Pre-Trial Discovery of Trial Preparation Materials Prepared, and Non-Testifying Experts Retained, in Anticipation of Prior Litigation

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I. Introduction

Although the scope of pretrial discovery is generally very broad, limitations do exist, particularly for trial preparation materials and facts known and opinions held by experts. Discovery of otherwise discoverable materials or information may be restricted or denied entirely because a party has prepared or developed the materials or information in anticipation of litigation. In *American Buildings Co. v. Kokomo Grain Co.*,[1] the Indiana Court of Appeals rendered one of the few published decisions by Indiana's appellate courts regarding the interpretation and application of Rule 26(B)(3),[2] pertaining to discovery of trial preparation materials,

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[1]506 N.E.2d 56 (Ind. Ct. App. 1987), *transfer denied*, September 14, 1987.

[2]Ind. R. Tr. P. 26(B)(3) provides:

> (3) Trial Preparation: Materials. Subject to the provisions of sub-division (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the 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.
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> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is
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> (a) a written statement signed or otherwise adopted approved by the person making it, or
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> (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital or an oral statement by the person making it and contemporaneously recorded.

and Rule 26(B)(4),[3] pertaining to the discovery of experts retained in anticipation of litigation.[4] More importantly, the court's opinion became one of only a handful considering the discovery of materials developed or experts retained in anticipation of *prior* litigation.[5]

The court ruled that documents prepared in anticipation of prior litigation were protected under Rule 26(B)(3).[6] However, the court concluded that facts known and opinions held by experts retained in anticipation of prior litigation were not protected under Rule 26(B)(4).[7] This difference in the application of the two provisions within Rule 26

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[3]Ind. R. Tr. P. 26(B)(4) provides:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (B)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (B)(4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(c) Unless manifest injustice would result,

(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (B)(4)(a)(ii) and (B)(4)(b) of this rule; and

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

[4]Discovery orders are not final orders; therefore, they are not immediately appealable except as interlocutory orders under Rule 4(B) of the Indiana Rules of Appellate Procedure. After final judgment, discovery orders are reviewable on appeal but are frequently moot or subject to the broad discretion afforded trial courts in discovery matters. *See, e.g.*, CIGNA-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1036 (Ind. Ct. App. 1985).

[5]*See infra* notes 53 and 70 and accompanying text.

[6]*American Buildings*, 506 N.E.2d at 62.

[7]*Id.* at 61.

is not based upon a proper reading of the rule's language or the policies it serves. Rule 26(B)(4) should be construed to protect the efforts of experts retained in anticipation of prior litigation in order to encourage litigants to properly prepare their cases, to discourage litigants from relying upon the pretrial efforts of their opponents and to promote the adversarial process.

II. The *American Buildings* Case

In *American Buildings Co. v. Kokomo Grain Co.*,[8] Kokomo Grain Co. ("Kokomo") brought suit against American Buildings Co. ("American") alleging breach of contract, negligence, fraud and strict liability in tort arising from the collapse of a grain storage building sold by American to Kokomo.[9] Kokomo filed a request for production of documents upon American, seeking all investigative reports and notes made by American, or on its behalf, regarding prior similar collapses of buildings sold by American, and specifically requested the report of Jim Fisher, an expert hired by American to analyze the collapse of another American building.[10]

American objected to the discovery request, asserting only that the documents sought were irrelevant and protected by the work product doctrine. Kokomo then moved for an order compelling discovery.[11] The trial court granted Kokomo's motion to compel and American appealed.[12]

On appeal, American argued that the order was erroneous as it "(1) permits discovery of work product from previously terminated litigation, (2) requires a case to have been actually filed and active at the time a document was created in order for the document to qualify as work product, and (3) limits the work product doctrine to work product of attorneys."[13] In response, Kokomo argued that the order was not in error because American did not carry its burden of demonstrating that the relevant documents were work product.[14]

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[8]506 N.E.2d 56 (Ind. Ct. App. 1987), *transfer denied*, September 14, 1987.

[9]*Id.* at 58.

[10]*Id.*

[11]*Id.*

[12]*Id.* The trial court excepted from its order compelling discovery only "those matters which are the work product of the attorneys on any and all cases that were actually filed and active at the time the information sought was determined . . . ." The court found that all other memorandums, testing results and the like are relevant to the case at bar and are discoverable as non-work product. *Id.* American brought its interlocutory appeal under Rule 4(B)(6) of the Indiana Rules of Appellate Procedure, on the trial court's certification of its order for appeal.

