 (footnote omitted).

191. *Id.* at 324-25 n.7.

192. *Id.* at 323. The *Duluth* court's conclusion is contrary to the decision rendered in *Applera*, 220 F.R.D. 13 (D. Conn. 2004), where the court relied on language from the advisory committee's notes to Fed. R. Evid. 701 to reach its decision. See *Applera*, 220 F.R.D. at 19 (stating that Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing). Under the amendment, a witness's testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. FED. R. EVID. 701 advisory committee's note, 2000 amend., citing *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3rd Cir. 1995); see also Joseph, *supra* note 48, at 108 (discussing factual testimony an expert may be permitted to give).

193. *Duluth*, 199 F.R.D. at 326 (citing FED. R. EVID. 701 advisory committee's notes, 2000 amend., which stated that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business without the necessity of qualifying the witness as an accountant, appraiser, or similar expert").

meet the expert witness requirements of Fed. R. Evid. 702, 703, and 705, presumably based on the subject matter of their testimony.¹⁹⁴

Notably, it is not clear from the opinion that the court's decision is based on an argument that was actually made by the plaintiff. In fact, based on the following language from the decision, it appears that the argument was not made:

Lighthouse argues that [the expert's] report did not violate the Court's pretrial order, because he is not expected to proffer testimony as an expert witness. Instead, the Lighthouse contends that, as the CEO of the Lighthouse, [the expert] is expected to offer his damages testimony as an employee-expert and, therefore, his opinions are not subject to the expert disclosure requirements of Rule 26(a)(2)(B) . . .

¹⁹⁵

Thus, the court seems to have raised the argument *sua sponte*.

C. Closing Comments to Part III

Courts addressing the employee expert reporting issue fall into two camps: (1) those that find the inequity of the Rule's application intolerable and (2) those that rely on strict constructionism. In fairness to the latter, the plain meaning of the language of Rule 26(a)(2)(B) appears to exclude employee experts who do not testify on a regular basis. The reason for this exclusion is not known; the drafters have shed no light on the issue. Although judicial districts are free to adopt local rules that require testifying employee experts to submit reports, the split in authority evidenced by the *Day* and *Navajo* decisions suggests that the schism will persist.

194. *Id.* at 326.

195. *Id.* at 323. The *Duluth* court noted that the CEO left the plaintiff's employ at some point, and that the record failed to disclose when the departure took place and whether the damages report was prepared before or after the CEO left. *Id.* at 13 n.6. Because the issue was not raised by the defendant, the court refused to address it. *Id.* at 324. This language suggests that had the issue been raised, the court may have viewed the issue as substantively reached a different decision. See discussion *infra* relating to *Monsanto Co. v. Aventis CropScience, N.V.*, 214 F.R.D. 545 (E.D. Mo. 2002), at Section IX.D.

PART IV

IX. THE DISCLOSURE OF WORK PRODUCT AND ATTORNEY-CLIENT-PRIVILEGED MATERIAL TO EMPLOYEE EXPERTS

Another tactical advantage of using employees as testifying experts is the ability, in some jurisdictions, to avoid disclosing relevant discovery based on the attorney-client privilege and work-product doctrine. While arguably permissible under the rules, avoidance of discovery is contrary to the trend favoring disclosure of information pertaining to testifying experts to allow for full and fair cross-examination.

A. *The Attorney-Client Privilege*

The attorney-client privilege protects communications between attorney and client that are for the purpose of giving and receiving legal advice.¹⁹⁶

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.¹⁹⁷

196. See *GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 194-95 (D.D.C. 2003) (addressing the attorney-client privilege with respect to financial documents and billing records); *Jane Doe #1 v. Wachovia Corp.*, 268 F. Supp. 2d 627, 633-34 (W.D.N.C. 2003) (discussing the purpose of the attorney-client privilege); *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998) (stating elements of attorney-client privilege).

197. *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (quoting Supreme Court Standard 503(b)).

Protection extends to communications between an attorney and/or his agent and the client, between the attorney and the client and/or the client's agent, and between the client and its agent.¹⁹⁸ "The privilege is based on two related principles. The first is that loyalty forms an intrinsic part of the relationship between a lawyer and client in our adversary system. . . . The second principle is that the privilege encourages clients to make full disclosure to their lawyers."¹⁹⁹

The elements of the attorney-client privilege are well known. The privilege exists when the following conditions are satisfied:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal advisor in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor recent appellate cases,
- (8) unless the protection is waived.²⁰⁰

The privilege, which has legal antecedents derived from British common law, is a creation of state law and federal common law. Unlike the work-product doctrine, the attorney-client privilege is not codified in the Federal Rules of Civil Procedure. Thus, there are no internal, linguistic inconsistencies that cause confusion as to its application.

The attorney-client privilege is waived if communications protected under the privilege are disclosed to third parties.²⁰¹ It is well accepted that the attorney-client privilege does not extend to communications between counsel and an independent testifying

198. See *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981) (discussing communications made by Upjohn employees to counsel for Upjohn); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 217 (S.D.N.Y. 2001) (explaining that when subject-matter jurisdiction is based on a federal question, the attorney-client privilege is governed by federal law).

199. *Reed*, 134 F.3d at 356.

200. *Id.* at 355-56 (citing *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992)).

201. See *Upjohn*, 449 U.S. at 387 (discussing facts in *Upjohn*, where the company voluntarily submitted a report to the SEC).

expert.²⁰² Whether the attorney-client privilege extends to communications with an employee expert is problematic and depends, to a large extent, upon the jurisdiction in which one practices.

