Discovery of Non-Testifying "In-House" Experts Under Federal Rule of Civil Procedure 26

James R. Pielemeier
Hamline University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Civil Procedure Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol58/iss4/2

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Discovery of Non-Testifying “In-House” Experts
Under Federal Rule of Civil Procedure 26†

JAMES R. PIELEMEIER*

Rule 26(b)(4) of the Federal Rules of Civil Procedure limits discovery of facts known or opinions held by “experts” where those facts and opinions were “acquired or developed in anticipation of litigation or for trial.” The rule purports to set forth the nature of these limitations with respect to experts who will testify at trial and “retained or specially employed experts” who will not testify.1 However, a person seeking to discern the limitations on discovery of a third category of experts, non-testifying experts who are regularly employed by a party and acquire and develop facts and opinions in anticipation of litigation, faces a significant amount of fog. The issue of what, if any, limitations apply to discovery of these “in-house” experts is not addressed plainly by the rule, and the advisory committee note only enhances the uncertainty.2 Commentators have only briefly skimmed the issue and have reached divergent conclusions with minimal analyses.3 The courts understandably have reached differing conclusions as well.4

The preferred resolution of the issue of what prerequisites apply to discovery of in-house experts would be an amendment to the rule among the spate of others recently proposed.5 However, this is not in the offing

† Copyright 1984 by James R. Pielemeier. All rights reserved.
* Professor of Law, Hamline University School of Law. The author would like to thank Peter N. Thompson, Professor of Law, Hamline University School of Law, Visiting Professor of Law, William Mitchell College of Law, for his helpful comments on this article.
1 FED. R. CIV. P. 26(b)(4).
4 See infra notes 24-35 and accompanying text.
and the floundering for an appropriate resolution is likely to continue. In such a confused atmosphere, some bearings are needed.

This article will focus on the appropriate bearings, which can be extracted from the policies underlying discovery and its limitations. After noting the context in which the issue arises and illustrating how rule 26(b)(4) fails to delineate clearly the appropriate limitations on discovery of in-house experts, the article will extract the policies pertinent to its resolution that emanate from the Rules. The article then will explore comprehensively how these policies apply to the in-house expert context and suggest the resolution of the issue that is most consistent with them. It is hoped that the article will serve to avoid the struggle presently facing courts that are forced to muddle through this unnecessarily inexplicit area.

I. THE "IN-HOUSE" EXPERT

Any discussion of the discoverability of in-house experts must begin with an understanding of the factual context in which the issue arises. Neither rule 26(b)(4) nor the advisory committee note provide guidelines for determining whether a person of whom discovery is sought is an "expert" and therefore arguably protected by the rule. In addition, reported litigation on this issue has been minimal.

The "expert" status of the person of whom discovery is sought is assumed in most reported decisions dealing with the discoverability of in-house experts. The courts rarely discuss the skills or qualifications of the employee. In the few decisions in which the skills of the employee are mentioned, the employee could be described as a "professional." The employees in these cases have included engineers who studied remnants of an airplane crash and a partner in an auditing firm who studied audits that were the subject of securities litigation. In-house expert discovery was also addressed in a patent infringement suit, where discovery was sought of tests made by analytical chemists to determine the ingredients of the allegedly infringing product.

Settled law dealing with experts in other contexts, however, establishes that "expert" status is not restricted to professionals. The black letter rule on whether a person has sufficient expert qualifications to testify as to his opinion at trial is that the individual "must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth." Under the

---

8 Loctite Corp. v. Fel-Pro, Inc., 30 Fed. R. Serv. 2d (Callaghan) 1587 (N.D. Ill. 1980).
9 McCormick's Handbook of the Law of Evidence 30 (E. Cleary 2d ed. 1972). See also J. WALTZ, CRIMINAL EVIDENCE 301 (1975) (opinion of an expert should depend on special knowledge, skill, or training not within the ordinary experience of lay jurors).
Federal Rules of Evidence, his knowledge must be "specialized."  

Because no distinct definition of an "expert" under rule 26(b)(4) was provided by its drafters, it is reasonable to assume that it contemplates use of these flexible trial standards in determining expert status. Use of these standards is appropriate because discovery is part of the litigation process leading up to a trial. Rule 26(b)(4) is designed in part to protect persons who in fact will be expert witnesses at trial. Absent a compelling reason to do otherwise, application of uniform standards throughout the process is desirable.

Because the issues in a case frequently will not be fully developed at the discovery stage, however, a determination at that time of whether a person does have specialized knowledge that will aid the trier in his search for truth often will be virtually impossible. Thus, a reasonable possibility that this standard would be met if the person subject to discovery were to testify at trial seems to be an appropriate modified test for use in discovery. It retains the substance of the standards apparently contemplated by the drafters of the Rules, modifying them only as is necessary to accommodate the realities of discovery. Apparently applying such a modified standard, one court has characterized an argument that persons were not qualified as experts for discovery purposes as "specious." Opining that hearings on their qualifications would be wasteful, the court noted that their testimony would be opinion evidence resulting in their being classified as expert witnesses if they testified at all. They therefore would be treated as experts for purposes of discovery, subject to objection to their qualifications at trial. There appear to be no opinions to the contrary.

Under this test, any person with specialized knowledge who, if called at trial, would give opinion testimony is an "expert" for purposes of discovery. Rule 26(b)(4), however, does not limit discovery of all information sought from persons falling within this definition. To qualify for protection under the rule, the information sought from the expert must have been "acquired or developed in anticipation of litigation." Thus, the issue

---

10 Fed. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."


13 Id.

14 Id.

15 Fed. R. Civ. P. 26(b)(4). The "test" for determining whether the information was acquired in this manner has been stated to be "whether, in light of the nature of the documents [sought] and factual situation in a particular case, the experts and their information can fairly be said to have been obtained or acquired because of the prospect of litigation." In re Sinking of Barge "Ranger 1", 32 Fed. R. Serv. 2d (Callaghan) 1708, 1711 (S.D. Tex. 1981).

According to Professor Moore, facts known to a party through his expert are discoverable. See 4 J. Moore, supra note 3, ¶ 26.66[2], at 26-451. He states that the rule precludes obtaining the information from the expert himself, and precludes identification of the facts and opinions as the work of the expert. Id. He concludes that the facts and opinions protected are
of whether the rule limits experts' amenability to discovery normally will arise when they have been asked to study and report on the matters giving rise to litigation after the events that triggered it have occurred. The advisory committee note makes it clear that actors or viewers "with respect to transactions or occurrences that are part of the subject matter of the lawsuit" are not protected. Facts known and opinions held by experts before the prospect of litigation arose, such as the process by which a product was produced and an expert's opinion at the time of production of the safety of the process, are not protected.

Although the "anticipation of litigation" requirement of the rule substantially narrows the field of experts arguably protected from discovery, the resulting definition is still quite broad. The foregoing suggests that virtually anyone with some "uncommon" skill, knowledge, or experience relating to an issue in a case would qualify as an "expert" under rule 26(b)(4) so long as his facts were acquired and opinions developed in anticipation of litigation, not as an actor or viewer to the underlying occurrence. In the in-house expert context, protected persons could range from employees learned in nuclear physics to apprentice mechanics in a defendant's automobile repair shop.

"test results and the like" and the conclusions predicated upon them, rather than the factual contentions of the party, whether sustainable by expert testimony or not. \textit{Id.} at n.2.

Because experts frequently will be engaged with their employer in a protected "mulling over" process, see infra text accompanying notes 86-89, Professor Moore's exception to limited discovery should be applied narrowly to avoid "back-door" evasion of rule 26(b)(4)'s limitations. In addition, in the in-house expert context, it might be argued that a regular employee is the party and, applying Professor Moore's exception, should be required to divulge all facts he has learned. Acceptance of this argument, however, would be inconsistent with the policies this article notes are reflected by rule 26(b)(4). Rather, in this context, this article's conclusion that in-house experts should be treated as retained experts can be effectuated only if Professor Moore's term, "party," is defined as limited to those persons to whom retained experts would normally relate facts they have learned.

\textit{Id.} For example, see Seiffer v. Topsy's Int'l Inc., 69 F.R.D. 69 (D. Kan. 1975) where the court protected an in-house expert from discovery, specifically noting that he had no involvement in the activities giving rise to the suit and contrasting the availability of discovery against persons who had been involved in those activities. \textit{Id.} at 72-73 n.3.

\textit{See} FED. R. Civ. P. 26(b)(4) advisory committee note. The court in Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 992 n.47 (D.C. Cir. 1980) noted that information concerning an employer's activities gained in the course of litigation assistance is protected by the rule, and that to say that an expert by acquiring such information has become an actor or viewer "is to emasculate the rule."

