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Must the Show Go On? Defining When One Party May Call or Compel an Opposing Party’s Consultative Expert to Testify

Kathleen Michaela Brennan

Expert witnesses dominate the courtroom.\(^1\) Litigators, searching for the "perfect expert witness," consult and discard numerous experts.\(^2\) Commentators disagree whether the opposing party should be able either to call or compel these discarded experts to testify. Courts seeking to regulate expert discovery have been unable to reconcile the conflicting policy issues behind the rules of discovery.

1. For an informative survey of the prevalence of expert witnesses, see Samuel R. Gross, Expert Evidence, 1991 WIS. L. REV. 1113, 1119. Of the 529 civil trials in the Gross sample, 86% had expert witnesses. Id. Each trial in which experts appeared had an average of 3.8 experts. Id. In addition, 60% of the expert witnesses were "repeat" witnesses who had testified as an expert at least twice in the last six years. Id. at 1120. Another source that courts and commentators often cite is Michael H. Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, an Empirical Study and a Proposal, 1977 U. ILL. L.F. 169. Graham conducted a survey of 222 federal judges and trial lawyers to determine their actual practices in discovering expert witnesses. Id. at 171; see also David S. Day, The Ordinary Witness Doctrine: Discovery of the Pre-Retention Knowledge of a Nonwitnes Expert Under Federal Rule 26(b)(4)(B), 38 ARK. L. REV. 763, 763 (1985) ("Modern litigation has entered an age of experts.") (collecting sources); Matthew R. Wildermuth, Note, Blind Man’s Bluff: An Analysis of the Discovery of Expert Witnesses Under Federal Rules of Civil Procedure 26(b)(4) and a Proposed Amendment, 64 IND. L.J. 925, 940-42 (1989) (noting increased use of experts).

2. Commentators criticize the current process of obtaining expert testimony as more concerned with style than substantive testimony. See, e.g., Gross, supra note 1, at 1126-35 (describing the superficial qualities that litigants seek in experts and the disgust that this shallow search engenders in all of its participants—judges, lawyers and the experts themselves). One attorney describes her ideal expert trial witness as someone "around 50 years old, having some gray in his hair, wear[s] a tweedy jacket and smoke[s] a pipe." Id. at 1133 (quoting Hyman Hillenbrand, The Effective Use of Expert Witnesses, BRIEF 48-49 (1987)). Some experts revel in this showcase by advertising themselves in legal publications as experienced courtroom performers. Id. at 1131 (describing expert advertisements in legal periodicals), 1132 (describing expert referral services).
Although this problem arises in various factual scenarios, three cases exemplify the voluntary and compelled sides of the consultative expert dilemma. In *Healy v. Counts*, the plaintiff in a medical malpractice action retained two doctors as consultative expert witnesses, but both experts determined there was no malpractice. One expert happened to know the attorney representing the defendant and, when the attorney asked the expert to review the medical records, the expert realized the records belonged to the same case and offered to testify for the defendant. In *Fenlon v. Thayer*, the plaintiffs in a medical malpractice action obtained a copy of a report from the defendant's medical expert during pre-trial discovery. The plaintiffs decided to subpoena the expert to testify at trial despite the expert's unwillingness to testify for them.

Most courts confronting the consultative expert dilemma must decide whether they will admit the testimony of an expert willing to testify for the adverse party. In a few cases, one party asks the court to compel the expert's testimony. Commentators that have addressed this issue tend to ignore the distinction. This Note will focus on the more prevalent issue of

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3. See, e.g., Levitsky v. Prince George's County, 439 A.2d 600, 604-06 (Md. Ct. Spec. App. 1982) (allowing plaintiff to call an appraiser originally hired by the defendant to testify in a condemnation award; the appraiser calculated a high value for the plaintiff's property and the defendant thus decided not to call the appraiser as a testifying expert).

4. The “consultative expert dilemma” hereinafter refers to whether, when one party retains an expert and then elects not to use him, the opposing party may then call or compel him to testify.


6. Id.

7. Id.


9. Id. at 320.

10. Id. at 320-321.


allowing the voluntary expert to testify, but will also address arguments about compelling the testimony as necessary.

Despite the relative frequency\(^4\) of the consultative expert dilemma, no commentator has suggested a solution to the specific problem of either calling or compelling an expert formerly retained by the adverse party to testify.\(^5\) Moreover, most courts deciding this issue focus on Rule 26 of the Federal Rules of Civil Procedure and ignore the Federal Rules of Evidence.

This Note explains the conflicts raised by calling or compelling an adverse party's consultative expert witness to testify. Part I explains the rules of procedure and evidence, and outlines the conflicting case law. Part II criticizes courts applying rules of discovery to this evidentiary issue and explains that no traditional privileges protect the expert's testimony. Part III proposes an amendment to the Federal Rules of Evidence to admit the testimony of an adverse party's consultative expert if the proffering party demonstrates a reasonable need for the testimony, subject to the trial court's discretion to exclude unduly prejudicial testimony. This Note concludes that trial courts should admit the testimony of a consultative witness, if the proffering party demonstrates a "reasonable need" for the expert's testimony, to further open discovery policies, promote fairness, and contribute to the pursuit of truth.

I. A CONFUSING SCENARIO: OVERLAPPING RULES AND CONFLICTING CASE LAW

Currently, courts and commentators use Rule 26 of the Federal Rules of Civil Procedure to resolve the nontestifying expert dilemma in civil trials.\(^6\) Expert testimony issues rarely arise in criminal trials,\(^7\) and this Note will only briefly consider the rel-


\(^5\) Gross describes the dilemma as one of many issues currently facing expert witnesses and briefly discusses the conflicting perspectives and case law surrounding it. Gross, *supra* note 1, at 1149-51.

\(^6\) See *infra* notes 54-55, 58 and accompanying text (collecting cases).

\(^7\) Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of 'Plain Meaning' Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 861 (1992) ("most problems with expert testimony arise in civil cases."); see also discussion *infra* notes 121-
evant criminal matters. This Note proposes the creation of Rule 707 of the Federal Rules of Evidence to provide a superior resolution of this problem.

A. RULE 26 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND ITS CONFLICTING POLICIES

Most courts rely on either Rule 26 of the Federal Rules of Civil Procedure or its underlying policies to exclude expert testimony.\(^{18}\) Rule 26 prescribes the procedure for discovering expert witnesses.\(^{19}\) Under Rule 26, discovery of expert witnesses involves a preliminary exchange of information\(^{20}\) and possible subsequent discovery by depositions,\(^{21}\) interrogatories\(^{22}\) and other means of obtaining the expert's opinion or knowledge of the facts at issue. The rule assigns expert witnesses to two broad categories: "testifying experts" and "consultative experts,"\(^{23}\) which are those experts who will not testify at trial.

124 and accompanying text (describing effect proposed Federal Rule of Evidence will have on experts in criminal trials).

18. _E.g._, Campbell Indus. v. M/V Gemini, 619 F.2d 24, 26 (9th Cir. 1980) (ex parte contacts between defendant and plaintiff's consultative expert while expert was employed by defendant constituted a "flagrant violation" of Rule 26(b)(4)(B)).

19. Rule 26(b)(1) allows for liberal discovery of "any matter . . . relevant to the subject matter involved" and Rule 26(b)(4) exclusively concerns expert witnesses and provides further guidelines for discovery of expert witnesses. _Fed. R. Civ. P._ 26. Rule 26(b) reads, in relevant part:

(4) Trial Preparation: Experts.
   (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial . . . .
   (B) 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) [mental and physical examination reports] 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.