B. *The Work-Product Doctrine*

The Work-Product Doctrine, created by the Supreme Court in *Hickman v. Taylor*,²⁰³ is embodied in Rule 26(b)(3) and protects "documents and tangible things . . . prepared in anticipation of litigation or for trial."²⁰⁴ The general rule is that discovery of work product is permitted only upon a showing of "substantial need."²⁰⁵

For purposes of this article, the second sentence of Rule 26(b)(3) is particularly important: "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."²⁰⁶ This language calls into question whether discovery of opinion work product shared with experts is permitted and has generated controversy since it was adopted. This conflict is unresolved due to the seemingly contradictory requirements of subdivisions 26(a)(2)(B) and 26(b)(3). While Rule 26(b)(3) prevents disclosure of opinion work product, Rule 26(a)(2)(B) requires disclosure of "the data or other information considered" by a testifying expert, making no exceptions or distinctions for material that may be regarded as work product.²⁰⁷

202. See, e.g., *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (D.C. Cir. 2001) (agreeing with the district court that the attorney-client privilege and work-product protection had been waived by the disclosure of confidential communications to expert witnesses).

203. 329 U.S. 495 (1947).

204. FED. R. CIV. P. 26(b)(3).

205. *Id.*

206. *Id.*

207. See FED. R. CIV. P. 26(a)(2)(B).

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a *written report prepared and signed by the witness*. The report shall contain a

But confusion extends well beyond these two subdivisions of the Rule. Several questions arise with respect to employee experts and the ability to shield work product: (1) First, is work product disclosed to or prepared by employee experts discoverable, and, if so, to what extent? (2) Is a litigant required to produce materials that an employee expert prepared for counsel that do not relate to the opinions that he or she will offer at trial? (3) Even if an employee expert is not required to submit a report that identifies all the materials he or she "considered" in forming an expert opinion, is the discovery of work product shared with or generated by an expert permissible? While most courts that have answered the first question in the affirmative, the latter questions never have been directly addressed.

C. *The Majority of Courts Hold That the Attorney-Client Privilege and Work-Product Doctrine May Not Be Asserted to Shield Discovery Shared With a Testifying Expert*

Attorney-client communications shared with a testifying, independent expert are discoverable. Since the adoption of the 1993 Amendment, there is virtual unanimity of opinion among courts that disclosing attorney-client communications to an independent expert witness waives the privilege.²⁰⁸ Some courts have based their

complete statement of all opinions to be expressed and the basis and reasons therefor; *the data or other information considered by the witness in forming the opinions.*

(Emphasis added). The previous iteration of the Rule used the term "relied upon" instead of "considered." The 1993 amended Rule, therefore, contemplates a much broader scope of discovery.

208. See, e.g., *Pioneer Hi-Bred*, 238 F.3d at 1375 (agreeing with the district court that the attorney-client privilege and work-product protection had been waived by a disclosure of confidential communications); *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 179 (D. Del. 2003) (holding disclosure to expert witness waives the privilege); *S. Scrap Material Co. v. Fleming*, Civ. A. No. 01-2554 Section "M" (3), 2003 U.S. Dist. LEXIS 10815, at *73 (E.D. La. June 18, 2003) (stating that any material shared with a testifying expert must be disclosed even if that material would otherwise be protected by the work-product privilege); *QST Energy, Inc. v. Mervyn's & Target Corp.*, No. C-00-1699-MJJ (EDL), 2001 U.S. Dist. LEXIS 23266, at *8-*10 (N.D. Cal. May 14, 2001) (holding that the right to an attorney-client privilege is waived by disclosing confidential communication to experts); *In re Tri-State Outdoor Media Group, Inc.*, 283 B.R.

determinations on the language of Rule 26(a)(2)(B) and an admonition that appears in the Advisory Committee Notes:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.²⁰⁹

But courts continue to have difficulty determining the extent to which work product shared with an expert is discoverable because of conflicting language in Rule 26, and courts have been forced to examine the interplay between subdivisions 26(a)(2)(B) and 26(b)(3).

Given the strong protection traditionally afforded to work product, particularly regarding an attorney's mental impressions and thought processes (core work product), it is, perhaps, surprising that most courts have resolved the tension between the language of two rules in favor of disclosure. Similar to opinions relating to the production of Rule 26(a)(2)(B) reports, courts adopting the majority view tend to rely at least as much on policy grounds favoring disclosure to support their conclusions as they do on the language of the Rule itself. However, this reliance was not always the case.

Early decisions interpreting the 1993 Amendments refused to break from tradition and the line of precedent that protected work product.²¹⁰ These decisions rejected the argument that the provisions

358, 364-65 (Bankr. M.D. Ga. 2002) (holding that testimony at trial of experts on confidential information waives the privilege).

209. FED. R. CIV. P. 26(a)(2)(B) advisory committee notes, 1993 amend.; see also *Pioneer Hi-Bred*, 238 F.3d at 1375 (quoting the advisory committee's notes); *S. Scrap Material*, 2003 U.S. Dist. LEXIS 10815, at *73 (quoting the advisory committee's notes).

