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Minn. L. Rev. Editorial Board

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Discovery of Experts: A Historical Problem and A Proposed FRCP Solution

Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.¹

But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.²

I. INTRODUCTION

It was within the context of the two countervailing considerations suggested by the above quotations that the Supreme Court decided Hickman v. Taylor,³ a decision which has stood for over 20 years as the primary source of enlightenment in the area of discovery. The actual holding of the Court was that written statements, private memoranda, and personal recollections prepared or formed by an attorney in preparation for litigation or trial, could not be discovered by an adverse party in the absence of necessity or justification.⁴ Also important, however, was the call for liberal interpretation of the discovery rules⁵ and a censure of certain concepts which tended to restrict them.⁶ The Court failed, however, to establish any guidelines for future application of these policies in discovering expert witnesses.⁷

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². Id. at 516.
⁴. Id. at 508-510 (1947).
⁵. The Court said, “We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment.” Id. at 507.
⁶. The Court specifically stated, “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.” Id.
⁷. The term “expert witness” is very broad in scope. It can best be defined by contrasting the expert’s function as a witness with the function of other witnesses.

An observer is qualified to testify because he has firsthand knowledge which the jury does not have of the situation or transaction at issue. The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or infer-
The expert plays a unique dual role in our judicial system. He often is an integral part of the trial preparation process, working with the available information and materials. He tests, graphs, quantifies, qualifies and generally uses all his specialized knowledge to elicit the "ultimate facts" which support a given claim. In this capacity as a discoverer and creator of relevant facts, the expert works under the control and for the interests of an attorney and client.

However, the expert often functions in another role at trial, testifying to the results of his work so that they may be "proven" or "disproven" in a court of law. In this capacity the expert assumes the role of a witness, rendering testimony to the existence of facts relevant to the issues being tried. Just as an eyewitness to an accident may be questioned as to his eyesight and memory, the expert may be questioned as to his qualifications as an expert, the methods he employed, and any other factors relevant to judging the evidence he is presenting.8

The federal courts have almost uniformly failed to distinguish between these separate roles of the expert when called on to apply the discovery procedures of the Federal Rules. Moreover, they have often invoked inappropriate concepts and standards to their narrow view of the expert. The district courts' approaches to the discoverability of expert witnesses have developed along divergent and often contradictory lines.9

Recently an amendment to the Federal Rules of Civil Procedure was proposed which attempts to provide a uniform approach to these problems.10 It is the purpose of this Note to


8. See 3 J. Wigmore, Evidence § 992 (3d ed. 1940), and cases cited therein.

9. A general compilation of these cases is found at 4 J. Moore, Federal Practice ¶ 26.24, at 1523-26 (2d ed. 1966) [hereinafter cited as Moore]. Perhaps the most extreme example of the conflicting nature of these cases is found in the situation where a single report of an expert was found to be discoverable in one jurisdiction and non-discoverable in another when the same litigation was being conducted in two districts. Compare Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947), aff'd sub nom., Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948), with Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947).

analyze that proposal in the context of both the policies announced by the Supreme Court in Hickman v. Taylor and the role of the expert in the litigation process.

II. DISCOVERY

A. FUNCTION AND PURPOSE OF DISCOVERY

Necessary to any analysis of expert discovery is an understanding of the function and purpose of discovery in general. At common law, the pleadings were utilized to compel the exchange of information prior to trial.\(^\text{11}\) Beyond the pleadings, which were most often of little assistance, means of pre-trial discovery were few in number and seldom used.\(^\text{12}\) The weakness of this system was, of course, the inability of counsel to learn the necessary facts either to prepare adequately or to focus on facts actually controverted.\(^\text{13}\)

In an attempt to overcome these weaknesses, the Federal Rules of Civil Procedure, adopted in 1938,\(^\text{14}\) fashioned an entirely


\(^{12}\) Taine, Discovery of Trial Preparations in the Federal Courts, 50 Colum. L. Rev. 1026 (1950). For a discussion of these various common law discovery procedures and their uses see Developments, supra note 11, at 946-50.

\(^{13}\) This problem was widely recognized by the commentators prior to the adoption of the Federal Rules of Civil Procedure.

The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for the pleader's allegations and denials.

Sunderland, supra note 11, at 216. See also Ragland, supra note 11, at 1-10.

\(^{14}\) In 1934, by act of Congress, the Supreme Court was given power to provide a uniform procedure governing civil actions. Act of June 19, 1934 (Rule-Making Statute of 1934), ch. 651, §§ 1, 2, 48 Stat.
different approach to trial preparation. The Federal Rules employ the pleadings merely to give the opposing parties a general indication of a party's claims or defenses. To provide a means of ascertaining facts and clarifying issues, Rules 26 to 37 were promulgated to permit discovery of other parties' evidence.