20. The 1993 amendments to Rule 26 require each party to disclose automatically "to the other parties the identity of any person who may be used at trial to present evidence." _Fed. R. Civ. P._ 26(a)(2). Each party also must disclose a report detailing the expert's opinion, the basis for the opinion, the expert's qualifications, the compensation the expert will receive, and a list of other cases in which the expert has testified in the preceding four years. _Id._


22. _Id._

23. Rule 26(b)(4)(A) allows a party to depose experts who will testify at trial. _Fed. R. Civ. P._ 26. Rule 26(b)(4)(B) concerns experts "retained" by a party "in anticipation of litigation" who are "not expected to be called as a witness at trial." _Fed. R. Civ. P._ 26. Two additional categories include informally-con-
Rule 26 grants the adverse party great latitude in conducting its discovery of testifying experts. The policy behind this liberal discovery rule is to allow the adverse party to prepare for an effective cross-examination. Accordingly, each party must identify its testifying experts, the topic about which the expert will testify, the "substance" of the expert's opinion, and a synopsis of the "grounds" of the opinion.

In contrast, Rule 26 restricts discovery of consultative experts. To obtain discovery of these experts, the party seeking discovery must demonstrate "exceptional circumstances" rendering alternative discovery methods of the subject matter "impracticable." Courts do not apply the "exceptional circumstances" rule in a uniform manner. This inconsistency stems, in part, from the clashing objectives of Rule 26.

sulted experts a party does not retain and experts a party does not retain in anticipation of litigation. Ager v. Jane C. Stormont Hosp., 622 F.2d 496, 500-501 (10th Cir. 1980). In Ager, the plaintiff in a medical malpractice action refused to reveal the names of its nontestifying expert witnesses. Id. at 498. The court remanded the case to determine whether the experts were retained, nontestifying experts, or informally-consulted experts. Id. at 504.

24. FED. R. CIV. P. 26 advisory committee's note (1970) (noting that the need for more open discovery of testifying experts is evident in "the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure").


27. FED. R. CIV. P. 26(b)(4)(B) (the party seeking discovery of the consultative expert must demonstrate "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means").

28. Compare Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 994 n.60 (D.C. Cir. 1980) (denying plaintiff's attempt to depose the defendant's consultative expert because the plaintiff had access to other bases of information and thus failed to demonstrate "exceptional circumstances" under Rule 26) and Mantolete v. Bolger, 96 F.R.D. 182-83 (D. Ariz. 1982) (same) with Coates v. AC & S, Inc., 133 F.R.D. 109, 110 (E.D. La. 1990) (allowing plaintiff to depose defendant's expert about his conclusions concerning tissue samples taken from decedent). In Coates, the court reasoned that exceptional circumstances existed because doctors had "difficulty in diagnosing mesothelioma" and although both parties could interview many experts, each might find only one supportive expert and the jury might incorrectly infer that experts evenly divided on the issue. Coates, 133 F.R.D. at 110.

In addition, commentators and courts do not always agree upon an interpretation of the "exceptional circumstances" test. Most commentators agree that the opponent may not discover the names of consultative witnesses without showing exceptional circumstances. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032 (1970 & Supp. 1993); Note, Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules
Rule 26's treatment of expert testimony does not make sense because the policy goals behind the rule conflict. Generally, the drafters of Rule 26 strove to establish more open channels of discovery and, thereby, a freer exchange of information. The drafters stressed the necessity of open discovery because, in their view, effective cross-examination and readiness for trial require "advance preparation." Hence, most commentators, noting these liberal discovery policies, agree that attorneys may not shield an expert from discovery or testimony simply because that person is an expert witness. In addition, some commentators see no difficulty in allowing a party to contact an expert


29. Fed. R. Civ. P. 26(b) advisory committee's note (1970) (referring to the need for "advance preparation" for cross-examination and the "fear that one side will benefit unduly from the other's better preparation"); Day, supra note 1, at 791 n.161 (noting that Rule 26(b)(4)(B) forms a "middle ground" between the conflicting policies of "open discovery" and no discovery).


31. Fed. R. Civ. P. 26(b)(4) advisory committee's note (1970). Furthermore, "effective rebuttal requires advance knowledge of the line of testimony of the other." Id.

32. See, e.g., Day, supra note 1, at 792 (asserting that consultative process, not expert, is partially immunized from discovery); 10 Fed. Proc., L. Ed. § 26, at 121 & n.60 (1988) (criticizing cases that excluded expert testimony solely because witness was expert) (citing cases); Jack H. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 460 (1962) ("Without special justification, communications with an expert ought not to be protected any more than communications of any other agent."); Kelly McDonald, Note, Gimme Shelter? Not If You Are a Non-Witness Expert Under Rule 26(b)(4)(B), 56 U. Cin. L. Rev. 1027, 1030 (1988) (describing prevalent practice of expert "sheltering" in which one party retains expert as consultative witness solely to prevent adverse party from discovering expert's opinion); see also Carrasquillo v. Rothschild, 443 N.Y.S.2d 113, 115 (N.Y. Sup. Ct. 1981) (discussing one party's ability to retain "outstanding" experts to "deny" the adverse party "access" to these excellent experts). To resolve this harmful practice, Congress should amend the Federal Rules of Civil Procedure. Solving the shielding of consultative expert witnesses, however, falls outside the scope of this Note.
favorable to its position, even if its opponent hired the expert first.33

Although open discovery benefits litigating parties, Rule 26 also seeks to prevent exploiting open discovery. The "unfairness rule" thus embodies a second major policy underlying Rule 26. A noted commentator defined the unfairness rule as follows: "it is unfair for one party, without expense, to obtain information from an expert who has been hired by the opposing party for an agreed compensation."34 The unfairness rule encompasses two policy arguments. The expert's testimony or knowledge may be the expert's property; therefore, taking the testimony or compelling it without pay is unfair.35 In addition, the unfairness rule asserts that unrestricted discovery procedures would "promote laziness" and result in one side doing the work for both sides.36 This rule discourages "free-riding," or building one's case upon efforts of the opposing party.37

Additionally, Rule 26 attempts to preserve the relationship between attorneys and experts by protecting consultative experts from abusive discovery practices38 and compelled testimony. Experts rely on their reputation for loyalty to the party that hired them.39 Compelling experts' testimony could destroy any reputation they have for loyalty by forcing them to testify

33. Gross, supra note 1, at 1150-51. In addition, a district judge for the Eastern District of New York finds "nothing unethical" in one party's interviewing the opponent's expert once it knows the opponent will not use the expert at trial. Joseph M. McLaughlin, Discovery and Admissibility of Expert Testimony, 63 NOTRE DAME L. REV. 760, 767-69 (1988) (collecting New York cases).
34. Friedenthal, supra note 32, at 479.
35. Id.
36. Id.
37. The advisory committee's note mentions its concern that "one side will benefit unduly from the other's better preparation." FED. R. CIV. P. 26 advisory committee's note (1970). One commentator has explained that Rule 26 requires each side to prepare its case before opening the case to discovery and cross-examination. Day, supra note 1, at 797 n.193; see also Ager v. Jane C. Stormont Hasp., 622 F.2d 496, 502 (10th Cir. 1980) (defining the unfairness rule as a rule "designed to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation").
38. One commentator has suggested that Rule 26 strives to avoid discovery abuse, by preventing the distortion of evidence, protecting nontestifying expert availability and providing clear rules for courts to follow. Day, supra note 1, at 792; see also McDonald, supra note 32, at 1030 (describing expert shielding and concluding that it violates drafters' intent in Rule 26 for more liberal discovery).
for the other side. Compelling expert testimony might discourage experts from acting as consultative witnesses, diminishing the pool of eligible experts. In particular, experts who testify for unpopular parties, such as doctors who testify for plaintiffs in medical malpractice suits, are already few in number.

Parties also use the attorney-client privilege and the work product rule to prevent courts from compelling their consultative expert to testify for their opponent. The attorney-client privilege protects communications made by the client to the at-

40. E.g., Healy v. Counts, 100 F.R.D. 493, 497 (D. Colo. 1984) (expressing concern about negative impact that adverse consultative expert testimony would have on available medical experts in medical malpractice actions); Ager, 622 F.2d at 503 (refusing discovery because it “would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel”).