210. See *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294 (W.D. Mich. 1995) (stating that "this Court concludes that the protection accorded an attorney's mental impressions and opinions by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and substantially codified in 1970 in Rule 26(b)(3), was intended to apply to discovery from experts"); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 88 (S.D. W. Va. 1995) (denying discovery of attorney's communications with an expert witness); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634, 638 (D. Kan. 1993) (stating that "the court holds that

regarding disclosure of expert testimony in Rule 26(a)(2)(B) trumped the work-product privilege in Rule 26(b)(3).²¹¹ The language in the Advisory Committee Notes cited above suggests that subdivision 26(a)(2)(B) was paramount.²¹² According to the early decisions, however, this language only required disclosure of facts—or, as the rule states, “data and information”—in an expert report.²¹³

The Northern District of Indiana’s decision in *Karn v. Ingersoll Rand*²¹⁴ led to changes. Relying on the language from the Advisory Committee Notes, the *Karn* court concluded that the “new Rule 26 and its supporting commentary reveal that the drafters considered the imperfect alignment between 26(b)(3) and 26(b)(4) under the old Rule, and clearly resolved it by providing that the requirements of (a)(2) ‘trump’ any assertion of work product or privilege.”²¹⁵ The *Karn* court offered a number of policy reasons to support this interpretation:

(1) requiring disclosure allows for effective cross-examination of experts on all bases for opinions expressed, including the influence(s) of a party’s attorney;

(2) the work-product doctrine is not violated or diminished because attorneys are free to develop legal theories and protected work product provided that it is not disclosed to a testifying expert;

the plaintiff did not waive the protection afforded by Rule 26(b)(3) for attorney work product by sharing the documents in question with its expert witness”).

211. See, e.g., *Haworth*, 162 F.R.D. at 295 (holding that attorney should no longer be able to make work-product privilege argument to facts because they are obligated to disclaim all factual information on their own in a report rather than in a motion).

212. FED. R. CIV. P. 26(a)(2) advisory committee’s notes, 1993 amend.

213. See *Haworth*, 162 F.R.D. at 295 (holding that all factual information considered by experts must be disclosed); *All W. Pet Supply*, 152 F.R.D. at 639 n.9 (interpreting the revised rule as requiring disclosure of data and information but not the documents that transmitted the data and information).

214. *Karn*, 168 F.R.D. 633.

215. *Id.* at 639.

(3) a bright-line rule requiring disclosure provides litigants with certainty and avoids unnecessary discovery disputes.²¹⁶

One writer offered the important observation that “allowing the work-product protection to continue in materials used to prepare an expert to give testimony would yield the perverse incentive of encouraging counsel to use only work-product materials to prepare an expert to give testimony, in order to avoid disclosure to the opposing party.”²¹⁷

The majority of courts that have addressed this issue have found the policy reasons established in *Karn* to be decisive and have adopted the view that both fact and opinion work product must be disclosed.²¹⁸ Subsequent decisions have offered additional policy

216. *Id.* at 639-41.

217. Mickus, *supra* note 5, at 787.

218. *See, e.g., Pioneer Hi-Bred*, 238 F.3d at 1375 (stating that “the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure make clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report”); *Weil v. Long Island Sav. Bank*, 206 F.R.D. 38, 40-41 (E.D.N.Y. 2001) (stating that “this court finds that the 1993 revision to Rule 26(a)(2)(B) does not exempt ‘core’ work product from the disclosure requirement, nor does it limit disclosure to factual material as opposed to mental impressions or opinions of counsel”); *Amway Corp. v. Procter & Gamble Co.*, Case No. 1:98cv 726, 2001 U.S. Dist. LEXIS 5317, at *3 (W.D. Mich. Apr. 17, 2001) (holding that “Rule 26(a)(2) requires disclosure of any document considered by a testifying expert, whether or not the document is otherwise privileged and regardless of whether the expert expressly relies upon the document in formulating his or her opinion”); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 647 (S.D. Ind. 2000) (holding that “[a]n intentional disclosure of opinion work product to a testifying expert witness effectively waives the work-product privilege”); *FDIC v. First Heights Bank*, Civ. No. 95-CV-72722-DT, 1998 U.S. Dist. LEXIS 21506, at *12-*14 (E.D. Mich. Mar. 3, 1998) (establishing that “[o]pinion work-product that is reviewed by an expert in preparation for testimony at trial is discoverable under Rules 26(a)(2)(B) and 26(b)(4)(A)”); *Lamonds v. Gen. Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998) (stating that “[w]here, however, an attorney provides work product material to one of her retained experts to be considered in the formulation of that expert’s opinion, the current rules and Advisory Committee’s Notes strongly suggest that that information is discoverable”); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) (commenting that “I find the *Karn* opinion and its progeny persuasive, and hold that when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion

reasons to support the rule. For example, because expert opinion is perceived to be powerful evidence—albeit with the potential to be misleading—judges and juries must be able to consider what influences counsel has exerted over the expert.²¹⁹ “Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions, pursuant to Federal Rule of Evidence 702. They do not participate as the alter-ego of the attorney who will be trying the case.”²²⁰

testimony at trial—whether factual in nature or containing the attorney’s opinions or impressions—that information is discoverable if it is considered by the expert”); *In re Gall*, 44 P.3d 233, 238 (Colo. 2002) (holding that “[t]he unambiguous language of the commentary compels the conclusion that opinion work product that is reviewed or considered by an expert in preparation for testimony at trial is discoverable under Rules 26(a)(2)(B) and 26(b)(4)(A)”).

