The Sedona Conference Journal

Volume 3 2002

# Expert Witnesses: Pitfalls Posed by the Discovery Process

David H. Marion & Christopher Pushaw



Recommended Citation: David H. Marion & Christopher Pushaw, *Expert Witnesses: Pitfalls Posed by the Discovery Process*, 3 SEDONA CONF. J. 199 (2002).

# EXPERT WITNESSES: PITFALLS POSED BY THE DISCOVERY PROCESS

*David H. Marion & Christopher Pushaw**
*Montgomery, McCracken, Walker & Rhoads, L.L.P.*
*Philadelphia, PA*

## I. INTRODUCTION

### A. Overview

Retaining an expert or experts is usually one of the earliest endeavors in any litigation involving a significant degree of complexity and/or monetary exposure. It can be an extremely costly endeavor for the client. Expert retention can be costlier still for the attorney in terms of winning or losing the client's case if the attorney is not mindful of the potential pitfalls — particularly during the discovery stage — that attend the attorney's management of communications with the expert, preparation of the expert's reports, and planning her proposed testimony. In selecting experts, designating their role in the litigation, and communicating with them, the potential discoverability of these activities must be weighed in order to avoid mistakes that could jeopardize your client's case.

This article will discuss what some of the dangers are, and possible means to avoid or deal with them. We will highlight issues where the courts have spoken and provided some guidance, and raise questions about areas where the legal boundaries are not clearly established. Hopefully this will assist the reader in making the critical judgment calls necessary when dealing with experts during the discovery phase of complex litigation.

### B. Problems

How would you handle the following situations:

1. Your opponent's interrogatory asks that you "Identify all potential experts you consulted with — even if not testifying." Are you obligated under the rules to disclose experts you have rejected or who have rejected your client's case? Are you obligated to disclose their opinions? Are you obligated to disclose consulting experts?

2. Your opponent's document request asks for production of drafts of expert reports. Are you under an obligation to preserve such drafts and produce them? What if discovery requests for such drafts were issued to you before you received any drafts? Can you tell your expert to keep drafts to himself and/or destroy them?

3. Your expert's entire file has been subpoenaed. Should you review the file? Can you remove anything from it? Are your expert's notes discoverable? Does your expert have a duty to retain and produce his or her data and/or test results? Are your own notes regarding your conversations with your expert discoverable?

* The authors wish to thank Molly Peckman for her "expert" assistance and consultation.

4. Your star associate prepared an excellent chronology or annotated document index for your case. If you give it to your expert, are you waiving the work product privilege? If your client prepared it for you, does providing it to the expert waive the attorney-client privilege?

5. When you engage your expert, do you specify that he or she is engaged by you and your firm or by the client? How do you protect yourself and your firm if the client does not pay the expert's fees and expenses? Do you have an obligation to pay the expert even if your client won't pay you? Even if you are not required to pay, do you want to risk being known for not paying experts?

6. If asked in discovery to provide a list of every case in which the expert previously testified, are you required to do so?

7. If you disclose sensitive matters about the case to the potential expert during initial conversations before he has been retained, are they discoverable?

8. What if you retain the expert and then decide to let him go? Can the other side speak with or engage your former expert?

9. What if you change the designation of your expert from "testifying" to "consulting?" Does this affect discoverability?

10. What about information your expert shares with or learns from other experts? Is it discoverable?

11. What, if any, contacts are you permitted to have with an opposing expert or your opponent's former expert?

C. Disclaimer

Reading the balance of this article is not guaranteed to reveal answers to all of the foregoing questions.

## II. BACKGROUND CONSIDERATIONS

At the trial stage, judges have become gatekeepers as to potential expert testimony, but during the discovery process the court usually does not play as visible a role in the policing of experts and their handling by counsel. In discovery, opposing counsel properly attempts to understand the technical aspects of the expert's impending testimony, prepare for the cross-examination of the expert at trial, and develop ways to impeach the credibility of the expert and blunt the adverse impact of her testimony. Attorneys must be vigilant to protect their expert from attack from the other side, and to protect materials given to the expert from premature or inappropriate disclosure.

