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The Attorney-Client Privilege in Civil Litigation

Protecting and Defending Confidentiality

CHAPTER 22

Preserving the Attorney-Client Privilege and Work-Production Protections Afforded to Communications with Experts: Be Careful of What You Say and to Whom You Say It

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CHAPTER 22

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I. Introduction

A regular client calls with a new matter—a series of tort claims allegedly caused by a defect in its most profitable product. The general counsel tells you that this is a “bet the company” situation and to spare no expense in the defense. Even though suit has not yet been filed, you retain several experts as consultants to assist you in the evaluation and defense of these expected suits. You and your client both provide the experts with factual information via e-mail, and you provide the experts with summaries of interviews you and your staff conducted of company witnesses and other third parties. Suits are filed in federal court, and you and your team of experts continue to work on the defense. You provide the experts with summaries of key depositions, summaries of detailed interviews with the company’s employees who designed the product, and your detailed outline of the claims and defenses with annotations to the facts already obtained, as well as the areas where further factual and expert inquiry is required. The deadline for your disclosure of experts approaches, and you decide to designate all of the experts you initially hired as testifying experts except one who remains a nontestifying expert. In response to your disclosure, your adversary serves a request for copies of the complete files of all of your testifying experts, as well as the complete files of the nontestifying expert on the grounds that the nontestifying expert provided information relied on by the others. After taking a deep breath, you consider your options. What do you produce?

As we all know, expert testimony has embedded itself as a pivotal component of nearly every lawsuit. There is hardly an action pursued without the guidance or opinion of an expert. As early as 1990, a Rand Corporation study concluded that expert witnesses appeared in 86 percent of California trials, with an average of 3.3 experts per trial.¹ Experts have become a part of daily life for litigators.² Accordingly, it is important to be aware of the boundaries regarding what an attorney may communicate to expert witnesses and how those communications relate to the preservation of the attorney-client privilege and the work-product doctrine embodied in Federal Rule of Civil Procedure 26 and its recent amendments.

What can be shared with testifying experts? How about consultants? What rules control? Can confidential client communications be shared with a consultant and remain confidential? How about with your testifying expert? Knowing the answers to these questions is imperative to preserving the attorney-client privilege.

The attorney-client privilege protects communications geared toward giving and receiving legal advice.³ The privilege exists when the following conditions are met:

- 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

insistence permanently protected, 7) from disclosure by himself or by the legal advisor, 8) unless the protection is waived.⁴

“The privilege is based on the 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 disclosures to their lawyers.”⁵ This privilege is integral not only to the attorney-client relationship but also to the attorney’s relationship with consultants hired by the attorney to assist in providing legal advice. An attorney, however, must always be cautious with respect to what information is shared with hired consultants. It is important to keep a broad overarching perspective of the litigation and where it may lead to ensure preservation of privilege.

As discussed in detail in this chapter, Federal Rule of Civil Procedure 26(a)(2) was amended effective December 1, 2010.⁶ The amendments are intended to change pre-amendment law as to testifying experts.⁷ Therefore, the practitioner is cautioned to note the changes and the likely inapplicability of prior law.

II. Attorney-Client Privilege Is Generally Safe with Your Consulting or Nontestifying Expert

Lawyers involved in litigation typically retain consulting, or nontestifying, experts to evaluate the facts and circumstances of the case and assess the merit of certain arguments or defenses. Such experts provide an array of services that include damage assessments, technical evaluation of products or premises where an event occurred, technical review of prior art in a patent case, and other similar professional work. The questions then are whether the communications among the client, lawyer, and consultant are protected from disclosure, and whether the consultant’s work product is likewise protected.

It is generally accepted that a consultant or nontestifying expert may communicate with the client or with the attorney without destroying the attorney-client privilege, if the communications are made on behalf of the client to obtain legal advice.⁸ In other words, the privilege extends to communications between agents of the attorney or the client and the client’s attorney.⁹ The term “agent” has been broadly defined to encompass a range of individuals, from expert consultants to relatives to insurance agents whose presence is necessary to the purpose of the meeting and to the rendering of advice.¹⁰ These protections will typically extend to fact and opinion work product shared with, reviewed by, or prepared by or for a consulting expert as well.¹¹

To ensure that such an expert may appropriately assess factual or legal issues in a particular setting, courts have commonly held that confidential communications between a party’s counsel and a nontestifying consultant hired to assist the attorney to render legal advice are protected by the attorney-client privilege.¹² While disclosure to a third party who lacks a common legal

interest waives the attorney-client privilege,¹³ courts protect communications made to an attorney by a consultant so that the attorney may provide sound legal advice to the client.¹⁴ Furthermore, the general rule that a client's disclosure of confidential communications or documents directly to a third party destroys the attorney-client privilege¹⁵ does not apply when the disclosure is made to third parties who assist an attorney in rendering legal advice.¹⁶

A. Classifying the Nontestifying Expert

How a nontestifying consultant is classified is crucial in determining the extent to which his or her work product may ultimately be discovered. A consultant acting as an arm of the attorney will likely fall within the scope of the attorney-client privilege, rendering the communications among the consultant, the attorney, and the client privileged.¹⁷ On the other hand, a consultant hired, for example, to determine the cause of an event will likely not be deemed to be an arm of the attorney, and the information generated by such a consultant may be discoverable under the dictates for Federal Rule of Civil Procedure 26(b)(4)(B).¹⁸

Judge Friendly's decision in *United States v. Kovel*¹⁹ lays the foundation for this distinction. In *Kovel*, Judge Friendly identified the need attorneys have to retain consultants to assist them in rendering legal advice.²⁰ The example Judge Friendly started with was one involving a client who spoke only a foreign language, and the obvious need the attorney had to use an interpreter.²¹ Judge Friendly concluded that the attorney-client privilege would never be waived simply because a third-party interpreter was required for the attorney to render legal advice.²² Following that logic, Judge Friendly observed that attorneys often need other kinds of professionals to assist them in understanding the client's information sufficiently to render legal advice: accountants, engineers, or other professionals.²³ Judge Friendly concluded that, as in the case of the interpreter, the disclosure of privileged information among the lawyer, client, and consultant should not automatically waive the privileged nature of those communications.²⁴ So long as the purpose in using consultants is to assist the attorney to render legal advice, the attorney-client privilege is not waived because the communications involved a third party.²⁵

*In re Bieter Co.*²⁶ exemplifies the application of this principle. There, the Eighth Circuit Court of Appeals determined that a consultant for Bieter was operating within the attorney-client privilege.²⁷ The Eighth Circuit relied heavily on Supreme Court Standard 503(b)(1).²⁸ That standard, never adopted as part of the Federal Rules of Evidence by Congress, specified that the attorney-client privilege applied "between [client] or his representative and his lawyer or his lawyer's representative."²⁹ The court also relied on *McCaugherty v. Sifferman*³⁰ in reaching this decision. The court concluded: "[W]hen applying the attorney-client privilege to a corporation or partnership, it is inappropriate to distinguish between those on the client's payroll and those who are instead, and for whatever reason, employed as independent contractors."³¹

The distinction between a consultant whose work is within the attorney-client privilege and a consultant whose work is not is highlighted in *U.S. Postal Service v. Phelps Dodge Refining Corp.*³² There, the court acknowledged the *Kovel* theory, but concluded that the expert's "function was not to put information gained from defendants into usable form for their attorneys to render legal advice, but rather, to collect information not obtainable directly from defendants."³³ The court affirmatively held that the consultants were not hired to interpret client confidences, but rather to prepare a remediation plan and to oversee remedial work.³⁴ The claim in this case was beyond the "outer boundary" of the privilege. The consultants based their opinions on factual and scientific data that they collected, not client confidences:

Such underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations. There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client.³⁵

B. Discovery from Consultants within the Attorney-Client Privilege

Absent waiver, confidential communications offered by and delivered to a consulting expert for the purpose of offering legal advice will be protected. The decision in *Ferko v. NASCAR*³⁶ provides a good illustration of this. This case involved a discovery dispute between Ferko and International Speedway Corporation (ISC) in which Ferko sought documents pertaining to the American Appraisal Associates' (AAA) review of certain financial statements.³⁷ ISC's chief counsel, Glenn Padgett, "retained the AAA to investigate and appraise the economic value of sanction agreements for races held at its tracks."³⁸ Padgett also made available to Ernst & Young LLP, an accounting agency, the documents that AAA prepared and reviewed regarding the statements.³⁹

During discovery, Ferko demanded that ISC produce these documents.⁴⁰ ISC refused and contended that these records were privileged communications between a client, its attorneys, and the outside consultants. Ferko moved to compel production, and, in response, ISC argued that the attorney-client privilege applied because Padgett "retained the AAA to help him render legal advice regarding anticipated litigation" with separate entity.⁴¹ The court agreed with ISC. It held that an "attorney may, however, divulge client information to accountants or financial professionals in order to represent their client more effectively."⁴² So long as an attorney hires a consultant for a specific purpose that relates significantly to the disputed communications or documents at issue, any documents disclosed to such professional and any communications regarding those documents are privileged.⁴³ In this case, Padgett hired the AAA to advise him on various financial issues,⁴⁴ and the AAA helped him translate complicated financial information. It was this translation that

enabled Padgett to represent the ISC more effectively.⁴⁵ Accordingly, because the purpose for sharing the documents and communications related directly to the documents requested by Ferko, the court held that Ferko could not discover them.⁴⁶

Moreover, the court held that it made no difference that Padgett did not hire the AAA for this particular lawsuit.⁴⁷ It was enough that the work done related to a potential lawsuit.⁴⁸ The court announced that the purpose for which the consultant was hired need only “relate significantly to the documents and communications at issue in the subsequent litigation.”⁴⁹ Here, the purpose for which Padgett hired AAA and Ernst & Young related directly to and paralleled the disputed documents and communications requested in Ferko’s discovery.⁵⁰ Hence, the court found the document and communication to be protected by the attorney-client privilege.⁵¹

The principle that the attorney-client privilege attaches to third-party consultants also has been applied to representatives of the attorney, such as administrative practitioners not admitted to the bar, and nontestifying experts hired to assist in the rendering of legal advice.⁵² Even still, some foresight with respect to what information should and should not be shared with a consulting expert at the outset of litigation is important, as a change in the expert’s classification could result in the waiver of this privilege.