[13]*Id.*

[14]*Id.*

The Indiana Court of Appeals observed that while some of the documents requested by Kokomo arguably did fall under the work product doctrine, "this case also involves the requested production of a document prepared by an expert in anticipation of litigation."[15] The discovery of work product and matters from experts are governed by separate exceptions to the general rule in Rule 26(B)(1) that all relevant matters are discoverable.[16]

Consequently, the court recharacterized the issues raised by the trial court's discovery order as: (1) whether Rule 26(B)(3) applied to restrict Kokomo's discovery request for investigative reports or notices prepared by or for American in anticipation of prior litigation;[17] and (2) whether Rule 26(B)(4) applied to restrict Kokomo's request for production of the expert's report prepared in anticipation of prior litigation.[18]

A. *Rule 26(B)(3) Protects Trial Preparation Materials Prepared in Anticipation of Prior Litigation*

The court of appeals restricted the trial court's requirement that in order for materials to fall within the "in anticipation of litigation"

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[15]*Id.*

[16]*Id.* at 57-59, 62. Although the two exceptions set forth in Rules 26(B)(3) and 26(B)(4) are conceptually distinct, the inquiry under both provisions includes the threshold question of whether the matters requested are relevant to the subject matter of the litigation and not privileged. Ind. R. Tr. P. 26(B)(1). Rule 26(B)(1) provides:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Ind. R. Tr. P. 26(B)(1). The court, in CIGNA-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033 (Ind. Ct. App. 1985), defined a document as relevant to discovery "if there is the possibility the information sought may be relevant to the subject matter of the action." *Id.* at 1036. There is no requirement that the requested document be relevant or admissible at trial.

The preference for discovery of all relevant material yields to the countervailing policies in favor of allowing certain information to remain non-discoverable. Examples of information that would retain such privilege include material whose production would constitute a violation of the fifth amendment privilege against self-incrimination, or would violate statutory privileges including: (i) attorney-client; (ii) minister-penitent; (iii) husband-wife; (iv) physician-patient; or (v) accountant-client. *See* Ind. Code §§ 34-1-14-5 and 25-2-1-23 (1982).

[17]506 N.E.2d at 61.

[18]506 N.E.2d at 59.

requirement of Rule 26(B)(3), a case must be filed and active.[19] The court noted that the protections afforded under the rule were based upon policies that go "to the heart of the attorney-client relationship" and that counsel would be greatly inhibited in the representation of a client if the work product protections did not extend beyond the termination of the litigation for which the documents were prepared.[20] As a result, the court held that the protections of Rule 26(B)(3) apply to items prepared in anticipation of prior litigation.[21]

The court remanded the case to the trial court in order to determine whether the trial preparation materials were discoverable.[22] The court set forth a "three-step process of shifting burdens."[23] First, the party seeking discovery must serve a request for production of documents pursuant to Rule 34.[24] The request must be reasonably particularized to inform the party of the materials that are desired. Second, the party resisting discovery must make a *prima facie* showing that the documents

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[19]*American Buildings*, 506 N.E.2d at 62. "They [courts and commentators] have made clear that a case need not be filed at the time the document is produced in order for work-product protection to attach." *Id. See also Hagerman-Shambaugh*, 473 N.E.2d at 1037. A document is found to be prepared in anticipation of litigation when "in light of the nature of the document and the factual circumstances in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 506 N.E.2d at 62-63 (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 198 (1970)).

[20]*American Buildings*, 506 N.E.2d at 62.

[21]*Id.* This position is in harmony with many cases and commentary that have considered the question under Rule 26(b)(3) of the Federal Rules of Civil Procedure. *See, e.g., In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977); Duplan Corp. v. Moulinage et Retorderie de Chavonoz, 487 F.2d 480, 484 (4th Cir. 1973). *See also* Annotation, *Attorney's Work Product Privilege Under Rule 26(b)(3) of the Federal Rules of Civil Procedure as Applicable to Documents Prepared in Anticipation of Terminated Litigation*, 41 A.L.R. Fed. 123 (1979); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, p. 199-202 (1970); Note, *The Work Product Doctrine in Subsequent Litigation*, 83 Colum. L. Rev. 412 (1983) (proposing an intermediate approach whereby trial preparation materials would receive protection from discovery when the possibility of related litigation exists).