Despite the popular view of an expert as a "hired gun," the expert's official role is to provide learned testimony to assist the trier of fact to understand the issues in proper context. He is not a client or party; therefore, the usual protections stemming from client privileges are absent. The expert witness may be subject to greater scrutiny by opposing counsel than the lay witness during the discovery process, because he is perceived to play a

more critical role in the complex aspects of the case and because he will be presented to the jury as independent of or at least separate from the parties and possessed of special knowledge, experience or competence. An expert's report alone is frequently viewed as potentially determinative of success at trial, and therefore heavily influences the prospects for settlement.

Obviously, careful and diligent preparation of the expert is required before trial. Similarly, we must prepare our expert to be wary in answering interrogatories and deposition questions. What is less obvious but no less critical is the need to be circumspect concerning the overall relationship with the expert. For example, an attorney should be careful about exposing sensitive documents to the expert that she may not want discovered by opposing counsel. You could seriously damage your case or your client by allowing materials shown to an expert to become discoverable when they otherwise would not be.

Difficult decisions in managing the expert come very early in the discovery process, long before the trial. It is crucial to ferret out potential conflicts of interest and background facts which could make talking to the expert dangerous or use of that expert risky. Since experts may be "shopped around" among opposing counsel, it is vital to secure assurances that the expert will protect client confidences as well as the attorney's opinions or theories of the case — and safer not to reveal them at all until the expert is formally engaged. Once an expert is retained, the attorney needs to consider protection of information and materials given to the expert for preparation of a report or opinion. This caution will also inform what role the attorney selects for the expert to play, as different regimes under the federal rules of discovery obtain for testifying and nontestifying experts. The discoverability of some expert information may also depend on whether it was obtained in anticipation of litigation.

The critical judgments a litigator must make in the grey areas of the discovery process regarding the management of expert witnesses should be informed not only by a thorough knowledge of the procedural rules, but also by an awareness of the attitude of the courts of the particular jurisdiction. The rather open-ended nature of the Federal Rules – and the rules of most state courts governing expert witness discovery leaves much leeway for divergent judicial opinions - ranging from judicial advocates of the most liberal disclosure to those most sympathetic to protection from disclosure.

The "discovery oriented" courts, which generally enforce broad discoverability of materials given to an expert, believe they are properly reinforcing the overall liberal discovery regime espoused by Rule 26(b)(1). Rule 26(b)(1) permits discovery of "any matter, not privileged, that is relevant to the claim or defense of any party." A liberal discovery policy with regard to expert witness materials is seen to further the overall objectives of the rules by both narrowing and ventilating the issues involving expert commentary for trial. In addition, the "discovery-oriented" approach affords opposing counsel an adequate opportunity to prepare for cross-examination of the expert at trial.

Conversely, "protection oriented" courts are more likely to immunize from discovery materials given to an expert, especially those falling under some recognized form of discovery protection. Some of these "protection-oriented" courts distinguish between the facts and opinions contained in the materials given to experts by attorneys and by other experts. Undergirding this "protection-oriented" regime is the belief that opposing counsel should not be able to parasitize the other side's hard work by gaining access to it under the pretext of discovery.

Examples of both approaches are discussed below.

## III. FEDERAL RULES GOVERNING DISCOVERY OF EXPERT WITNESSES

Without attempting to be exhaustive, a brief reference to the federal rules is necessary to supply appropriate context.

Under FRCP 26(a)(2), a *testifying* expert must disclose the data, conclusions and opinions that are to be the subject of his testimony, as well as the factual basis for that testimony. Thus, any preparatory materials furnished to him by an attorney are subject to discovery by opposing counsel, and may include attorney reports and memoranda that would ordinarily be subject to the work product protections afforded by Rule 26(b)(3). Similarly, Rule 26(b)(4)(A) allows opposing counsel to depose and request interrogatories from a testifying expert, in order to become aware of the subject matter of the expert's proposed testimony and the background for such testimony. On the other hand, Rule 26(b)(4)(B) protects opinions and the background materials of *nontestifying* experts from discovery by opposing counsel, a discovery protection that can be overcome only by a showing of "exceptional circumstances". Finally, to discourage expert cannibalization by opposing counsel during discovery, Rule 26(b)(4)(C) provides in certain circumstances for fee sharing of the costs of the expert by opposing counsel requesting the discovery.