C. Discovery from Consultants outside the Attorney-Client Privilege

A consultant hired for the purpose of providing assistance in anticipation of litigation, and not for purpose of rendering legal advice, will not fall under the protection provided by the attorney-client privilege. This consultant’s work, however, does not automatically become discoverable. The facts and opinions of such a consultant are protected under Federal Rule of Civil Procedure 26. More specifically, Rule 26(b)(4)(D) provides that discovery of work product created by or shared with a consulting expert is not permitted unless the party seeking discovery can show that “exceptional circumstances” exist.⁵³

Historically, the “exceptional circumstances” standard has proven sufficiently rigorous to afford adequate protection to the facts learned and opinions developed by a consulting expert.⁵⁴ Rule 26(b)(4)(D), however, is not an “impenetrable fortress.”⁵⁵ The existence of an “exceptional circumstance” can be shown under a variety of conditions. Typical exceptional circumstances include:

1. The object or condition observed by the consulting expert is no longer observable for the party seeking the deposition;⁵⁶
2. Expert discovery on a contested issue can be replicated, but the costs would be “judicially prohibitive”;⁵⁷ and
3. The consulting expert provided information considered by a testifying expert informing an opinion, or an opinion resulted from collaboration between both experts.⁵⁸

*Bank Brussels Lambert v. Chase Manhattan Bank*⁵⁹ provides a good representative discussion regarding the discoverability of facts and opinions held by a consultant upon a showing of exceptional circumstances. This case involved a discovery dispute in which Bank Paribas (Suisse) (BPS) sought to compel the production of financial records reviewed by Arthur Andersen & Co.⁶⁰ Andersen was retained on December 23, 1991 by AroChem to investigate discrepancies in its inventory and to determine whether the inventory was properly stated in AroChem's financial statements.⁶¹ AroChem became concerned with its reporting practices as they related to its inventory after it was informed that a discrepancy existed in its reported and actual values.⁶² Andersen's investigation continued through June 26, 1992,⁶³ and occupied the time of eight to 15 people consuming approximately 10,000 hours on the project.⁶⁴

In response to the discovery request, Andersen asserted that Rule 26(b)(4) (B) applied, thereby precluding discovery of these facts and opinions because Andersen was hired in anticipation of litigation.⁶⁵ BPS put forth various counterarguments, among them that Andersen's facts and opinions were discoverable because "exceptional circumstances" were present.⁶⁶ More specifically, BPS argued that the investigation took place at the time when Andersen alone was able to observe and analyze AroChem's financial situation, and it would be impracticable to recreate it.⁶⁷ Next, BPS contended that even if AroChem's financial situation could be reproduced, the cost of hiring an expert to reconstruct its situation would be judicially prohibitive.⁶⁸

The court ultimately agreed with BPS and ordered discovery of the facts and opinions held by Andersen regarding its investigation of AroChem's inventory.⁶⁹ In its analysis, the court found Andersen to be an expert "in that it brought technical background to bear on AroChem's accounts and records."⁷⁰ Moreover, it established that Andersen was hired in anticipation of litigation.⁷¹ The court held that the facts surrounding the decision to hire Andersen reflected that there existed more than a mere possibility of litigation.⁷² Lastly, the court affirmatively announced that "exceptional circumstances" were present, which demanded that the facts learned and the opinions held by Andersen be discoverable. Because Andersen's investigation took place two years before the lawsuit was filed and "numerous parties had an opportunity to observe, remove, and copy AroChem's files," the court found that it would be impracticable for BPS to recreate the same financial condition that AroChem was in at the time of Andersen's evaluation.⁷³ Even though the documents examined by Andersen still existed, the court feared that they had been rearranged or possibly lost or damaged.⁷⁴ Furthermore, the court found that even if AroChem's financial situation could be recreated, the costs of reviewing the documents, which took Andersen in excess of 10,000 hours, would be judicially prohibitive.⁷⁵

Courts from various jurisdictions have reached very similar conclusions.⁷⁶ Accordingly, when a consultant is hired to interpret financial statements for purposes of rendering legal advice, or merely to determine whether there is a discrepancy between stated and actual numbers regarding inventory, some

level of protection is afforded. Although the former communications will not be waived upon a showing of exceptional circumstances, the latter could possibly be waived. For this reason, it is important to consider the circumstances under which the consultant is hired and under what privilege the expert's communications and work product will fall if a motion to compel is brought by the opposing party.

III. The Law as to Testifying Experts

A. Introduction

Prior to 1993, Federal Rule of Civil Procedure 26 required the disclosure of expert opinions by way of interrogatory answers.⁷⁷ The amendments effective in 1993 changed the manner by which expert opinions were disclosed: the rule required (1) a report "of all opinions the witness will express and the basis and reasons for them,"⁷⁸ (2) disclosure of "the data or other information considered by the witness in forming [the opinions],"⁷⁹ and (3) the deposition of the expert.⁸⁰ Before 1993, courts were split on the breadth of the information discoverable from testifying experts. Since the 1993 amendments to Rule 26, there is near unanimity of opinion among federal courts that disclosing attorney-client communications to an independent expert witness waives the privilege.⁸¹ State courts have generally followed suit.⁸² Several courts, however, have based their decisions on the pre-1993 version of the Federal Rules.⁸³ Additionally, several states have discovery rules that mirror the pre-1993 federal version of Rule 26.⁸⁴

As noted above, Rule 26 was again amended, effective December 1, 2010. The Advisory Committee comments state the purpose of the amendments:

This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures of attorney-expert communications.

B. Attorney-Client Communications

A testifying expert is a witness who is specifically qualified to "assist the trier of fact to understand evidence or to determine a fact in issue."⁸⁵ In federal courts, expert testimony is governed by Federal Rules of Evidence 702, 703, and 704, under which expert witnesses are given greater latitude to offer opinions and testify to a wider spectrum of topics than fact witnesses are.⁸⁶ Disclosure of privileged information, however, is controlled under Federal Rule of Civil Procedure 26(a)(2)(B).⁸⁷ Under the pre-2010 amendment of Rule 26, the vast majority of federal courts required the disclosure of all privileged information considered by a testifying expert.⁸⁸ Disclosure requirements changed with

the 1993 amendment to the rule, and significantly increased a litigant's ability to obtain expert discovery.⁸⁹ The 1970 amendment required the disclosure of all information "relied" upon by the expert. The 1993 amendment required a party to produce all information "considered" by a testifying expert in forming an opinion.⁹⁰ Several courts noted that the 1970 amendment was far less inclusive of information than the 1993 amendment.⁹¹

The change in the text of the rule and the admonition that appears in the Advisory Committee Notes⁹² broadened the scope of information that must be disclosed. The decision in *In re Pioneer Hi-Bred International, Inc.*⁹³ provides the seminal example of how courts across the country have treated the privileged communications that have been shared with testifying experts. *In re Pioneer* involved a suit for breach of contract, patent infringement, and misappropriation of trade secrets.⁹⁴ Throughout the discovery process, Monsanto sought information regarding a merger in which Pioneer was involved and shared documents with their testifying expert.⁹⁵ Specifically, Monsanto deposed Pioneer's in-house counsel, which Pioneer designated as its representative pursuant to Rule 30(b)(6).⁹⁶ During the deposition, Monsanto sought information relating to the analysis of the financial benefits stemming from the merger, to which Pioneer's in-house counsel invoked the attorney-client privilege in some instances.⁹⁷

In response, Monsanto moved to compel Pioneer's in-house counsel to respond to the deposition questions.⁹⁸ The district court granted the motion, stating that it was persuaded, "limited to the facts and circumstances presented in this instance, that, if ever privileged, the protection applying to these opinions and communications has been waived by defendant's disclosure of the opinions to expert witnesses."⁹⁹ The Federal Circuit agreed¹⁰⁰ and stated:

[T]he 1993 amendments to Rule 26 of the Federal Rule 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 document and information in preparing his report. Rule 26(a)(2) requires that the testifying expert's report "contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in the opinions." The accompanying Advisory Committee Note explicitly states "[t]he report is to disclose the data and other information considered by the expert. . . . 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."¹⁰¹

*Synthes Spine Co. v. Walden*¹⁰² is similarly illustrative. Here, Walden sought the production of all information "considered" by the plaintiff's damage

expert, John Stavros, in fashioning his opinions as required by Federal Rule of Civil Procedure 26(a)(2). Walden sought this information irrespective of its privileged status, asserting that disclosure was mandatory under Rule 26(a)(2) and that any privilege had been waived when the information was given to the testifying expert.

The court stated that it was clear from the commentary provided by the advisory committee notes to the 1993 amendment that the term “considered” exceeded the more narrow definition of “relied upon” present in the previous version of the rule.¹⁰³ According to the court, “considered” refers to any information furnished to a testifying expert that such expert reviews, reflects upon, reads, or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.¹⁰⁴ Moreover, the court found that “it is equally clear that the disclosure requirements of Rule 26(a)(2)(B) were meant to trump all claims of privilege, mandating production of all information furnished to the testifying expert for consideration in the formulation of her opinions, regardless of privilege.”¹⁰⁵ The notes to Rule 26 do not distinguish between types of “privilege,” such as the attorney-client or the work product.¹⁰⁶ Hence, a bright-line rule of disclosure is created, which serves important policy considerations, “including the facilitation of effective cross-examination and the resolution of uncertainty as to the discoverability of documentation divulged to a testifying expert.”¹⁰⁷

C. Work Product

The interpretation of the post-1993 Rule 26 as expressed by the courts in *In re Pioneer* and *Synthes* is the nearly unanimous position among courts nationwide with respect to attorney-client privilege.¹⁰⁸ But courts continue to have difficulty coming to an agreement on the extent to which work product shared with a testifying expert is discoverable.¹⁰⁹ The majority of courts agree that work product shared with a testifying expert is discoverable.¹¹⁰ A minority of cases, however, following the pre-1993 amendment case *Bogosian v. Gulf Oil Corp.*,¹¹¹ hold that the 1993 amendment was insufficiently specific to cause waiver with respect to “core” work product protections afforded to the legal conclusions and analysis of lawyers, even when shared with a testifying expert.¹¹² The 2010 amendment to Rule 26, however, should end application of the majority rule as we know it. Indeed, that is the view expressed in the Committee Notes to Rule 26(a)(2)(B): “This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.”¹¹³

1. Pre-Amendment Majority View

In the pre-amendment majority view, nothing you disclose to your expert will be protected.

The court’s decision in *Regional Airport Authority of Louisville v. LFG, LLC*¹¹⁴ is revealing of the obstacles one faced in trying to protect from discovery

privileged documents disclosed to a testifying expert. This decision represented the majority view among both federal and state jurisdictions. *Regional Airport* involved an action brought by an owner of a contaminated airport property against the prior owner under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹¹⁵ and state law. The Authority purchased a piece of land from LFG for the purpose of expanding the Louisville International Airport. Shortly after the purchase, the Authority discovered the property was more highly contaminated than originally represented prior to purchase.¹¹⁶

Extensive discovery ensued.¹¹⁷ During this time, LFG sought to compel the production of thousands of documents relating to the communications between attorneys for the Authority and employees of outside companies that worked closely with the Authority on the expansion.¹¹⁸ The district court ordered production of all the documents, which required the disclosure of certain documents that Authority gave its testifying experts.¹¹⁹ The Sixth Circuit affirmed this decision.¹²⁰

In doing so, the court specifically relied on the language in Rule 26(a)(2) and the 1993 amendments to the rule.¹²¹ In its decision, the court acknowledged that, since the amendment to the rule, two lines of cases have emerged regarding the protection of work-product associated with testifying experts:¹²² first, that work product is not discoverable merely because it has been shared with a testifying expert;¹²³ second, that Rule 26 creates a bright-line rule that requires disclosure of all information provided to testifying experts, including attorney opinion work product.¹²⁴ The court, adopting what was considered the majority position, relied on subsection (a)(2) of the rule in holding that the Authority must disclose all information given to its testifying experts, including attorney opinion work product.¹²⁵ The court agreed that “a plain reading of subsections (a)(2) and (b) makes clear that (b) applies to the *discovery* of information provided to experts generally, while (a)(2) applies to the disclosure of information provided to testifying experts specifically.”¹²⁶

Having determined that subsection (a)(2) mandated disclosure regarding testifying experts, the court then determined the extent of the required disclosure.¹²⁷ Here, it focused on the 1993 amendment to the rule and conceded that, from the text alone, the extent of disclosure was ambiguous.¹²⁸ But because neither the text of the rule nor the Advisory Committee Notes placed any qualifiers as to the extent of “information” or “materials” given its experts, the court read the rule to require disclosure of all information provided to testifying experts.¹²⁹

The court was clear that subsections (b)(4)¹³⁰ and (b)(3)¹³¹ of Rule 26 did not change this analysis.¹³² The court deduced that subsection (b)(4) cannot be said to limit subsection (a)(2)’s disclosure requirements.¹³³ Likewise, the court stated that Rule 26(b)(3) merely placed a limitation on the “discovery of documents and tangible things, otherwise discoverable under subdivision (b)(1),”¹³⁴ which articulated a party’s general right to discover all relevant materials.¹³⁵ Subsection (b)(3) did not place limitations on disclosure requirements of (a)(2), and

the court believed it to be axiomatic that a general provision yields to a specific provision when there is no conflict.¹³⁶ Therefore, the court held that nothing in Rule 26(a)(2) “displaces or even limits a party’s obligation under Rule 26(a)(2) to disclose information provided to its testifying experts.”¹³⁷

2. Pre-Amendment Minority View

In the pre-amendment minority view, all work product disclosed to your expert will be protected unless, of course, your opponent can show exceptional circumstances exist.