See also In re Air Crash at Dubrovnik, Croatia, No. MDL 1180, Civ. 398CV2464AVC, 2001 WL 777433, at *11 (D. Conn. Jun. 4, 2001) (stating that “[e]ven if these documents do represent product, the defendants cannot shield them from discovery after they have been passed to the testifying expert”); *Suskind v. Home Depot Corp.*, No. Civ. A. 99-10575-NG, 2001 WL 92183, at *1 (D. Mass. Jan. 2, 2001) (suggesting that “[i]n the 1993 amendments, certain information relating to expert testimony was a ‘required disclosure’ to be made in the form of a report”); *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585, 589 (S.D. Miss. 2000) (stating that “given the plain language of Rule 26(a)(2) and accompanying advisory committee note, the court finds that the Magistrate’s order was not clearly erroneous”); *Johnson v. Gmeinder*, 191 F.R.D. 638, 647 (D. Kan. 2000) (holding that “any type of privileged material . . . lose their privileged status when disclosed to, and considered by, a testifying expert”); *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258, at *4 (W.D.N.Y. Nov. 2, 2000) (stating, in regard to the revised rule, “It is illogical that such broad language, explicitly directed to privileges and other sources of protection against disclosure, was intended to exclude any form of work product”); *Culbertson v. Shelter Mut. Ins. Co.*, No. 97-1609, 1999 WL 109566, at *1 (E.D. La. Mar. 2, 1999) (holding that the work-product protection was waived because the witness testified as an expert rather than a fact witness); *Kennedy v. Baptist Mem. Hosp.-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1998) (finding that, on the facts of the case before it, communications between counsel and expert were discoverable); *Barna v. United States*, No. 95-C-6552, 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997) (holding that any information considered by a testifying expert, even if it contains attorney-opinion work product, is discoverable); *World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.M. 1996) (stating that a “litigant should no longer be able to argue that materials furnished to their experts used in forming their opinions . . . are privileged”).

219. *See, e.g., Weil*, 206 F.R.D. at 41; *Lamonds*, 180 F.R.D. at 305-06; *Barna*, 1997 WL 417847, at *2.

220. *Occulto*, 125 F.R.D. at 616.

Among other things, an expert's opinion may be influenced by the selection and timing of disclosures by an attorney and the explicit or implicit understanding that an expert's opinion must be favorable to the litigant's position. Thus, if an attorney has played a role in crafting an expert's opinion, an opposing litigant is entitled to know that information and use it on cross-examination.²²¹ In this regard, the guiding principle seems to be that parties must be allowed full opportunity to show the extent to which an attorney has influenced the expert's opinion. As one court noted:

Although it is not improper for an attorney to assist a retained expert in developing opinion testimony for trial—as the commentary to Rule 26 suggests—opposing counsel must be free during discovery to determine the nature and extent of this collaboration, in order to ascertain whether the opinion which is to be offered at trial is that of the expert, as opposed to the attorney. To hold otherwise would be an invitation to abuse, allowing the attorney to effectively construct the retained expert's opinion testimony to support the attorney's theory of the case, while blocking opposing counsel from learning of, or exposing, this influence. If permitted, this practice would seriously undermine the integrity of the truth finding process at trial.²²²

To the extent that attorneys are discouraged from crafting or unduly influencing an expert's opinion, the disclosure rule supports, rather than harms, the integrity of the judicial process.²²³

221. See *Simon Property*, 194 F.R.D. at 647 (stating that “an attorney should not be permitted to give a testifying expert witness a detailed ‘road-map’ for the desired testimony without also giving the opposing party an opportunity to discover that ‘map’ and to cross-examine the expert about its effect on the expert’s opinions in the case”).

222. *Musselman*, 176 F.R.D. at 201.

223. See *Weil*, 206 F.R.D. at 42 (suggesting that “[i]f the work-product privilege is intended to keep private the opinions of the attorney, that interest is not served by allowing an expert to consider those opinions and present them in the guise of the expert’s own opinion”); *FDIC*, 1998 U.S. Dist. LEXIS, at *15 (noting that “[d]iscovery of all materials provided to the expert by the attorney either will

Courts espousing the majority view rely on the language of Rule 26(b)(3) as further evidence that the rules are intended to require discovery of work product shared with experts.²²⁴ Rule 26(b)(3) begins with the following language: "Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery."²²⁵ Accordingly, the provisions regarding work product in Rule 26(b)(3) are limited by and subject to the expert-discovery provisions in Rule 26(b)(4).²²⁶ Lending further credence to this interpretation is the fact that, until the 1993 Amendments, all of the provisions regarding expert discovery were contained in Rule 26(b)(4), not Rule 26(a).²²⁷ Thus, it is logical to conclude—as some courts have—that the work-product provisions of Rule 26(b) are subject to subdivision (a)(2)(B).²²⁸ Additionally, the language of Rule 26(a)(2)(B) does not limit expert discovery to information "not privileged or protected from disclosure," a limitation found in other provisions of the rule.²²⁹ Applying the strict-construction model used by the *Navajo* and *Duluth* courts, one may argue that had the drafters intended to impose such a limitation on expert disclosures, they could have done so.²³⁰

Another argument favoring disclosure is that, even before the 1993 Amendments, most courts already had decided that *fact* work product disclosed to experts was discoverable.²³¹ As such, the only

prevent such undue influence or will allow the opposing party to expose the expert as a mere mouthpiece of the attorney").

224. See *B.C.F. Oil Ref., Inc. v. Consol. Edison Co.*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997) (commenting that "the drafters of the rules understood the policies behind expert disclosure and work-product doctrine and have decided that disclosure . . . is more important").

225. FED. R. CIV. P. 26(b)(3) (emphasis added).

226. *B.C.F. Oil*, 171 F.R.D. at 66-67.

227. FED. R. CIV. P. 26(b)(4) (1987 version); see also *Suskind*, 2001 WL 92183, at *3 (noting that "before and after the 1993 amendments [Rule 26(b)(4)] has been entitled 'Trial Preparation: Experts' and has been the vehicle for obtaining discovery of expert opinions").