The rather favorable discovery climate for opposing counsel set up by the Rules comes into conflict with other rules that would normally protect trial preparation materials. For example, Rule 26(b)(3) — while not addressing experts — protects factual and opinion attorney work product from discovery except upon a showing of "substantial need" and "undue hardship" to obtain the substantial equivalent of the materials by other means. Rules 26(a)(2) and (b)(4), which govern the disclosure and discoverability of expert materials, are largely silent with respect to work product protection. Shifting attention to the adversary's expert witness, Rule 32(a)(3) presents another danger, as it allows for the introduction of witness depositions for "any purpose" at trial if the (potential expert) witness is "unavailable" to testify. Thus, when you elect to depose an adversary's expert witness, you run the risk of having the expert's deposition admitted at trial (if he should become unavailable) without a proper cross-examination of the expert (because you do not normally want to expose your full cross-examination at the deposition, but merely want to "pin down" the expert's positions). These and other dilemmas — which remind us that trial practice is closer to art than to science — and some practical considerations in guiding the expert through the discovery minefield, are addressed below.

## IV. SELECTING EXPERTS, DESIGNATING THEIR ROLE, AND PREPARING THEM FOR DEPOSITIONS

### A. Unretained Experts

Information and opinions obtained from an expert consultant that the lawyer does not then retain may nevertheless be subject to discovery. *See Harasimowicz v. McAllister*, 78 F.R.D. 319, 320 (E.D. Pa. 1978). However, confidential information about the case received from the client or attorney is protected, especially if the expert communicates with or is retained by opposing counsel. Violation of these confidences can result in the disqualification of both the expert and opposing counsel. *See*, *e.g. Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 582, 584 (D.N.J. 1994); *see generally* Douglas R. Richmond, *Regulating Expert Testimony*, 62 Mo. L. Rev. 485 (1997).

In deciding whether to disqualify an expert witness later retained by opposing counsel, courts consider: (a) whether a confidential relationship existed between the expert and the other side; (b) whether it was reasonable for the other side to believe a confidential relationship existed; and (c) whether any attorney or client confidences were actually disclosed to the expert by the other side. *See Wyatt v. Hanan*, 871 F. Supp. 415, 419 (M.D. Ala. 1994). Opposing counsel can be disqualified for failing to discover the true nature of the relationship between the expert and the other side, for example, by at least making a phone call to the other side's counsel. *See Cordy*, 156 F.R.D. at 584.

Courts are, however, reluctant to disqualify expert witnesses because of both policy-oriented and practical considerations. From a policy perspective, courts must balance the need to protect client confidences and litigation strategy with the need to ensure that parties have access to qualified expert witnesses possessing esoteric knowledge. *See Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 281-82 (S.D. Ohio 1988); *Wyatt*, 871 F. Supp. at 420-21. From a practical perspective, a too-ready standard for expert disqualification would encourage unscrupulous attorneys to quickly tie up many experts in the field to foreclose the other side by conflicting them out of the case. *See Paul*, 123 F.R.D. at 282.

The complications and appearance of foul play attendant upon attempted use of an expert consulted by your adversary would seem to counsel that such a course should rarely if ever be pursued.

B. Retained Experts

1. Testifying Expert

The materials and reports given to and by a testifying expert are fully disclosable and discoverable under Rules 26(a)(2) and (b)(4)(A). Under Rule 26(a)(2), an expert must disclose the data and conclusions on which he will offer testimony, as well as the basis for them, including all sources and materials consulted. Nondisclosure of any such materials could result in the exclusion of the expert's testimony at trial under Rule 37(c)(1). *See, e.g., Doe v. Johnson*, 52 F.3d 1448, 1464 (7th Cir. 1995).

As noted above, the ordinary privileges and protections under the Federal Rules do not generally extend to materials given to testifying experts in preparing their reports. *See, e.g., Boring v. Keller*, 97 F.R.D. 405, 407-08 (D. Colo. 1983); *see generally* James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. Miami L. Rev. 1101 (1988). In fact, given the broad discoverability endorsed by Rule 26(b)(4)(A), even reports prepared by other *nontestifying* experts are discoverable if shown to the testifying expert, thus trumping the protections of Rule 26(b)(4)(B). *See*, *e.g., Heitmann v. Concrete Pipe Machinery*, 98 F.R.D. 740, 743 (E.D. Mo. 1983). However, at least one court has ruled that, if a testifying expert does not consider the work of the nontestifying, consulting expert in reaching his conclusions, the consulting expert's materials are protected under the Rule. *See Dominguez v. Syntex Laboratories, Inc.*, 149 F.R.D. 158, 162 (S.D. Ind. 1993).