The purpose of the Federal Rules is announced by the last sentence in Rule 1, which states that they "shall be construed to secure the just, speedy, and inexpensive determination of every action." This purpose is implemented by the discovery rules in three primary ways: disclosure and presentation; issue formulation; and encouragement of settlement.

The effort to secure a just determination is advanced by the rules of discovery in bringing about the "disclosure and presentation" of all the relevant evidence. By permitting compulsory pre-trial exchange of information the discovery rules lead to a minimal concealment of relevant information. Also, examination of parties and witnesses shortly after the occurrence or transaction is apt to result in a more accurate statement than one taken at trial, which may be affected by time or the workings of advocacy. In addition, the existence of written statements avoids the risk of lost testimony due to the inability of the witness to be present at trial. Finally, the presence of a written statement lessens the opportunity for perjury because of the difficulty in fabricating evidence which contradicts a prior statement made during discovery.

1064, 28 U.S.C. §§ 723b, 723c (1940), now found in 28 U.S.C. §§ 2072, 2073 (1964). This power was first exercised in 1938 with the promulgation of the Federal Rules of Civil Procedure. 308 U.S. 645 (1939).


16. See United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) ("[Modern instruments of discovery] . . . make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("Thus civil trials in the federal courts no longer need be carried on in the dark.").


19. Use of a deposition of a non-party witness for other than impeachment purposes is allowable in the circumstances described in Rule 26(d) (3) of the Federal Rules of Civil Procedure.

20. See Ragland, supra note 11, at 124-25. Professor Ragland's early investigation in this area lends practical support to this idea.
Discovery aids in “issue formulation” by revealing both agreement on issues which may superficially appear to be in conflict and a clear delineation of the issues actually in dispute.\textsuperscript{21} As the controverted issues become more precisely defined, it is easier for counsel to present evidence in a more efficient and orderly fashion, saving time and expense while also assisting the judge or jury in understanding the genuine controversies involved.\textsuperscript{22}

“Encouragement of settlement” is also effectuated through the discovery rules by disclosing the parties’ relative strength and by providing the parties with the factual basis necessary to determine the amount of a settlement. Similarly, discovery often exposes fraudulent, false and groundless claims and defenses.\textsuperscript{23}

B. SIGNIFICANCE OF Hickman v. Taylor

The most perplexing problem created by the discovery rules was the extent to which a party could require discovery of an adversary’s investigation file and trial preparations.\textsuperscript{24} The Advisory Committee, working from 1942 to 1946 on an amendment to alleviate this problem,\textsuperscript{25} ultimately concluded that discovery of trial preparation should be allowed only where the inquiring party could show that the inquiry was necessary to avoid prejudice, undue hardship, or injustice. Further, an absolute protection was given to both the attorney’s mental impressions and the expert’s conclusions.\textsuperscript{26} This approach specifically re-

\begin{itemize}
\item \textsuperscript{21} This aspect of discovery and its relationship to the expert witness is the subject of special concern in Long, Discovery and Experts under the Federal Rules of Civil Procedure, 39 Wash. L. Rev. 665 (1964).
\item \textsuperscript{22} Time and expense are saved not only in eliminating issues, but also in providing counsel with some indication of how much effort and proof will be needed to prove conclusively any particular element of his case. See Developments, supra note 11, at 945.
\item \textsuperscript{23} These groundless claims or defenses, once exposed, can be “settled” without trial by summary judgment. This aspect of discovery has special relevance to expert testimony where, without pre-trial preparation, the technical or scientific testimony of the expert may be very difficult or impossible to expose as false or inaccurate. See Osborn, Reasons and Reasoning in Expert Testimony, 2 Law & Contemp. Probs. 488 (1935).
\item \textsuperscript{25} The amendment was aimed at Rule 30(b). See Report of the Advisory Committee, 5 F.R.D. 434 (1946).
\item \textsuperscript{26} The wording of the proposal was:
\end{itemize}
jected proposals which would have given unqualified immunity to this “work product” as required by the Third Circuit in Hickman v. Taylor.  

While this proposed amendment to Rule 30(b) was never adopted by the Supreme Court, it was significantly reflected by that Court's decision in Hickman v. Taylor. The litigation in Hickman concerned claims for the death of five seamen in the sinking of a tugboat. Interrogatories directed by the plaintiff to the tug owners requested any written statements obtained from the crew of the vessels involved and all memoranda covering any oral statements which may have been taken. The tug owners refused to answer, other than to admit that statements of the survivors had been taken, on the ground that this request asked for privileged matter obtained in preparation for trial. The district court held the requested materials were not privileged and ordered their production. Upon refusal to comply, the court held the recalcitrant counsel in contempt. The Court

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The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.