228. See, e.g., *Suskind*, 2001 WL 92183, at *3-*4.

229. See FED. R. CIV. P. 26(a)(1)(C) (limiting the discoverability of materials relating to damages calculations to those "not privileged or protected from disclosure").

230. See *Suskind*, 2001 WL 92183, at *4.

231. See, e.g., *Suffolk*, 122 F.R.D. at 122 (referring to an earlier decision ordering the production of any memoranda reflecting opinions on matters about which the expert intended to testify at trial, but stating that counsel was not required to turn over documents which reflected counsel's opinions, legal

real remaining tension in Rule 26 related to *opinion* work product.²³² Given this conclusion, the Advisory Committee Notes indicating that the privilege is waived as to "materials furnished to . . . experts to be used in forming their opinions" logically must refer to both fact and opinion work product.²³³

Nevertheless, some courts still refuse to accept that the need for expert discovery trumps traditional work-product protection.²³⁴ These courts hold that opinion work product shared with a testifying expert is privileged, but fact work product shared with an expert is not and must be disclosed.²³⁵ The basis for this minority view is that

conclusions, or strategy); *B.C.F. Oil*, 171 F.R.D. at 66 (stating that any material given to an expert by an attorney is discoverable, including the attorney's mental impressions, since such material would be "considered" by an expert); *Haworth*, 162 F.R.D. at 295 (ordering disclosure of all factual information considered by the experts).

232. *B.C.F. Oil*, 171 F.R.D. at 65-66.

233. *Id.* at 66 (quoting Rule 26(a)(2), advisory committee's notes, 1970 amend.).

234. See *Nexxus Prods. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999) (stating that "this Court concludes that the required disclosure under 26(a)(2)(B) & (b)(4)(A) does not include core attorney work product considered by the expert"); *Ladd Furniture, Inc. v. Ernst & Young*, No. 2:95CV00403, 1998 U.S. Dist. LEXIS 17345, at *45 (M.D.N.C. Aug. 27, 1998) (The court stated that:

in light of the Fourth Circuit's very protective stance with respect to opinion work product, this Court is persuaded that it should follow the line of cases in which other courts have found opinion work product to be protected even when it was considered by an expert in forming his opinions

(footnote omitted). In *Ladd Furniture*, however, the court concluded that all but one of the documents at issue contained only fact, not opinion, work product and, therefore, were required to be disclosed. *Id.* at *40-*41.); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (stating that "the Court holds that 'the data or other information considered by [an expert] in forming [his] opinions' required to be disclosed in the expert's report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by an expert" (brackets in original)); *Rail Intermodal Specialists, Inc. v. Gen. Elec. Capital Corp.*, 154 F.R.D. 218, 222 (N.D. Iowa 1994) (determining that letters from counsel to experts were not discoverable, but not considering the 1993 Amendments).

235. See *Nexxus Prods.*, 188 F.R.D. at 10; *Ladd Furniture*, 1998 U.S. Dist. LEXIS 17345, at *45; *Magee*, 172 F.R.D. at 642. The only decision concluding that *all* work product (fact and opinion) is not waived when disclosed to an expert

even though "the data or other information considered by the witness" must be disclosed under Rule 26(a)(2)(B), the rule does not categorically state that opinion work product must be disclosed.²³⁶ Courts that adhere to this reasoning hold that, absent express language that abrogates the work-product doctrine, there is no basis to conclude that waiver was intended.²³⁷

The minority view relies on a strict reading of the introductory clause of Rule 26(b)(3), which states: "Subject to the provisions of subdivision (b)(4) of this rule"²³⁸ Courts opposing the minority view argue that because this qualifying language references only the first sentence of 26(b)(3), which deals with fact work product, and does not reference the second sentence of 26(b)(4), which deals with opinion work product, the

is *All W. Pet Supply*, 152 F.R.D. at 638 (holding that defendant did not meet its burden to overcome the privilege with little more than a speculative need).

236. See *Magee*, 172 F.R.D. at 634; see also Mickus, *supra* note 5, at 777 (suggesting that, "[d]espite the efforts of the drafters of Federal Rule 26(a)(2)(B), the text of the new rule does not resolve the issue of whether work-product materials furnished to a testifying expert are discoverable").

237. See *Magee*, 172 F.R.D. at 642-43 (stating that "Rule 26(a) should not be construed as vitiating the attorney work-product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure"); *Ladd Furniture*, 1998 U.S. Dist. LEXIS 17345, at *46 (stating, "However, no such language [abrogating opinion work-product privilege] appears in the expert-discovery provisions in Rule 26(a) and (b)"); *Nexxus Prods.*, 188 F.R.D. at 10. The court in *Nexxus Products* stated:

The most reasonable reading of the 1993 Advisory Committee Note is that the drafters intended to put to rest any dispute concerning expert disclosures and to clarify that disclosure of factual materials — 'data and [sic] other information . . . and any exhibits or charts that summarize or support the expert's opinion' — whether considered or relied on by the expert, was required under the rule.