It is difficult to quarrel with the liberal discovery provisions governing testifying experts. By their very nature, the work and materials an expert consults, gathers, and synthesizes in preparation for his ultimate testimony are potential evidence. Such materials must be discoverable to enable opposing counsel to prepare for such testimony, to prepare cross-examination and to prepare rebuttal to counter that expert's viewpoint. Without such discovery, it would be difficult for opposing counsel to ferret out the influence of an attorney on an expert. The expert, of course, is unavoidably biased, to some degree, as a

member of the adversary's team, since he is dependent on that team for information and compensation. Thus, discovery is necessary to divine the extent of this influence and to prepare adequately to counter it. Rule 26(b)(4)(A) mirrors the evidentiary concern of Federal Rule of Evidence 705, which allows opposing counsel, during cross-examination, to require the expert to disclose the factual basis of his opinion. Rule 26(b)(4)(A) offers a cost-effective procedure whereby opposing counsel can obtain quick access to an expert's proposed testimony and research without the costs of deposition or interrogatories, though these methods are permissible as well.

2. Nontestifying Expert

A nontestifying or "consulting" expert enjoys much greater protection from discovery than his testifying counterpart, a consideration the lawyer should bear in mind in designating the role he would like a particular expert to play. In general, the opinions, conclusions, and background materials offered by and given to a nontestifying expert are protected from discovery under Rule 26(b)(4)(B). *See, e.g., U.S.M. Corp. v. American Aerosols, Inc.,* 631 F.2d 420, 424-25 (6th Cir. 1980); Hayes & Ryder, *supra.*

This heightened protection can only be overcome by a showing of "exceptional circumstances" facing opposing counsel in seeking to obtain equivalent information, such as an inordinate outlay of time, money or expense. The "exceptional circumstances" standard for nontestifying expert opinion is a "heavy burden," present only when the other side can demonstrate an inability to discover equivalent information by other means. *See, e.g., Hartford Fire Insur. Co. v. Pure Air on the Lake, Ltd.*, 154 F.R.D. 202, 210 (N.D. Ind. 1993); *Brown v. Ringstad*, 142 F.R.D. 461, 464-65 (S.D. Iowa 1992). Courts have also found "exceptional circumstances" when one party's experts cannot duplicate a test or an observation by a consulting expert, possibly because of the destruction of the subject matter on which such tests were run. *See, e.g., Sanborn v. Kaiser*, 45 F.R.D. 465, 466-67 (E. D. Ky. 1968) (allowing discovery where defective pipe replaced at site before duplicate photographs could be made); *Delcastor v. Vail*, 108 F.R.D. 405, 409 (D. Colo. 1985) (requiring deposition of nontestifying expert who investigated a mud slide before conditions at site changed).

Rule 26(b)(4)(B)'s discovery protections for a retained consulting expert are intended to eliminate the "free rider" problem which would be encountered were opposing counsel able to freely access the conclusions, data, and information of opposing experts, retained and remunerated by the other side. *See, e.g., Brown*, 142 F.R.D. at 465. In addition, the discovery protections of Rule 26(b)(4)(B) afford added insulation from the danger of ex parte contacts or other influence by opposing counsel. Finally, from a policy standpoint, the protection of this informal consultation promotes the enlistment of expert consultation free from the shadow of discovery and possible subpoena.

Delicate problems may arise when a client's own employees or consultants are retained as "in-house" experts to prepare for litigation. Predictably, courts require some evidence that any reports prepared or materials accessed by these "in-house consultants" were done in anticipation of litigation and not in the ordinary course of business. To avail yourself of the protections of Rule 26(b)(4)(b), you must show, at the time the materials were prepared, that there existed "more than a remote possibility of litigation." *Fox v. California Sierra Financial Services*, 120 F.R.D. 520, 524 (N.D. Cal. 1988). Where "in-house expert reports" were prepared to assist litigation as well as for ordinary business purposes, you must show that "the primary motivating purpose behind the creation of [the materials] was to assist in pending or impending litigation". *United States v. Gulf Oil Corp.*, 760 F.2d 292, 297 (U.S. Temp. Emer. Ct. App. 1985).