41. Ager, 622 F.2d at 503 (noting “widespread aversion” of medical experts to medical malpractice litigation and limited availability of nontestifying medical experts, and concluding that “absent special circumstances, discovery evaluative consultants’ identity [should] be denied”; see also Healy, 100 F.R.D. at 497 (arguing that allowing consultative witness to testify for adverse party would diminish “pool of potential expert medical [malpractice] witnesses”). One commentator includes school desegregation experts, who testify on behalf of school districts charged with segregation, within this caste of unpopular experts. Gross, supra note 1, at 1131 n.55.

Some courts, in contrast, use the particular role of doctors as experts in medical malpractice cases to bolster the contacts allowed between the expert and the adverse party. In Lazorick v. Brown, 480 A.2d 223 (N.J. Super. Ct. App. Div. 1984), for example, the court rejected the plaintiff’s argument that the doctors treating the patient owed the plaintiff a duty of loyalty which forbade contact with the defendants. Id. at 229. The Lazorick court reasoned that the experts “may sympathize with another doctor who they believe has been unjustly accused of malpractice. They may feel an obligation to see justice done as they view it.” Id.

42. At least one court has established a precise definition of the common law attorney-client privilege:

[W]here legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relevant to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.


43. Rule 26 defines the attorney work product rule: “[t]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” FED. R. CIV. P. 26(b)(3).

44. Several commentators have listed these two rules and add the “rule of unfairness” as a third rationale. Friedenthal, supra note 32, at 465; David G. Crockett, Note, Civil Procedure—Discovery of Expert Information, 47 N.C. L. Rev. 401, 403-04 (1969).
torney in her capacity as attorney. This privilege encourages frank and open communication between the client and attorney so that the attorney can best assist the client. The work product rule protects documents prepared in anticipation of litigation by the attorney or by a "representative" acting on behalf of the party. In the context of the discovery of experts, courts must decide whether an expert qualifies as a party's "representative." The attorney-client privilege and the work product rule, however, do not compel courts to exclude disputed expert testimony; in fact, courts have argued to the contrary. Absent such a privilege, the trial court should admit the testimony.

B. A MAZE OF CONFLICTING CASE LAW UNDER RULE 26

Most commentators agree that federal and state courts have mishandled the issue of admitting the testimony of an expert originally retained by the opponent. Courts employ the policy

45. See supra note 42 (defining attorney-client privilege). When deciding whether the attorney-client privilege prohibits discovery or compelled testimony, courts often employ criteria that evaluate the "type of agent" who communicated with the attorney and "the nature of the communication." Friedenthal, supra note 32, at 457 (citing cases).

46. 8 WRIGHT & MILLER, supra note 28, § 2032 (citing cases).

47. The work product rule is not a privilege, but a judicially-developed theory designed to protect an attorney's thought processes in building a case. See Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the Supreme Court held that "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties... fall[] outside the arena of discovery." Id. at 510. The Federal Rules of Civil Procedure codify the Hickman decision in Rule 26. FED. R. CIV. P. 26(b)(3).


49. See Friedenthal, supra note 32, at 471-74 (discussing case law distinguishing attorneys from their "agent" for work product purposes).

50. E.g., Sun Charm Ranch, Inc. v. City of Orlando, 407 So. 2d 938, 939 (Fla. Dist. Ct. App. 1981) (noting that "[t]he traditional barriers to this practice—work product privilege, attorney-client privilege, and 'unfairness'—have been substantially eroded in this context").

51. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 501(06), at 501-66 (1993) (citing cases) [hereinafter WEINSTEIN].

52. See, e.g., Graham, supra note 14, at 934 (stating that the "law is unclear"); Crockett, supra note 44, at 406 ("Confrontation with the morass of case law on discovery of expert information should dispel a court's temptation to resolve a case solely on the basis of precedent. Surely decisions can best be reached through consideration of each case's individual circumstances in the light of underlying discovery policy."); James L. Hayes & Paul T. Ryder, Jr.,
considerations underlying Rule 26 in a contradictory fashion to both exclude and admit the consultative expert’s testimony. Some courts rely upon the rule’s plain language to exclude the testimony. In contrast, other courts allow counsel to question the expert witness about his original consultation with the opponent because the questioning affects the weight and credibility of the expert’s testimony. Finally, still other courts seek to strike a middle ground, admitting testimony from the opponent’s rejected consultative expert, but excluding testimony about the expert’s original position with the opponent.

When courts exclude testimony from the opponent’s consultative expert, they typically base their decision on the policy rea-

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53. E.g., Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984) (excluding consultative expert’s testimony because proffering party “circumvented” discovery rules in bad faith); Healy v. Counts, 100 F.R.D. 493, 496 (D. Colo. 1984) (excluding testimony of doctor originally retained by plaintiffs in medical malpractice action); Young v. Strong, 499 N.Y.S.2d 988, 990 (N.Y. App. Div. 1986) (relying upon unfairness rule to exclude consultative expert’s testimony and stating that “[w]here there is no difficulty in obtaining other expert testimony, one party may not call as a witness another party’s expert”).


55. E.g., Campbell Indus. v. M/V Gemini, 619 F.2d 24, 26-27 (9th Cir. 1980) (holding that ex parte meetings between defendant and expert retained by plaintiff constituted a “flagrant violation” of Rule 26). The Campbell court did not specify which provision of Rule 26 the defendant’s actions violated. See id. at 27.

56. E.g., Fenlon v. Thayer, 506 A.2d 319, 322-23 (N.H. 1986) (holding that plaintiff in medical malpractice action may subpoena medical expert originally retained by defendant and question expert about prior employment with defendant); Cogdell v. Brown, 531 A.2d 1379, 1382 (N.J. Super. Ct. Law Div. 1987) (same); Barton, 617 P.2d at 350 (“The jury was entitled to know the essential background facts of the witness so as to be able to give proper weight to his testimony.”).

57. E.g., Granger v. Wisner, 656 P.2d 1238, 1242 (Ariz. 1982) (prohibiting defense questioning of medical expert on direct examination about prior consultation with plaintiff); Sun Charm Ranch, Inc. v. City of Orlando, 407 So. 2d 938, 940 (Fla. Dist. Ct. App. 1981) (allowing plaintiff to call appraiser originally retained by City of Orlando to testify, but prohibiting plaintiff from questioning appraiser about previous employment with city).
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sons underlying Rule 26(b), not its actual language. If they first determine that using the adverse party's consultative expert unfairly advantages the proffering party, they will exclude the testimony because it allows the proffering party to rely upon its opponent's work, violating the unfairness rule.

Other courts exclude the testimony because admitting it would put the opposing party in the "no-win" situation of cross-examining its own consultative witness. The cross-examining party might hesitate to attack the expert's credentials or credibility for fear that, in rebuttal, the opposing party would point out that the expert's qualifications were acceptable to the cross-examining party when the party first hired the expert. Moreover, the cross-examining party might be forced to impeach the expert's testimony with information that the expert obtained during previous employment with that party. Traditional cross-examination tactics thus fail against the expert originally retained by the cross-examiner.

58. Healy v. Counts, 100 F.R.D. 493, 495 (D. Colo. 1984) (noting that the fact situation fell "beyond the explicit language of Rule 26(b)(4)(B)" and commenting that there was "virtually nothing in print to guide [the trial court's] decision" to exclude or admit the expert's testimony). The Healy judge continued by stating that "[m]y decision is guided by several policy decisions." Id. at 496; see also Piller v. Kovarsky, 476 A.2d 1279, 1281 (N.J. Super. Ct. Law Div. 1984) (preventing physician who treated plaintiff in medical malpractice action from testifying for defense by relying, inter alia, upon public policy reasoning).