\textit{Cf.} Rodriguez v. Hrinda, 56 F.R.D. 11, 12 (W.D. Pa. 1972), where the court rejected a contention that a defendant physician could not be deposed on opinions he held regarding the post-operative condition of his patient because it viewed rule 26(b)(4) as applicable only to experts engaged in anticipation of litigation or for trial.

Protection of any particular expert under the rule is not necessarily an all or nothing proposition. In Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 992 (D.C. Cir. 1980), the court noted that "one may simultaneously be a litigational expert with rule 26(b)(4) protection as to some matters and simply an unprotected actor or witness as to others." In Hermdorfer v. American Motors Corp., 96 F.R.D. 13 (W.D.N.Y. 1982), however, the court held that an expert employed for dual purposes, preparing for litigation and product improvement, was entitled to all the protection provided for experts employed for litigation preparation.
Adverse reaction to the breadth of this definition on the ground that it may shield too many persons from discovery, however, should be tempered. Some persons falling within the definition may have only marginal expert qualifications, and there will be little legitimate reason to seek discovery of them when they have no firsthand knowledge of the underlying facts. In fact, protection of such persons from discovery may reduce harassing discovery, and “fact” witnesses will still be subject to normal discovery. As a practical matter, the persons the definition will protect from discovery in any particular case will be a small number of relatively well qualified experts. It is in this context that the battles under rule 26(b)(4) will be fought.

Regardless of the magnitude of an “expert” employee’s qualifications, an employer may find it convenient to ask his opinion about a case in which the employer is a party. The context may be a short conversation in which the employer briefly relates his opponent’s contentions and wants confirmation of his belief that they are incredible, or it may be a request that the employee devote months to intensive study of a technical issue in a case alongside a battery of outside experts. In either event, the opposing party may wish to undertake discovery to ascertain what the employee has learned or concluded in the process. When this wish is manifested by a formal discovery request, the fog of rule 26(b)(4) comes to the fore.

II. THE FAILURE OF THE RULE

Rule 26(b)(4) purports to be the exclusive means by which discovery can be obtained of “facts known and opinions held by experts, ... acquired or developed in anticipation of litigation or for trial . . . .”\(^\text{19}\) Subdivision (A)
permits limited inquiry by interrogatories regarding persons a party expects to call as expert witnesses at trial and provides for further discovery of them upon motion. Subdivision (B) permits discovery of experts who have been "retained or specially employed ... in anticipation of litigation or preparation for trial" and who are not expected to be called as witnesses at trial, "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." Subdivision (C) requires the party seeking discovery to pay reasonable fees of experts for their time spent in responding to discovery beyond the limited interrogatories regarding experts who will be witnesses. In addition, with respect to experts who will testify it permits, and with respect to "retained or specially employed" experts it requires, a court to order the party seeking discovery beyond the limited interrogatories to pay the other party a fair portion of the expenses incurred by the latter in obtaining facts and opinions from the expert.

Non-testifying regularly employed "in-house" experts are not clearly within the explicit language of the rule's subdivisions. Subdivision (A) is inapplicable because they will not testify. Subdivision (B) is not clearly applicable because the category of experts "retained or specially employed ... in anticipation of litigation" may be read as not encompassing regular employees. Yet, regular employees clearly can be experts who have learned and developed facts and opinions in anticipation of litigation, and thus they fall within the general scope of the rule. Thus, while they appear to be within the category of persons to which the protection of the rule was addressed, the issue of what specific standards govern their amenability to discovery is not resolved by the rule. The resulting uncertainty has led to three different interpretations of the rule's application to in-house experts.

One interpretation is that non-testifying in-house experts are totally immune from discovery. This reading of the rule focuses on its introductory language that discovery of experts who acquired or developed information in anticipation of litigation "may be obtained only as follows." Because non-testifying in-house experts may be encompassed within this introductory language and none of the following subdivisions clearly permits any

(ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b) (4) (B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.


There is no consensus on what standard should be used to order additional discovery of an expert under rule 26(b)(4)(A)(ii). Some courts allow virtually unlimited discovery, while others are quite restrictive. See Connors, A New Look at an Old Concern—Protecting Expert Information From Discovery Under the Federal Rules, 18 Duq. L. Rev. 271, 273-77 (1980).

discovery of these experts, the logical implication of the rule is that no
discovery of in-house experts is permitted.

This interpretation can also be supported by the advisory committee note. The
note states that because subdivision (b)(4)(B) does not encompass ex-

perts “informally consulted” in preparation for trial, the rule precludes
discovery of these experts. If in-house experts similarly are not encom-

passed by the subdivision, a consistent interpretation of the rule requires
preclusion of discovery as to them as well. Accordingly, at least one

commentator has espoused this view, and the logic of a United States court

of appeals decision dealing with informally consulted experts, if applied
to in-house experts, would also compel this result.

A second interpretation of the rule is that it imposes no special restric-
tions whatsoever on discovery of in-house experts. This interpretation has

been made through three different approaches. One federal magistrate, con-

fronted with an argument that discovery of an expert was limited by rule
26(b)(4), rejected the argument by noting that the expert was a regular

employee of a party and blithely stating that this fact “makes all the dif-

ference in the world.” The magistrate did not say why this fact made such
a difference, but merely quoted a portion of the advisory committee note
stating that “a general employee of the party not specially employed on
the case” is excluded from the category of experts covered by subdivision
(B). The magistrate apparently concluded from this language that all
regular employees are outside the scope of subdivision (B) and are therefore
outside of the rule’s protection. Of course, the latter conclusion ignores

22 FED. R. CIV. P. 26(b)(4) advisory committee note.
23 See, Comment, Ambiguities After the 1970 Amendments, supra note 3, at 1167, contrasting
“permanently” employed experts with “specially” employed experts and concluding that the
former are not within subdivision (b)(4)(B). Professors Wright and Miller characterize this
view as “simply incorrect” in that it fails to take account of the introductory language of
the rule. C. WRIGHT & A. MILLER, supra note 3, § 2033, at n.91 (Supp. 1982). They do not specify
what portion of the introductory language the commentator failed to consider. The criticism as phrased is surprising in light of the fact that the commentator’s position is premised on
the introductory language that limits discovery of experts to the circumstances specified
in the subdivisions of the rule. The criticism makes sense only if one assumes that an in-
house expert cannot be one within the introductory language limiting its coverage to ex-

perts who acquire or develop information in anticipation of litigation or for trial. Such an
assumption is unwarranted.

discovery of expert information acquired in anticipation of litigation can only be had in ac-
cordance with Rule 26(b)(4), if no provision is made for experts informally consulted in
anticipation of litigation, no discovery concerning them is permissible.
”).
26 Id. (quoting FED. R. CIV. P. 26(b)(4) advisory committee note).
27 The magistrate apparently was uncertain whether the employee would testify at trial.
Assuming that he would testify, the magistrate held that because the expert was a regular
employee, the discretion to permit further discovery under rule 26(b)(4)(A) should be exer-
cised in favor of permitting depositions. Id. at 687. Assuming the employee would not testify,
the magistrate said the result should be the same, citing the advisory committee note. Id.
at 687. The magistrate’s conclusion that the advisory committee note’s “exclusion” of regular
the introductory language of the rule limiting discovery of litigation experts to the mechanisms provided by the rule.

A second approach leading to the conclusion that no protection is provided to in-house experts was taken by the United States District Court for the Eastern District of Virginia in Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co. The court undertook a detailed review of the language of the rule and advisory committee note to ascertain whether the rule limited discovery of in-house experts. Finding no specific guidance in any language, it concluded that no rule 26(b)(4) limitations applied, largely on the premise that an “expert” is by nature impartial. Since a general employee cannot be impartial, the court concluded, he cannot be an “expert” protected by the rule. This rationale is questionable, as few litigators would concur that all persons considered experts in judicial proceedings, particularly those who will testify, are nonpartisan, and no other published decision suggests that the rule’s protection applies only to nonpartisan experts.

Professors Wright and Miller also conclude that no limitations on in-house expert discovery are provided by the rule, apparently by taking a third approach to the effect that regularly employed experts are not experts who have acquired information in preparation for trial and therefore are not covered by the introductory language of the rule. Because regularly

employees from subdivision (B) totally dispensed with the rule’s protections is apparent from the fact that he made no finding of “extraordinary circumstances” under subdivision (B). To permit free discovery of a non-testifying expert without such a finding is equivalent to holding that the rule’s limitations on non-testifying experts simply are inapplicable. The magistrate’s alternative holdings result in the anomaly that, under the language of the rule, regular employees who will testify are entitled to greater protection than non-testifying regular employees. With respect to testifying employees, an order permitting discovery beyond the limited interrogatories would be required, while the court’s rationale would provide no protection to non-testifying employees. This anomaly reverses the policy embodied in the rule’s structure that testifying experts should be more amenable to discovery than non-testifying ones.