An ancillary concern is whether the litigator is obligated to disclose the names of consulting experts, or whether even their identities are protected from discovery under Rule 26(b)(4)(B). Since tracking down the right expert and evaluating his suitability for retention in itself entails significant effort on the part of an attorney in building his case, one could argue that protecting the identity of these consultants furthers the policy considerations of 26(b)(4)(B). On the other hand, it could be argued that the overall policy considerations behind Rule 26(a)(1)(A), mandating initial disclosure of all persons "likely to have discoverable information," should include these consultants. The name of a consulting expert might be required by the adversary to build his case for the necessity of accessing that expert's information due to the "exceptional circumstances" discussed earlier. One court has held that the name of a treating, as opposed to an expert, physician would need to be disclosed, if the physician will offer expert testimony. *See Patel v. Gayes*, 984 F.2d 214 (7th Cir. 1993).

Need the lawyer worry about waiving the discovery protections of Rule 26(b)(4)(B) inadvertently? In general, the protection of nontestifying expert information is not waivable. *Vanguard Savings & Loan Ass'n v. Banks*, Civ. A. No. 93 - 4627, 1995 U.S. Dist. LEXIS 2016, at *7 (E.D. Pa. Feb. 17, 1995) (noting absence of waiver where consultant's report allegedly turned over to third parties). However, in *United States v. 22.80 Acres*, 107 F.R.D. 20, 26 (N.D. Cal. 1985), the use of an appraisal report prepared by a government employee by two other government employees to refresh their recollections in preparation for their depositions was held to constitute a waiver of discovery protection for that report.

Can you avoid discovery by simply re-labeling a "testifying" expert as a "consulting" expert? It has been held that one cannot protect potentially unfavorable information from discovery simply by switching a retained expert's designation from "testifying" to "consulting". *See, e.g., Furniture World, Inc. v. D.A.V. Thrift Stores*, 168 F.R.D. 61, 63 (D.N.M. 1996). While courts do not always penalize the litigant for this maneuver, *see In re Vestavia Associates Limited Partnership*, 105 B.R. 680, 684 (Bankr. M.D. Fla. 1989), it is unlikely to succeed because it obviously flouts the carefully demarcated discovery policies of Rule 26(b)(4). A more prudent course of action would be, upon retention, to protect an expert as a "consultant," then possibly open his status to the more liberal discovery regime of Rule 26(b)(4)(A) if it later appears necessary to use at trial.

What if a retained expert later changes his opinion, to the detriment of retaining counsel? While some courts have allowed experts to "switch sides" in this manner, *see Peterson v. Willie*, 81 F.3d 1033, 1038 (11th Cir. 1996), other courts have disallowed it. *See Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460, 462 (S.D.N.Y. 1995). Courts generally consider the availability of other experts in making this determination, *see Rubel*, 160 F.R.D. at 462, and should restrict the ability of opposing counsel to make the damaging observation of the expert's previous retention by the other side.

A related disqualification concern focuses on the tricky situation in which one expert decides to consult another expert in his specialized field. Such expert-to-expert consultation, even between experts on opposing sides, is permissible provided that confidential information and/or trial strategies between the experts is protected, and attorney involvement is kept to a minimum. *See Palmer v. Ozbek*, 144 F.R.D. 66, 67-68 (D. Md. 1992).

D. Expert Information Acquired or Developed Outside of Retention

Of course, the simple retention of an expert, even as a consultant, does not necessarily insulate the totality of his information from discovery. The discovery protections

of Rule 26(b)(4) only apply to materials consulted and prepared in anticipation of trial. Everything else is potentially discoverable. If a testifying expert possesses information as an ordinary witness, outside the specific domain of his expertise, such information is as discoverable as his expert information. Thus, if an expert witnesses an event germane to the case prior to his retention as an expert, his personal knowledge is subject to discovery just like that of an ordinary fact witness. *See, e.g., Harasimowicz*, 78 F.R.D. at 320; *cf. Chiquita Int'l Ltd. v. M/V Bolero Reefer*, No. 93 - 0167, 1994 U.S. Dist. LEXIS 5820, at *3 (S.D.N.Y. May 6, 1994) (noting that the "relevant distinction is not between fact and opinion testimony but between those witnesses whose information was obtained in the normal course of business and those who were hired to make an evaluation in connection with expected litigation").