The court’s decision in *Krisa v. Equitable Life Assurance Society*¹³⁸ is representative of the minority position taken by various courts.¹³⁹ Under the minority view, work product produced to an expert was not discoverable unless that party can show “exceptional circumstances.”¹⁴⁰ In *Krisa*, Equitable denied Krisa’s application for disability benefits under insurance policies issued to Krisa by Equitable.¹⁴¹ Krisa contended that he was entitled to benefits because a medical condition rendered him “unable to pursue his chosen vocation of a litigation lawyer.”¹⁴² On March 10, 1999, Krisa wrote to the court requesting that Equitable be ordered to produce documents generated by or provided to Equitable’s experts.¹⁴³ Equitable responded and contended that “the documents are outside the scope of permissible discovery of expert witnesses and covered by the work product privilege.”¹⁴⁴

With respect to work product containing communications from Equitable’s counsel to the testifying expert witnesses, the court agreed.¹⁴⁵ Much like the approach taken by the court in *Regional Airport*, this court began with a discussion of the significant split among the courts that have addressed whether core attorney work product shared with a party’s expert was discoverable.¹⁴⁶ The court acknowledged that several courts have held that the 1993 amendments to Rule 26(a)(2) were “designed to mandate full disclosure of those materials reviewed by an expert witness, regardless of whether they constitute opinion work product.”¹⁴⁷ The court added, however, that other courts have rejected the reasoning of these courts based upon their finding that “nothing in any version of subdivisions (b)(3) and (b)(4), or the committee notes . . . suggests core attorney work product was discoverable under subdivision (b)(4).”¹⁴⁸ Accordingly, the protections provided an attorney’s mental impressions and opinions by the Supreme Court in *Hickman v. Taylor*¹⁴⁹ were to be preserved. Because contrary language was not present in the rule, the court refused to permit the work-product doctrine to be abridged.¹⁵⁰

The court sided with the minority position affirmatively set forth in *Bogosian*.¹⁵¹ The court noted that the marginal value of the policy concerns¹⁵² advanced by the “bright line” rule did not warrant overriding the strong policy against the disclosure of documents consisting of core work product.¹⁵³ For example, the court asserted that the “bright line” rule’s policy of ensuring effective cross-examination can be equally achieved under the minority position by presenting one’s own credible witness.¹⁵⁴ The court stated that:

The risk of an attorney influencing an expert witness does not go unchecked in the adversarial system, for the reasonableness of an expert can be judged against the knowledge of the expert's field and is always subject to the scrutiny of other experts. Because the law requires expert testimony where the subject matter is outside the common knowledge of the finder of fact, the most effective and dependable manner of discrediting an opponent's expert is the presentation of a credible expert who can dispute, based upon authorities in that expert's field, the conclusions of the other's party.¹⁵⁵

Lastly, the court stated that the majority's interpretation that Rule 26, which demands the production of all work product that is disclosed to its expert, ignores the language of Rule 26(b)(3).¹⁵⁶ Rule 26(b)(3) requires the production of documents containing work product only when the requesting party shows a necessity and undue hardship to obtain the substantial equivalent of such document by other means.¹⁵⁷ Consequently, the court stated, an interpretation of Rule 26 that mandates production of core work product disclosed to an expert would render the language in Rule 26(b)(3) superfluous.¹⁵⁸

The position espoused in *Krisa* remains the minority position and its application is progressively shrinking. This may be because of the deep-seated skepticism displayed by some courts that many testifying experts are neither "independent" nor truly knowledgeable, but rather serve simply as conduits for the lawyers to present their own theories in the guise of expert testimony.¹⁵⁹ In deciding to use testifying and nontestifying experts, it is important to understand the degree to which judicial rulings on expert testimony may be influenced by judicial suspicions about the misuse of expert testimony. The court in *Karn v. Ingersoll Rand*¹⁶⁰ was clear on this issue. In *Karn*, the court cited an article that described testifying experts as "saxophones"—"the lawyer plays the tune, manipulating the expert as though the expert was the musical instrument on which the lawyer sounds the desired notes."¹⁶¹ Similarly, the court in *Manufacturing Administration & Management Systems, Inc. v. ICT Group, Inc.*¹⁶² was unmistakably suspicious when it stated that the attorney-expert relationship "provides fertile ground for improper influence," undermining the "independence" of the expert and mandatory disclosure of all attorney-client interactions reveals such improper influence and "cleanses any canker of corruption."¹⁶³

3. The 2010 Amendment to Rule 26(a): Finding a Middle Ground?

On December 1, 2010, three amendments to Rule 26 became effective. The amendments aim to prevent inefficiencies that arise from the current discrepancies in the treatment of written materials created by testifying versus nontestifying experts, and to obviate the need for litigants to retain testifying and nontestifying experts to prepare for trial.¹⁶⁴ The first amendment adds section (b)(4)(B) to Rule 26, and makes all drafts of expert reports protected work

product under Rules 26(b)(3)(A) and (B).¹⁶⁵ The second amendment changes the language of Rule 26(a)(2)(B)(ii) from “the data or other information considered by the witness” to “facts or data considered by the witness.”¹⁶⁶ This change will likely permit attorneys to communicate freely with experts without fear of creating discoverable written materials adverse to the client’s interest.¹⁶⁷ The committee notes state, however, that the disclosure obligation continues to extend to “any materials considered by” an expert, thus leaving the rule open to differing interpretations.¹⁶⁸ The third amendment adds section (b)(4)(C) to Rule 26.¹⁶⁹ This new section provides work-product protection for communications between experts and attorneys, except those that (1) relate to compensation, (2) identify facts or data provided by counsel and considered by the witness, or (3) identify assumptions provided by counsel and relied upon by the witness in forming his or her opinions.¹⁷⁰

Further, the committee notes to Rule 26 affirmatively state that the changes to Rule 26(a)(2) and 26(b)(4) are intended to be complementary.¹⁷¹ The notes also express that the new rules are intended to alter Rule 26(a) in those jurisdictions following the majority’s bright-line rule.¹⁷² More specifically, the committee notes state that the Rule 26 “amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.”¹⁷³ The notes additionally state that the changes for Rule 26(b)(4) and Rule 26(a)(2)(B)(ii) “rest not on high theory but on the realities of actual experiences.”¹⁷⁴ In other words, the committee contends that “routine discovery into attorney-expert communications and draft reports has had undesirable effects” including rising costs and less effective attorney-expert interactions.¹⁷⁵ The changes seek to allow an attorney to communicate freely with an expert without having to engage in time-consuming and wasteful measures to avoid the creation of a draft report.

On at least one occasion, a party has cited to the 2010 amendments to Rule 26(a) as authority for rejecting the majority rule.¹⁷⁶ In *Galvin v. Pepe*, plaintiffs identified an expert and, citing Rule 26(a)(2), provided defendants with a detailed written report of the expert’s opinions and the bases and reasons for those opinions.¹⁷⁷ Some time later, defendant deposed the expert and subpoenaed certain documents to be produced at the deposition. The request demanded documents “including any email to a party, an attorney for a party or any non-party, regarding the subject investigation.”¹⁷⁸ During the deposition, the expert testified that she received information regarding the case via e-mail and brought hard copies of at least two e-mails exchanged between herself and plaintiff’s counsel.¹⁷⁹ Plaintiff’s counsel objected to their production on the basis that they included work product.¹⁸⁰

Pursuant to Rule 26(a)(2)(B), defendant moved to compel production of these and all other similar documents.¹⁸¹ Plaintiff resisted the motion on the grounds that the e-mails are subject to work-product protection under Rule 26(b)(3)(A), not overcome by substantial need.¹⁸² Plaintiff also asserted that the then proposed 2010 amendments to Rule 26(a) serve as additional authority to reject the majority rule.¹⁸³ The court ultimately granted defendant’s motion to

compel and decided not to make the proposed amendment to Rule 26 immediately applicable to this case.¹⁸⁴ The court found, “Whatever weight the statement of intent might of had on the court interpreting the proposed [Rule 26] in the future . . . it has little bearing on my interpretation of the existing form of Rule 26.”¹⁸⁵

Two recent cases highlight a difference of opinion as to the protections afforded experts who are not required to submit a Rule 26 report.¹⁸⁶ In *Graco, Inc. v. PMC Global, Inc.*,¹⁸⁷ defendant sought production of all communication between Graco’s counsel and five employee experts who filed affidavits in support of Graco’s motion for an injunction and in opposition to PMC’s motion for summary judgment.¹⁸⁸ Graco refused to produce the requested documents, relying on the attorney-client privilege and the work-product doctrine.¹⁸⁹ Graco argued that Rule 26 does not require employee experts to submit a Rule 26 report, and that therefore the protections afforded by the privileges were not waived by using affidavits from the employee experts.¹⁹⁰ The court first concluded that the December 2010 amendments to Rule 26 applied to this dispute because the expert reports were not due until after the amendments’ effective date.¹⁹¹ The court reviewed the Advisory Committee Notes to conclude that the protection of Rule 26(b)(4) is also afforded to experts not required to submit a report.¹⁹² The court also rejected PMC’s argument that the work-product privilege had been waived by submitting the employee witness affidavits.¹⁹³

In contrast, the court in *United States v. Sierra Pacific Industries*¹⁹⁴ held that the protections of Rule 26(b)(4) applied only to experts who were required to issue reports under Rule 26 (a)(1)(C)(2). The litigation arose from the “Moonlight Fire” of September 2007. The experts in question were employees of the U.S. Forestry Service and the California Department of Forestry and Fire Protection who investigated the fire and prepared a report documenting their findings as to origin and cause.¹⁹⁵ Sierra sought production of all communications between counsel and these witnesses after they were identified as experts by the government.¹⁹⁶ Noting that the expert reports were due by April 11, 2011, and the depositions were to occur thereafter, the court decided the issue under Rule 26 as amended in December 2010.¹⁹⁷ In a lengthy and detailed opinion, the court rejected the *Graco* concept and chose to apply the pre-amendment law to these experts.¹⁹⁸ The court explained that the protection afforded by Rule 26(b)(4) applied only to experts required to provide a report, and not to employee experts whose disclosure is more limited.¹⁹⁹ Because the government identified these witnesses as expert employees from whom no report was required, the court held that the protections afforded by Rule 26(b)(4) did not apply, and it ordered production of the requested documents as was required before Rule 26 was amended.²⁰⁰

The foregoing highlights the difficulty that courts may have in applying these recent rule changes. As of this writing, seven months after the effective date of the amendments, there are only a couple of substantive decisions under the amended Rule 26. Accordingly, it is important to understand the law in the jurisdiction where your case is venued and how those judges have interpreted the 2010 amendments to Rule 26.