27. See Advisory Notes, 5 F.R.D. 433, 460 (1946).

28. 153 F.2d 212 (3d Cir. 1945), aff'd on other grounds, 329 U.S. 495 (1947). The Third Circuit decision rejected the “fishing expedition” and “property right” objections to discovery. Its primary concern was the attorney-client relationship and it was on the basis of this relationship that the court found the information non-discoverable. Rule 26(b), then as now, stated in pertinent part that, “[U]nless otherwise ordered by the court . . . , the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ” Fed. R. Civ. P. 26(b) (emphasis added). After finding that this privilege exception of Rule 26 applied to Rule 33 interrogatories, the Third Circuit held that the privilege included the materials sought to be discovered in that proceeding. 153 F.2d at 222-23. Thus, their ruling would have given the attorney's work product an absolute immunity from discovery.


30. Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the towing operation, the sinking of the tug, the salvaging and repair of the tug, and the death of the deceased. If the answer was in the affirmative, the tug owners were then requested to set forth the nature of all such records, reports, statements or other memoranda. Hickman v. Taylor, 329 U.S. 495, 498-500 (1947).

31. The attorney, Mr. Fortenbaugh, had been employed by the tug owners soon after the accident in anticipation of possible lawsuits. The attorney had sought out the witnesses and obtained their statements in this capacity. Id.

of Appeals for the Third Circuit reversed, reasoning that "privileged," as used in Rule 26, was more expansive than the attorney-client privilege and also included the "work product of the lawyer."33

While the Supreme Court unanimously affirmed the Court of Appeals, the reasoning used to reach this affirmation was strikingly different. The majority opinion, by Mr. Justice Murphy, summarily disposed of the reasoning that the privilege accorded by Rule 26 includes an attorney's work product.34 The opinion noted, however, that "the impropriety of invoking that privilege does not provide an answer to the problem before us."35 Emphasis was put on the fact that in the case before the Court the party seeking discovery had full access to the facts and the witnesses interviewed by the defendant's attorney. The Court concluded:

...[this] is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.36

The Court's decision seems to be based on two interrelated policy considerations. The majority opinion suggests that if the written efforts of the attorney-advocate were open to unlimited discovery, much of his work would go unwritten and "inefficiency, unfairness, and sharp practices would inevitably develop" in the legal profession.37 Secondly, discovery of written

33. 153 F.2d 212 (3d Cir. 1945). The term "work product of the lawyer" was apparently first used in the argument of Hickman v. Taylor to the Third Circuit. 4 Moore ¶ 26.23, at 1356. The phrase was then adopted by the circuit court in their opinion, 153 F.2d 212, 223, and finally given approval by the Supreme Court in their affirmance of that opinion. 329 U.S. 495, 511 (1947). It was defined by the Supreme Court as including interviews, statements, memoranda, correspondence, mental impressions and numerous other means by which an attorney attempts to protect the interests of his client by the use of his professional skills. Id.

34. It is unnecessary here to delineate the content and scope of that privilege as recognized in the federal courts. For present purposes, it suffices to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client. "..." Hickman v. Taylor, 329 U.S. 495, 506 (1947).

35. Id.

36. Id. at 510.

37. Id. at 511. This point of view was reiterated by the concurrence of Mr. Justice Jackson which emphasized the position that dis-
statements, especially memoranda of oral statements, might well force the attorney to the witness stand to testify as to their accuracy.\(^3\) As a participant in the controversy, the lawyer's role as an officer of the court and as an advocate would obviously suffer.\(^9\) The Court refrained, however, from laying down any general rule proscribing discovery of all materials prepared or obtained in anticipation of litigation and noted that there would be situations of "necessity or justification" in which a party could compel discovery.\(^40\)

In analyzing the propositions and views of Hickman, it is helpful to view the problem formulated by the Court:

Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.\(^41\)

Thus, the Court's position would support the contention that discovery is to be allowed unless a countervailing factor supersedes the public interest in discovery. The Court recognizes one such factor as the nature of the adversary process which requires some degree of private preparation. To eliminate this privacy where alternative channels of obtaining equivalent information are open would be an unnecessary sacrifice to the adversary process.\(^42\) When analyzed in this manner, the "necessity or justifi-

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38. See Hickman v. Taylor, 329 U.S. 495, 513 (1947); id. at 517-18 (concurring opinion).

39. His role as a professional advocate would be especially compromised if statements obtained by him from witnesses or his recollections of oral statements were used to impeach a witness to the detriment of his client's interests.

40. The Court suggested discovery might be justified where witnesses were no longer available. Were discovery to be precluded under these circumstances the Court felt that "... the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning." Hickman v. Taylor, 329 U.S. 495, 511-12 (1947).