59. E.g., Young v. Strong, 499 N.Y.S.2d 988,990 (N.Y. App. Div. 1986) (compelling defendant's surveyor to testify for plaintiffs would be unfair, especially when plaintiff already has another expert); Brink v. Multnomah County, 356 P.2d 536, 541 (Or. 1960) (contending that by allowing disputed expert testimony, court would unfairly penalize hard-working trial lawyers and would reward laziness); see also Henkel, supra note 13, at 236-38 (collecting cases).

60. See supra notes 34-37 and accompanying text (defining the unfairness rule).

61. E.g., Healy, 100 F.R.D. at 496-97 (expressing concern that court could not "adequately protect" party that originally hired consultative witness).

62. See, e.g., Granger v. Wisner, 656 P.2d 1238, 1243 (Ariz. 1982) (reasoning that "[a]rguably, that prior consultation [between adverse party and expert] might be an admission that plaintiff believed the witness to be qualified"); Piller, 476 A.2d at 1282 (asserting that "defendants [proffering party] have an unfair advantage when they present [the plaintiffs' consultative expert] because the plaintiffs have already necessarily vouched for his credibility and the value of his opinions").

63. See, e.g., Granger, 656 P.2d at 1243 (refusing to allow plaintiff's former consultative expert to testify for defendant primarily because plaintiff would be unable to cross-examine expert effectively and stating that "[c]ross-examination is a difficult art which is not made easier when counsel must perform it on a tightrope").
Courts that admit or compel the expert's testimony either ignore Rule 26 or claim that Rule 26 does not apply. Most courts that overlook Rule 26 admit or compel the expert's testimony after determining that no privilege protects it. These courts argue that it is unfair to "shield" an expert from discovery and deny the adverse party access to the potentially helpful expert. Even if courts admit the disputed expert testimony, they do not agree whether the proffering party may question the witness about prior employment with the opposing party. Courts

64. Steele v. Seglie, No. 84-2200, 1986 WL 30765, at *3 (D. Kan. Mar. 27, 1986) (stating that Rule 26 applies to the discovery of expert testimony, not to the potential suppression of expert testimony); Granger, 656 P.2d at 1242 (reasoning that Rule 26 "does not address itself to the admissibility at trial of the testimony of such an expert which is elicited by the opponent" and that "the rules of discovery provide no express basis for the suppression of such testimony"); Fenlon v. Thayer, 506 A.2d 319, 321 (N.H. 1986) (concluding that Rule 26 does not control testimony at trial).

65. See Fenlon, 506 A.2d at 322 (stating that "the rule favoring testimonial compulsion should be applied to all experts, including doctors, appraisers, and others").

66. See, e.g., Sun Charm Ranch, Inc. v. City of Orlando, 407 So. 2d 938, 939 (Fla. Dist. Ct. App. 1981) (allowing plaintiffs to call appraiser originally retained by City of Orlando to testify at trial because no privileges protected appraiser's testimony); Knoff v. American Crystal Sugar Co., 380 N.W.2d 313, 319-320 (N.D. 1986) (allowing defendant-corporation in nuisance action to call appraiser originally hired by plaintiff to testify at trial because expert fell outside scope of traditional privileges); Board of Educ. of S. Sanpete Sch. Dist. v. Barton, 617 P.2d 347, 349-50 (Utah 1980) (admitting expert testimony of appraiser in eminent domain action because it concerned "the heart of the issue at trial," fell outside of any evidentiary privileges, and jury was entitled to hear it).

67. See supra note 32 and accompanying text (discussing expert shielding).

68. E.g., Cogdell v. Brown, 531 A.2d 1379, 1381 (N.J. Super. Ct. Law Div. 1987) ("No party to litigation has anything resembling a proprietary right to any witness's evidence."); Lazorick v. Brown, 480 A.2d 223, 228 (N.J. Super. Ct. App. Div. 1984) ("Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone.") (quoting Doe v. Eli Lilly & Co., 99 F.R.D. 126, 128 (D.D.C. 1983)). Some attorneys regularly "shield" experts by retaining the experts as consultative witnesses to avoid discovery by the adverse party. Gross, supra note 1, at 1131 n.54; see also McDonnell, supra note 32, at 1030 (noting importance of good faith conduct in pre-trial discovery).

that allow the party to question the consultative expert assert
that the trier of fact ought to know about the expert's prior deal-
ings with the opposing party because it relates to the weight and
credibility of the expert's opinion. 70 Testimony about the ex-
pert's original employer allows an attorney to expose the ex-
pert's bias. 71 The trier of fact should know whether one side
"shopped" for an expert to support its theory of the case. 72 These
courts thus admit or compel the expert's testimony because it is
relevant, probative, and falls outside protective privileges.

On the other hand, some courts refuse to allow the proffer-
ing party to question the expert about prior employment with
the adverse party because this questioning would overempha-
size the witness in the jury's mind 73 or because such questioning
would be too prejudicial. 74 Other courts reason that by granting
the party's request to subpoena the expert or allow the expert to
testify, the party already has the upper hand. 75

70. E.g., Fenlon, 506 A.2d at 323 (finding that "the fact that a party's ad-
versary first contacted the expert is material to the weight and credibili-
ty of that expert's testimony"). But see Sun Charm Ranch, 407 So. 2d at 940 (con-
cluding that the "relevancy of this evidence is the inference that the party who
fails to call an expert is covering up harmful evidence or concealing bad facts"
but the party may have other legitimate reasons for not calling expert whom
the party originally consulted).

71. JOHN KAPLAN, et al., CASES AND MATERIALS ON EVIDENCE 505 (7th ed.
1992) (concluding that "[p]roof of bias and the like is always relevant to credibil-
ity and can be inquired into thoroughly"); see also Barton, 617 P.2d at 350 (re-
asoning that jury should know essential facts about witness's background in
order to give proper weight to testimony).

72. E.g., Fenlon, 506 A.2d at 323 ("Whether an expert is a 'hired gun' or one
whose opinions have greater foundations of objectivity is an issue to be litigated
by counsel and considered by the jury."); Cogdell, 531 A.2d at 1382 (same).

73. These courts fear that juries would give the expert's testimony too
much weight because both parties retained the same expert. Wildermuth,
supra note 1, at 943 (citing cases).

74. Sun Charm Ranch, 407 So.2d at 940 (questioning fairness of rule that
would require party to explain and apologize to jury for not calling expert wit-
ness to testify). Cf. State Highway Comm'n v. Earl, 143 N.W.2d 88, 92 (S.D.
1968) (concluding that when adverse party calls the opponent's former consult-
ative expert, "t]he party calling such expert makes [the expert] his witness,
therefore, the fact of prior employment or payment by the opposite party is not
relevant or material").

27, 1986) (stating that although prohibiting questions to expert witnesses about
prior retention by plaintiffs may restrict defendants' ability to rehabilitate ex-
pert witness, that is small price to defendants for right to present expert testi-
mony at trial).
C. An Alternative to Rule 26: Relevant Rules of the Federal Rules of Evidence

Some courts use the Federal Rules of Evidence to resolve the consultative expert dilemma, arguing that Rule 26 does not apply. These courts turn to Rules 702, 703 and 403 to provide another framework to evaluate the admission of consultative expert testimony. Rule 702 regulates the testimony of expert witnesses and requires that the expert's testimony "assist" the jury. Rule 703 stipulates that an expert may base an opinion upon facts and information directly observed by the expert or "made known" to the expert before the testimony. As long as the expert uses a type of information "reasonably relied upon by experts in the particular field" to establish an opinion, the actual information that the expert used need not be admissible evidence.