IV. *The Use of Dual-Role Experts*

This section examines the impact that utilizing one expert for a dual consulting-testifying function has on the attorney-client and work-product protections. Additionally, it provides a discussion regarding issues of waiver of attorney-client privilege and work-product protections when the same company provides a consulting and testifying expert to assist in a piece of litigation.

Courts have generally held that “documents having no relation to the [consulting] expert’s role as [testifying] 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.”²⁰¹ In other words, a privileged document will be preserved if it can be shown that an expert serving in a dual capacity, consulting and testifying, reviewed the document solely in his capacity as a consulting expert. A failure to clearly delineate whether the expert functions as a consulting or testifying expert will result in waiver. This standard, however, is not without dissention, as some courts have totally rejected the idea that an expert can serve as both a consultant and as a testifying expert.²⁰²

*Construction Industry Services Corp. v. Hanover Insurance Co.*²⁰³ is an example of a case where the court strictly enforced the principle that documents “considered” by the expert in the production of his or her expert report must be produced. *Hanover* involved various discovery disputes, one of which was whether privileged documents must be produced just because they were reviewed by a testifying expert.²⁰⁴

Hanover sought the production of documents created and reviewed by Construction Services’ consulting and testifying expert, Liegold.²⁰⁵ Construction Services made two arguments in support of its claim that the documents were privileged and thus nondiscoverable: that the documents were protected by the attorney-client or work-product privileges and that those privileges had not been waived pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) because the disputed documents related only to Liegold’s role as consultant expert.²⁰⁶

Specifically, Construction Services argued that Liegold served as its accountant and it was in this capacity that he was consulted regarding the initial decision to bring the lawsuit.²⁰⁷ The court ultimately sided with Hanover and ordered Construction Services to produce the documents created and reviewed by Liegold.²⁰⁸ The court felt that Liegold’s roles as consultant and as testifying expert were too intertwined and his creation and review of the documents too ambiguous. In so holding, the court discussed the “gray” area of the application of Rule 26 to a consultant-testifying expert.²⁰⁹ The court noted an earlier decision in *B.C.F. Oil Refinery v. Consolidated Edison*,²¹⁰ which held that it “was conceivable that an expert could be retained to testify and in addition, to advise counsel outside of the subject of the testimony. Under such a circumstance it might be possible to claim a . . . privilege if this delineation were clearly made.”²¹¹ It also noted the *B.C.F. Oil* court’s consideration of *Detweiler*

*Trust v. Offenbecher*²¹² and its conclusion “that documents having no relationship to the expert’s role as [a testifying] 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.”²¹³ Absent a clear distinction between the two roles, the court held, privileged and nonprivileged materials must be produced.²¹⁴

Here, the court was unable to find a clear delineation between Liegold’s role as a consulting and testifying expert. As a result of this ambiguity, the court resolved the issue in favor of complete disclosure. This result, the court stated, was mandated by the policies underlying the requirement that a testifying expert disclose all materials that he considered in reaching his opinion, and on the rule that the party seeking to compel the production of the document “should not have to rely on the [resisting party’s] representation that the documents were not considered by the expert in forming his opinion.”²¹⁵

Other courts have considered whether an expert may act in a dual capacity as a consulting and testifying expert and have dismissed dual roles as an impossibility. *Furniture World v. D.A.V. Thrift Stores, Inc.*²¹⁶ is one such case. There, the plaintiff sought discovery of defendant’s expert. The defendant contended that its expert was retained as a nontestifying expert consultant with respect to matters involving rebuttal of plaintiff’s expert’s testimony, and therefore, to seek discovery from its expert, plaintiff had to show “exceptional circumstances.”²¹⁷ The court disagreed and stated:

In my view, under the facts and circumstances of this case, a person initially selected to testify as an expert at trial cannot be shielded from questioning by later being also designated as a consultant expert and invoking the work product doctrine. Counsel must choose to designate an expert as either one who will testify at trial or consult with counsel. Having an expert who is both creates an unmanageable situation by requiring a question-by-question analysis of an expert witnesses’ deposition testimony to determine whether the work product privilege applies.²¹⁸

The dual designation negates the “exceptional circumstances” requirement. Accordingly, the expert could be deposed as a testifying expert.²¹⁹

Courts similarly have also found an unclear delineation under circumstances where a consulting expert assisted a testifying expert from the same firm in his or her preparation of their opinion.²²⁰ In a situation like this, one court has specifically stated that a litigant is “playing with fire.”²²¹ *U.S. Fidelity & Guaranty Co. v. Braspetro Oil Services*²²² provides a good example of the impact this kind of relationship may have on the attorney-client privilege and the protection afforded work product. In this case, Braspetro furnished its consulting experts with 1.1 million documents, including privileged materials.²²³ Braspetro’s testifying and nontestifying experts were employed by the same firm and each had equal access to the produced documents.²²⁴ There

were no protections or practices in place to keep these documents from being considered by Braspetro's testifying experts.²²⁵ In arguing this motion, Braspetro failed to meet its burden to identify the precise scope of the disclosure of documents to experts, including limitations placed on their use and the type of privilege asserted for those documents.²²⁶

Consequently, the court held that because experts within the same firm doubled as consulting and testifying experts, and because there was "no evidence supporting Braspetro's base assertion that certain documents were reviewed by the experts solely on a consultative capacity," all of the documents were discoverable.²²⁷ Additionally, Braspetro's failure to present evidence that it tried to limit access to the documents only to the nontestifying expert contributed to this conclusion.²²⁸ Rather, the record indicated "that at least two of the Braspetro's experts, and their staff, had access to the entire universe of defendant's documents for use in connection with the expert's reports and testimony."²²⁹ There were no limitations placed on this access, which ultimately led to the court's finding that all the documents were "considered" by testifying experts and were, therefore, discoverable.²³⁰

More recently, the court applied the December 2010 amendments to Rule 26 in a case where an expert served in a dual role.²³¹ In *Sara Lee Corp. v. Kraft Foods, Inc.*, Sara Lee sued Kraft for falsely advertising its hot dogs.²³² Kraft retained an expert to conduct a survey as to one of Kraft's allegedly false ads, and to consult with its counsel on a survey about another allegedly false claim.²³³ Sara Lee sought production of all of the expert's files, and Kraft objected to producing the file that related solely to the expert's nontestifying role.²³⁴ The court reviewed the documents in question, and concluded that the expert was, in fact, acting in two roles for Kraft.²³⁵ The court stated:

Such expert-attorney communications arguably may have been discoverable under the pre-amendment Rule 26, but no more. None of the communications contain facts, data, or assumptions that [the expert] could have considered in assembling his expert report, and thus Defendants had no duty to disclose the communications and Plaintiff no right to discover them.²³⁶

The court also rejected Sara Lee's argument it had a "substantial need" for the documents because they might be used to impeach the expert as to the survey he did conduct.²³⁷

V. Testifying to Nontestifying: Redesignating an Expert Witness

Before the 2010 amendment to Rule 26, the law regarding the application of the attorney-client privilege and the work-product concept where a testifying party is redesignated from testifying to nontestifying were in conflict. The adoption of the 2010 amendment, however, should make this issue far less significant because the amendment limits the information that is now discoverable from

a testifying expert.²³⁸ Rule 26(b)(4)(C) provides extensive protection for attorney-expert communications irrespective of whether an expert is designated as testifying or nontestifying.²³⁹ But a question still remains as to whether any discovery from a redesignated expert will be allowed. Clearly, nontestifying experts cannot be deposed.²⁴⁰ But is discovery of portions of their files permitted? Even though the new rule differs from the perspective taken by courts in the past, that perspective may assist the courts in answering this question.

A leading treatise on the attorney-client privilege and the work-product doctrine asserts that “a party is deemed to have waived privilege as to documents provided to its named experts, that party may not avoid production of those documents under Rule 26(b)(4)(A)²⁴¹ later by changing the designations of that expert from ‘testifying’ to ‘non-testifying.’”²⁴² In contrast, a number of courts have held that a party may prevent discovery from a consulting expert after his designation as a testifying expert is withdrawn.²⁴³

In this context, the underlying purposes of the pre-2010 amendment Rules 26(b)(4)(A) and 26(b)(4)(B) come into conflict. Rule 26(b)(4)(A) permits a party to depose any person who has been identified as an expert, and this provision permits open discovery with respect to privileged and nonprivileged materials considered by a testifying expert because of the necessity to assess the bases for an expert’s opinion in preparing effective cross-examination.²⁴⁴ Rule 26(b)(4)(B) seeks to protect the facts known and the opinions held by a nontestifying expert in the interest of fairness and to promote effective communication among the client, the attorney, and the consulting expert. Accordingly, an important question arises: Where does one provision cease operating and the other begin when a once-testifying expert is later redesignated a nontestifying expert? Some have argued that if an originally designated testifying expert is dropped as a trial witness before Rule 26(a)(2)(B) disclosures are produced, there is no longer the need to know what the expert considered in forming an opinion because the expert will not be testifying. Thus, there is no reason to cross-examine the expert, which then does away with the need to know what information the expert considered. A handful of courts, however, have disagreed with this line of argument and have held that redesignation does not change the fact that the attorney-client privilege is waived when privileged materials are provided to a testifying expert, which consequently makes the materials themselves discoverable.²⁴⁵

*CP Kelco U.S. Inc. v. Pharmacia*²⁴⁶ provides a good example. Here, Pharmacia retained a testifying expert witness, Schnapf.²⁴⁷ At Schnapf’s deposition, CP Kelco learned that he reviewed documents that had not been produced despite the requirements under Rules 26(a)(2) and 26(b)(4).²⁴⁸ Pharmacia acknowledged that Schnapf had in fact reviewed these documents but took the position that the documents were privileged.²⁴⁹

In response, CP Kelco brought a motion to compel production of these documents and to resume Schnapf’s deposition.²⁵⁰ At the same time this dispute was occurring, the magistrate judge issued a Report and Recommendation, which suggested that certain environmental claims in the case be dismissed.²⁵¹

Subsequently, Pharmacia determined that it no longer required the service of Schnapf as a testifying witness and redesignated him as a nontestifying expert.²⁵² It asserted that Schnapf was now an expert “as to whom the controlling discovery provision is Federal Rule of Civil Procedure 26(b)(4)(B).”²⁵³ According to Pharmacia, because it had not called Schnapf to the stand, he must be viewed as a nontestifying expert under Rule 26(b)(4)(B), and therefore further discovery pertaining to him, including document discovery, would be inappropriate.²⁵⁴