However, as noted by one court adopting the majority view, nor do the Advisory Committee Notes limit that waiver of work product under Rule 26(a)(2)(B) to just fact work product. See *B.C.F. Oil*, 171 F.R.D. at 66. The overall tenor of the amendments, coupled with the Advisory Committee Notes' admonition that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions [are protected by work product privilege,] weigh in favor of a disclosure rule." *Id.*

238. See *Haworth*, 162 F.R.D. at 292-93 (holding that the "drafters intended the terms 'subject to' to mean that subdivision (b)(3) applies, unless there is a standard to the contrary in subdivision (b)(4)").

discoverability of opinion work product is unaffected by the language of the expert discovery provisions of the rules.²³⁹ The minority view also dismisses the importance of being able to determine the influence of an attorney over an expert, arguing that substantive criticism of an expert's opinions may be secured through an opposing expert.²⁴⁰

Although the minority view is repudiated by the vast majority of recent decisions, courts espousing that view are correct that the language of the amended rules does not expressly waive the work-product doctrine with respect to materials disclosed to employee experts.²⁴¹ The 1993 Amendments should be revisited to remove the ambiguity between the various provisions of Rule 26. Any future amendments should clarify the extent to which disclosure of work product to employee experts waives both fact and opinion work product. Finally, any contemplated amendments should clarify whether work-product protection may be asserted in connection with a testifying employee expert and whether communications with an employee expert may be subject to the attorney-client privilege. There is no reason why answers to each of the foregoing issues should not be stated in plain English to obviate the need for further litigation.

239. See *id.* at 293; *Magee*, 172 F.R.D. at 643. However, courts have reasonably drawn the conclusion that the "subject to Rule 26(b)(4)" language applies to the whole of 26(b)(3) and therefore that the subdivision's provisions regarding both fact and opinion work product are "subject to" the rules regarding expert discovery. See *Gall ex rel. Gall v. Jamison*, 44 P.3d 233, 238-39 (Colo. 2002) (stating that the work-product doctrine does not protect the materials informing an expert's report or opinion under Rule 26(b)(3)).

240. See, e.g., *Haworth*, 162 F.R.D. at 295-96 (stating that "[t]he risk of an attorney influencing an expert witness does not go unchecked in the adversarial system, for the reasonableness of an expert opinion can be judged against the knowledge of the expert's field and is always subject to the scrutiny of other experts").

241. See *Joseph*, *supra* note 48, at 104-06 (advocating what is now considered the minority view, namely, that Rule 26(a)(2)(B) does not require the disclosure of opinion work product shared with an expert).

D. *It Is Unclear Whether the Attorney-Client Privilege and Work-Product Doctrine Are Waived as to Materials Provided to an Employee Expert*

Despite the fact that most courts hold that fact and opinion work-product privileges are waived when shared with an independent expert, it is unclear which rules apply to an employee expert whose duties do not "regularly" involve giving expert testimony. Despite the apparent importance of this question, no decisions currently address it.

The requirement for submitting a report gives rise to the requirement that an expert disclose all "data or other information" he or she considered.²⁴² However, if no report is required, is there still an obligation to disclose the materials that an employee expert considered? If so, how and when must they be disclosed, and does a producing party have an obligation to specifically identify them?

Based on previous decisions, it seems reasonable to assume that courts that require testifying employee experts to submit Rule 26(a)(2)(B) reports will hold that privilege is also waived when work product is provided to an employee expert.²⁴³ It also seems reasonable to assume that courts that uphold the work-product doctrine with respect to independent experts will reach the same conclusion for employee experts.²⁴⁴ But, what result will be obtained in a jurisdiction where employee experts are not required to submit reports? Will those courts adhere to the majority view that work product is waived when disclosed to independent testifying experts? There is every reason to believe that views among the courts will continue to differ.

One decision, *Monsanto Co. v. Aventis Cropscience, N.V.*,²⁴⁵ involved a former employee who was offered as a testifying expert. The *Monsanto* court concluded that all work-product materials shared with the former employee during his employment that related to the subject matter of his testimony must be disclosed.²⁴⁶ It stated:

242. FED. R. CIV. P. 26(a)(2)(B).

243. See, e.g., *KW Plastics*, 199 F.R.D. at 689-90 (finding that the text of Rule 26(a)(2)(B) supports the position that expert reports must be filed for corporate employees).

244. See, e.g., *Haworth*, 162 F.R.D. at 295 (stating that no special standard for disclosure applies to core work product in the possession of an expert).

245. 214 F.R.D. 545 (E.D. Mo. 2002).

246. *Id.* at 548-49.

This Court recognizes the importance of the work-product protection in promoting the operation of the adversary system by "ensuring that a party cannot obtain materials that his opponent prepared in anticipation of litigation." There is, however, a countervailing consideration in cases involving expert testimony. . . . [P]arties should not be able to argue that "materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."²⁴⁷

Based on this language, the *Monsanto* court may have reached the same conclusion if the expert had been a current employee, but this remains conjecture.

Uncertainty in the area of attorney-client privilege is caused by the absence of case precedent. If the rule applicable to independent experts applies, then no attorney-client privilege exists for employee experts and all communications are discoverable.²⁴⁸ Courts that apply the *Day* analysis and treat testifying employee experts the same as other experts for purposes of the reporting requirement will require disclosure of attorney-client materials.²⁴⁹ Whether courts that concur with the *Navajo* line of reasoning will uphold the attorney-client privilege and shield communications with an employee expert is unclear.²⁵⁰

Answers to the foregoing questions aside, nuances make application of the attorney-client privilege in the context of an employee expert problematic. Consider, for example, a corporate executive whose employer is sued. Such an employee may play an

247. *Id.* at 549 (quoting *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997), and quoting FED. R. CIV. P. 26 advisory committee's notes, 1993 amend.).

248. *See, e.g., Pioneer Hi-Bred*, 238 F.3d at 1375-76 (noting that disclosure to a testifying expert in connection with his testimony will be assumed to be made public).

249. *See Day*, 1996 U.S. Dist. LEXIS 6596, at *6-*7 (noting that Rule 26 (b)(4)(A)'s exemption is addressed to experts who are testifying as fact witnesses).