These rules of evidence confer considerable discretion upon the trial courts to admit evidence and testimony that the courts consider relevant. Testimony is relevant if it tends to make the existence of one or more facts in issue more probable than they would be without the testimony. The drafters of the Federal Rules of Evidence recognized the potential danger in al-

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Admittedly, some tension exists between the rules governing discovery and the Federal Rules of Evidence. "Handling the opponent's expert has become more difficult because the rules of evidence have been liberalized over the years, while the rules of discovery recently have been restricted." Paul F. Rothstein, The Collision Between New Discovery Amendments and Expert Testimony Rules, 35 U. Pitt. L. Rev. 1, 17 (1988); cf. McLaughlin, supra note 33, at 765 (noting that federal discovery rules "give [adverse parties] nothing and damn little of that").

77. Rule 702 states "[i]f 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... may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

78. Id.

79. Fed. R. Evid. 703.

80. Id; see also McLaughlin, supra note 33, at 766 (describing Rule 703 parameters).

81. McLaughlin, supra note 33, at 765; see also 1 WEINSTEIN, supra note 51, ¶ 403(01), at 403-6 (noting broad discretion that Rule 403 gives to trial courts).

82. Fed. R. Evid. 401 (defining relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the deter-
lowing relevant but unfairly prejudicial evidence to sway the jury. Accordingly, Rule 403 allows a trial court to exclude relevant evidence whose probative value is “substantially outweighed by the danger of unfair prejudice.” The rules of evidence thus provide this safety net to exclude potentially inflammatory evidence.

The conflicting case law in both federal and state courts demonstrates a need for a uniform approach to the consultative expert dilemma. Policies underlying both Rule 26 and Rules 702, 703 and 403 of the Federal Rules of Evidence can play a decisive role in the unification process.

II. THE CURRENT SYSTEM INADEQUATELY ADDRESSES THE CONSULTATIVE EXPERT DILEMMA

Courts have inconsistently resolved the consultative expert dilemma. This confusion in the law results from the inappropriate reliance of courts and litigators upon Rule 26 and claims of privilege to exclude consultative expert testimony.

A. RULES OF DISCOVERY DO NOT APPLY TO THE CONSULTATIVE EXPERT DILEMMA

Rule 26 has nothing to do with admitting or compelling consultative expert testimony. The adverse party seeking to produce the expert does not wish to obtain more information through formal discovery, but wishes to put the expert on the
witness stand to add to the trial record. This distinction separates expert discovery from expert testimony. For example, to question a consultative expert about opinions in a deposition or interrogatory, Rule 26 requires a party to demonstrate "exceptional circumstances." If, however, that party calls the expert to testify on the assumption that the expert's opinion is favorable because the opposing party declined to list the expert as a witness, the disputed testimony ceases to be discovery and becomes instead an evidentiary matter.

B. NO PRIVILEGE PROTECTS THE EXPERT FROM COMPELLED OR VOLUNTARY TESTIMONY

Although litigators rely on the attorney-client privilege and the work product rule to protect either compelled or voluntary consultative expert testimony, these privileges do not apply. Courts also recognize similar professional rules of conduct within the experts' profession that would exclude their testimony for an opposing party. Because privileges impede the discovery of the truth, however, courts should narrowly construe them and admit evidence absent a privilege.

The attorney-client privilege does not preclude the admission of expert testimony. The advisory committee's note to Rule

87. Kaplan, et al., supra note 71, at 1-2, 64 (emphasizing the importance of the trial record).
88. Some courts distinguish these procedural rules. See, e.g., Rancourt v. Waterville Urban Renewal Auth., 223 A.2d 303, 305 (Me. 1966) ("Rule 26(b) is neither limited by nor does it limit, the admissibility of evidence at trial. No new privilege is necessary, and it is not intended to exclude evidence from the Court and jury") (discussing the discovery and deposition process before the trial).
90. See supra note 64 and accompanying text.
91. This is true for attorneys, Model Code of Professional Responsibility DR5-101 (1981), and, to some degree, for doctors; see, e.g., Piller v. Kovarsky, 476 A.2d 1279, 1282-83 (N.J. Super. Ct. Law Div. 1984) (barring a physician treating the plaintiff in a medical malpractice action from testifying for the defendants); cf. Arctic Motor Freight, Inc. v. Stover, 571 P.2d 1006, 1008-09 (Alaska 1977) (discussing the extent to which plaintiff waives patient-doctor privilege by filing personal injury claim, thus allowing defense to obtain information about plaintiff's medical history).
92. 8 Wright & Miller, supra note 28, § 2016, at 124 (noting that "[p]rivileges are created to foster a relation that the state deems of such importance that it will encourage it even at the price of excluding helpful testimony").
26 discourages interpreting the rule to exclude expert testimony under a broadly-construed privilege theory. In fact, most courts distinguish expert witnesses from attorneys for purposes of the attorney-client privilege. Moreover, the attorney-client privilege like the work product rule does not generally apply to information possessed by experts. Expert witnesses, unlike interpreters for instance, are not necessary to confidential attorney-client conversations.

Some courts prohibit an opposing party from compelling the opponent’s consultative expert witness to testify by using the attorney-client privilege. This exclusion, however, applies only to communications made by the client to the expert acting as the attorney’s agent. Generally, the adverse party who compels the opponent’s consultative witness to testify seeks the actual opinion of the expert, based upon information that the attorney provided to the expert. This set of communications does not involve the client.

94. The 1970 amendments to the rules were meant to “repudiate the few decisions that have held an expert’s information privileged simply because of his status as an expert . . . .” Fed. R. Civ. P. 26 advisory committee’s note (1970). Furthermore, the 1970 amendments “also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine.” Id.

95. E.g., Rancourt v. Waterville Urban Renewal Auth., 223 A.2d 303, 304 (Me. 1966) (concluding that relationship between expert appraiser and party is not equivalent to attorney-client relationship); Levitsky v. Prince George’s County, 439 A.2d 600, 605 (Md. Ct. Spec. App. 1982) (holding that appraiser is neither client nor attorney for purposes of attorney-client privilege).

96. E.g., 2 WEINSTEIN, supra note 51, § 503(a)(3)[01], at 503-37 to 503-38 (stating that “the expert’s observations, conclusions and information derived from sources other than the client’s communication constitute the expert’s knowledge, which, like the client’s knowledge and the attorney’s knowledge, is not privileged”); 10 FED. PROC., supra note 32, § 26:121, at 357 (noting that work product rule does not exempt discovery of expert information); Note, supra note 28, at 520 n.33 (commenting that scholarly reviews debunked idea that attorney-client privilege or work product rule shields expert’s knowledge); Morgan Chu, Discovery of Experts, LITIG., Winter 1982, at 13, 16 (arguing that expert information falls outside work product rule if counsel may show information to expert, while refusing to show information to opposing party).

97. Friedenthal, supra note 32, at 463 (arguing that expert witnesses contribute much more to trial preparation than “interpreter” would); Gross, supra note 1, at 1151 (criticizing courts that treat experts like agents of the party and thus include experts within the scope of the attorney-client privilege).


99. Id.

100. Arguably, a more difficult scenario results when a client reveals information when both the attorney and the consultative expert are present. In that situation, the client is not certain of confidentiality. The rationale behind the
The attorney work product rule also does not apply to consultative expert testimony. In essence, this rule protects records of an attorney's thought processes. Even if the consultative witness contributes to the attorney's preparation for trial, the attorney's labor did not create the expert. Litigation publications, in contrast, encourage attorneys to consider any work given to experts (both testifying and consultative) discoverable by the adverse party.

Deep-rooted policy concerns support the admission of the opponent's consultative expert's testimony. Trial courts assert repeatedly that the true mission of litigation is to find "the truth." If this assessment is correct, then trial courts should presumptively admit expert testimony helpful to the fact finder's determination of "the truth." This argument supersedes claims of privilege or unfairness.