It is also true that information possessed by a nontestifying expert, developed or acquired prior to retention, is discoverable. For example, in *Adams v. Shell Oil Co.*, 134 F.R.D. 148 (E.D. La. 1990), the court allowed inquiry into the facts and opinions of consulting experts, known or held prior to their retention, while prohibiting discovery of these same experts' post-retention opinion. Similarly, in *Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976), the deposition of a retained expert regarding his previous master's thesis, likely to be introduced into evidence by opposing counsel, was discoverable. The court reasoned that, since the information was not developed in anticipation of trial, the discovery policy and fairness concerns of FRCP 26(b)(4) were absent. *See id.*

## V. SPECIAL CONFLICTS INVOLVING EXPERT OPINION INFORMATION AND THE WORK PRODUCT DOCTRINE

The work product protections of Rule 26(b)(3) are not always airtight, particularly with respect to materials given to an expert.

### A. Work Product Protection

You cannot rely too heavily on work product protection in the context of discoverability of expert witness materials. The work product protection of Rule 26(b)(3) is designed to encourage the robust, innovative development of the client's case, free from the fear of potential access by opposing counsel through discovery. However, these concerns do not transfer cleanly to the preparation of an expert for trial. Rule 26(a)(2)'s endorsement of the liberal disclosure of expert information places work product protections in jeopardy. Rule 26(a)(2), along with the free discoverability of testifying expert materials under Rule 26(b)(4)(A), allow opposing counsel to understand the issues for trial, as well as to prepare for cross-examination and impeachment of the expert. Neither of these provisions specifically address the force of work product protection in the face of their liberalization of discovery. *See generally* Christa L. Klopfenstein, *Discoverability of Work Product Materials Provided to Testifying Experts*, 32 Ind. L. Rev. 481 (1999). It is prudent, however, for counsel never to assume that the work product doctrine will shield materials given to an expert, especially a testifying expert, from discovery by opposing counsel.

As mentioned above, courts have developed various tests to deal with the competing concerns of the work product doctrine and the discoverability of expert information, splitting into camps which see the discovery provisions regarding expert information as trumping work product protection ("discovery-oriented") and those who are more protective of materials that are the product of the attorney ("protection-oriented"). *See generally* Michael E. Plunkett, *Discoverability of Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed*

*Anything?*, 69 Temple L. Rev. 451 (1996). The reasoning of these judges provides some guidance in deciding whether to give materials to an expert which bear the stamp of the facts, opinions, and theories developed by the attorney, disclosure of which would be helpful to opposing counsel.

1. *"Discovery-Oriented" Approaches*

Some courts entirely disregard work product protection and will not let it impede the free flow of the discovery of expert materials. For example, in *Boring*, 97 F.R.D. at 407-08, the court permitted the discovery of attorney work product materials used by the expert, reasoning that "full" discovery best serves the purpose of Rules 26(a)(2) and (b)(4), to allow discovery of facts and opinions held by experts and to allow opposing counsel to prepare for cross-examination. A more nuanced approach allows such discovery unless it can be shown that the work product materials clearly "could not have influenced" the expert. *Mojica v. Doboy Packaging Machinery*, No. 86C 4076, 1987 U.S. Dist. LEXIS 1853 (N.D. Ill. Mar. 10, 1987). Liberally allowing discovery of work product materials given to the expert reduces the inclination and opportunity for the attorney to coach the expert to align his theories with the attorney's overall theory of the case, which in turn adds to the credibility of the expert's opinion. This judicial approach also has the practical advantage of giving a clear guideline to the lawyer not to rely on work product protection as possible insulation for materials given to the expert. The lawyer knows he should not give to his expert any work product materials he would not want opposing counsel to discover.