41. Id. at 497.

42. It has been suggested that this privacy is that last vestige of the "fox and hounds" theory of the lawsuit. Note, 62 Harv. L. Rev. 269, 270 (1948). Granting the correctness of this suggestion, it is equally true that the operation of an adversary system needs some amount of independent work. It is clear that the proposed 1946 amendment to
cration" exception to the work product doctrine appears as a means of balancing the two interests and focusing attention on the point at which the adversary system does not have a justifiable interest in protection. The Federal Rules of Civil Procedure are rooted in the assumption that litigation is to be handled by advocates in full possession of all the relevant facts, and should not be utilized to suppress necessary information.\(^4\) The Court in *Hickman*, therefore, attempted to establish a rule which would allow the goals of discovery and the necessities of the adversary system to co-exist. It is within this context that the questions surrounding the discovery of expert witnesses should be considered.

III. APPROACHES TO DISCOVERY OF THE EXPERT

As has been indicated, the boundaries of work product discovery are at best nebulous and at worst non-existent. District courts have been shackled with the task of determining boundaries for discovering experts on the basis of general policy considerations announced in a case which did not even deal with experts.\(^4\)\(^4\) The lack of guidelines, either by decision or by rule, has led to a proliferation of various ancillary theories for the application of discovery to experts. While they have little in common, these theories generally have confined discovery to extremely narrow areas of expert information.\(^4\)\(^5\) In so restricting expert discovery the courts seem to have relied on three distinct grounds: attorney-client privilege; the "work product" doctrine; and the "good cause" exception to the work product doctrine.\(^4\)\(^3\)

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\(^4\) Rule 30(b) rejected the concept that our judicial system could function as an idealistic search for truth wherein the individual litigants would pool their resources. *See Discovery Procedure Symposium*, 5 F.R.D. 403, 404 (1946).

\(^4\) Although promotion of the adversary system and the avoidance of surprise at trial appear inconsistent, the necessity or justification exception of *Hickman* provides a method of reconciliation. Where the circumstances are such that independent advocates could not obtain equivalent or similar information, the "good cause" exception provides a means whereby that particular information can be obtained and "trial by surprise" avoided. While superior advocacy is important, each side theoretically has an equal opportunity to obtain all relevant information. *See Developments*, supra, note 11, at 1028; Note, *Aspects of the Minnesota Rule Prohibiting Discovery of Work-Product and Expert Conclusions*, 48 Minn. L. Rev. 977, 981 (1964).

\(^4\) *Hickman* dealt with the attorney's pretrial preparation rather than preparation done by an expert at the request of an attorney.

and the “unfairness rule.”

A. ATTORNEY-CLIENT PRIVILEGE

Some courts have indicated that communications of experts are not discoverable because they fall within the scope of the attorney-client privilege. This has been a minority position, however, and the Supreme Court decision in Hickman v. Taylor has made it difficult to sustain. Though the Hickman decision does not concern itself with the discovery of expert witnesses, the broad language of the Court seems to support Professor Moore’s argument that “if memoranda prepared by counsel himself are not privileged, a fortiori reports prepared for him by experts are not.” However, as was stated by the Hickman decision, a determination that privilege does not exist is not conclusive as to whether discovery should be allowed.

B. EXTENSION OF THE WORK PRODUCT DOCTRINE

A more extensively employed method of limiting expert discovery has been found within the ambit of the Hickman “work product” doctrine. The source of this protective approach is probably a long-standing inclination to consider the specially retained expert as an assistant counsel. This attitude was

46. See D. LOUISELL, MODERN CALIFORNIA DISCOVERY § 11, at 315 (1963); Friedenthal, supra note 45.
48. But see Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D. Mass. 1947). In that case Cold Metal had employed two scientists to test certain claims made in one of their patents. Cold Metal brought suit against Aluminum Company for patent infringement. One defense was that the patent was invalid because of the falsity of these same claims. In attempting to discover the findings of the scientists employed by Cold Metal, Aluminum Company cited Hickman as authority. The district court, however, relied on Hickman to deny discovery. Oddly enough, the court found that “...public policy would seem to compel the extension of the privilege rule to the situation as presented here.” Id. at 687. While Hickman may have been authority for denying discovery, it could hardly be cited for an extension of the privilege rule. See note 34 supra, and accompanying text.
49. See note 34 supra, and accompanying text.
52. This attitude appears to have originated in Lalance & Gros-
given great impetus by the decision of the Third Circuit in Allmont v. United States\(^5\) which extended Hickman’s qualified work product protection for attorneys to their agents.\(^6\) Extending this decision, a number of courts have denied expert discovery, reasoning that the expert was an agent of the attorney.\(^6\) Other courts, while following this same approach, have interpreted Hickman more narrowly and have held that reports containing an agent’s conclusions are within the scope of Hickman only if made under the attorney’s immediate direction and supervision.\(^6\)

However, experts are unlike other agents in that the expert’s conclusions and opinions often constitute evidence in themselves.\(^6\) To this extent, the expert information is dissimilar