The magistrate judge accepted this argument,²⁵⁵ basing her decision on the 1993 Advisory Committee Notes to Rule 26.²⁵⁶ She concluded that attorney-client privilege was waived “when an expert testifies or is deposed.”²⁵⁷ Because Schnapf did not testify and was not deposed, the privilege applied. The district court disagreed.²⁵⁸ It held that the magistrate judge’s ruling was contrary to the law because of its implicit conclusion that a party’s knowing waiver of the attorney-client privilege can somehow be “unwaived” by redesignating a testifying expert as a nontestifying expert.²⁵⁹ “Waiver is a deliberate relinquishment of a right which must otherwise be claimed. Except as in limited circumstances not apposite here,²⁶⁰ a right that is waived is not available to be picked up again as if it were a handy tool.”²⁶¹ In the context of an assertion of privilege, the court stated the inviolability of the rule is of fundamental importance:²⁶² “It would be manifestly unfair to allow a party to use the privilege to shield the information which it had deliberately chosen to use offensively, as Pharmacia did in this instance when it used the allegedly privileged documents to arm its expert for testimony.”²⁶³ The court then stated that a privilege cannot be used as both a shield and a sword.²⁶⁴

Ultimately, the court did not accept Pharmacia’s claim that the parties are free to invoke an already waived privilege simply by changing the designation of an expert from testifying to nontestifying: “It would be a perverse incentive to dilatory discovery practice if, because of the fortuitous timing of a tentative ruling on a partially dispositive motion, the Court were to allow a party to escape disclosure of documents it has shown to a testifying expert.”²⁶⁵

Rule 26(b)(4)(D) seeks to protect all discovery from nontestifying witnesses absent a showing of exceptional circumstances.²⁶⁶ The underlying policy of this provision stems from the necessity in litigation today to retain consulting nontestifying experts.²⁶⁷ Consequently, courts have found it imperative that clients, as well as attorneys, have a level of confidence that privileged information, including attorney-client communications, will be preserved if shared with a consulting expert. Moreover, courts have frequently alluded to the promotion of fairness as a policy concern.²⁶⁸ As a result, a contrary line of authority, which prohibits discovery of materials considered by a consulting expert once designated as a testifying expert, has risen.²⁶⁹

Frequently cited as representing this line of cases are *Callaway Golf Co. v. Dunlop Slazenger Group Americas*²⁷⁰ and *NetJumper Software, L.L.C. v. Google, Inc.*²⁷¹ *Callaway* provides a discussion of authority establishing that a party may not discover information held by a nontestifying expert absent a showing of

exceptional circumstances.²⁷² This case involved a discovery dispute that arose when Callaway advised Dunlop that it was withholding its expert and that it intended to replace him.²⁷³ This information was conveyed a little over a week before the scheduled deposition of Callaway's original expert was to take place. Dunlop objected to the substitution and argued that it had the right to depose Callaway's redesignated expert to inquire into clearly relevant and discoverable information.²⁷⁴ Relying on Rule 26(b)(4)(B) and case law interpreting the rule, Callaway argued that experts who are initially designated as testifying experts but are later withdrawn may not be deposed absent a showing of exceptional circumstances.²⁷⁵

The district court agreed. In its decision, the court first discussed the holdings in *Ross v. Burlington Northern Railroad Co.*²⁷⁶ and *Dayton-Phoenix Group v. General Motors Corp.*²⁷⁷ In *Ross*, the plaintiff designated his expert and revealed the subject matter of his testimony.²⁷⁸ The plaintiff later withdrew the designation. In denying the defendant's motion to compel the expert's testimony the court held, "[S]ince plaintiff changed his mind before any expert testimony was given in this case, the witness never actually acted as a testifying expert."²⁷⁹ The court in *Dayton-Phoenix* similarly held and relied on the following to support its conclusion:

The Advisory Committee Notes to Rule 26(b)(4)(B) limit discovery to trial witnesses; the primary purpose of Rule 26(b)(4)(B) is to allow a party to prepare adequately for cross-examination at trial, and its purpose to promote fairness, which would not be accomplished by allowing access to the other's party's trial preparation.²⁸⁰

Moreover, absent exceptional circumstance the *Dayton-Phoenix* court refused to allow discovery held by the nontestifying expert.²⁸¹

The court continued with its analysis by examining the holdings in *Mantolite v. Bolger*,²⁸² *In re Shell Oil Refinery*,²⁸³ and *FMC Corp. v. Vendo Co.*²⁸⁴ Each of these cases similarly expressed the importance of preserving the underlying policy concerns of Rule 26(b)(4)(B) and the lack of need for an exchange of information regarding nonwitness experts who act as consultants to counsel.²⁸⁵ Additionally, the court relied on the holdings in *In re Shell Oil Refinery* and *FMC Corp.* for the proposition that exceptional circumstances must be shown to secure discovery from nontestifying experts, irrespective of the fact that the experts produced their reports or expressed opinions.²⁸⁶ In the end, the court held that Dunlop failed to show that exceptional circumstances existed and, therefore, denied its motion to compel the deposition of Callaway's redesignated expert.

*NetJumper Software, L.L.C. v. Google, Inc.*²⁸⁷ is similarly illustrative of the reluctance of certain courts to allow the discovery of the materials considered by a redesignated nontestifying expert absent considerable involvement in litigation. Here, the court distinguished the present facts from those in *CP Kelco* in finding that access to a nontestifying expert was not appropriate absent

a showing of exceptional circumstances.²⁸⁸ NetJumper informed Google that its designated testifying expert was terminated and redesignated as nontestifying expert.²⁸⁹ Shortly thereafter, Google served the terminated expert with a subpoena duces tecum in an effort to discover the facts considered by the expert.²⁹⁰ NetJumper objected on the ground that Rule 26(b)(4)(B) controlled and that the expert need not comply with the subpoena absent a showing of exceptional circumstances.²⁹¹ Google asserted that Rule 26(b)(4)(A) required the expert to comply regardless of NetJumper's redesignation.²⁹²

The court sided with NetJumper.²⁹³ In doing so, the court based its decision on the fact that NetJumper's expert had not overly involved himself in the litigation.²⁹⁴ The expert had not been deposed like the expert in *CP Kelco*, nor had he produced a report like the expert in *House v. Combined*.²⁹⁵ Because he had not done so, the court felt it inappropriate to designate the expert under Rule 26(b)(4)(B) because the expert "will not testify, has never been deposed and has never produced a report."²⁹⁶ Accordingly, "to promote fairness by precluding unreasonable access to an opposing party's diligent trial preparation" the court held that the expert was a nontestifying expert subject to the protections of Rule 26(b)(4)(B).²⁹⁷ The court did add, however, that if the expert's deposition had been taken, access to his testimony would have been permitted.²⁹⁸

According to the holding in *NetJumper*, the distinction seems to lie in the level of involvement of the expert in the litigation. The weight of the authority discussed in *Callaway*, however, suggests that the mere reclassification of the expert as nontestifying is more persuasive. For example, in *In re Shell Oil Refinery* the consulting expert set forth his opinions in a preliminary report, which was issued pursuant to a court-ordered deadline, and still his deposition was not permitted to be taken because plaintiff failed to show that exceptional circumstances were present.²⁹⁹ Similarly, in *FMC Corp.* the consulting experts were withdrawn after their reports and opinions had been provided and again their depositions were not permitted.³⁰⁰ Accordingly, the level of involvement the expert had in the litigation plays only a minor role, while the expert's classification as testifying or nontestifying is generally the determinative factor. If the expert is designated a nontestifying consultant or expert, exceptional circumstances will likely have to be shown.³⁰¹ It is still possible, however, that an expert's involvement by way of producing a report, responding to discovery, or providing testimony may waive some protections.³⁰²

VI. Conclusion

The first question that you must answer before a consultant is provided with any materials is "Will this expert testify?" If the answer to that question is anything other than an unqualified "no," then you must exercise caution in what is shared with that expert, but substantially less caution because of the 2010 amendments to Rule 26, which became effective on December 1, 2010. Prior to the change in Rule 26, everything in a testifying expert's file, including materials that would otherwise be protected by the attorney-client privilege or the

work-product doctrine set forth in Rule 26, was discoverable. The 2010 amendments are intended to abrogate this principle in the federal courts and limit what an expert must disclose. Thus you should consider, in advance of providing anything to the expert, exactly what you want the expert to consider, and whether that information falls into one of the categories of Rule 26(b)(4)(C).

If the role of the expert will be strictly interpretive, and the expert will not testify, it is likely that everything shared among the expert, the attorney, and the client will be protected by the attorney-client privilege. And even if the expert is working outside the protections afforded by the attorney-client privilege, if the expert will not testify, his or her work product should not be discoverable absent a showing of exceptional circumstances under Rule 26.

Notes

1. George Brent Mickum IV & Luther L. Hajek, *Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts*, 24 REV. LITIG. 301 (2005) (citing Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119).
2. See *United States v. Nobles*, 422 U.S. 225, 238 (1975) (“One of [the] realities [of litigation] is that attorneys often must rely on the assistance of [an expert consultant] in preparation for trial.”); see also Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19 (1990) (stating that by sending the client to an expert without the protection of the privilege, the attorney might well “be stick[ing] the client’s] head in a noose”).
3. Mickum & Hajek, *supra* note 1, at 349 (citing *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998)). See also 8 JAMES H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2292, at 554 (James McNaughton rev. ed. 1961 & Supp. 1996).
4. WIGMORE, *supra* note 3, at 554.
5. *Reed*, 134 F.3d at 356.
6. See *infra* notes 164–75.
7. See *id.*
8. See *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (“What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.”); *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 283 (S.D.N.Y. 2001) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991); *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982); *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 217 (S.D.N.Y. 2001) (citing Sup. Ct. Standard 503(b)); *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005); *Andritz, Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632 (M.D. Pa. 1997) (“Disclosure to agents retained by counsel to assist him or her in advising the client and handling legal matters does not operate as a waiver. The privilege attaches to agents and representatives of counsel whose services are necessary for effective representation of the client’s interests.”); *United States v. Alvarez*, 519 F.2d 1036, 1045–46 (3d Cir. 1975) (use of psychiatrist to assist attorney); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (use of accountant to assist attorney); see also Imwinkelried, *supra* note 2, at 23.

9. See *Golden Trade v. Lee Ansarel Co.*, 143 F.R.D. 514, 518 (S.D.N.Y. 1992).
10. *Farmaceutisk Laboratorium v. Reid Rowell, Inc.*, 864 F. Supp. 1274 (N.D. Ga. 1994) (stating that independent consultant was so meaningfully associated with corporation that it could be considered insider for purposes of privilege). See also, e.g., *Benedict v. Amaducci*, No. 92 Civ 5239 (KMW), 1995 U.S. Dist. LEXIS 573, *3-4 (S.D.N.Y. Jan. 18, 1995) (consultant); *Kevlick v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (client's father); *Foseco Int'l v. Fireline Inc.*, 546 F. Supp. 22, 25 (N.D. Ohio 1982) (patent agent); *Atmel Corp. v. St. Paul Fire & Marine Co.*, 409 F. Supp. 2d 1180, 1181-82 (N.D. Cal. 2005) (insurance broker); *Harkobusic v. Gen. Am.*, 31 F.R.D. 264, 265 (W.D. Pa. 1962) (brother-in-law).
11. See, e.g., *Martin v. Bally's Park Place Hotel & Casino*, 983 F.3d 1252 (3d Cir. 1993) (technical report prepared by a consulting firm was protected from discovery because it was prepared in anticipation of litigation by a party's representative); *Sprague v. Dir., Office of Workers' Comp. Programs*, 688 F.2d 862, 869-70 (1st Cir. 1982) (opinion letter setting forth expert's medical opinion was protected because it was prepared to advise counsel).
12. See *Kovel*, 296 F.2d 918, 922; *In re Grand Jury Subpoenas*, 179 F. Supp. 2d at 283; *El Paso Co.*, 682 F.2d at 541; *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. at 217; *Exp.-Imp. Bank of U.S.*, 232 F.R.D. at 113; *Andritz, Sprout-Bauer, Inc.*, 174 F.R.D. at 632; *Alvarez*, 519 F.2d at 1045-46; *Cote*, 456 F.2d at 144.
13. See *Ferko v. NASCAR*, 218 F.R.D. 125, 134 (E.D. Tex. 2003) (citing *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999)).
14. See *In re Alliance Constr. Solutions, Inc. v. Dep't of Corr.*, 54 P.3d 861, 869 (Colo. 2002).
15. *Ferko*, 218 F.R.D. at 125 (citing *El Paso Co.*, 682 F.2d at 540).
16. *Kovel*, 296 F.2d at 922.
17. *Id.*
18. "A party may, through interrogatories or by deposition, 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 circumstance under which is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." FED. R. Civ. P. 26(b)(4)(B).
19. 296 F.2d 918 (2d Cir. 1961).
20. *Id.* at 920-21.
21. *Id.* at 921.
22. *Id.* at 922.
23. *Id.*
24. *Id.*
25. *Id.*
26. 16 F.3d 929 (8th Cir. 1994).
27. *Id.* at 939-40.
28. *Reproduced in* 3 J. McLAUGHLIN, J. WEINSTEIN & M. BERGER, WEINSTEIN'S FEDERAL EVIDENCE ch. 503 (2d ed. 2007).
29. *Id.*
30. 132 F.R.D. 234 (N.D. Cal. 1990).
31. 16 F.3d at 937. For an extensive discussion of the application of *Bieter* to another fact situation, see *Western Resources Inc. v. Union Pacific Railroad Co.*, No.