See also Kelleher v. Omark Industries, Inc., 20 FED. R. SERV. 2d (Callaghan) 1430, 1433 (D. Mass. 1975) where the same magistrate stated that reliance on rule 26(b)(4)(B) to protect regular employees from discovery was inappropriate because of the advisory committee note’s exclusion of them from the purview of that subdivision.

29 Id. at 406-08.
30 See McCormick’s Handbook of the Law of Evidence, supra note 9, at 38-41 (discussing remedies to redress the partisan element in the selection of experts). When this author described the rationale of the Virginia Electric Power decision to a partner of a 200 lawyer law firm who had worked in products liability litigation, the partner’s laughter was sustained. He suggested that in such litigation, the question attorneys implicitly ask in evaluating the potential expert testimony of each party is, to paraphrase, whether “my whore” will be more persuasive than “your whore.”
31 C. WRIGHT & A. MILLER, supra note 3, § 2029, at 250 (regularly employed experts are within the class of experts whose information was not acquired in preparation for trial) and § 2033, at 258 (blanket statement that regularly employed experts are not protected). Professor Graham has stated that Professors Wright and Miller apparently assume that all regular employees may be classified as occurrence witnesses who are not protected by the rule.
employed experts clearly can acquire information in anticipation of litigation, this unexplained general assumption is unwarranted.\footnote{Graham, Part One, supra note 3, at 941-42. However, to the extent regular employees, in anticipation of litigation, develop information subsequent to the occurrence giving rise to litigation, they are no more "occurrence witnesses" than are retained experts who acquire information in the same manner.}

A third interpretation of the rule's application to in-house experts is that in-house experts can be deemed "specially employed" and that discovery of them is specifically governed by the provisions of subdivision (B). For example, Professor Graham has suggested that a regular employee may become "specially employed" when he is designated and assigned by a party to apply his expertise to a particular matter in anticipation of litigation or for trial.\footnote{Graham, Part One, supra note 3, at 942. See also Seiffer v. Topsy's Int'l Inc., 69 F.R.D. 69 (D. Kan. 1975) (concluding that a regular employee may be "specially employed" within the language of the rule).} This conclusion can also be drawn from language in the advisory committee note excluding from the scope of rule 26(b)(4)(B) "a general employee of a party not specially employed on the case"\footnote{See supra text accompanying note 34.} which suggests by negative implication that a "general employee" may or may not be "specially employed" and within subdivision (B).

However, this interpretation, like the others, has not been uniformly accepted. The rule protects experts who have been specially "employed," not specially "assigned" to work on litigation, and at least one court\footnote{Id. at 408.} and one commentator\footnote{Logan states that the words "specially employed" refer to the manner by which the expert was employed, and that an "already employed expert" can hardly be said to be "specially employed." Logan, supra note 3, at 11. He agreed with the Virginia Electric Power decision that in-house experts are outside the protection of the rule, but would come to a different conclusion if the language of the rule protected experts who were "specially assigned." Logan, supra note 3, at 12.} believe that current employees cannot suddenly become "specially employed." The conclusion that regular employees are not within subdivision (B) also can be supported by reading the language of the advisory committee note\footnote{See supra text accompanying note 34.} as merely descriptive of the nature of a "general employee" to the effect that he cannot be deemed "specially employed."
In addition, if one concludes that "special employment" commences when an employee begins work in anticipation of litigation, the "specially employed" language of subdivision (B) becomes redundant of the introductory language of the rule protecting information acquired in anticipation of litigation. This suggests that the "specially employed" language refers to the circumstances of the employee's hiring, not the nature of the work to which the employee is assigned, and lends some credence to the view that general employees are not within the subdivision.

By current count, then, the discoverability of in-house experts under the Rules has been interpreted at least three different ways: no discovery, full discovery, and discovery as it is limited to retained and specially employed experts. Because the language of the rule and advisory committee note apparently fail to provide clear guidance on this issue, the competing policies underlying discovery and rule 26(b)(4) must be examined to determine the most appropriate resolution.

III. RELEVANT POLICIES

At least four policies merit recognition in ascertaining the standards under which in-house experts will be subject to discovery. The first is the policy of liberal discovery. The second is the policy of avoiding financial "unfairness." The third is the "free ride" policy, which has three "sub-policies" of discouraging laziness, encouraging diligence, and protecting confidentiality in trial preparation. The fourth is a policy of deference to an expert's feelings of loyalty.

The policy of liberal discovery underlies all the discovery rules. The purposes of discovery include narrowing and clarifying the issues between the parties and ascertainment of "facts, or information as to the existence or whereabouts of facts, relative to those issues." Broad knowledge of facts and information relating to issues in a case enables each party to present its case to the fullest and in its most favorable light. Liberal discovery, resulting in broad knowledge of the facts and effective case presentations, is thought to lead through the adversary process to a greater likelihood that adjudications will be based on the true facts.

---

38 A parsed version of the rule incorporating Professor Graham's position would be to the effect that expert "information developed in anticipation of litigation may be discovered only upon a showing of extraordinary circumstances where an expert employee's information was developed in anticipation of litigation." Under this interpretation, the words "specially employed" add nothing to the rule.

39 Hickman v. Taylor, 329 U.S. 495, 505 (1947) (liberal atmosphere surrounds discovery rules); id. at 507 (deposition-discovery rules are to be accorded a broad and liberal treatment).

40 See id. at 501.

41 See id. at 507 ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); D. LOUSSELL, G. HAZARD & C. TAIT, PLEADING AND PROCEDURE, STATE AND FEDERAL, CASES AND MATERIALS 818 (5th ed. 1983).

42 See Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958) (discovery is founded on the policy that the search for truth should be aided, resulting in liberal con-
This policy of liberal discovery is conditioned, however, by other policies. These other policies are reflected by rules that place limits on the breadth of permissible discovery. The limiting rule most pertinent to discovery of in-house experts is the one limiting discovery of experts, rule 26(b)(4).

The advisory committee note to rule 26(b)(4) states that the rule adopts a form of the "doctrine of 'unfairness,'" which suggests that protection against "unfairness" is a policy underlying the rule that limits broad discovery. While "unfairness" has little concrete meaning in the abstract, the authorities cited by the advisory committee in support of this statement give it some substance. Each focuses on financial unfairness. Their thrust is that it is "unfair" to require a party who has expended resources in the employment of an expert to turn over the fruits of these expenditures gratis to an opponent.
This financial “unfairness” policy alone does not explain the overall structure of rule 26(b)(4). Subdivision (b)(4)(C) provides for, and in most cases requires, payment by the discovering party for the expert’s time in discovery and portions of expenses incurred by the employing party in obtaining facts and opinions from the expert. The policy of avoiding financial unfairness would be fulfilled by that provision alone. Yet, the rule limits discovery notwithstanding payment, which leads to the conclusion that additional limiting policies underlie the rule.46

One additional policy that is reflected in the rule can be characterized as the “free ride” policy. This policy was articulated in Justice Jackson’s concurring opinion in the seminal attorney work product case, Hickman v. Taylor, to the effect that “Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”47 The policy recently was reaffirmed in the majority opinion of the Supreme Court in Upjohn Co. v. United States.48

The free ride policy incorporates three “sub-policies” or component principles. One is similar to the financial unfairness policy, that one party should not be able simply to help itself to the fruits of the other party’s diligence in trial preparation because such a practice would promote laziness in trial preparation by the party seeking discovery.49 This may be called the “discouraging laziness” policy. The second sub-policy is the flip side of the first, that protection of the fruits of diligent trial preparation from discovery will encourage diligence in trial preparation because the attorney will know that his efforts cannot be confiscated by his opponent.50 This may be called...


An expert employed by one of the parties ought not to be compelled to furnish expert testimony to the other just because the latter offers him compensation.

It is his privilege, if not his duty, to refuse compensation from one of the parties when he has already accepted employment for the other, and such refusal ought not of itself to result in his being ordered to testify.

However, aside from this, no other indication of what is meant by “unfairness” is given by the treatise, other than quotations from cases suggesting that discovery of the adversary’s expert is somehow unseemly. For a description of the cases, see 4 J. Moore, supra note 3, ¶ 26.66[1], at 26-465 n.5.