\(^5\) Jean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563 (S.D.N.Y. 1898). The case concerned patent litigation and the defendant was seeking to obtain a letter from plaintiff’s attorney to an expert in the field concerning the scientific issues in controversy. The court said that:

\[
\ldots \text{questions of science and art are frequently so mingled with questions of patent law, in controversies arising upon some patent, that a party substantially retains an expert to conduct the case almost as associate counsel with the solicitor.}
\]

Id. at 564. On this basis the court found that the communications between an attorney and an expert retained by him would normally be privileged. However, it is highly interesting to note that the court went on to say that:

\[
\text{It would seem, however, that in such a case the privilege should be lost when the expert ceases to act as counsel, and allows himself to be made a witness; at least, to the extent to which he testifies.}
\]

Id. It is somewhat ironic that this latter pronouncement, on which the actual decision turned, should have been overlooked while the more restive concept of “assistant counsel” is relied upon. See, e.g., Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684 (D.Mass. 1947).

53. 177 F.2d 971 (3d Cir. 1950).

54. For a general discussion of Allmont, see Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); Keegan, Privileged Matter and Protective Orders, 1959 U. Ill. L.F. 801, 806-07; Tollman, Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer, 58 Colum. L. Rev. 498, 508-09 (1958). For an excellent criticism see Comment, 41 Minn. L. Rev. 823 (1957). This criticism was based upon the distinction between invading the privacy of an attorney’s preparation and obtaining reports which were handed the attorney without any of his personal effort. Id. at 825.


57. See C. McCormick, Handbook of the Law of Evidence §§ 13, 14 (1954); 7 J. Wigmore, Evidence §§ 1923, 1925 (3d ed. 1940); Rosenthal,
from that sought to be protected by Hickman; its nature is such that it is often impossible to uncover absent pre-trial discovery. Furthermore, one of the major considerations behind the work product immunization is the harmful effect on the adversary process of having lawyers testify in cases they are trying.\textsuperscript{53} Since experts are themselves proper witnesses, this justification is here inapplicable.\textsuperscript{59}

A variation of the work product shield over experts has been the protection of their conclusions and opinions while allowing discovery of their findings and observations.\textsuperscript{60} This distinction between fact and opinion seems indefensible in several regards.\textsuperscript{61} As mentioned above, the experts' conclusions are evidentiary in nature.\textsuperscript{62} As a consequence, if discovery of conclusions is restricted, the function that discovery serves in ascertaining evidence and in narrowing issues will be frustrated. Furthermore, since the conclusions and observations of experts are proper evidence, it is meaningless to separate them. When experts testify, the issues will often involve the correctness of their methods, techniques and judgment. As regards these issues, the "facts" are the opinions, conclusions and methods of the expert and not merely the raw data he has obtained. Thus, where tests are performed in order to determine the validity of patent claims, the conclusion of the scientist will be evidence introduced into court. But the basis leading to this conclusion will also be in evidence; the validity of the test methods used, the reliability of the test results, as well as the validity of the conclusion drawn from the raw data might all be at issue.\textsuperscript{63}

\begin{thebibliography}{99}
\bibitem{58} See note 38 supra, and accompanying text.
\bibitem{59} See Long, supra note 21, at 691; Note. supra note 43, at 981.
\bibitem{61} This distinction between findings and conclusions cannot be justified when dealing with expert discovery. However, on a practical level this distinction may be significant as to a showing of necessity. Where comparable experts are available but the materials have been so altered as to prevent duplication of necessary tests, it would be appropriate to allow discovery of test results but not conclusions. See note 85 infra, and accompanying text.
\bibitem{62} See note 57 supra, and accompanying text.
\bibitem{63} This example is factually similar to a case in which discovery was not allowed. Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 684, 687 (D. Mass. 1947).
\end{thebibliography}
It is fundamental to an understanding of the relationship between the expert witness and the discovery rules to realize that, by his knowledge and expertise, the expert "creates" evidence—ultimate facts—from the situation with which he works. Pre-trial discovery on this level may be absolutely essential to prevent surprise and to clarify and narrow issues.\textsuperscript{64}

C. PROTECTION THROUGH THE "UNFAIRNESS RULE"

Restricting the discoverability of experts on concepts of fairness has probably been the majority position of courts\textsuperscript{65} and some of the leading commentators.\textsuperscript{66} This approach was presented in the first reported decision dealing with expert discovery under the Federal Rules of Civil Procedure:

To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor.\textsuperscript{67}

Albeit important, this observation is apparently not crucial since a willingness to share the expert's fees, of itself, is usually not considered sufficient to permit discovery.\textsuperscript{68} However, detrimental effects of unrestricted expert discovery on the adversary system have been noted: the penalization of diligence and promotion of laziness,\textsuperscript{69} and the inhibition to use experts in litigations.

\textsuperscript{64} In E.I. duPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416, 421 (D. Del. 1959), a patent infringement suit, the evidence on both sides was of a highly technical nature. The court in this case recognized that, "[u]nless procedures can be inquired into and records of actual tests produced, neither party can have any idea of what the evidence against it is going to be." The court failed to recognize, however, that this same problem would exist to a lesser degree in any trial where use was made of expert opinion and testimony.