Because Rule 26 does not address the issue of consultative expert testimony, courts must turn elsewhere to aid their deci-
The creation of a general evidentiary rule with a clear standard for admitting consultative expert testimony would allow courts to avoid confusion and steer clear of the conflicting policies of the current system.

III. A PROPOSED SOLUTION: REVISIGN THE FEDERAL RULES OF EVIDENCE

A. CREATING RULE 707 OF THE FEDERAL RULES OF EVIDENCE

Because federal and state courts have failed to solve the nontestifying expert dilemma, Congress should clarify and define the law in this area by amending the Federal Rules of Evidence to include a uniform rule to address this problem. This uniform, federal rule should establish a standard by which a trial court may admit or compel the adverse party's consultative expert testimony.

106. E.g., Granger v. Wisner, 656 P.2d 1238, 1241-42 (Ariz. 1982) (determining that no privilege protects consultative expert's testimony and reasoning that court has discretion to exclude that testimony under Rule 403); Fenlon, 506 A.2d at 322 (noting that courts should rely upon evidentiary rules such as Rule 403 to address this issue of admitting consultative expert testimony rather than the discovery rules of Rule 26); Cogdell, 531 A.2d at 1381 (relying upon more open discovery policy underlying Rule 26 and evidentiary rules governing admissibility of expert testimony).

107. The process for amending the Federal Rules of Evidence is multistaged. The Judicial Conference includes the Chief Justice, each chief circuit judge, the Court of International Trade chief judge, and a district judge from each circuit. 28 U.S.C. § 331 (1988 & Supp. 1994). It "[prescribes] and [publishes] the procedures for the consideration" of proposed amendments to the federal rules. 28 U.S.C. § 2073(a)(1) (1988). The Judicial Conference may create committees composed of Supreme Court justices, attorneys and judges to assist in the consideration of proposed amendments. Id. § 2073(a)(2). After considering the proposals, the Supreme Court must transmit its proposed recommendations to Congress before May 1 of the year in which the amendments would take effect. 28 U.S.C. § 2074(a) (1988). Absent contrary congressional action, the proposed amendments become effective on December 1 of that year. Id.

In addition, Congress itself may initiate amendments to the Federal Rules of Evidence. Becker & Orenstein, supra note 17, at 859. In the past, Congress has responded to calls for procedural reform of Rule 26. Indeed, recent changes in Rule 26 address concerns raised by commentators and litigators alike. For example, many commentators indicated general dissatisfaction with the rule's preference for interrogatories in the discovery of experts. See Graham, supra note 1, at 172-74; Wildermuth, supra note 1, at 940-42 (describing studies). The 1993 amendments to Rule 26 eliminate this interrogatory provision. Fed. R. Civ. P. 26.

108. The Federal Rules of Evidence apply to federal courts. Fed. R. Evid. 101. A majority of state courts, however, have adopted them. Weinstein, supra note 51, at T-1, T-5 to T-9, and T-88 to T-91 (describing states that have adopted Federal Rules of Evidence and any changes each state made in Rule 101 and Rules 702 and 703, concerning expert witnesses).
Specifically, Rule 707 should admit the consultative expert testimony if the proffering party demonstrates a reasonable need for the testimony and agrees to pay the expert reasonable fees for her testimony. The amended rule could read as follows:

An expert, retained by a party in anticipation of litigation as a nontestifying witness, may testify for the opposing party if that party demonstrates a reasonable need for the expert's testimony.

The advisory committee's note should further define the contours of what constitutes "reasonable need." As an illustration, the unavailability of other experts or the opposing party's bad faith retention of experts to shield them from discovery could constitute reasonable need. The court may also consider the proffering party's inability to locate a comparable expert, as when one party lacks the financial resources to retain an expert outside of the jurisdiction. In deciding whether to compel an expert's testimony, the trial court should give serious consideration to the proffering party's amenability to pay the expert and the expert's willingness to testify. The reasonable need standard would prevent bad faith litigation tactics, but would allow more access to consultative expert testimony than Rule 26 makes available.

The reasonable need standard differs from Rule 26's "exceptional circumstances" standard in both its goals and practice. Rule 707 would regulate consultative expert testimony, while Rule 26's exceptional circumstances standard affects only discovery, because Rule 26 does not authorize a party to either request or compel the opponent's consultative expert to testify. Additionally, the two standards assess different factors. The exceptional circumstances standard considers: the near impossibility of otherwise obtaining the information sought in discovery, a "substantial need" for the information, and the demonstrable fairness of the discovery. Under Rule 707, courts

110. See, e.g., id. (stating that expert must be willing to work with other side before court will compel testimony); see also infra note 135 and accompanying text (stating that fairness requires that expert be available to proffering party). But see Fenlon, 506 A.2d at 322 ("The expert's desire not to testify . . . [is] immaterial.").
111. Under Rule 26, the party seeking discovery of a consultative expert must demonstrate "exceptional circumstances." FED. R. CIV. P. 26(b)(4)(B).
would consider: the inability to locate a comparable expert without undue burden, the number and quality of other experts readily available to the party, bad faith expert shielding, the amount of time and money the retaining party has invested in the contested expert, the extent to which the expert assisted in creating a theory of the case, and additional considerations of fairness. Courts may also consider the disparity of resources between the parties, especially if one party uses its greater resources to "buy" local experts and force the other party to search for experts out of state, incurring a greater cost.

The reasonable need standard creates a threshold that the proffering party must cross to examine the opponent's expert. The trial court must first determine whether the proffering party has met the reasonable need standard before applying Rule 403, which excludes evidence that may prejudice the trier of fact. Unlike Rule 403, which addresses already relevant and otherwise admissible testimony, the proposed amendment requires the proffering party to meet the reasonable need test before the court may admit the expert's testimony. Of course, once the court admits the expert's testimony, Rule 403 applies to the testimony itself.\textsuperscript{113} Rule 403 thus prevents the possibility of unfair prejudice springing from the expert's testimony. This built-in flexibility enables the trial court to answer the specific needs of each case while following a uniform, general rule.

\textbf{B. Attributes of the Reasonable Need Test and Its Impact Upon the Current System of Expert Testimony}

The proposal set forth in this Note offers flexibility and stability and relies upon existing evidentiary protections. Although the conflicting case law of consultative expert testimony demonstrates the need for uniform regulation, this rule does not advocate either automatic admission or exclusion of the disputed expert testimony. Automatic admission may allow abusive manipulation of the discovery and use of evidence at trial. By the same token, automatic exclusion of the expert testimony may encourage shielding consultative experts. Creating a reasonable need standard in Rule 707 provides the stability of a general

\textsuperscript{113} See, e.g., \textit{Fenlon}, 506 A.2d at 322 (noting that consultative expert's testimony is still subject to Rule 403's ban against prejudicial, misleading, and cumulative evidence). Thus, a court may still apply Rule 403 to exclude testimony regarding the expert's prior employment with the opposing party. See \textit{infra} notes 115-117 and accompanying text.
rule, which will allow the trial court to encourage a more constant exchange of information and discourage expert shielding.\textsuperscript{114}

Even if the trial court determines that questioning an expert about original retention by the adverse party is unfair, the trial court may still allow the expert to testify. The court has several ways to insure that inflammatory or highly prejudicial evidence does not taint the trial record. The trial court may use either Rule 403 or a motion in limine\textsuperscript{115} to limit the direct examination to the expert's opinion, omitting reference to the expert's prior retention by the adverse party.\textsuperscript{116} The trial court can readily enforce this restriction:\textsuperscript{117} the expert may mention earlier reports or material the expert used in formulating a conclusion

\textsuperscript{114} See, e.g., Bockweg v. Anderson, 117 F.R.D. 563, 566 (M.D.N.C. 1987) (allowing additional discovery of the opponent's expert and stating that although "discretion creates uncertainty, it also permits a more reasoned decision, taking into account the peculiarities and needs of each case and the benefit of the Court's growing experience").