Professor Friedenthal notes that financial unfairness does not, standing alone, justify limitations on discovery of experts, as it is a policy that could equally be applicable to discovery of any witness who was unearthed at considerable expense to a party. Friedenthal, Discovery and Use of an Adverse Party’s Expert Information, 14 Stan. L. Rev. 455, 487 (1962).


Cf. Hickman v. Taylor, 329 U.S. 495, 518 (1947) (party seeking witnesses’ statements gave no reason why he could not interview them himself) (Jackson, J., concurring; supra text accompanying note 47.

See Hickman, 329 U.S. at 511 (“Were [trial preparation] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.”).
the "encouraging diligence" policy. The third sub-policy is a necessary incident of the effectuation of the first two, that although discovery of all relevant facts underlying the litigation is to be encouraged to enable the parties to present relevant evidence and to question effectively the evidence of their opponents, privacy and confidentiality in the development of trial strategy and theories of the case should be maintained. 51 This may be called the "protecting confidentiality" policy. 52

The advisory committee note states that the provisions of rule 26(b)(4) "reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine." 53 Because the free ride sub-policies are reflected in cases dealing with protection of work product, 54 this statement in the advisory committee note may cast some doubt on their pertinence in the context of discovery of experts. Close analysis, however, dispels this doubt. The case cited in support of the advisory committee note's statement rejected a work product argument for protection against discovery of an expert's reports because they were not prepared by the lawyer. 55 Rather, they were "solely the work product of an expert witness whom he employed to prepare it." 56 Although the advisory committee note thus appears to reject the notion that expert trial preparation constitutes attorney work product, it does not necessarily follow that policies underlying the work product doctrine are inapplicable. Rather, the rule simply replaces the work product categorization with provisions reflecting similar policies. 57

51 Cf. Hickman, 329 U.S. at 510 (privacy in trial preparation is essential to the orderly working of the judicial system).

52 Communications of an expert on occasion might be protected by the attorney-client privilege. For example, Professor Friedenthal noted that reports made solely or primarily for transmission to an attorney might be privileged. Friedenthal, supra note 46, at 458. The Supreme Court recently has held that communications of a party's employee to the attorney may be privileged. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). But see 4 J. Moore, supra note 3, ¶ 26.66(1), at 26-489 ("If memoranda prepared by counsel himself are not privileged, a fortiori reports prepared for him by experts are not."). The discussion in the text deals with contexts where the privilege would be inapplicable, such as where the knowledge and opinions of an expert are sought, not his actual communications to counsel. See C. Wright & A. Miller, supra note 3, § 2029, at 243 (knowledge of an expert in and of itself is not privileged).


54 See cases cited supra notes 47-51 and accompanying text.

55 United States v. McKay, 372 F.2d 174, 177 (5th Cir. 1967).

56 Id.

57 The case cited by the advisory committee note is reflective of the debate that existed prior to the promulgation of rule 26(b)(3), which was adopted at the same time as rule 26(b)(4), on whether the work product doctrine was limited to materials prepared by attorneys. See Fed. R. Civ. P. 26(b)(4) advisory committee note. A conclusion that non-attorney trial preparation material is not "work product" does not necessarily mean it is not protected by reason of policies similar to those supporting the work product doctrine. Although it does not contain the word "work product," rule 26(b)(3) does not restrict its protection of trial preparation materials to that prepared by attorneys, but extends its protection to materials prepared in anticipation of litigation by parties. See Fed. R. Civ. P. 26(b)(3). Indeed, the debate on whether expert knowledge gained in anticipation of litigation is work product continues, but there
Indeed, the free ride policy clearly is reflected by another portion of the advisory committee note which states:

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their experts will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.55

In addition, although two articles cited favorably by the advisory committee note criticized the application of the work product doctrine to experts, they did so on the ground that the experts would be witnesses, and their opinions would constitute evidence at trial, arguably leaving intact the doctrine's possible application to non-witness experts.56 Indeed, one of the articles characterized the discouraging laziness policy and protecting confidentiality policy as aspects of the unfairness doctrine as applied by the courts,57 a doctrine the advisory committee note explicitly espouses.58 Thus, notwithstanding its disclaimer of the work product rationale, the advisory committee note itself suggests the pertinence of the free ride policy.

Other authorities suggest the pertinence of the free ride policy as well. One court has stated that the purpose behind the requirement of a court order for non-interrogatory discovery of trial expert witnesses under rule 26(b)(4)(A)(ii) "is to insure that the movant's only interest is in obtaining information for cross-examination."60 This statement implies that although discovery of testifying experts is permitted to assure adequate opportunity for cross-examination at trial, the rule is intended to limit the risk that information will be elicited for other uses, such as finding support for the

is no question that it is protected. Compare 8 C. WRIGHT & A. MILLER, supra note 3, § 2029, at 243, (arguing that knowledge of an expert is not part of work product) with 4 J. MOORE, supra note 3, § 26.66[2], at 26-480 (arguing that the “facts known and opinions held” language of the introductory clause means “of course, that the expert cannot be deposed and questioned regarding the trial preparation work.”).

55 FED. R. Civ. P. 26(b)(4) advisory committee note.

56 Friedenthal, supra note 46, at 479; Long, supra note 45, at 141-42. Current rule 26(b)(4) accepts this criticism by permitting discovery of anticipated testimony, but retains more extensive protection against discovery of non-witness experts.

60 Friedenthal, supra note 46, at 479 (laziness); id. at 482 (confidentiality). Professor Friedenthal criticizes the confidentiality basis for protection because it is inconsistent with the requirement that one disclose facts. Id. See also Comment, A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained, 12 U. Mich. J.L. Ref. 533, 536-42 (1979), which discerned three aspects of the "unfairness" doctrine: (1) appropriation of the opponent's "property" in the form of the expert's services; (2) discouragement of laziness; and (3) encouragement of the seeking out of expert advice, and states that the third aspect has not received judicial articulation.

61 See supra text accompanying note 43.

discovering party’s case out of the efforts of the other party. Similarly, prohibiting discovery of retained or specially employed experts in the ordinary case and totally prohibiting discovery of informally-consulted experts have been viewed as having the purposes of encouraging thorough trial preparation and discouraging laziness. Case law interpreting the rule indicates that parties may not be able even to obtain the names of retained, specially employed, or informally consulted experts, largely on the same rationale. More generally, cases suggest that the rule essentially requires the party seeking discovery to “find and use your own experts” to suggest avenues for development of its case, not to rely on the trial preparation of its opponent. Thus, the “free ride” policy is clearly pertinent in resolving issues of expert discovery.

Another limiting policy reflected by rule 26(b)(4) is deference to an expert’s feelings of loyalty. This policy recognizes and defers to the expert’s potential emotional aversion to giving the benefit of his general expertise to his employer’s opponents. It is reflected by the provision that limits

---

63 Professor Friedenthal notes the risk that discovery of trial experts could elicit information to support one’s own case, but takes the position that the goal of having decisions based on the true facts overcomes this objection to discovery of trial experts. See Friedenthal, supra note 46, at 487. By limiting discovery of trial experts, the rule only partially adopts his position.


67 See, e.g., Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 992-93 (D.C. Cir. 1980) (“Rule 26(b)(4)B) implicitly recognizes that a party might well be deterred from thorough preparation of his case were it possible for his opponent to freely discover information from a hired expert whose assistance is important but yet not so vital as to require testimony at trial.”); Inspiration Consol. Copper Co. v. Lumbermens Mut. Cas. Co., 60 F.R.D. 205, 210 (S.D.N.Y. 1973) (the court, denying discovery of an expert on matters to which he would not testify, stated, “It is easy enough for the moving party to obtain his own expert opinion based on the facts and figures discovered from the plaintiff’s books and records.”); Seiffer v. Topsy’s Int’l, Inc., 69 F.R.D. 69, 72 (D. Kan. 1975) (design of the discovery rules prohibits a party from “delving[ing] at will into an expert mind solely to sustain its own burden of preparing for litigation.”); In re Brown Co. Sec. Litig., 54 F.R.D. 384, 385 (E.D. La. 1972) (“The purpose of Rule 26(b)(4) is to prevent a party from building his case with opinions of experts that his opponent engages for assistance and guidance in the preparation of the merits of litigation.”). But cf. Graham, Part One, supra note 3, at 927 n.122-23 (work product doctrine rejected under rule 26(b)(4)).