\textsuperscript{66} See, e.g., 4 Moore \textsuperscript{26.24} supra note 54; Keegan, supra note 54; cf. Long, supra note 21, at 665.


\textsuperscript{69} The most famous presentation of this idea is found in McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D.N.Y. 1939), aff'd, 113 F.2d 721 (2d Cir.), cert. denied, 311 U.S. 680 (1940):

While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to
However, since this approach bases its restrictions on concepts of fairness, an exception is provided to allow discovery of an expert where necessity can be shown by the discovering party.

The problems and inconsistencies in this approach are numerous. The expense consideration seems somewhat inconsistent with the situation where discovery is permitted of an ordinary witness who has been located only after great expenditures of time and money. The concept of a property right, while having some support, competes with the public interest in full exposition of the facts. And finally, the notion that discovery can lead to an unjust advantage-taking of an opponent's trial preparation has not been determinative in protecting non-expert witnesses.

In spite of these weaknesses, the "unfairness rule" remains rather persuasive. Most of the criticisms lose their potency when necessity exists. Furthermore, the expert is an exception among witnesses in that he normally has no unique knowledge of the facts, but "creates" evidence from them. To the extent that his

be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended.

While the issue in this case concerned the introduction of a document into evidence, it has often been cited as applicable to the issue of discovering expert information. See, e.g., United Air Lines v. United States, 26 F.R.D. 213 (D. Del. 1960); Schuyler v. United Air Lines, 10 F.R.D. 111 (M.D. Pa. 1950).

70. See Friedenthal, note 45 supra, at 460; Developments in the Law—Discovery, 74 HARV. L. REV. 940, 1032 (1961). But see Note, supra note 42, at 272. The normal reasoning is, of course, that if the reports of the expert are discoverable an attorney would not wish to use experts for fear of finding something advantageous to his opponent.


72. The majority of American courts have held that an expert may not refuse to testify or demand a fee in excess of the ordinary witness fee. See 4 Moore ¶ 26.24; Bomar, The Compensation of Expert Witnesses, 2 LAW & CONTEMP. PROBS. 510 (1935). This rule does restrict the testimony which the expert may be required to give to matters within his present knowledge. He can not be required to conduct experiments or otherwise specially prepare. 4 Moore ¶ 26.24. However, some cases have held that the expert may refuse to testify as to his expert conclusions and opinions. E.g., Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954); see Friedenthal, note 45 supra, at 480.
efforts in "creating" evidence can be duplicated, his protection from discovery would seem to cause no major injustice. Duplication of effort seems to be justified by the nature of the adversary system which attempts to achieve the truth by independent representation.

The most telling criticism of the "unfairness rule," however, is its failure to distinguish between two essentially different aspects and uses of the expert witness, as illustrated by Professor Moore's formulation of the fairness test:

The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research.\textsuperscript{73}

While this approach is arguably justified in regard to attempted discovery and use of the expert in his "evidence creating" function, which often can be duplicated, it clearly has no relevance to the use of the expert in his capacity as a witness. The emphasis in the unfairness approach is to avoid an usurpation of the knowledge and expertise of an opponent's expert allowing the acquisition of valuable information with little effort or expense. However, to the extent that the expert's particular methods and conclusions will be used as testimony, they should be divulged. As has been discussed,\textsuperscript{74} the nature of expert testimony is such that the methods, techniques and conclusions are important issues, often vital to the just disposition of the case, which may be completely unascertainable without discovery. Therefore, any attempt to restrict expert discovery must recognize and deal with his function as a witness, as well as a "creator" of evidence.\textsuperscript{75}


\textsuperscript{74} See note 57 supra, and accompanying text.

\textsuperscript{75} While this approach might arguably be merely an extension of the fairness exception, it is difficult to justify an "exception" in nearly all cases. Some courts have recognized this special need for discovery of evidentiary materials. See Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948); United States v. Nysco Laboratories, Inc., 26 F.R.D. 161 (E.D.N.Y. 1960); E.I. duPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416, (D. Del. 1960) (relied on special facts).
D. CASES ALLOWING EXPERT DISCOVERY

The cases allowing expert discovery have relied on a showing of special need or a general desire not to shield experts from discovery. Situations disclosing special need are of little significance since almost all approaches allow discovery on such a showing. Some courts, however, take the position that discovery of experts is to be generally allowed since discovery merely advances the stage at which disclosure can be compelled. However, this approach seems to oversimplify the problem. The scope of examination at trial is significantly different than during pre-trial preparation. Furthermore, the considerations of fairness must be considered; the interests of the parties and the public may be served by some degree of protection.