Other "discovery-oriented" approaches offer less predictive value to attorneys in guiding their decision whether to give work product materials to their experts. For example, the court in *Fauteck v. Montgomery Ward & Co.*, 91 F.R.D. 393 (N.D. Ill. 1980) endorsed a test allowing discovery of work product materials given to an expert by an attorney if they were to form the "foundation" of the expert's testimony at trial. However, the inherent vagueness of what constitutes this "foundation" renders the test of lesser help to the attorney who must decide what materials he should give to his expert. Of similarly reduced value to the practicing lawyer is the test endorsed by Judge Becker in dissent in *Bogosian v. Gulf Oil*, 738 F.2d 587, 597 (3d Cir. 1984) (Becker, J., dissenting). In evaluating the discoverability of work product materials, Judge Becker proposed to "balance" the fairness considerations to counsel retaining the expert versus opposing counsel's need to prepare for cross-examination. While weighing the broad policy issues on both sides of the question of the discoverability of expert witness materials is academically appealing, a "balancing" test offers far less help than the bright-line position of the *Boring* court to a lawyer trying to decide whether to give work product materials to her expert.

2. *"Protection-Oriented" Approaches*

Some courts do accord the traditional protection to work product materials to which lawyers are accustomed, even those given to testifying experts. Like their discovery-oriented counterparts in *Boring*, the court in *Bogosian*, 738 F.2d at 594-95, intended a clear test to guide the lawyer's decision in giving work product materials to experts. The court allowed discovery of factual work product, while disallowing discovery of opinion work product under any circumstances. *Id.* Other courts have lumped both fact and opinion work product together under the "substantial need" test of *Bogosian*. *See Bethany Medical Center v. Harder*, Cir. A. No. 85-2415, 1987 U.S. Dist. LEXIS 2482, at *30-*31 (D. Kan. Mar. 12, 1987). While these opinions offer some measure of security to the lawyer in giving over his work product materials to the expert, substantial predictive uncertainty remains as to the court's eventual estimation of what might constitute "substantial need".

At least one court has confronted head-on the apparent gaps created by the intersection of the discovery rules regarding work product protection and expert witness materials, and has attempted to reconcile the two. The court in *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995) noted that the expert discovery rules did not erode the traditional protection afforded opinion work product under 26(b)(3), absent a showing of unambiguous statutory intent to the contrary. However, the court found that the disclosure requirement for expert witnesses of 26(a)(2) required the discovery of fact work product, even without a showing of "substantial need" on the part of opposing counsel. *Id*. The court found the already thin qualified immunity accorded "fact" work product unavailing in the face of the strong requirement of Rule 26(a)(2) that the facts and data upon which the expert relied in forming his opinion be disclosed. *Id*.

If the *Haworth* analysis governs one's opinion and theories on a particular case should still enjoy the protection of 26(b)(3), and thus materials given to an expert which bear this stamp would probably not be discoverable. Such protection encourages the free communication between attorneys and their retained experts necessary to build the strongest case for your client. But many courts find that these protections are waived once such information is given to an expert. *See, e.g.*, *Hager v. Bluefield Regional Medical Center*, 170 F.R.D. 70, 78, 80 (D.D.C. 1997); *James Julian, Inc. v. Raytheon*, 93 F.R.D. 138, 146 (D. Del. 1982); *cf. B.C.F. Oil Refining Co. v. Con Edison*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997).

## VI. CONSIDERATIONS RELATING TO POTENTIAL USE OF EXPERT DEPOSITIONS AT TRIAL

So far we have focused primarily on discovery issues relating to protecting from unwanted discovery by opposing counsel materials given to your own expert. When you are in the position of "opposing counsel," other decisions made must be at the discovery stage regarding communications with and management of your opponent's expert. These include considerations governing *ex parte* communications with an adversary's expert and taking steps to avoid violating confidentiality which could result in the attorney's disqualification and the disqualification of the expert.

Also, as alluded to above, discovery decisions involving the other side's expert include dealing with the tension between Rule 32(a)(3), governing the use of depositions at trial when the deponent is "unavailable" to testify, and Rule 26(b)(4)(B), authorizing the deposition of the adversary's expert. *See generally* Steven D. Parman, *Twisting the Purposes of Discovery: Expert Witnesses and the Deposition Dilemma*, 36 Vand. L. Rev. 1615 (1983). Deposing the opponent's expert creates the risk that the opponent will be able to use the deposition against you at trial if the expert becomes "unavailable," because of death, infirmity, age, location outside of a 100-mile radius of the courtroom, or for other "exceptional circumstances." You must decide whether to forego the deposition of the opposing expert entirely or run the risk of having his deposition testimony admitted without benefit of effective cross-examination. Normally you want the deposition to help prepare for cross-examination at trial by "pinning down" the expert's positions, but you don't want to cross-examine at the deposition itself. This becomes yet another "critical case management" decision for counsel regarding the handling of experts during the discovery phase – one for which there is no ready answer or guideline.