- 00-2043-CM, 2002 WL 181494 (D. Kan. Jan. 31, 2002) (concluding that a consultant was within the attorney-client privilege, but that the privilege had been waived by disclosure of the consultant's work product to Western's testifying expert).
32. 852 F. Supp. 156 (E.D.N.Y. 1994).
 33. *Id.* at 161.
 34. *Id.*
 35. *Id.* at 162; *see also* United States v. Bell, No. C94-204342, 1994 WL 665295 (N.D. Cal. Nov. 9, 1994) (wherein the court analyzed an accountant's role under both the attorney-client privilege and the work-product doctrine).
 36. 218 F.R.D. 125 (E.D. Tex. 2003).
 37. *Id.* at 132.
 38. *Id.* at 129.
 39. *Id.* at 130.
 40. *Id.* at 131–32.
 41. *Id.*
 42. *Id.* (citing United States v. El Paso Co., 682 F.2d 530, 541 (5th Cir. 1982); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)).
 43. *Id.* at 138–39.
 44. *Id.* at 139.
 45. *Id.* at 139–40. This was also the case with respect to the documents given to and communications with Ernst & Young. *Id.*
 46. *Id.* at 139–40.
 47. *Id.* at 139.
 48. *See id.* (“An attorney need not hire an accountant or financial professional solely for a particular lawsuit or discovery dispute to gain protection under the attorney-client privilege.”). *See also* United States v. Pipkins, 528 F.2d 559, 562 (5th Cir. 1976).
 49. *Ferko*, 218 F.R.D. at 139.
 50. *Id.*
 51. *Id.*
 52. *Id.* (citing Edward M. Spiro & Caroline Rule, “*Kovel*” Experts Cloaked by Attorney Client Privilege, N.Y. L.J., Feb. 22, 1994, at S1, S10 (stating that privilege has been applied to “communications with a psychiatrist assisting a lawyer in forming a defense, a bail bondsman, and polygraph operator”).
 53. *See also, e.g.,* ARIZ. R. CIV. P. 26(b)(4)(B); D.C. R. CIV. P. 26(b)(4); FLA. R. CIV. P. 1.280(b)(4)(B); ILL. S. CT. R. 2001(b)(3); MINN. R. CIV. P. 26.02(d)(2); OHIO R. CIV. P. 26(B)(4); PA. R. CIV. P. 4003.5(a)(3).
 54. Mickum & Hajek, *supra* note 1, at 310 (citing Marine Petroleum Co v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1980) (requiring that the information 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 where the information was discoverable from the retaining party); Crocket v. Va. Folding Box Co., 61 F.R.D. 312, 320–321 (E.D. Va. 1974) (holding that information sought must be material to the cause of action). *See also* Moore U.S.A. Inc. v. Std. Register Co., 206 F.R.D. 72 (W.D.N.Y. 2001); *In re* Shell Oil Refinery, 132 F.R.D. 437, 442 (E.D. La. 1990), *clarified by* 134 F.R.D. 148 (E.D. La. 1990); Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. P’ship, 154 F.R.D. 202 (N.D. Ind. 1993).
 55. *Hartford Fire Ins. Co.*, 154 F.R.D. at 208 (N.D. Ind. 1993) (citing *Roesberg v. Johnsmansville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980)).

56. Upon showing exceptional circumstances the opposing party is entitled to know only facts observed by the expert. *See, e.g.*, 800 Front St. Corp. v. Travelers Prop. Cas. Co. of Am., No. CV 06-500 (LDW) (ARL), 2006 U.S. Dist. LEXIS 84160 (E.D.N.Y. Nov. 20, 2006). *See also, e.g.*, Delcastor v. Vail, 108 F.R.D. 405 (D. Colo. 1985) (compelling deposition of consulting expert who investigated a mudslide in part because conditions at the site had changed).
57. *In re Polymedica Corp.*, 235 F.R.D. at 33 (“[P]laintiffs have not shown that the cost of discovery are so great as to make it impracticable for them to obtain the information by other means and thus warrant an exception to the Rule.”); *see also In re Agent Orange*, 105 F.R.D. 577, 581 (E.D.N.Y. 1985).
58. Long-Term Capital Holdings, No. 01-CV-1290, 2003 WL 21269586 (D. Conn. May 6, 2003); *see also* Herman v. Marine Midland Bank, 207 F.R.D. 26, 30–32 (W.D.N.Y. 2002); Derrickson v. Circuit City Stores, Inc., No. DKC 95-3296, 1999 U.S. Dist. LEXIS 21100, at *18 (D. Md. Mar. 19, 1999); *Hartford Fire Ins. Co.*, 154 F.R.D. at 208; David S. Gray, *Expert Discovery in the Eighth Circuit*, 122 F.R.D. 35, 39 (1988).
59. 175 F.R.D. 34 (S.D.N.Y. 1997).
60. *Bank Brussels*, 175 F.R.D. at 41–42.
61. *Id.* at 38.
62. *Id.*
63. *Id.* at 44.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 45.
69. *Id.* at 44–45.
70. *Id.* at 42.
71. *Id.* at 43.
72. *Id.*
73. *Id.* at 44–45 (stating also that “one of plaintiff’s officers has conceded that it would be more difficult now to reconstruct AroChem’s collateral position as of December 1991 than it was for Andersen to reconstruct that collateral position when it conducted its work”).
74. *Id.* at 40 (“no one was assigned to watch over the removal and copying of documents”).
75. *Id.*
76. *See, e.g.*, Braun v. Lorillard, Inc., 84 F.R.D. 230, 236–37 (7th Cir. 1996) (holding that consultant’s facts and opinion regarding asbestos contamination were discoverable because he destroyed the only lung tissue available for purposes of testing).
77. FED. R. CIV. P. 26 (1987).
78. FED. R. CIV. P. 26(a)(2)(B)(i) (1993).
79. FED. R. CIV. P. 26(a)(2)(B)(ii) (1993).
80. FED. R. CIV. P. 26(b)(4)(a) (1993).
81. For an example of a federal court of appeals decision, *see In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (agreeing with the district court that the attorney-client and work-product protection has been waived by the disclosure of the confidential communications to expert witnesses). For examples of federal district court decisions, *see* Synthes Spine Co., L.P. v. Walden, 232 F.R.D. 460, 463–64 (E.D. Pa. 2005); American Fidelity Assurance Co. v. Boyer, 225

F.R.D. 520, 522 (D.S.C. 2004) (“[I]t is essential during pretrial discovery that the parties be able to discover not only what the opposing expert’s opinions are, but also the manner in which they were arrived at, what was considered in doing so, and whether this was done as a result of an objective consideration of the facts, or directed by an attorney advocating a particular position”); *Baxter Diagnostic, Inc. v. AVL Scientific Corp.*, No. CV 91-4178 RG (Ex), 1993 WL 390674, at *1 (C.D. Cal. Aug. 6, 1993); *Vitalo v. Cabot Corp.*, 212 F.R.D. 478, 479 (E.D. Pa. 2002) (“Rule 26(a)(2)(B) . . . vitiates a claim for attorney work product with respect to any information considered by a party’s expert, whether or not relied upon by that expert.”); and *In re McRae*, 295 B.R. 676, 679 (Bankr. N.D. Fla. 2003) (stating that materials furnished to testifying expert must be disclosed because “plain meaning of Rule 26(a)(2) trumps protections afforded by attorney-client privilege and work product doctrine”). See also PAUL RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:33 (2005) (when an expert witness considers confidential attorney-client communications in developing her testimony, offering of opinions constitutes waiver of the attorney-client privilege for those communications); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 5.10, at 574 (1995) (“Experts hired to testify are generally not viewed as representatives of the client for purposes of the privilege because their communications are subject to disclosure at trial and therefore can not be confidential.”).

82. State courts have also held that disclosure of confidential attorney-client communications to a testifying expert will waive the privilege.

California	See CAL. EVID. CODE § 912 (a) (2010). See also <i>Nat’l Steel Prods. Co. v. Superior Court</i> , 210 Cal. Rptr. 535 (Cal. Ct. App. 1985) (holding that expert report is discoverable when related to the subject matter of the expert’s prospective testimony because expert’s prospective testimony would disclose a significant portion of privileged communications to the expert).
Colorado	<i>Gall v. Jamison (In re Gall)</i> , 44 P.3d 233, 234 (Colo. 2002) (reviewing federal authority and holding that privileged material loses its protected status once disclosed to a testifying expert).
Illinois	<i>People v. Wagener</i> , 752 N.E.2d 430, 435 (Ill. 2001) (stating that defendant waived any attorney-client privilege by giving his testifying expert witness the police report containing statements regarding his conversation about his attorney) (citing <i>People v. Knuckles</i> , 650 N.E.2d 974 (Ill. 1995)).
Missouri	See Mo. SUP. CT. R. 56.01(4) (2010). See, e.g., <i>Tracy v. Danrund</i> , 30 S.W.3d 831, 836 (Mo. 2000) (stating that the Supreme Court of Missouri had adopted a “bright line rule” requiring that “all material given to a testifying expert must, if requested, be disclosed.” Additionally, the court stated that attorney-client privilege will be waived when documents containing such information are produced to a testifying expert).
Texas	See TEX. R. CIV. P. 192.3(e) (2010). See also <i>In re Christus Spohn Hosp. Kleberg</i> , 222 S.W.3d 434, 437–39 (Tex. 2007) (analyzing TEX. R. CIV. P. 192.3(e)(b), which mandates the production of all documents “that have been provided to, [or] reviewed by” a testifying expert. The court also analyzed the rule’s similarities to FED. R. CIV. P. 26).