68 A pre-rule 26(b)(4) opinion reflecting the “loyalty” policy is Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941), quoted supra note 45. Recognition of an expert’s emotional loyalty to the position of the party who obtains his opinions was made in Ager v. Jane C. Stormont Hosp. & Training School for Nurses, 622 F.2d 496, 503 (10th Cir. 1980) (aversion of health care providers to assisting plaintiffs’ counsel requires denial of discovery of identities of evaluative consultants which will result in a greater willingness of experts to render opinions).
the information that must be disclosed as a matter of course by experts who will testify to information directly related to their anticipated testimony, and more generally by the rule's overall protection of hired experts. They normally will not be required to speculate on theories that might be helpful to their employer's opponent or to educate the opponent generally in their areas of expertise. This is so notwithstanding the degree to which the experts are involved in their employer's trial preparation (so long as their opinions can be deemed to have been formulated in anticipation of litigation), and notwithstanding the availability of compensation under rule 26(b)(4)(C). Thus, they are protected even though the pertinence of the free ride and financial unfairness policies may be minimal.

In summary, four primary policies are pertinent in resolving the proper scope of discovery of in-house experts. These are the policy of liberal discovery, the policy of avoiding financial unfairness, the free ride policy, and the policy of deference to an expert's feelings of loyalty. The propriety of applying these policies to discovery of experts might be questioned if courts were writing on a blank slate. However, the validity of these policies and their appropriate balance have been presumptively established through the promulgation of rule 26(b)(4), which reflects and endorses them. Thus, absent an amendment to the rule, the task of courts should be not to question these policies, but to apply them to the in-house expert dilemma in a manner consistent with the balance struck under the rule. In doing so, it is important to be cognizant of the reasoning underlying these policies, and to take into account pertinent distinctions between in-house experts and the categories of experts clearly addressed by the rule.

IV. THE POLICIES APPLIED TO THE IN-HOUSE EXPERT

A. The Utility of Liberal Discovery

No pretense should be made that wide-open discovery of in-house experts will not serve the purpose of discovery to assure broad knowledge by all parties of facts and information relating to issues in a case. If the in-house expert has any knowledge, first-hand or otherwise, of facts or information pertinent to the case, discovery of the expert may ferret out matters

---

70 It also has been suggested that the rule's protective provisions are designed to encourage access to experts and encourage full disclosure by the expert to the client. See Graham, Part One, supra note 3, at 902 n.34. These policies are encompassed within those discussed in the text. For example, the confidentiality aspect of the free ride policy will encourage reticent experts to make themselves available and make full disclosure to the client.
previously unknown to the discovering party. An engineer who has examined the wreckage of an airplane may have noticed aspects of the wreckage missed by an examination performed by the discovering party. A chemist may know of scientific principles relating to the composition of a substance that is the subject of the litigation, and these principles might be unknown and of assistance to his employer's opponent. An expert's opinion may generate new ideas or theories that can be put to use by the adversary, or lead the adversary to examine facts that otherwise would not have been explored. Such theories and facts may be those most appropriate to consider in resolving the issues in the case. Permitting only limited discovery of trial experts hinders the adversary's ability to learn of these facts and theories and therefore may prevent resolution of a dispute based on the truth. Limitations on in-house expert discovery can be seen as implicit permission to "hold back" relevant data if other discovery requests do not call for its disclosure.\textsuperscript{72}

However, these same arguments are equally applicable to other experts who are clearly covered by the rule. In the usual case, they will know of facts and may have formed opinions that may be of use to the adversary. Yet discovery of such information is clearly limited by the rule.\textsuperscript{73} Thus, the ambiguities of rule 26(b)(4) should not be resolved with a mere flick of the hand and the incantation of "liberal discovery," with a resultant brew of discovery with no special limitations. Rather, inquiry must be made into whether discovery of in-house experts may be more useful than that of other experts in effectuating the goals of discovery. If so, such a distinction may justify broader discovery than is permitted of other experts.

One possible basis upon which to distinguish the value of information obtained from a regular employee from that obtained from other experts is that as a practical matter, it is potentially more useful to the discovering party at trial. If discovery elicits opinions from the regularly employed expert that are adverse to his employer, the adversary may attempt to call the employee as a witness at trial.\textsuperscript{74} If the testimony at trial is consistent with that obtained through discovery, it may be seen as courtroom "dynamite" by the jury. The fact that the witness is or was an employee

\textsuperscript{72} Professor Graham has noted that non-testifying experts also may have made inquiries that form the basis of opinions of testifying experts. Deeming such non-testifying experts as "second-tier" experts, he notes that while testifying experts would be required to disclose information received from them that form the bases for their opinions, under the current rule the validity of that data cannot be questioned through discovery of the non-testifying expert. Graham, \textit{Part Two}, supra note 71, at 196-99.

\textsuperscript{73} See \textit{Fed. R. Civ. P.} 26(b)(4).

\textsuperscript{74} Professor Graham notes that while "the law is unclear as to whether a party may compel testimony at trial from his adversary's expert or from any other expert whom the calling party has not retained," most states permit such a practice, and the general federal approach permits it. Graham, \textit{Part One}, supra note 3, at 934-36. See also \textit{4 J. Moore, supra note 3}, \textsuperscript{\textdagger} 28.66[1], at 26-469 (general American rule is that an expert stands on the same footing as any other witness and may be compelled to testify).
of a party indicates that that party has some confidence in his abilities, perhaps more so than an expert hired on a short-term basis. The fact-finder may assume (legitimately or not) that the employee has access to a broader range of factual data on which to base his opinion than does the expert who was hired independently and was shown only what the employer chose to reveal. In addition, testimony adverse to his employer may appear to be contrary to an employee's interest. There is a distinct likelihood that the testimony of such a witness would, for these reasons, be given more weight by the fact-finder than that of other expert witnesses.\footnote{Professor Graham notes that disclosure at trial that an expert was previously retained by the examining party's opponent "is an obvious attestment of the expert's qualifications, and disclosure of the expert's unfavorable opinion being presented by the opponent may be highly influential with the jury. The jury will probably give undue weight to the expert's testimony solely because they know the opponent consulted the same expert." Graham, Part Two, supra note 71, at 195. He suggests prohibitions on such disclosure. Id. at 196. The same, if not more, weight would likely be given to the unfavorable testimony of a regular employee. Yet, it would seem much more difficult to avoid disclosure of the employment relationship.}

However, the fact that discovery of in-house experts may lead to more "useful" evidence to the adversary than discovery of other experts does not necessarily lead to the conclusion that there is a weightier justification for discovery. It may actually be a reason to deny discovery. In many, if not most, cases, the extra weight given to this testimony as a practical matter would be inappropriate. If any issue that turns on expert testimony merits a trial, the issue is by definition subject to legitimately differing opinions. The fact that one expert is regularly employed by a party does not in and of itself make his opinion more legitimate than others. Only his relative qualifications and experience should make a legitimate difference in this regard. Because the jury may give extra weight to the employee's testimony because of the employment relationship, however, the party calling him is interjecting testimony that can be seen as prejudicial. Whether this prejudice outweighs the probative value of the evidence so as to warrant its exclusion at trial may be subject to question, but its mere existence destroys the "utility" argument for more expansive discovery than that permitted of other experts. The increased practical utility of the evidence to the discovering party does not make it more relevant than evidence that could be obtained through discovery of other experts.

Another basis for distinguishing discovery of in-house experts from that of others stems from the possibility that in fact, because of their employment and familiarity with their employer, in-house experts may be aware of more facts than independent experts. There is more potential relevant information in the mind of the regularly employed expert than in the minds of others. The more potential relevant information there is to be obtained, the argument would run, the more there is to be learned through discovery, and thus the more its goals will be effectuated.
This argument also has its flaws. First, the only reason an employee, because of his employment, would have knowledge of more facts about his employer than would an expert contracted for the purpose of litigation is that the employee had access to these facts prior to his work in anticipation of litigation. Rule 26(b)(4) does not preclude discovery of these facts, even from experts. It only limits discovery of facts known and acquired or developed by experts in anticipation of litigation or for trial, not those obtained earlier. It does not limit discovery of the knowledge gained by persons who were actors or witnesses to the occurrence underlying the suit. Although an employee may be a quicker study as an expert because of his familiarity with his employer's operations, the additional knowledge the employee may possess because of his regular employment is not shielded from the adversary's view. Thus, the possibility that the employee may have more potential relevant information than other experts that may be obtained if discovery is freely permitted does not justify distinguishing him from other experts in discovery. The additional information is discoverable even if the rule is applied to the in-house expert, and avoiding its limitations will not make additional information available.

Second, the rule itself makes no distinction among retained experts dependent upon how extensively they have reviewed the party's operations and practices. In many cases the retained experts may well eventually acquire more "background" information upon which to form their conclusions than the employee who is asked to look into the matter. The fact that one is a regular employee does nothing to distinguish him from a retained expert who has been immersed in the party's practices. His status merely gives him a distinction without a difference.