250. *See Navajo*, 189 F.R.D. at 612-13 (observing that if drafters of the rules had intended to impose a report obligation on all employee experts, they would have done so).

integral role in formulating defenses to the complaint allegations or speak with counsel on a daily basis about the strengths and weaknesses of a case. He or she is exposed to work product and participates in high-level discussions with the company's attorneys. As the litigation progresses, the determination is made to use this employee as a testifying expert. Adding an additional layer of complexity, this employee expert is both a fact and expert opinion witness.

In the case of an independent, confidential expert turned testimony expert, the result is clear: all the information is fair game and discoverable.²⁵¹ Under circumstances such as these, is it unfair to require a party to disclose attorney-client materials and discussions that were shared with an employee expert before the party determined to use him or her as testifying expert? Or is requiring disclosure simply the obvious and natural consequence of designating an employee as a testifying expert?

No court has addressed whether the attorney-client privilege is irrevocably lost for an employee who becomes an expert. No court has addressed how to apply the attorney-client privilege to an employee who is exposed to privileged communications before any litigation is anticipated. At this time, no guidance exists for courts to use in determining whether attorney-client materials reviewed by an employee expert must be disclosed.

251. See *B.C.F. Oil*, 171 F.R.D. at 62 ("The rule . . . is that documents having no relation to the expert's role as an expert need not be produced but that any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery."); *House v. Combined Ins. Co.*, 168 F.R.D. 236, 240 (N.D. Iowa 1996) (ruling that defendant does not have to rely on plaintiff's representation that documents in question were not used by expert in forming his decision); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.M. 1996) (ruling that expert designated as consulting witness after she was designated as a witness expected to testify at trial was subject to discovery); *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2043-CM, 2002 U.S. Dist. LEXIS 1911, at *43-*44 (D. Kan. Jan. 31, 2002) (ruling that protection from disclosure was waived because subject matter of documents related to matters in expert's report); *Commerce & Indus. Ins. Co. v. Grinnell Corp.*, No. Civ. A. 97-0075, 1999 WL 731410, at *2 (E.D. La. Sept. 20, 1999) (ruling that there was no work-product protection for an expert witness listed on witness list already exchanged with opposing party). *But see* *Messier v. Southbury Training Sch.*, No. 3:94 CV 1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998) (stating that, under the professional-judgment standard, courts may not specify which of several professionally acceptable choices have been made).

PART V

X. A MAGISTRATE JUDGE'S INTERPRETATION: *KAL KAN FOODS, INC. v. THE IAMS CO.*

All the issues discussed in this article were argued, in one form or another, before a magistrate judge in the Southern District of Ohio in *Kal Kan Foods, Inc. v. The Iams Co.*²⁵² To prosecute and defend the advertising and damages claims at issue in the case, each side relied on multiple expert witnesses. One party retained "independent" experts. Defendants employed independent and employee experts. Three of the defendants' employee scientists were identified as testifying experts and fact witnesses.²⁵³ Some of the defendants' employee experts were corporate employees who were involved in the litigation since it was filed. Two of these employee experts represented Defendants in a hearing before a regulatory agency that involved many of the same issues as those being litigated. Several of the experts and Defendants' counsel designed and conducted scientific testing expressly for purposes of the litigation to counter test results relied upon by Plaintiff in its complaint.²⁵⁴

Several days before expert reports were due, Defendants informed Plaintiff that Rule 26(a)(2)(B) reports would not be submitted by their employee-expert witnesses. Ultimately, Defendants produced written reports for two of the employee experts, but refused to produce a written report for the last expert. Plaintiff challenged the sufficiency of one of the produced reports, which consisted of four sentences that referenced approximately

252. 197 F. Supp. 2d 1061 (S.D. Ohio 2002). The author's firm, Keller and Heckman LLP, represented Kal Kan in the litigation. Almost all of the motions submitted in this case were filed under seal, including all discovery motions. Thus, it is not possible to cite from the actual motions, oppositions, and replies that were submitted by the parties. The only information that is quoted in this article comes from the court's decisions and orders that were issued in response to discovery motions filed by Kal Kan in the case.

253. Defendants' independent testifying experts all submitted proper Rule 26(a)(2)(B) reports.

254. Third Amended Counterclaim of Kal Kan Foods, Inc. (on file with author).

8,000 pages of documents. Defendants argued they were not required to submit expert reports for their employees because none regularly provided expert testimony.²⁵⁵

Sitting in Dayton, Ohio, a district in the Sixth Circuit, the magistrate judge was faced with conflicting precedent. The *Signtech* and *Duluth* decisions, both issued out of Minnesota, offered opposing views of the same issue. The magistrate ruled that employee experts were not required to produce Rule 26(a)(2)(B) reports:

It is certainly true that requiring employee experts to prepare reports would be consistent with the purpose of the 1993 amendments and would further the overall purpose of the discovery rules to make information broadly available before trial. Nevertheless, the drafters of the amendments plainly carved out an exception to the report-writing requirement: reports are not required of employees unless they are specially employed to give expert testimony or their duties as employees regularly involve giving expert testimony. That the exception cuts into the expansive purpose of the amendments is undoubted, but the exception is not ambiguous. Courts as statutory interpreters have no warrant to expand a statute to carry out its purpose when the drafters plainly did not do so. As Hart and Sacks put it, an interpreter may not impose on words a "meaning that they will not bear." To refuse to recognize the exception to the report-writing requirement for a person in [the expert's] position would be to read the exception out of the rule.²⁵⁶

Like the *Navajo* and *Duluth* courts, the Dayton district court felt constrained by the plain meaning of the language of Rule 26 and

255. The pertinent language states that disclosure is required of a witness "whose duties as an employee of the party *regularly* involve giving expert testimony." FED. R. CIV. P. 26(a)(2)(B) (emphasis added).