83. See Stephen D. Easton, *Ammunition for the Shoot-Out with Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465 (2000) (listing jurisdictions that have retained the pre-1993 versions of the Federal Rules of Civil Procedure 26(a) and 26(b)(4), which include, for example, D.C. R. CIV. P. 26(a), (b)(4); MINN. R. CIV. P. 26.02(a), (d); OHIO R. CIV. P. 26(A), (B)(4); PA. R. CIV. P. 4003.5).
84. A few states have adopted procedural rules or statutes that mirror the 1993 amendments to Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4): see, e.g., COLO. R. CIV. P. 26(a)(2), (b)(4); WASH. R. CIV. P. 26(a), (b)(4). Some jurisdictions appear to have adopted provisions that track some, but not all, of the provisions in the 1993 amendments to Federal Rules of Civil Procedure 26(a)(2) and 26(b)(4). The majority of those jurisdictions allow for the deposition of expert witnesses as in Rule 26(b)(4), but do not require parties to submit expert witness reports as in Rule 26(a)(2). See, e.g., ARIZ. R. CIV. P. 26(a), (b)(4); FLA. R. CIV. P. 1.280(a), (b)(4); MICH. R. CIV. P. 2.302(A), (B)(4); N.J. R. CIV. P. 4:10-2(a), (d); TEX. R. CIV. P. 166b(1), (2)(e); WIS. R. CIV. P. 804.01(1), (2)(d). At least two jurisdictions appear to have adopted some form of the Rule 26(a)(2) requirements for the submission of expert witness reports, but have restricted the allowance of expert witness depositions as in Rule 26(b)(4). See, e.g., NEV. R. CIV. P. 26(b)(5); N.Y. C.P.L.R. § 3101 (McKinney 1998).
85. See FED. R. CIV. P. 702.
86. Mickum & Hajek, *supra* note 1, at 310.
87. Rule 26(a)(2)(B) provides:
- Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
 - (ii) the facts or data considered by the witness in forming them;
 - (iii) any exhibits that will be used to summarize or support them;
 - (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
 - (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
 - (vi) a statement of the compensation to be paid for the study and testimony in the case.
88. See sources cited *supra* note 55.
89. See generally FED. R. CIV. P. 26 advisory committee's note (2010).
90. See FED. R. CIV. P. 26(a)(2)(B).
91. See FED. R. CIV. P. 26(b)(4) (1993). See also Duke Oishi, *A Piece of Mind for Peace of Mind; Federal Discoverability of Opinion Work Product Provided to Expert Witnesses and Its Implications in Hawaii*, 24 U. HAW. L. REV. 859, 868 (2002) (addressing dif-

- ferences between pre-1993 expert discovery rules and post-1993 expert discovery rules).
92. “Given this obligation of disclosure, litigant 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.” FED. R. CIV. P. 26 (a)(2)(B) advisory committee’s note (2010).
 93. 238 F.3d 1370 (D.C. Cir. 2001).
 94. *Id.* at 1372.
 95. *Id.*
 96. *Id.*
 97. *Id.*
 98. *Id.* at 1373.
 99. *Id.*
 100. 238 F.3d at 1372.
 101. *Id.* at 1375.
 102. 232 F.R.D. 460 (E.D. Pa. 2005).
 103. *Id.* (“Prior to 1993, parties were limited both in what they could discover from testifying experts and in how they could obtain this discovery. Expert testimony was only discoverable if ‘known’ and relied on by the expert.”).
 104. *Id.* (citing, e.g., *Amway Corp. v. P&G*, No. 1:98 cv 726, 2001 U.S. Dist. LEXIS 5317, at *1 (W.D. Mich. Apr. 17, 2001) (stating that documents supplied to testifying expert, but not read, reviewed, or considered in forming opinions, were not discoverable under Rule 26(a)(2)(B); *Vitalo v. Cabot Corp.*, 212 F.R.D. 472, 474 (E.D. Pa. 2002) (defining “consider” in Rule 26(a)(2)(B) as reflecting on, reviewing, or using even if ultimately rejected by expert). *See also* *Simon Prop. Grp. L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 647 (S.D. Ind. 2000) (stating there is “no distinction between reviewing a document and considering a document” because such a distinction “could become too easy to dodge”); *In re Tri-State Outdoor Media Grp., Inc.*, 283 B.R. 358, 364–65 (M.D. Ga. 2002) (“When an expert has read or reviewed privileged materials before or in connection with formulating their opinion, the expert witness is deemed to have ‘considered’ the materials to satisfy Rule 26(a)(2)(B).”).
 105. *Id.* *See also* *Musselman v. Phillips*, 176 F.R.D. 194, 202 (D. Md. 1997) (finding that the act of supplying a document to a testifying expert creates a rebuttable presumption that the expert “considered” it, shifting the burden to the party who retained the expert to prove that the document was not considered and therefore does not fall within the mandatory disclosure provision in Rule 26(a)(2)(B)).
 106. *Id.*
 107. *Id.* (citing *Musselman*, 176 F.R.D. at 198 (outlining policy considerations behind pro-discovery interpretation of Rule 26(a)(2)(B))). *See also* *Gall*, 44 P.3d at 234 (stating that jury is entitled to know what influenced the expert and opposing counsel must be provided with that information to conduct an adequate cross-examination). *See also* *Reg’l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 717 (6th Cir. 2006) (“Rule 26 creates a bright-line rule mandating disclosure of all documents . . . given to testifying experts.”).
 108. *Mickum & Hajek*, *supra* note 1, at 351 (citing *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d at 1375; *CP Kelco*, 213 F.R.D. at 179; *S. Scrap Material Co. v. Fleming*, No. 01-2554 Section “M” (3), 2003 U.S. Dist. LEXIS 10815, at *73 (E.D. La.

- June 18, 2003); *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 attorney-client privilege is waived by disclosing confidential communications to experts); *In re Tri-State*, 283 B.R. 358, at 364–65 (holding that testimony at trial of experts on confidential information waives the privilege).
109. *B.C.F. Oil Ref. Co. v. Consol. Edison Co.*, 171 F.R.D. 57, 62 (S.D.N.Y. 1997).
 110. *See, e.g.*, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 283 (S.D.N.Y. 2001); *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 217 (S.D.N.Y. 2001); *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005); *Andritz, Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632 (M.D. Pa. 1997); *United States v. Alvarez*, 519 F.2d 1036, 1045–46 (3d Cir. 1975) (use of psychiatrist to assist attorney); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972). *See also* *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585, 589 (S.D. Miss. 2000) (stating that correspondence between expert witnesses and counsel was discoverable, notwithstanding defendant's work-product objection); *Simon Prop. Grp. L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 647 (S.D. Ind. 2000) (“[A]n intentional disclosure of opinion work product to a testifying expert effectively waives the work product privilege.”).
 111. 738 F.2d 587, 595 (3d Cir. 1984).
 112. *See, e.g.*, *Krisa v. Equitable Life Assur. Soc’y*, 196 F.R.D. 254 (M.D. Pa. 2000); *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289, 294 (W.D. Mich. 1995); *Smith v. Transducer Tech., Inc.*, No. 1995-28, 2000 U.S. Dist. LEXIS 17212 (D.V.I. Nov. 2, 2000); *Ladd Furniture v. Ernst & Young*, No. 2:95CV00403, 1998 U.S. Dist. LEXIS 17345, at *45 (M.D.N.C. Aug. 27, 1998) (stating it was “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 opinion”); *Helton v. Kincaid*, No. CA2004-08-099, 2005 Ohio 2794 (Ohio Ct. App. June 6, 2005).
 113. FED. R. CIV. P. 26 advisory committee’s note (2010).
 114. 460 F.3d 697, 717 (6th Cir. 2006).
 115. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, permits private-party property owners to recover from prior private-party property owners certain costs associated with the cleanup of contamination caused by the prior owners, where the cleanup costs were “necessary.” “Necessary” costs means they were incurred in response to a threat to human health or the environment, *see* U.S.C. § 9607(a) (4)(B), and “consistent” with the National Oil and Hazardous Substances Pollution Contingency Plan, *see* 42 U.S.C. § 9607(a).
 116. *Reg'l Airport*, 460 F.3d at 700–01.
 117. *Id.* at 702.
 118. *Id.*
 119. *Id.*
 120. *Id.* at 713–17.
 121. *Id.* at 715.
 122. *Id.*
 123. *Id.* at 714 (citing *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292–96 (W.D. Mich. 1995); *Smith v. Transducer Tech. Inc.*, 197 F.R.D. 260, 261–62 (D.V.I.

- 2000); Estate of Moore v. R.J. Reynolds Tobacco Co., 194 F.R.D. 659, 663–64 (S.D. Iowa 2000)).
124. *Id.* (citing *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001); *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 637–41 (N.D. Ind. 1996); *Gall v. Jamison (In re Gall)*, 44 P.3d 233, 238–39 (Colo. 2002); *cf. Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005)).
125. *Reg'l Airport*, 460 F.3d at 715.
126. *Id.*
127. *Id.* at 716.
128. *Id.*
129. *Id.*
130. Upon exceptional circumstances or as provided in Rule 35(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 preparation for trial and who is not expected to be called as a witness at trial.” *See* FED. R. CIV. P. 26(b)(4)(B).
131. FED. R. CIV. P. 26(b)(3).
132. *Reg'l Airport*, 460 F.3d at 715–16. *See also* *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (“New Rule 26 and its supporting commentary reveal that the drafted 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 privilege.”).
133. *Reg'l Airport*, 460 F.3d at 715.
134. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *See* FED. R. CIV. P. 26(b)(1).
135. *Reg'l Airport*, 460 F.3d at 716.
136. *Id.*
137. *Id.*
138. 196 F.R.D. 254 (M.D. Pa. 2000).
139. *See also, e.g.,* *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984); *Haworth v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995); *Pritchard v. Dow Agro Scis.*, 263 F.R.D. 277, 293 (W.D. Pa. 2009); *Dominguez v. Syntex Labs., Inc.*, 149 F.R.D. 158, 159 (S.D. Ind. 1993); *Smith v. Transducer Tech. Inc.*, 197 F.R.D. 260, 261–62 (D.V.I. 2000); *Estate of Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 663–64 (S.D. Iowa 2000). *But see also* *Occulto v. Adamar of N.J.*, 125 F.R.D. 611, 612 (D.N.J. 1989) (balancing policies underlying the work-product doctrine and liberal discovery in a case-specific fashion); *All W. Pet Supply Co. v. Hill's Pet Prod. Div.*, 152 F.R.D. 634, 639 (D. Kan. 1993) (stating that the rule requiring discovery of material *considered* by a testifying expert “does not compel the productions of the documents that transmitted information to the expert, which may well, as here, contain protected work product other than date or information”) (emphasis in original).
140. *See, e.g., Krisa*, 196 F.R.D. at 292–94. *See also* FED. R. CIV. P. 26(b)(4)(B).
141. 196 F.R.D. at 255.
142. *Id.*
143. *Id.*

144. *Id.*
145. *Id.* at 260.
146. *Id.* at 258 (citing *B.C.F. Oil Ref. Co. v. Consol. Edison Co.*, 171 F.R.D. 57, 64 (S.D.N.Y. 1997)). *See also* *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 714 (6th Cir. 2006).
147. *Krisa*, 196 F.R.D. at 258–59.
148. *Id.* at 259.
149. 329 U.S. 495, 510–11 (1947) (“Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interest of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client’s interests.”).
150. *Krisa*, 196 F.R.D. at 259–60.
151. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).
152. *Krisa*, 196 F.R.D. at 258 (citing *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996)) (“[The bright-line interpretation] makes good sense on several policy grounds: effective cross examination of expert witnesses will be enhanced; the policies underlying the work product doctrine will not be violated; and finally, litigation certainly will be achieved—counsel will know exactly what documents will be subject to disclosure and can react accordingly.”).
153. *Id.* at 259.
154. *Id.* at 260.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See* Steven S. Anderson & Jonathan M. Palmer, *Work Product Protections for “Dual Purpose” Experts* (Feb. 2005) (unpublished article).
160. 168 F.R.D. 633, 639 (N.D. Ind. 1996).
161. *Id.*
162. 212 F.R.D. 110 (E.D.N.Y. 2002). *See also* Anderson & Palmer, *supra* note 156.
163. *Id.* at 116 (“[A]n attorney controls the information flow to the expert and can, therefore, influence the expert’s opinion through his decisions about what to disclose (such as his opinions and mental impressions about the case) and when to do so.”).
164. *See generally* FED. R. CIV. P. 26 advisory committee’s note (2010).
165. *Id.*
166. *Id.*
167. *Id.* (“The refocus of disclosure on ‘facts and data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.”).