IV. PROPOSED AMENDMENT TO RULE 26(b)

A. FORM AND OPERATION

The Advisory Committee on Civil Rules, in their extensive proposals relating to discovery, has included a new provision intended to unify and clarify the issue of expert discovery. The preliminary draft of the proposed amendment, Rule 26(b) (4), provides as follows:

26(b) (4) Trial Preparation: Experts.

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See note 71 supra, and accompanying text.


See note 71 supra, and accompanying text.


The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceeding it, thus reducing the possibility of surprise.

See 4 Moore § 26.15. Rule 26(b) provides that, "[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). The Proposed Amendment leaves this language basically unchanged, merely substituting the word "information" for "testimony" to permit general application to all discovery. 1967 Prelim. Draft 14, 19.

See note 10 supra, and authorities cited therein.
DISCOVERY OF EXPERTS

(A) Subject to the provisions of subdivision (b)(4)(B) of this rule and Rule 35(b), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

(B) As an alternative or in addition to obtaining discovery under subdivision (b)(4)(A) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial.

(C) The court may require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (b)(4)(A) of this rule, require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.82

It is apparent that subdivisions (b)(4)(A) and (b)(4)(C), speaking to the pre-trial use of experts rather than the witness use of experts, as does subdivision (b)(4)(B), represent an adoption of the "unfairness" doctrine.83 The Committee's comments reveal that it has rejected any protection of the expert based solely on either his status as an expert or an extension of the work product doctrine.84 It is the Committee's position that a party can obtain the needed information by consulting his own experts; where this is not possible, discovery will be allowed. Oftentimes, where opposing experts are available, the test ma-

83. The "unfairness doctrine" as expounded by Professor Moore states that:

The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research. However, since one of the purposes of the Federal Rules as stated in Rule 1 is to facilitate the inexpensive determination of causes, the court should have discretion to order discovery upon condition that the moving party pay a reasonable portion of the fees of the expert.

4 Moore ¶ 26.24, at 1531.
Materials have been so altered as to prevent opposition experts from arriving at equivalent or accurate conclusions. Thus, where scientific testing of a substance would cause its destruction or alteration and a similar substance is not available, discovery of the test results, but not of the opinions drawn from them, should be allowed. The Committee points out, therefore, that facts will be more often discoverable than opinions.\(^8\)

Subdivision (b)(4)(C) reflects the "unfairness" doctrine's concern with the injustice in allowing one party to take and use information and conclusions for which the other party has incurred the expense.\(^8\) However, a party seeking this expensive information could be compelled to bear part of this expense. While the expense factor is not, standing alone, sufficient to prohibit discovery,\(^8\) there are no policies in favor of allowing a party a windfall when discovery is permitted because of necessity or some other justification.

The most noteworthy aspect of this provision is the scope of subdivision (b)(4)(A) and the distinction between it and (b)(4)(B). Subdivision (b)(4)(A) applies to any "expert retained or specially employed by another party in anticipation of litigation or preparation for trial. . . ." As to these experts "creating" evidence, "a party may discover facts known or opinions held" only upon a showing of special need or hardship. The expert to be used as a witness, on the other hand, can be discovered under subdivision (b)(4)(B) as to "opinions previously given" and those to be given "on direct examination at trial" without special showing. In adopting this position, the Advisory Committee has afforded the party using the expert a great deal of protection. Inasmuch as discovery without special showing is allowed only of the expert who will be a witness, the party employing an expert only to "create" evidence will be shielded.

The Advisory Committee, in the Notes to the Proposed Amendments, assumes that since this discovery is available only after the parties know who their witnesses will be, it will come too late to be a significant preparatory aid. It is not suggested how the timing aspects will operate. Without further specificity the danger exists that the litigants will either prepare their cases too early, making it possible for their opponent to exploit the preparation, or, more probably, delay naming their expert

\(^{86}\) See notes 67 & 68 supra, and accompanying text.  
\(^{87}\) See note 68 supra, and accompanying text.
witnesses, rendering it difficult for their opponents to use the
available discovery procedures. While discretionary authority of
the courts could be used to curb possible abuses on a case-by-
case basis, it would seem far wiser and safer to provide guide-
lines in the Rules. A suggested solution would be to use the
pre-trial conference as a vehicle for arranging this discovery.
While such a solution has merit in that it would employ a
familiar procedure, the important consideration is that specific
standards or guidelines should be established.

Finally, since the scope of discovery within this provision is
restricted to opinions “previously given or those to be given
on direct examination at trial,” the party seeking discovery can
be further precluded from using this process to establish his
own claim or defense. This restriction seems to be directed at
preventing the deposing party from asking hypothetical ques-
tions or questions as to which the expert does not presently have
an opinion since answers to such questions might well aid the
deposing party in establishing his own case.