256. *Kal Kan*, slip op. at 5 (Oct. 28, 2003) (Decision and Order Denying, on Conditions, Plaintiff's Motion to Exclude the Expert Testimony of Dr. Diane Hirakawa) (on file with author).

did not apply the reporting requirement to the defendants' employee experts. An unavailable and unpublished decision issued by one of the Dayton district court judges may have played an important role in Magistrate Judge Merz's decision.²⁵⁷ In that decision, the court ruled that an employee expert was not required to submit a written report.²⁵⁸

The magistrate in *Kal Kan* also heard discovery motions regarding the applicability of the attorney-client and work-product privileges to the defendants' employee experts. In a separate, unpublished order, the magistrate judge ruled that that work-product privilege was waived as to documents shared with employee experts.²⁵⁹ Siding with the majority view, the court held that work-product privilege was waived as to all fact and opinion work product shared with the defendants' employee experts, but limited its ruling to materials considered by the employee in forming an expert opinion.²⁶⁰ Despite the defendants' arguments that their employee experts should be treated differently because they were not required to submit expert reports and had done so voluntarily, the court drew no distinction between the defendants' employee experts and independent testifying experts.²⁶¹

The court did not explain whether the submission of reports by the defendants' employee experts had played a role in its decision, thereby failing to reconcile an important question regarding defendants' discovery obligations.²⁶² Although the court ruled that the employee experts were not required to submit expert reports, it did not address what, if any, obligation the defendants had to produce work product that was shared with or provided to the

257. *JLJ, Inc. v. Santa's Best Craft, LLC*, No. 02-CV-513, slip op. at 47 (S.D. Ohio May 2, 2003) (Entry and Order Confirming the Overruling of Defendant's Motion to Exclude the Expert and Lay Testimony of John Janning and Michael Suger).

258. *Id.*

259. *Kal Kan*, slip op. (June 26, 2003) (Decision and Order Granting in Part and Denying in Part Plaintiff's Urgent Motion to Compel Documents . . . Relating to Expert Discovery). At *Kal Kan*'s insistence, the Iams employees had submitted minimal expert reports, which *Kal Kan* argued were insufficient. *See id.* at 2.

260. *Id.* at 5 (stating that "this Court concludes that the protection for both factual and attorney-opinion work product is waived when that material is furnished to a designated expert witness and considered by him or her in preparing an expert opinion under FED. R. CIV. P. 26(a)").

261. *Id.*

262. *Id.*

employee expert who did not submit a report. Thus, in the Southern District of Ohio, not producing a report is strategically advisable.

The court described the application of the attorney-client privilege as a "much closer issue."²⁶³ Noting the absence of any case precedent on point, the court reasoned:

While some of the cases relied upon by *Kal Kan* include mention of waiver of attorney-client privilege, the focus of the discussion is on attorney opinion work product. Moreover, it is unclear from the discussion of the cases whether they involve the same fact pattern as this case—the designated experts are high-ranking employees of Iams who have had occasion, at least as Iams represents, to seek legal advice from Iams' counsel. While they may have seen or "considered" such advice in the course of preparing their opinions, it may be sufficiently far removed from the subject matter of the opinions as to be immaterial to them and therefore perhaps more deserving of protection.²⁶⁴

Without controlling precedent for deciding the issue either way, the court ordered that the materials be produced for *in camera* inspection.²⁶⁵ Given the lack of authority on point, there may have been few alternatives.

XI. CONCLUSION

All of the discovery disputes discussed in this article could easily be addressed by simple, clarifying amendments to the Federal Rules of Civil Procedure. Rule 26 should be amended to clarify that *all* testifying expert witnesses are subject to the same disclosure requirements, even testifying employee experts. The current version of Rule 26 is unacceptable because it promotes: (1) inefficiency, (2)

263. *Kal Kan*, slip op. at 5 (Decision and Order Granting in Part Plaintiff's Urgent Motion to Compel Documents . . . Relating to Discovery).

264. *Id.*

265. *Id.* The court never reached this issue because the case settled before the *in camera* inspection was completed.

unfairness, and (3) uncertainty as to how to apply the rules to employee experts. The disputes involving current employee experts cannot be what the drafters intended, unless they intended to impede efficiency by provoking discord.

It is unfair to require a litigant who retains an independent expert to submit a report that complies with 26(a)(2)(B) and waive work-product and attorney-client privileges, while allowing an opposing party to sandbag an opponent because that party's expert is an employee. Doing so creates the very evils the 1970 and 1993 amendments to Rule 26 sought to prevent.²⁶⁶ As the *Duluth* court noted: "While we agree . . . that it is undesirable for litigants to elude the automatic expert disclosure requirements by guise, contrivance, or artful dodging, we are not empowered to modify the plain language of the Federal Rules so as to secure a result that we think is correct."²⁶⁷

In the interim, courts should heed the admonitions of both Justice Powell and Justice Brennan and require a level playing field. The search is best served when discovery is made readily available for use in cross-examination, and litigants are not allowed to hold cards until trial. This is particularly true when expert witnesses are involved.

266. For example, if an independent, testifying expert was involved in testing that weakened a party's position as to any given claim, generally accepted discovery principles would allow an opposing party to take deposition discovery on the subject and obtain relevant documents. Likewise, if a testifying expert were involved in discussions with counsel during which weaknesses in a party's case were discussed, discovery regarding these conversations is appropriate and fair game.

267. *Duluth*, 199 F.R.D. at 325.