Thus, no valid justifications based on effectuating the general purposes of discovery are apparent to distinguish in-house experts from others. This implies that they should receive at least as much protection as other experts if the other policies underlying the rule are applicable. However, before making a final conclusion to this effect and determining the proper degree of protection, if any, those other policies should be explored.

B. Financial Unfairness

The existence of financial unfairness resulting from discovery of in-house experts and the capacity of rule 26(b)(4) to rectify it has a bearing on the extent to which discovery should be permitted. If no financial unfairness exists, at least one policy underlying the rule's limitations is not present, arguably justifying more liberal discovery than is permitted of experts.

---

16 See supra notes 17-18 and accompanying text.
clearly covered by the rule. On the other hand, if the rule cannot rectify any financial unfairness to the extent it does in the context of discovery of other experts, more extensive limitations on discovery might be justified.

Some have suggested that no financial unfairness concerns are presented when discovery is sought of regularly-employed experts. One federal magistrate, holding in-house experts to be unprotected by rule 26(b)(4) stated, "Of course, this fact [that the expert was an employee of the defendant] would also not warrant the defendant seeking expenses or compensation for the time of the expert." Professors Wright and Miller also take this position without explanation.

Notwithstanding these unexplained suggestions, however, financial unfairness clearly exists if no compensation is provided on discovery. The employer presumably will pay the in-house expert wages for time spent working on the litigation and responding to discovery. Although a discovering party might argue that these expenditures reflect an overhead expense that would have been incurred without litigation, this argument ignores the fact that the expenditures would not have been made for the work upon which discovery is sought. If the employee is diverted from other tasks, the employer loses the benefits of the employee's productivity resulting from those tasks, or incurs expenses in hiring a substitute employee to pursue them. If the employee's regular position entails work solely related to litigation, the employer will have incurred expenses in creating the position and the workplace, and the existence of the position without the litigation cannot be assumed. In either event, an employer usually will have incurred expenses in developing a regular employee's expertise. A party obtaining discovery of in-house experts is reaping the benefits of these costs incurred by the employer in the same manner that occurs with respect to "retained or specially employed" experts. Absent compensation by the discovering party, comparable "financial unfairness" would flow from free discovery.

Thus the pertinent question becomes whether this financial unfairness can be rectified by the provisions of the current rule. It attempts to remedy the financial unfairness resulting from discovery of non-testifying "retained or specially employed" experts by providing that the court (1) shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery and (2) shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses

---

[38] It is not clear, however, that lack of financial unfairness would favor more liberal discovery. The rule attempts to rectify financial unfairness when it exists. Assuming rectification is adequate, no financial unfairness does exist in fact when experts clearly covered by the rule are subject to discovery. Yet, discovery of these experts is still limited.


reasonably incurred by the latter in obtaining facts from the expert. The first requirement can be met by requiring payment to the employer of the wages paid to the employee on account of the time spent by the latter responding to discovery. While such a practice does not comport with a literal reading of the rule, it can easily be viewed as a form of indemnity consistent with the rule's overall scheme to prevent financial unfairness.

The only difficulty with meeting the second requirement is determining the appropriate amount. Allocation of expenses for in-house experts poses problems not present with respect to experts in other categories. With respect to the latter, it will normally be quite simple to ascertain the total "fees and expenses incurred ... in obtaining facts and opinions from the expert." This will be the total amount paid to the retained expert, and the only debatable question under the rule will be what constitutes a "fair portion" to compensate the party who hired the expert.

Where the expert is a regular employee of a party, however, the total expense incurred in obtaining the benefits of his expertise is not so easily ascertained. Professor Graham presumes that the salary of a regular employee engaged in studying litigation would be accounted for in the employer's records as litigation costs rather than, for example, research and development. If an employer did so account for the employee's wages, it would seem at first glance appropriate to use the total wages so allocated on the litigation as the "base" from which to determine the appropriate expense allocation. However, use of this figure will fail to remedy the discovering party's appropriation of other costs, such as productivity and training costs, incurred by the employer. These types of costs are not incurred when a party uses an outside expert.

The unfairness of leaving these amounts uncompensated may be at least partially alleviated by adding a premium to the wages paid to the employee for his work on the litigation in determining the amount incurred by the employer. A benchmark, although somewhat arbitrary, figure for the appropriate amount can be the "going rate" for independent experts with similar qualifications in the employee's field. Because the employee is in

---

81 FED. CIV. P. 26(b)(4)(C).
82 Logan argues that the provision requiring compensation of an expert for his time is inconsistent with an intent to include in-house experts within the rule. Logan, supra note 3, at 11. This seems questionable. The rule simply attempts to rectify potential financial unfairness resulting from discovery of experts by requiring compensation to the appropriate person. In the usual case, this will entail some compensation directly to the expert where the time expended is clearly attributable to the discovering party. This is what the rule provides. It is difficult to perceive that the rule anticipates that no such compensation from the discovering party would be appropriate if someone other than that party paid the expert for his time, through an "advance," for example. This should be the reading of the rule regardless of whether the expert is a regular employee.
83 FED. R. CIV. P. 26(b)(4)(C).
84 FED. R. CIV. P. 26(b)(4)(C).
85 Graham, Part One, supra note 3, at 942 n.197.
essence a substitute for an expert who would charge the "going rate," and
because an outside expert's education costs and market "production value"
are presumably reflected roughly in this rate, it is not unfair to use it as
the equivalent for the expenses incurred by the employer. This rate
multiplied by the hours expended by the employee on the litigation can
then be used as the base from which to allocate a "fair" portion to be paid
by the discovering party, in the same manner applied in determining ap-
propriate compensation in the case of retained experts.

Thus, although financial unfairness may result from permitting un-
compensated discovery of in-house experts, it can be remedied in a man-
ner designed to approximate, albeit roughly, that provided for in the rule
for independent experts. Consequently, the financial unfairness policy does
not counsel greater or lesser limits on discovery of in-house experts than
exist with respect to "retained or specially employed experts."

C. The "Free Ride" Policy

Rule 26(b)(4)'s effectuation of the free ride policy through its protection
of expert trial preparation apparently envisions the following scenario. In
many instances a party will employ more than one expert to study the mat-
ters subject to litigation, but only some of them will testify. Those who
will testify often will not be identified until relatively late in the litigation
process. Prior to the identification of trial witnesses, a "mulling over" pro-
cess involving the experts, party, and attorney presumably will occur. They
will discuss and develop various theories on the issues requiring expert
testimony. Decisions will be made to press some theories in litigation and
to abandon others. Once these decisions are made, those experts who will
be used as witnesses will be identified and the theories embraced will be
disclosed. The theories to be used at trial may be disclosed through
discovery of the experts who will testify, and perhaps through inter-
rogatories that request opinions or contentions that relate to fact or the

See Fed. R. Civ. P. 26(b)(4) advisory committee note. ("Discovery is limited to trial
witnesses, and may be obtained only at a time when the parties know who their expert
witnesses will be. A party must as a practical matter prepare his own case in advance of
that time. . . ").

(S.D.N.Y. 1973), where discovery of an accountant was denied as to matters to which he would
not testify at trial. At a deposition, the accountant testified that "he checked, analyzed and
commented on various drafts of claims prepared by Inspiration employees, and that he had
since worked with them and Inspiration's counsel in preparing for trial." Id. at 208. The court
stated that to permit discovery "would tend . . . to expose the theories and opinions that
were sifted to arrive at the theory of the claim for relief with the aid of an expert." Id. at
210. See also Graham, Part One, supra note 3, at 942 n.197 (suggesting a specially employed
expert "would assist the attorney in understanding various complex matters, in formulating
strategy for the presentation of expert information, and in preparing cross-examination of
the opponent's expert.").
application of law to fact. However, to effectuate the free ride policy, the actual mulling over process of developing and sifting through various potential theories on the pertinent issues is protected, absent "exceptional circumstances."  

With the foregoing as the anticipated scenario, it is clear that the free ride policy is applicable to in-house experts as well as independent ones. The protected process of sifting and developing expert theories is as likely, if not more likely, to occur with regularly-employed experts as with contracted ones. Indeed, because regular employees may have more familiarity with the product or process at issue and because they are readily available, they often will be the most logical candidates for the "mulling over" task. In addition, because they may be involved in this process with independent experts, unrestricted discovery poses an unnecessarily high risk that they will disclose the facts and opinions acquired or developed by independent experts that are explicitly protected by rule 26(b)(4), thus thwarting its literal proscriptions.