\textsuperscript{115} ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK 4-5 (1991) (discussing motion in limine). The court may also grant a limiting instruction. Id. at 18.

\textsuperscript{116} This scenario assumes that the expert's testimony about her recent work with the retaining party meets the reasonable need test, but fails the Rule 403 balancing test. See id. at 18. Park explains that "[e]ven if evidence is ruled admissible, the purposes for which the evidence can be used may be limited. Or, only part of it may be admissible." Id. In that case, the objecting trial attorney should request a limiting instruction. Id.

\textsuperscript{117} A sample direct examination of the adverse party's consultative expert (after qualifying the witness as an expert) in a medical malpractice action might proceed as follows:

Q. Did you examine Mr. Smith?
A. Yes.
Q. Do you have an opinion to a reasonable degree of medical certainty as to the cause of Mr. Smith's injury?
A. I do.
Q. What is your opinion?
A. I think the XYZ drug administered by Dr. Jones did not cause Mr. Smith's injury.
Q. Did you examine Mr. Smith's medical reports?
A. Yes.
Q. Who gave you those medical reports? —Objection.
Sustained.

As soon as the attorney conducting the direct examination asks the expert about the source of the documents she examined, the adverse party may object. The trial court may thus exclude the fact that the expert previously worked for the adverse party.

By extension, if reports or other documents come into evidence through the expert and those papers contain the original employing party's name, the trial court may strike its name from the documents to remove any trace of the original source of the information upon which the expert relied.
but may not directly reveal having obtained this information from the adverse party.\textsuperscript{118}

Rule 707 will not alter the federal rules concerning a trial court's ability to subpoena an expert witness.\textsuperscript{119} The court's power to compel expert testimony, however, is limited to the scope of its subpoena power.\textsuperscript{120} This factor narrows the extent to which consultative expert testimony will be compelled against the expert's will.

As a federal evidentiary rule, Rule 707 will apply to both civil and criminal trials.\textsuperscript{121} In criminal trials, however, different factors will arise.\textsuperscript{122} For example, prosecutors already must reveal beneficial evidence to the defendant.\textsuperscript{123} Criminal courts

\textsuperscript{118} See, e.g., Steele v. Seglie, No. 84-2200, 1986 WL 30765, at *4 (D. Kan. Mar. 27, 1986) (noting that the court may avoid concerns about crafty cross-examination through "careful limitations on the type of questions allowed to be posed to these experts").

\textsuperscript{119} Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972) ("The weight of authority holds that, although it is not the usual practice, a court does have the power to subpoena an expert witness and, though it cannot require him to conduct any examinations . . . it can require him to state whatever opinions he may have previously formed.") (citations omitted), cert. denied, 412 U.S. 929 (1973).

\textsuperscript{120} Rule 45 of the Federal Rules of Civil Procedure limits the court's power to subpoena a "person who is not a party or an officer of a party" to 100 miles from "the place where that person resides, is employed or regularly transacts business in person." \textsuperscript{118} FED. R. CIV. P. 45(c)(3)(A)(ii). In criminal trials, however, a subpoena "requiring the attendance of a witness" at trial "may be served at any place within the United States." \textsuperscript{119} FED. R. CRIM. P. 17(e)(1). Additional criminal discovery rules limit this far-reaching subpoena power in criminal trials. \textsuperscript{120} See infra notes 123-124 and accompanying text.

\textsuperscript{121} The Federal Rules of Evidence "govern proceedings in the courts of the United States . . . ." \textsuperscript{121} FED. R. EVID. 101.

\textsuperscript{122} The federal criminal rules governing discovery differ from Rule 26. Under Rule 16 of the Federal Rules of Criminal Procedure, which regulates discovery, if the defendant requests a summary of the prosecution's expert testimony, the government must provide this summary and the defendant, in return, must disclose a summary of its expert testimony. \textsuperscript{122} FED. R. CRIM. P. 16(a)(1)(E) and 16(b)(1)(C). "[S]tatements made by either of the two parties' "prospective witnesses" are not "subject to disclosure." \textsuperscript{123} FED. R. CRIM. P. 16(a)(2) and 16(b)(2). Like Rule 26, however, Rule 16 does not refer to calling or compelling the opponent's consultative expert to testify because the summary "only applies to expert witnesses that each side intends to call." \textsuperscript{124} FED. R. CRIM. P. 16 advisory committee's notes.

Expert testimony in criminal cases arises in another context. If a defendant intends to call an expert to testify about the defendant's mental condition, he must notify the government in advance. \textsuperscript{125} FED. R. CRIM. P. 12.2(b).

\textsuperscript{123} The prosecution has a constitutional duty to disclose exculpatory evidence to the defendant if the evidence is "material" . . . [defined as] 'a reasonable probability' that, had disclosure been made, the 'result of the proceeding would have been different.' \textsuperscript{124} WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL
should emphasize the importance of fundamental fairness when considering a request to allow or compel the defendant's consultative expert to testify against the defense.\textsuperscript{124} 

The proposed amendment is consistent with the rules governing civil discovery. Rule 707 does not alter Rule 26's prohibition of deposing a consultative expert until the requesting party demonstrates "exceptional circumstances."\textsuperscript{125} Indeed, formal discovery is not always necessary. If a consultative expert voluntarily agrees to testify for the opposing party, as in the \textit{Healy}\textsuperscript{126} case, the expert will tell that party what it needs to know to prepare for direct examination.\textsuperscript{127} Admittedly, this informal discovery process cannot occur when the consultative expert does not want to testify for the opponent. In that case, the proffering party must either meet the exceptional circumstances requirement of Rule 26\textsuperscript{128} or find an external source of the expert's opinion, such as published articles or, as in the \textit{Fenlon} case,\textsuperscript{129} a report written by the expert.\textsuperscript{130} If not, the proffering party may have to content itself with the opportunity to directly

\textsuperscript{124}. Courts may be reluctant to allow the prosecution to call the defendant's expert, while allowing the defendant to call or compel the prosecution's expert to testify. A court probably will not admit the defendant's former expert's testimony, barring unusual circumstances. For example, in Morris v. State, the court allowed the prosecution to summon an expert, whom the defense initially consulted, to testify because the scientific tests that the expert performed on the accused's clothing destroyed the clothing. 477 A.2d 1206, 1211-12 (Md. Ct. Spec. App. 1984). The Morris court determined that admitting the testimony best served societal interests. \textit{Id.}

If the prosecution, on the other hand, obtains an unfavorable expert opinion about the defendant's mental condition or other beneficial information, the government must disclose this information to the defendant. See \textit{LAFAVÈ & ISRAEL}, supra note 123, at 883-95 (describing historical emergence of government's duty to disclose).\textsuperscript{125}

\textsuperscript{126}. \textit{FED. R. CIV. P. 26(b)(4)(B)}.\textsuperscript{126}

\textsuperscript{127}. \textit{100 F.R.D. at 494; see supra text accompanying notes 5-7} (describing facts of case).\textsuperscript{126}

\textsuperscript{128}. The consultative expert must be careful not to break an agreement with the original retaining party in disclosing this information to the opposing party.\textsuperscript{127}

\textsuperscript{129}. 506 A.2d at 320; see \textit{supra} text accompanying notes 8-10.\textsuperscript{129}

\textsuperscript{130}. In addition, if the retaining party first designated the expert as a testifying witness, it gave the proffering party a report describing, \textit{inter alia}, the substance of the expert's testimony and qualifications. \textit{FED. R. CIV. P. 26(a)(2)(B)}. The proffering party thus generally knows about the expert's opin-
examine the expert at trial, and forego formal discovery of the expert's opinion. A party might be willing to risk allowing the expert to testify without formal discovery if the expert is the only one within the party's jurisdiction who speaks articulately.\textsuperscript{131}

The proposed amendment may affect expert discovery in several different ways. It may encourage attorneys to select only experts who will are sure to agree with their view of the case. Perhaps attorneys will rely more upon testifying experts. Rule 707 should impair the effectiveness of expert shielding\textsuperscript{132} because consultative experts would no longer be locked away from the opposing party.