[22]*American Buildings*, 506 N.E.2d at 65.

[23]*Id.* at 63.

[24]Rule 34 provides, in pertinent part:

> (A) Scope. Any party may serve on any other party a request:
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> (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including, without limitation, writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which intelligence can be perceived, with or without the use of detection devices) or to inspect and copy, test or sample any tangible things which constitute or contain matters with the scope of Rule 26(B) and which are in the possession, custody or control of the party upon whom the request is served . . . .

Ind. R. Tr. P. 34(A)(1).

are protected as trial preparation materials under Rule 26(b)(3). This burden can be met by specifying the documents considered to be protected and the basis for protection. Third, the party seeking discovery must show substantial need of the materials and an inability to obtain the substantial equivalent without undue hardship. If the documents sought contain the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party such documents "enjoy a near absolute immunity from discovery."[25]

B. Rule 26(B)(4) Does Not Protect the Facts Known and Opinions Held by Experts Retained in Prior Litigation

Although the court of appeals concluded that the protections afforded trial preparation materials extended to materials developed in prior litigation, the court concluded that the protections afforded the facts or opinions of experts retained in anticipation of prior litigation did not extend to subsequent litigation.[26] The report of Jim Fisher, an expert hired by American, was found to be freely discoverable under the scope of Rule 26(B)(1) and not subject to the restrictions contained in Rule 26(B)(4).[27]

The court's inconsistent application of Rules 26(B)(3) and 26(B)(4) to prior litigation arises from its definition of the phrase "in anticipation of litigation." The court recognized this inconsistency but found it "not logically possible to harmonize the meaning of 'in anticipation of litigation' within the two sections."[28] The court's compulsion to limit the scope of "in anticipation of litigation" under Rule 26(B)(4) to the instant litigation follows from the court's preoccupation with language in that provision pertaining to the different levels of discoverability between testifying and non-testifying experts.[29]

Subsections (a) and (b) of Rule 26(B)(4) provide different means of discovering an expert expected to be called as a witness at trial from an expert not expected to be called as a witness. The court found the "only logical interpretation of this subsection [Rule 26(B)(4)(b)] is that the trial in preparation of which the expert was hired, and the trial at which the expert is not expected to be called, are the one and the same

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[25]*American Buildings*, 506 N.E.2d at 63-65. *But see* Truck Ins. Exchange v. St. Paul (D.C. Pa. 1975) (an attorney's mental impressions, conclusions, opinions and legal theories were discoverable in subsequent litigation where they formed the basis for that litigation).

[26]*Id.* at 60.

[27]*Id.* at 61.

[28]*Id.* at 62.

[29]*Id.* at 60.

trial. It is impossible for an expert not to be called as a witness in a trial which has already taken place."[30]

The court's conclusion that the inquiry as to whether the expert is expected to be called as a witness at trial requires that the expert have been retained in anticipation of the *instant* litigation is greatly strained and not supported by authority. A more reasonable explanation for the inquiry as to whether the expert will testify at trial is that the rule provides for different degrees of discoverability depending upon the party's use of the expert.

The question of the application of Rule 26(b)(4) to experts retained in anticipation of prior litigation was one of first impression in Indiana and the court turned to three federal cases for authority.[31] Review of these cases shows that they provide very limited support for the court's ruling. By its terms, Rule 26(B)(4) affords protection to the facts known and opinions held by experts only when the facts or opinions have been acquired or developed in anticipation of litigation. The federal cases cited as authority by the court recognize only that the protections under Rule 26(B)(4) do not apply to: (1) facts and opinions not acquired or developed for litigation;[32] (2) facts and opinions acquired or developed

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[30]*Id.*

> [T]he protection granted materials from experts does not extend to facts known or opinions held by an expert retained or specifically employed in anticipation of prior litigation. Subsection (a) of T.R. 26(B)(4) clearly applies only to experts retained in anticipation of the pending litigation:
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> > "(a)(i) A party may through interrogatories require any other party to identify each person *whom the other party expects to call as an expert witness at trial,* to state the subject matter on which the expert is expected to testify . . . ." (Emphasis supplied).
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> This future reference to the trial clearly limits application of this provision to experts retained for the purposes of the pending litigation. The same future reference to a trial is present in subsection (b) of the rule:
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> > "(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial *and who is not expected to be called as a witness at trial* . . . ." (Emphasis supplied).
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> The only logical interpretation of this subsection is that the trial in preparation of which the expert was hired, and the trial at which the expert is not expected to be called, are one and the same. It is impossible for an expert not to be expected to be called as a witness in a trial which has already taken place. Thus, 26(B)(4)(b) does not apply to expert witnesses retained or specifically hired in anticipation of prior litigation.