A conclusion that discovery of in-house experts is limited by the free ride policy also is consistent with discovery principles that do not pertain directly to experts. Rule 26(b)(3), which was enacted at the same time as rule 26(b)(4), extends work product protection not only to materials prepared by an attorney, but also to those prepared by a party. The rule explicitly protects the work product of a party's "agent," a term that encompasses employees. Absolute immunity attaches to the opinions and conclusions of these persons, an immunity that rule 26(b)(4) abrogates completely only with respect to experts who will testify, and then only regarding their proposed testimony. Similarly, the attorney-client privilege applies to in-house as well as independent counsel. These principles reflect

---

90 Cf. Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1980) where the court denied discovery of information obtained by an expert who had previously been an independent consultant on general energy policies when the information sought was obtained after he was asked to give assistance on potential litigation. In language that is equally applicable to in-house experts, the court stated: "The rule's tacit acknowledgement of the necessity of meticulous preparation has equal force whether the expert is one originally and exclusively retained for anticipated litigation or one whose employment responsibilities are expanded to encompass consultation and advice in expectation of litigation." Id. at 993.
95 Rule 26(b)(3) is explicitly subject to the provisions of rule 26(b)(4). At least one court has held, as an alternative to a conclusion that an in-house expert's reports were protected by rule 26(b)(4), that they were protected by rule 26(b)(3). See Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972).
a view that the policies underlying protection of the trial preparation process extend to all persons legitimately engaged in it, including employees, not simply to independent attorneys. In light of this view, it appears that that discovery of all aspects of the "mulling over" process, regardless of whether or not the experts involved are in-house experts, is limited. Indeed, requests for free discovery into this process is analogous to asking for all the sources used by an attorney in devising his ultimate legal theories, a request clearly not within the scope of the discovery rules.

The only difference between regularly employed experts and independent experts that arguably relates to the sub-policies of the free ride policy is that of the employer's relatively easy access to its employees. A discovering party can argue that because of the ease of access, an employer will not "work very hard" to acquire the information sought and therefore the policy of encouraging diligence will not be significantly frustrated by permitting discovery. One flaw in this argument is that the rule makes no distinctions premised on the amount of diligence that the party subject to discovery has exhibited. It limits discovery of a retained expert even if he is the only expert who has been consulted and his compensation is minimal. Second, even if the degree of diligence were a relevant factor, the easy task of asking the employee to study the issues is not the only diligence being appropriated. The work of the employee is the substance of what is being taken and therefore should be imputed to the employer in ascertaining the extent of the appropriation. Finally, the practical implication of this argument for discovery is that the employer should search out and hire independent experts if it desires limitations on discovery. To encourage such a practice would encourage economic waste, contrary to rule 1's admonition that the Federal Rules of Civil Procedure be construed to secure inexpensive determinations of actions.

Footnotes:

98 However, Professor Friedenthal states that opinions and conclusions of experts are not like the impressions of an attorney or his client, but constitute evidence in themselves. See Friedenthal, supra note 41, at 472-73. He criticizes cases differentiating facts and opinions, permitting discovery of the former: "It is impossible to justify such a distinction within the framework of the Hickman doctrine. Either expert information ought to be protected because it forms a part of the strategy of the party's case, or it ought to be revealed in its entirety." Friedenthal, supra note 41, at 473. By protecting both facts and opinions, the rule appears to incorporate Professor Friedenthal's first option. This is so notwithstanding the advisory committee note's protest that the rule rejects the work product rationale. See supra notes 48-61 and accompanying text.

99 In fact, the rule's total proscription of discovery of informally consulted experts results in greater protection against discovery of experts with respect to whom the employer normally would exercise a lesser degree of diligence than it would with retained or specially employed experts. See supra note 22 and accompanying text.

100 Professor Graham has raised a similar criticism. See Graham, Part One, supra note 3, at 943 n.199.

101 FED. R. CIV. P. 1. A discovering party may argue that this policy would be better effectuated by permitting free discovery, as that may reduce the expense of litigation by possibly negating the need to hire its own expert. However, this argument fails because even if the discovering party was permitted to discover the opposing party's expert, he would have to
Where the discovering party seeks the fruits of tasks that are similar to, if not part of, an in-house expert’s regular duties, the discovering party might make another argument for discovery related to the free ride policy. This argument is that the information sought was prepared in the ordinary course of business.

For example, an in-house expert, as part of his regular employment duties, may analyze products that are defective with a view towards product improvement. On occasion, the employer may request the employee to analyze a product that is the subject of litigation. In this context, the discovering party might argue that discovery is permissible because it is seeking materials that are regularly prepared by the employee. Analogizing cases interpreting rule 26(b)(3) as not protecting materials prepared in the regular course of business,\(^1\) the discovering party may argue that such materials would have been prepared even without the potential of litigation. The fact that the materials sought would have existed without litigation leads to the conclusion that the policy of encouraging diligence in trial preparation will not be undercut by permitting discovery.

This argument ignores the other sub-policies of the free ride policy, discouragement of laziness and protection of confidentiality in the “mulling over” process. In addition, the employer may have created the employee’s position in part because of its desire to have qualified persons work on litigation. If free discovery is permitted, it will be a disincentive to the creation of such positions, or to asking employees to pursue such work. Thus, the policy of encouraging diligence in trial preparation may in fact be adversely affected by permitting free discovery. Other social benefits stemming from the existence of these types of employment positions, such as the improvement of product safety, may also be adversely affected.\(^2\)

\(^1\) See cases cited in C. WRIGHT & A. MILLER, supra note 3, § 2024, at 199.

\(^2\) Several cases have suggested that a policy of improving public safety is a pertinent factor in resolving discovery disputes. In Hermansdorfer v. American Motors Corp., 96 F.R.D. 13, 15 (W.D.N.Y. 1982), the court stated that to subject an expert employed for litigation to full discovery because he was also retained to assist in product improvement “would undermine the important public policy of encouraging defendants to repair or improve their products without fear that such actions will later be used against them in a lawsuit....” In United Air Lines v. United States, 26 F.R.D. 213 (D. Del. 1960) discovery was sought of opinions and conclusions not made in anticipation of litigation by experts who had investigated an air crash. Denial of discovery was premised in part on the government’s contention that disclosure would discourage investigators from testifying fully before investigatory boards and from assessing blame freely, resulting in a detrimental effect on flight safety programs. Id. at 219. Similarly, in Gilman v. United States, 53 F.R.D. 316, 319 (S.D.N.Y. 1971), reports of director and board of inquiry of mental hospital were held not subject to discovery because of the need to compensate the expert for that discovery under rule 26(b)(4)(C). Thus, discovery will not significantly reduce the discovering party’s expenses. In addition, in most cases the discovering party is likely to hire its own experts regardless of its ability to obtain discovery of its opponent’s experts. Finally, even if the argument has some validity, the other policies discussed in this article appear to have been deemed, through the promulgation of the rule, to override it, as a similar argument could be made with respect to experts clearly covered by the rule.
The true issue underlying this argument is whether the material sought was in fact prepared in anticipation of litigation. If it was not, the expert's product simply will not fall within the rule, but this fact gives no warrant for distinguishing in-house experts from others when their work was in anticipation of litigation. At least one recent work product case has recognized that even though an employee's "product" may be part of his regular duties, at some point the focus of the employee's activities will become in anticipation of litigation, and once this shift in focus has occurred, it should be protected by the work product policies. A similar focus is appropriate in the in-house expert context. If, in fact, the employee's work was in anticipation of litigation and therefore fits within the scope of rule 26(b)(4), the free ride policy should apply fully.

The foregoing shows that the policies of liberal discovery do not counsel more liberal discovery of in-house experts than that provided other experts under rule 26(b)(4). It shows that financial "unfairness" concerns exist with respect to discovery of in-house experts but can be accommodated by means similar to those provided by the existing rule. It also illustrates that the free ride policy applies to in-house experts and mandates some limitations upon their amenability to discovery. Thus, resolving the in-house expert dilemma by permitting unrestricted discovery is inappropriate. However, the appropriate degree of limitation on in-house expert discovery is not apparent from the application of these policies. One of them, the free ride policy, justifies both the total prohibition against discovery of informally consulted experts and the qualified protection of retained or specially employed experts. On the surface, analogizing in-house experts to either category does not seem unreasonable if focus is solely on this policy. However, analysis of the other policy underlying rule 26(b)(4), deference to an expert's feelings of loyalty, shows that the most appropriate analogy is to retained or specially employed experts.