C. Responding to Potential Criticisms of the Proposed Amendment

Critics attack the admission of consultative expert testimony on several grounds. They claim the testimony is unfair and leads to abusive discovery practices as well as ethical problems.\textsuperscript{133} Each of the critics' arguments for excluding the contested expert testimony, however, generates an argument supporting its admission.

The proposed amendment prevents unfairness. The unfairness rule prohibits the discovering party from obtaining beneficial testimony at its opponent's expense.\textsuperscript{134} The unfairness rule may actually justify admitting the consultative expert's testi-

\begin{itemize}
  \item \textsuperscript{131} See supra note 2 and accompanying text (describing superficial characteristics sought in testifying expert). In some fields, for example, an expert's ability to either describe technical terms in easy to understand vernacular or his ability to speak English fluently may well be important to the party proffering his testimony. Supra note 2.
  \item \textsuperscript{132} See McDonald, supra note 32.
  \item \textsuperscript{133} Courts have stated several reasons to exclude the consultative expert's testimony. See, e.g., Campbell Indus. v. M/V Gemini, 619 F.2d 24, 26-27 (9th Cir. 1980) (using Rule 26 itself); Healy v. Counts, 100 F.R.D. 493, 496-97 (D. Colo. 1984) (expressing fear of negative impact that allowing adverse party's consultative experts to testify would have upon availability of consultative experts); Piller v. Kovarsky, 476 A.2d 1279, 1282 (N.J. Super. Ct. Law Div. 1984) (excluding consultative expert's testimony because it was protected by privilege).
  \item \textsuperscript{134} The unfairness rule, however, does not necessarily exclude the consultative expert's testimony because it is not a privilege. See Friedenthal, supra note 32, at 479 (describing rule as policy preference). Courts must thus approach the unfairness rule within its policy context and not as a principle of absolute exclusion.
\end{itemize}
mony. Courts have already allowed consultative experts to testify out of fairness to the proffering party.\textsuperscript{135} Excluding the expert's testimony allows a party to "buy" an expert's opinion.\textsuperscript{136} Paying an expert, however, does not give a party exclusive rights to the expert's opinion.\textsuperscript{137} Otherwise one party may "buy" experts to hide them from the adverse party.\textsuperscript{138} This argument may be described as an "inverse unfairness rule."\textsuperscript{139}

The proposed amendment guards against discovery abuse. Although some concern exists that allowing adverse parties to compel each other's consultative experts to testify would open the door to unnecessary discovery and collateral issues,\textsuperscript{140} the advantages outweigh the disadvantages.\textsuperscript{141} By the same token,
however, compelling expert testimony might check the ravages of "expert shopping"\textsuperscript{142} and "expert shielding"\textsuperscript{143}—abuses currently employed by many litigators. If trial lawyers anticipate facing their own expert across the witness stand, they will narrow their selection of experts instead of attempting to corner and buy out the market.\textsuperscript{144}

Rule 707 will not alter the way litigators prepare for their expert witnesses' testimony. Currently, many litigation publications encourage attorneys to obtain several kinds of Rule 26 experts, in order to provide both backup trial witnesses and to hide unfavorable experts.\textsuperscript{145} According to these publications, attorneys should assume that current rules protect almost none of their expert's research from discovery\textsuperscript{146} and should draft all of their correspondence with experts under the assumption that it will be discovered by the adverse party.\textsuperscript{147}

cussed this dilemma, and then sided with more open discovery: "[a]s matters presently stand, the apparent advantages derived from permitting liberal discovery of expert witnesses outweigh the potential abuses." Bockweg v. Anderson 117 F.R.D. 563, 566 (M.D. N.C. 1987).

142. See, e.g., Peter I. Ostroff, Experts: A Few Fundamentals, LITIG., Winter 1982, at 8, 9 (recommended qualities that attorneys should consider in their search for expert with the "right" opinion).

143. See McDonald, supra note 32, at 1030 (discussing extensive dangers of expert shielding).

144. The opposing argument insists that litigators will carefully select only experts who will agree with the parties who hire them. In this sense, by trying to expose more of the litigator's information to the "truth" searching process, savvy litigators will obscure the truth by paying experts whose loyalty to their employers comes before their concern for the truth. But see Carrasquillo v. Rothschild, 443 N.Y.S.2d 113, 115 (N.Y. Sup. Ct. 1981) (stating that courts commit "gross disservice" to experts by assuming that experts will base opinion upon which party pays).

145. See, e.g., Suplee & Woodruff, supra note 14, at 11 (suggesting that attorneys should retain two or more types of Rule 26 witnesses so that if expert's research or tests go awry attorney may classify expert as consultant and prevent opponent from discovering expert); Ostroff, supra note 142, at 8-9 (recommending "spare" experts because many will reach the "wrong" conclusion or will be otherwise incompatible with party's needs).

146. See, e.g., Ostroff, supra note 142, at 9 (advising attorneys to consider all information given to and received from experts as discoverable and further suggesting that consultative expert not talk with trial expert for fear of discovery through trial expert); Suplee & Woodruff, supra note 14, at 17 (attorneys should assume that nothing, including data and conversations with consultative experts, is protected from discovery); Vernon, supra note 103, at 18 (recommending that attorneys assume that any written work given to expert is discoverable).

147. Suplee & Woodruff, supra note 14, at 17-18. In light of these assumptions, one prominent commentator advises an "exclusivity provision preventing the expert from consulting with any other party to the litigation." Graham, supra note 1, at 195. At this time, courts have not yet compelled an expert to
The proposed amendment will not exclude experts from the courtroom. Rather, it will give them greater freedom to testify. Experts must be true to themselves and their profession. When litigators retain experts for use as non-testifying witnesses, they—at least in principle—hire the expert to provide an impartial, honest opinion.\textsuperscript{148} Under the current rules of discovery, however, the retaining party may monopolize a consultative expert, regardless of the expert's view of the case. The expert, by agreeing to examine preliminary materials of a case, should not feel forever bound to that side of the litigation even if the expert disagrees with it.\textsuperscript{149} The proposed amendment thus permits a consultative expert the opportunity to serve the party that the expert opinion supports if that party demonstrates a reasonable need for the testimony. In this way, the expert obtains freer access to the courtroom, not banishment from it.

CONCLUSION

In light of the conflicting case law and procedural rules, Congress should promulgate an evidentiary provision concerning the consultative expert witness dilemma. The rule should allow experts retained as nontestifying witnesses to testify at trial for the adverse party if the proffering party demonstrates a reasonable need for the testimony. This regulation best suits the more open discovery and evidentiary policies currently in place. If such testimony proves to be too prejudicial, the trial court may always exclude or properly limit the scope of the expert's testimony. By promulgating this rule, experts may yet again prove a valuable source of information for the trier of fact.

testify despite an exclusivity clause in the expert's contract with the original party. \textit{Id.}

\textsuperscript{148} Some courts emphasize the fact that the expert is not bound by the source of her payment. \textit{Carрасquillo}, 443 N.Y.S.2d at 115 (reasoning that "[t]o conclude that the opinion will in any way, be based on which party pays for the examination . . . and on which party pays for the testimony, does gross disservice to the expert and to his or her integrity").

\textsuperscript{149} Commentators split on this issue. Some contend that experts naturally would support the party that hired them or, would not attempt to talk to the adverse party. Platt, \textit{supra} note 39, at 363. Other commentators note that experts who are not retained to testify, but to "brief" the attorney may be quite surprised to find they cannot offer their testimony to the side with whom they agree. \textit{See Gross}, \textit{supra} note 1, at 1150.