## VII. CONCLUSION: ETHICAL AND PRACTICAL CONSIDERATIONS

We will conclude with a brief recap of ethical and practical considerations for dealing with expert witnesses during the discovery phase.

Use of expert testimony is usually essential if not indispensable to success in complex litigation. But your expert is not your client, and communications with him are not shielded by ordinary attorney/client privileges. Thus, in initially seeking out and consulting with a potential expert, preliminary to retention, you should secure his commitment to protect client confidences as well as your opinions and theories about the case. Conversely, as opposing counsel, one should be mindful of these sensitive confidentiality issues in contacting the other side's expert to avoid possibly disqualifying yourself as counsel and/or the expert if he decides to "switch sides." Also, as opposing counsel, you cannot make an *ex parte* offer of a "monetary inducement" to a plaintiff's expert. *Erickson v. Newmar*, 87 F.3d 298, 302-03 (9th Cir. 1996) (noting that such conduct constitutes "witness tampering" and is "prejudicial to the administration of justice").

We have discussed at some length considerations surrounding furnishing documents and information to the expert for his use in preparing reports, in fielding questions in deposition or in interrogatories. It is helpful to bear in mind that due to the expert's special witness status the reports, answers, and testimony of the expert do not constitute an "admission" of the party calling the expert, unless there is a finding that the expert is an agent of the party and is authorized to speak on his behalf. *Kirk v. Raymark*, 61 F.3d 147, 164 (3d Cir. 1995).

There are usually deadlines for designating expert witnesses, but there are many other reasons for seeking expert assistance as early as possible besides being ready to submit expert reports on a timely basis. Retention may be on a testifying or consulting basis; as discussed above, retention as a consultant provides greater protection from discovery under FRCP 26(b)(4)(B).

Clients should be warned that retaining experts is an expensive proposition. Beyond the expert's fees, substantial attorney time will be required in preparing an expert for deposition, as well as for trial. Frequently, even experts with substantial experience are resistant to absorbing the most rudimentary requirements of listening carefully to each question, answering only after thoughtful consideration, avoiding guesswork and attempts by opposing counsel to get the expert to stretch beyond his knowledge, and making answers as brief and succinct as possible. When taking your opponent's expert deposition, it often requires some discipline on your part to avoid prematurely destroying the other side's expert. A major purpose of the deposition is to gain ammunition to attack the expert *at trial*; if a woeful performance by the adverse expert during deposition forces your opponent to retain another expert for trial, your masterful performance will have been counterproductive.

The contents of an expert's file, especially a testifying expert, may be completely discoverable. Therefore, documents contained in the expert's file should be only those which counsel and the expert would not object to producing for opposing counsel. Counsel should remind the expert to exercise care in putting preliminary impressions, opinions, or thoughts in writing, as these are also discoverable. As a corollary, counsel should avoid jotting any notes or highlighting any materials for the expert in giving him preparatory documents unless willing to show such jottings to opposing counsel. For example, a note encouraging the expert to make particular use of a particular document to align to a particular theory of the case would obviously be very helpful in building a case for

impeachment of the expert by opposing counsel. Thus, in considering which documents to give to a particular expert, the degree of their probable discoverability is a crucial issue. Obviously, difficult judgment calls must be made by the lawyer. For example, if an internal memorandum which includes your theory of the case is the best way to quickly bring the expert up to speed, and time is short, you may decide to furnish it notwithstanding concern about its discoverability.

In addition to preparatory materials, the expert's report is also obviously discoverable. Therefore, before requesting a report from the expert, counsel should thoroughly discuss the findings and conclusions of the expert to make sure that any potentially harmful statements do not appear in the report. Since drafts of such a report are also discoverable, obvious difficulties arise in obtaining preliminary versions of the expert's findings. Such considerations may also lead to a decision not to request a written report at all.

The handling of expert witnesses and expert witness materials during discovery requires judgments and decisions by the lawyer that can not always have the benefit of clear legal guidance. From initial selection and consultation, through retention, to designation as a witness or consultant, numerous ethical and practical issues are spawned by your contact with the expert and the materials you choose to disclose to him. How you resolve these issues may well spell the difference between success and failure for your client.