Because subdivision (b)(4)(B) is dealing with the expert as a
witness there is no justification for extending its scope to matters
not within the scope of his testimony. However, the use of the
ambiguous language “previously given” may prove a major flaw
in this provision. To treat this phrase as allowing discovery of
all opinions given by the expert would undermine the amend-
ment and its dichotomous treatment of the expert depending on
his function. Perhaps the words “those previously given” should be deleted from the subdivision. While discovery there-

88. See Long, Discovery and Experts under the Federal Rules of
the pre-trial conference the court could determine whether expert wit-
nesses were going to be called and then set a date by which detailed
reports of the experts would have to be available. Id. A simpler sug-
gestion might be to require the parties to have the names of the expert
witnesses they intend to use along with reports of the experts’ opin-
ions and grounds therefor available at the pre-trial conference. In
many cases an exchange of reports would provide sufficient discovery.
See 1967 PRELIM. DRAFT 25.

89. Neither the text nor the Advisory Committee Notes provide any
aid in interpreting this phrase. 1967 PRELIM. DRAFT 23-25.

90. It has been suggested that the phrase “previously given” may
mean that discovery of the grounds for opinions already given in tes-
timony or discovery is to be permitted. See Note, Proposed 1967 Amend-
Such an interpretation would be acceptable since it would limit the
discovery therein consistently with the expert’s role as a witness. How-
ever, it is not at all clear from the text of the proposed amendment that
“previously given” is intended to modify only “opinions.”
under would then be limited to "opinions and the grounds therefore . . . to be given on direct examination at trial," this knowledge would be sufficient to allow the opposing counsel to prepare cross-examination and rebuttal effectively—the stated goal of the provision.\textsuperscript{91}

The importance of subdivision (b) (4) (B), however, lies not in its protection of the party employing the expert, but rather in its permitting the discovery necessary for effective cross-examination and rebuttal.\textsuperscript{92} Further, the discovery of this information is essential to a meaningful clarification and narrowing of issues.\textsuperscript{93} To the extent these protections permit discovery without unduly impairing the workings of the adversary system, they clearly advance the overall goals of the discovery procedure.

B. Relation to Functions of Discovery and the Hickman Rationale

As discussed earlier,\textsuperscript{94} the functions of discovery are disclosure and presentation of relevant information, issue formulation, and encouragement of settlements. The decision in \textit{Hickman v. Taylor} was shown to be concerned with preserving the efficacy of the adversary system;\textsuperscript{95} the work product doctrine was to achieve a balancing of discovery benefits with the needs of an effective advocacy process. The problems created by discovery of experts concern many of the same policies dealt with in \textit{Hickman v. Taylor}. The significance of the amendment proposed by the Advisory Committee arises from the fact that it has achieved a solution to these problems which balances the competing interests near the optimal point. Subdivision (b) (4) (A) protects the interest of the opposing parties in using the expert to "create" evidence only to the extent that the adversary system fails to furnish the machinery adequate to elicit necessary and unavailable information. Subdivision (b) (4) (B) recognizes the separate implications and functions of the expert as a witness and allows liberal discovery of experts so functioning in the interest of effective cross-examination and rebuttal, and in the interest in clarifying and narrowing the issues. The protections built into this subdivision can prevent any unnecessary en-

\textsuperscript{91} 1967 Prelim. Draft 24.
\textsuperscript{93} \textit{See} notes 21 & 22 \textit{supra}, and accompanying text.
\textsuperscript{94} \textit{See} text accompanying notes 11-23 \textit{supra}.
\textsuperscript{95} \textit{See} notes 41 & 42 \textit{supra}, and accompanying text.
croachment of these interests into the proper functioning of the adversary system.

V. CONCLUSION

The problem of discovery in relation to the expert witness and expert information is one which has long plagued the federal courts. The expert's role is not easily defined and the considerations to be weighed in deciding the issue are not readily separated. With the noted exceptions\(^9\) the amendment proposed by the Advisory Committee provides a satisfactory, if not optimal, solution. While the discretion of the district courts will still play a role in the final determination, coherent and justifiable guidelines can be established by the adoption of this proposal.\(^9\)

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96. See notes 88 & 89 supra, and accompanying text.
97. The proposed amendment will not and does not purport to remove these questions from the district courts as subjects of traditionally recognized discretion. Even if some discovery is warranted by a showing of necessity the court will still have wide powers over the scope of that discovery. See 1967 Prelim. Draft 25. As one commentator has effectively pointed out:

The concepts embodying judicial discretion and authority represent the only valid answer yet offered to the varied problems which may arise in determining the scope and extent of discovery, no more nor less with experts than with other witnesses or evidence. . . . We . . . have adjustments by the courts rather than a determination by deduction.

Long, supra note 88, at 701. The function of the proposed amendment is to provide uniform and intelligent guidelines for the exercise of this discretion. The diversity and confusion in approaching this problem exhibited by the district courts provides evidence of its necessity. See note 9 supra, and accompanying text.