168. *Id.*
169. *Id.*
170. *Id.* (“The addition of Rule 26(b)(4)(C) is designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide reports under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including ‘preliminary’ expert opinions. Protected ‘communications’ includes those between the party’s attorney and assistants of the expert witness.”).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Galvin v. Pepe, No. 09-cv-104-PB, 2010 WL 3092640, at *6 (D.N.H. Aug. 5, 2010).
177. *Id.* at *1.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at *2.
182. *Id.*
183. *Id.* at *6.
184. *Id.* (“The new rules do not apply to cases closed before their effective date and only apply to cases pending on their effective date if their applicability is just and practicable. . . . The proposed rules cannot be construed to apply at this time to govern the outcome of a motion that is currently pending for resolution.”).
185. *Id.*
186. FED. R. CIV. P. 26(a)(1)(B)(2)(C) (2011).
187. No. 08-1304 (FLW), 2011 WL 666056 (D.N.J. Feb. 14, 2011).
188. *Id.* slip op. at *1.
189. *Id.* at *4–5.
190. *Id.* at *5.
191. *Id.* at *7.
192. *Id.* at *10–12.
193. *Id.* at *13.
194. No. CIV S-09-2445 KJM EFB, 2011 WL 2119078 (E.D. Cal. May 26, 2011).
195. *Id.* slip op. at *1.
196. *Id.*
197. *Id.* at *2.
198. *Id.* at *11.
199. *Id.* at *4–7. The court relied heavily on the Advisory Committee reports, especially the May 8, 2009, report, in which the minutes state: “Both the Subcommittee and the Committee concluded that the time has not yet come to extend the protection for attorney expert communications beyond experts required to give an (a)(2)(B) report.” *Id.* at *7.
200. *Id.* at *10.
201. See, e.g., B.C.F. Oil Ref., Inc. v. Consol. Edison Co., 171 F.R.D. 57, 61 (S.D.N.Y. 1997).

202. *See, e.g.*, *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61 (D.N.M. 1996). *But see* *Sara Lee Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416, 420–21 (N.D. Ill. 2011) (noting that the 2010 amendments to Rule 26 narrowed the scope of expert discovery, even in the dual expert context).
203. 206 F.R.D. 43 (E.D.N.Y. 2002).
204. *Id.* at 44.
205. *Id.*
206. *Id.*
207. *Id.* at 52.
208. *Id.*
209. *Id.*
210. 171 F.R.D. 57, 61 (S.D.N.Y. 1997).
211. 206 F.R.D. at 54 (quoting *B.C.F. Oil*, 171 F.R.D. at 61).
212. 124 F.R.D. 545 (S.D.N.Y. 1989).
213. 206 F.R.D. at 54.
214. *Id.* (citing *In re Air Crash*, No. 3:98cv2464 (AVC), 2001 U.S. Dist. LEXIS 14334, at *9 (D. Conn. June 4, 2001)).
215. *Id.*
216. 168 F.R.D. 61 (D.N.M. 1996).
217. *Id.* at 62.
218. *Id.* at 63.
219. *Id.*
220. *See, e.g.*, *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 31 (W.D.N.Y. 2002) (allowing expanded discovery based on the conclusions that there seemed to be a “seamless collaboration” between the consulting and testifying experts).
221. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 280 (E.D. Va. 2001).
222. No. 97 Civ. 6124 (JGK) (THK), 2002 U.S. Dist. LEXIS 111 (S.D.N.Y. Jan. 7, 2002).
223. *Id.* at *11.
224. *Id.*
225. *Id.* at *18–22.
226. *Id.* at *16.
227. *Id.* at *20–21.
228. *Id.* at *21.
229. *Id.* at *21–22.
230. *Id.*
231. *Sara Lee Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416 (N.D. Ill. 2011).
232. *Id.* at 417.
233. *Id.* at 418.
234. *Id.*
235. *Id.* at 420.
236. *Id.*
237. *Id.* at 421.
238. FED. R. CIV. P. 26 advisory committee’s note (2010).
239. FED. R. CIV. P. 26(b)(4)(C) (2010).
240. FED. R. CIV. P. 26(b)(4)(A) (“A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.”).
241. *Id.*

242. JAMES W. MOORE, *MOORE'S FEDERAL PRACTICE* § 26.80(1)(a) (3d ed. 2007) (Professor Moore cites to *House v. Combined Insurance Co. of America*, 168 F.R.D. 238 (N.D. Iowa 1996), and *CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176 (D. Del. 2003)). See also *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 176 (D. Del. 2003); *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1995).
243. See, e.g., *Callaway Golf Co. v. Dunlop Slazenger Grp. Ams., Inc.*, No. A. 01-669 (MPT), 2002 WL 1906628 (D. Del. Aug. 14, 2002); *NetJumper Software, L.L.C. v. Google, Inc.*, No. M19-138, 04-70366CV, 2005 WL 3046271 (S.D.N.Y. Nov. 10, 2005); *Ross v. Burlington N. R.R. Co.*, 136 F.R.D. 638 (N.D. Ill. 1991); *In re Estate of Manship*, 240 F.R.D. 229 (M.D. La. 2006); *Green v. Nygard*, 143 P.3d 393 (Ariz. 2006).
244. See, e.g., *Hoover v. U.S. Dep't of the Interior*, 611 F.2d 1132, 1142 (5th Cir. 1980) ("The primary purpose of [Rule 26(b)(4)(B)'s required disclosures about experts to be called at trial] is to permit the opposing party to prepare for an effective cross-examination.").
245. See *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 283 (S.D.N.Y. 2001); *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 217 (S.D.N.Y. 2001); *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005); *Andritz, Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632 (M.D. Pa. 1997); *United States v. Alvarez*, 519 F.2d 1036, 1045-46 (3d Cir. 1975); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972). See also, e.g., *Bradley v. Cooper Tire & Rubber Co.*, No. 07-mc-001-JM, 2007 WL 148764 (D.N.H. Jan. 11, 2007).
246. 213 F.R.D. 176 (D. Del. 2003).
247. *Id.* at 177.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 178.
254. *Id.*
255. *Id.*
256. *Id.* The 1993 Advisory Committee Notes to Rule 26 provide that a litigant may not "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."
257. 213 F.R.D. at 179.
258. *Id.*
259. *Id.*
260. *Id.* (Stating in a footnote that "[t]here is authority indicating that disclosure of privileged information can, in certain circumstances, create a limited waiver or be not considered a waiver at all." Cf. *Upjohn*, 449 U.S. at 387).
261. *Id.* (citing *United States v. Krasnov*, 143 F. Supp. 184, 191 (E.D. Pa. 1956) ("The privilege once waived can not be regained."); *Oppenheimer v. United States*, 355 U.S. 5 (1951) (discussing the Fifth Amendment privilege against self-incrimination, the Court noted that, having waived the privilege, one cannot

- later assert it: "To uphold a claim of privilege in this case would open the way to distortion of facts permitting a witness to select any stopping place in the testimony."). See also *In re G-I Holdings Inc.*, 218 F.R.D. 428, 432 (D.N.J. 2003) ("Once a party waives the attorney client privilege, it relinquishes the privilege for all purposes and circumstances thereafter.").
262. *Id.*
263. *Id.* (citing FED. R. CIV. P. 26(b)(4)(A) and advisory committee's note).
264. 213 F.R.D. at 179 (citing *United States v. Rylander*, 460 U.S. 752, 758, 75 (1983)).
265. *Id.*
266. FED. R. CIV. P. 26(b)(4)(D) provides:
- A party may, through interrogatories or by deposition, 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.
267. See *United States v. Nobles*, 422 U.S. 225, 238 (1975). See also *Imwinkelried*, *supra* note 2, at 23.
268. See, e.g., *Emp'r's Reinsurance Corp. v. Clarendon Nat'l Ins. Co.*, 213 F.R.D. 422, 426 (D. Kan. 2003) (stating that the rule is also designed to promote fairness by preventing access to another party's diligent trial preparation).
269. No. A. 01-669 (MPT), 2002 WL 1906628 (D. Del. Aug. 14, 2002).
270. 2002 WL 1906628, at *1.
271. No. M19-138, 04-70366CV, 2005 WL 3046271 (S.D.N.Y. Nov. 10, 2005).
272. *Callaway*, 2002 WL 1906628, at *1.
273. *Id.*
274. *Id.*
275. *Id.*
276. 136 F.R.D. 638 (N.D. Ill. 1991).
277. No. C-3-95-480, 1997 WL 1764760 (S.D. Ohio Feb. 19, 1997).
278. *Callaway*, 2002 WL 1906628, at *2 (discussing *Ross*, 136 F.R.D. at 638).
279. *Id.*
280. *Id.* (discussing *Dayton-Phx.*, 1997 WL 1764760, at *1).
281. *Id.*
282. 96 F.R.D. 179 (D. Ariz. 1982).
283. 132 F.R.D. 437 (E.D. La. 1990).
284. 196 F. Supp. 2d 1023 (E.D. Cal. 2002).
285. *Callaway*, 2002 WL 1906628, at *2-3.
286. *Id.* at *3.
287. No. M-19-138, 04-70366CV, 2005 WL 3046271 (S.D.N.Y. Nov. 10, 2005).
288. *Id.* at *2.
289. *Id.* at *1.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at *3.

294. *Id.* at *2–3 (analyzing to the circumstances present in *Ross v. Burlington N. R.R. Co.*, 136 F.R.D. 638 (N.D. Ill. 1991), and *Mantolete v. Bolger*, 96 F.R.D. 179 (D. Ariz. 1982), among other cases including *Callaway*, 2002 WL 1906628, *Durflinger v. Artiles*, 727 F.2d 888 (10th Cir. 1984), and *Dayton-Phx. Grp. v. Gen. Motors Corp.*, 1997 WL 1764760 (S.D. Ohio Feb. 19, 1997)).
295. *Id.* at *3.
296. *Id.*
297. *Id.*
298. *Id.*
299. 132 F.R.D. at 440.
300. 196 F. Supp. 2d at 1042–46.
301. Don Zupanec, *Testifying Expert—Redesignation—Deposition*, 22 No. 5 FED. LITIG. 9 (May 2007) (“If a testifying expert has been redesignated a consulting expert, a party seeking to take the person’s deposition should assume it will be necessary to satisfy Rule 26(b)(4)(B)’s ‘exceptional circumstances’ requirement.”).
302. *Id.*