D. Loyalty

The manner in which the loyalty policy bears on rule 26(b)(4)'s contrast between total prohibition against discovery of informally consulted experts and limited discovery of retained or specially employed experts suggests the appropriate standard for discovery of in-house experts. The impact of

---

105 See supra notes 25-32 and accompanying text.
106 See cases and sources cited supra notes 64-65 and accompanying text.
107 See supra notes 53-67 and accompanying text.
this policy under the rule is reflected by what might be called the "anomaly" of the rule's total prohibition of discovery of informally-consulted experts.

This anomaly is that although the rule gives greater protection to informally consulted experts than it does to retained or specially employed experts, fewer limiting policies apply to the former. The only limiting policies that clearly apply to discovery of informally consulted experts are two of the three aspects of the free ride policy, discouraging laziness (i.e., discouraging reliance on the other party's efforts to find experts for use in the litigation), and encouraging diligence (i.e., encouraging parties to seek out available expertise in their trial preparation). Financial unfairness is not a major concern because the fact that the expert was "informally consulted" implies that minimal, if any, compensation has been paid him. The confidentiality aspect of the free ride policy is of minimal relevance because informal consultation implies that the expert was not deeply involved in the protected "mulling over" process, learning about the case and developing strategy. Respect for an expert's feelings of loyalty, in the sense that this policy protects against discovery of experts, has little applicability because an expert who has not been hired generally will have minimal feelings of loyalty towards the party who consulted him.

This anomaly is explained by the fact that informally consulted experts are freely available for hire by the party seeking discovery. Because their consultation was only informal, no emotional or legal inhibitions will normally prevent them from working for the other side. Thus, the rule prohibits discovery and instead requires the party seeking their expertise to approach them personally, effectuating the policies of discouraging laziness and encouraging diligence. In short, the non-existence of significant feel-

---

108 See USM Corp. v. American Aerosols, Inc., 631 F.2d 420, 425 (6th Cir. 1980) (lack of compensation is an important factor in concluding that an expert has been "informally consulted"). But see Note, Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4), 67 IOWA L. REV. 349, 357 (1982) (suggesting that if payment were dispositive, parties could totally hide experts from discovery by nonpayment).

109 Professor Graham speculates that informally consulted experts are likely to cooperate and be helpful if consulted by the adversary. See Graham, Part One, supra note 3, at 939 n.172. He would define an informally consulted expert as one the consulting party did not consider to be of any assistance. Id. at 939 n.182. He suggests that free discovery of such experts would discourage a search for experts. Id. at 940. He would not make compensation a determinative factor in classifying informally consulted experts.

In Ager v. Jane C. Stormont Hosp. & Training School for Nurses, 622 F.2d 496 (10th Cir. 1980), the court declined to adopt Professor Graham's approach. It stated that the status of an expert must be determined on an ad hoc basis, considering (1) the manner in which the consultation was initiated; (2) the nature, type, and extent of information or material provided to, or determined by, the expert in connection with his review; (3) the duration and intensity of the consultative relationship; and (4) the terms of the consultation, if any (e.g. payment, confidentiality of test data or opinions, etc.).

Id. at 501.
ings of loyalty on the part of informally-consulted experts makes their expertise freely available if diligence is exercised by the party seeking discovery, and thus justifies the total proscription of discovery.

As a practical matter, however, loyalty of a retained expert to his employer will preclude his consulting for the other side.\(^\text{110}\) Because of this fact, the opposing party will be unable to obtain informal assistance through a retained expert or to hire him for its own use, and the rule limits formal assistance through discovery. The resulting overall scheme reflects a preference that parties seek out and utilize experts who have no strong loyalties to the opposition, thereby respecting such loyalties.\(^\text{111}\)

The rule, however, recognizes that as a practical matter the only way information can be obtained from a retained expert is through discovery. Therefore it abrogates loyalty considerations and permits discovery if "exceptional circumstances" exist whereby a party cannot through due diligence find qualified experts who can assist it on the subject matter of a case.\(^\text{112}\) Presumably under these circumstances, discussions of trial strategy will remain protected, but the general expertise of the expert may be explored. The rule thereby also reflects a preference that, notwithstanding loyalty considerations, some qualified expertise should be available to all parties to a dispute. This preference justifies the limited discovery permitted of retained experts.

The fact that such "exceptional circumstances" justifying discovery of an expert retained by an opponent may exist furnishes the key to ascertaining the appropriate limitations of discovery of in-house experts. There may be occasions where the only qualified experts on an issue subject to litigation are the regular employees of a party.\(^\text{113}\) Their loyalty to their

\(^\text{110}\) Cf. Campbell Industries v. M/V Gemini, 619 F.2d 24, 26 (9th Cir. 1980) (affirming trial court order that characterized ex parte communications with an expert retained by an opposing party as a "flagrant violation" of the rules governing discovery of experts).

\(^\text{111}\) The preference has been reflected in at least one case dealing with discovery of in-house experts. See Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 205 (N.D. Miss. 1972) where the court, denying discovery of reports made by in-house experts, specifically noted that "plaintiffs either have, or had the opportunity to have, experts of their own selection make critical analysis and findings."

\(^\text{112}\) See Fed. R. Civ. P. 26(b)(4)(B); In re Sinking of Barge "Ranger I", 32 Fed. R. Serv. 2d (Callaghan) 1708, 1711 n.4 (S.D. Tex. 1981) ("Rule 26(b)(4) is intended to allow a party who cannot practicably obtain consultative expert advice or opinion on a given subject to discover the facts known or opinions held by an expert retained by another party in connection with that subject."). Professor Graham gives as an example of "extraordinary circumstances" a situation where "an object is no longer available, either having been destroyed or changed in form, therefore making the adversary's expert the only source of information concerning the object." Graham, Part One, supra note 3, at 932 n.139. See also Friedenthal, supra note 46, at 484 (discovery of expert most necessary when a hired expert is the only one practically available, or he formed his opinion before items were changed or altered).

\(^\text{113}\) For example, where the only facts a party alleging patent infringement has to support its charges are tests made by its expert employees with a view towards litigation, discovery of those tests to enable the defendant to meet those charges, and a finding of "exceptional circumstances" triggering its permissibility clearly seem appropriate. See Loctite Corp. v.
employer typically will be similar to, if not greater than, the loyalties of retained experts. Few will be willing to sacrifice potentially long-term employment for short-term assistance to their employer's opponent. Hence, they will be practically unavailable for use by their employer's opponent, as are experts under retainer in the ordinary case. Under these circumstances the rule's preference that some qualified expertise be available to all parties to a dispute mandates the availability of some discovery. Absolute preclusion of discovery would be inconsistent with the rule's overall scheme.

Because some limited availability of discovery of in-house experts is appropriate under the rule, in-house experts should be treated analogously to retained or specially employed experts. The standard applicable for discovery of these experts is readily available and, through experience, easy to apply. It also reflects the circumstances under which the rule contemplates the abrogation of loyalty considerations, which are at least as applicable to in-house experts as they are to retained experts.

CONCLUSION

If the drafters of rule 26(b)(4) had anticipated the problems its application to in-house experts would engender, they surely would have been more careful in their choice of words. Ambiguities and redundancy within the rule and advisory committee note have led to at least three different interpretations of how the rule applies in this context. In dealing with experts more clearly covered by the rule's language, clear policies were reflected. These policies are as pertinent to discovery of in-house experts as they are to others. Poor drafting is not a reason for ignoring those policies in the in-house expert context. Yet, many decisions that have attempted to untangle the linguistic mess of the rule and its advisory committee note, relying solely on the language of both, appear to have disregarded those policies.

The policies reflected by the rule support the conclusion that discovery of in-house experts should be treated in the same manner as discovery of "retained or specially employed" experts. Amendment of the rule to delete the adjective "specially" before "employed" would eliminate the confusion and be totally consistent with the policies reflected by the rule. Absent an amendment, courts should resolve the issue based on these policies.

Fel-Pro, Inc., 30 FED. R. SERV. 2d (Callaghan) 1587, 1596-97 (N.D. Ill. 1980). Although the Loc-tite court in this context found "exceptional circumstances," discovery might have been permissible on the ground that the experts were "fact" witnesses because they allegedly "discovered" the nature of the infringement and are analogous to fact witnesses who view conduct that allegedly leads to liability. See E. I. Du Pont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416, 421 (D. Del. 1959) (discovery granted in chemical patent infringement case where procedures used to determine chemical product approached being ultimate fact and major issue).
which were not intended to be abrogated in the context of in-house experts. Decisions that have failed to do so and have concluded that discovery is freely available are clearly wrong, as is the conclusion that total preclusion of discovery is the appropriate solution. Lawyers and judges know that all language is pliable and that meaning must be sought by looking beyond it. Courts should start looking beyond the fog. There is some daylight out there.