Id.

[31]*Id.* at 59-60. *See infra* notes 32-34.

[32]The court quotes Grinnell Corp. v. Hackett, 70 F.R.D. 326, 332 (D.R.I. 1976), as follows: "that discovery of experts is to be limited only insofar as the information sought was obtained for the very purpose of preparing *for the litigation in question.*"

prior to the expert being retained;[33] or (3) facts or opinions held by expert employees not specially retained.[34]

A review of the policy considerations and authorities regarding the work product doctrine, the protection of trial preparation materials under Rule 26(B)(3), and the protection of facts known and opinions held by experts under Rule 26(B)(4), leads to the conclusion that the court was correct in extending the protection granted trial preparation materials to materials prepared in anticipation of prior litigation.[35] However, the court's blanket denial of protection to facts known and opinions held by experts retained in prior litigation implicates many of the same policy concerns as are addressed in the case of trial preparation materials. A denial of protection to the work of experts in subsequent litigation may reduce the effectiveness of the adversarial process, discourage parties and their attorneys from adequately preparing their cases and allow a dilatory party to unfairly benefit from the efforts of its opponent.[36]

III. The Work Product Doctrine and Rule 26

Review of the common law development of the work product doctrine and its eventual codification in Rule 26(B)(3) shows that although the doctrine initially began as a means of protecting the labors of an attorney from discovery, the doctrine has been rapidly expanded. As now codified, the doctrine protects materials prepared in anticipation of litigation by the *party* or the party's attorney, consultant, surety, indemnitor, insurer or agent.[37] The doctrine is no longer based exclusively upon the notion of protecting an attorney's labors, although the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative receive extraordinary protection from disclosure.[38] Rule 26(B)(3)

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506 N.E.2d at 59. The above quotation is unsupported dictum as it arises in a case where the district court expressly found that the facts and opinions sought from experts were not prepared for litigation or trial. *Grinnell Corp.*, 70 F.R.D. at 333.

[33]In Sullivan v. Sturm, Ruger & Co., Inc., 80 F.R.D. 489 (D. Mont. 1978), the court did not refuse to extend the protections afforded facts known and opinions held by experts which were acquired or developed in anticipation of litigation. The court in *Sullivan* correctly permitted discovery of a party's expert as to facts known and opinions held by that expert prior to being retained in anticipation. *Id.* at 491.

[34]An expert not specifically retained or employed in anticipation does not fall within the purview of Rule 26(B)(4) and is treated as an ordinary witness. *See* Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 407-08 (E.D. Va. 1975).

[35]*See infra* notes 39-57 and accompanying text.

[36]*See infra* notes 58-79 and accompanying text.

[37]The court in *American Buildings* recognized this fact in further disagreeing with the trial court's interpretation of Rule 26(B)(3). 506 N.E.2d at 63. *See supra* notes 12 and 17.

[38]*See supra* note 17.

encourages litigants to undertake prudent pretrial preparation and restricts one party from unfairly benefitting from the efforts of its opposition. These same policies support the rule restricting the discovery of facts known and opinions held by experts retained in anticipation of litigation. These policies support the extension of the protections afforded under Rule 26(B)(4) to experts retained in prior litigation just as they support the court's decision to extend the protections under Rule 26(B)(3) for trial preparation materials.

A. The Work Product Doctrine and Rule 26(B)(3)

The work product doctrine has its origin in case law culminating in the landmark decision, *Hickman v. Taylor*.[39] In *Hickman*, the United States Supreme Court recognized that, although "deposition-discovery rules are to be accorded a broad and liberal treatment,"[40] a lawyer's thoughts and impressions should remain inviolate and a party should not be able to prepare its case by discovering the fruits of the efforts of its opponents.[41] The Court further recognized that proper representation of a client required that a lawyer be allowed a certain degree of privacy to discharge his duties to the client responsibly and effectively.[42]

To permit discovery of an attorney's work product,[43] the Court reasoned, would undermine the adversarial process[44] and demoralize the efforts of competent counsel.

> Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[45]

Nonetheless, the Court recognized that there were instances in which the protections afforded work product must succumb to other goals of

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[39]329 U.S. 495 (1947).

[40]*Id.* at 507.

[41]*Id.* at 510-12.

[42]*Id.* at 510-11.

[43]The Court defined work product of the lawyer as his "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs . . . ." *Hickman*, *Id.* at 511.

[44]Justice Jackson aptly noted in his concurrence: "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." *Id.* at 516 (Jackson J., concurring).

[45]*Id.* at 511.

the adversarial system including the quest for truth and discovery of facts essential to the preparation of the case.[46]

Following *Hickman*, lower courts applied the work product doctrine to protect the work product of attorney's agents[47] and the work product and information gathered by clients themselves in anticipation of litigation.[48] Indiana courts have recognized and conformed with federal decisions establishing the work product doctrine.[49]

In the federal and many state systems from 1947 through 1970, the scope and application of the work product doctrine was left to courts on a case-by-case basis.[50] Indiana adopted discovery rules on July 1, 1971, which were taken from the 1967 Proposed Amendments to the Federal Rules of Civil Procedure.[51] On January 1, 1982, Indiana's Trial Rules were amended to substantially conform to the Federal Rules of Civil Procedure.[52]

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[46]The Court stated:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.

Id. at 511-12.

[47]*See, e.g.*, Alltmont v. United States, 177 F.2d 971, 976 (3d Cir. 1949) (statements taken by nonlawyer protected), *cert. denied*, 339 U.S. 967 (1950). *But see* Southern Ry. Co. v. Campbell, 309 F.2d 569, 572 (5th Cir. 1962) (statements taken by nonlawyer not protected as work product).

[48]Guilford Nat'l Bank v. Southern Ry. Co., 297 F.2d 921, 926 (4th Cir. 1962).

[49]*See, e.g.*, Newton v. Yates, 170 Ind. App. 486, 353 N.E.2d 485 (1976).

[50]*See* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2022, at 189-90 (1970).

[51]Ind. R. Tr. P. 26-37.

[52]See 2 W. Harvey, Indiana Practice, § 26.1 at 491-92 (1987), for a useful discussion of the development of Indiana's discovery rules and their relation to federal discovery rules. Indiana Rules 26(B)(3) and (4) are identical to their present federal counterparts. *See* Fed. R. Civ. P. 26(b)(3) and (4). Rule 26(B)(3), by its language, represents a codification of the work product doctrine as recognized in Hickman v. Taylor, 329 U.S. 195 (1947), only to the extent that discovery is sought of documents and tangible things prepared in anticipation of litigation. One commentator has correctly acknowledged that the work product doctrine has continuing vitality because it is larger than the protection afforded in Rule 26(B)(3). *See* 2 W. Harvey, *supra* § 26.8, at 503-04.

The Indiana Court of Appeals in *American Buildings*, properly determined that trial preparation materials are entitled to perpetual protection under the substantial need and undue hardship requirements of Rule 26(B)(3).[53] The court quoted extensively from *In re Murphy*[54] which recognized that the evils which the work product doctrine was designed to avoid—*i.e.*, inhibiting attorney representation of his client for fear that his files will become readily available to the adversary—would be present if work product was made available in subsequent litigation.[55]

It is interesting to note, however, that the court in *In re Murphy* relied upon the policy against inhibiting attorney representation when faced with a discovery request for production of an attorney's work product.[56] The court in *American Buildings* relied upon this very same policy without any showing that the documents sought to be discovered were the results of an attorney's efforts or part of his file.[57] The court was correct in not distinguishing between the protection afforded attorney trial preparation material and other trial preparation material as no such distinction exists under Rule 26(B)(3). The court did not, however, acknowledge the full scope of the policy considerations served by extending the protections under Rule 26(B)(3) to materials prepared in anticipation of prior litigation.

The policies served by extending the application of Rule 26(B)(3)—*i.e.*, encouraging prudent litigation preparation, prohibiting one party from benefitting from the efforts of its opponent, and preserving the adversarial process—are all present in the case of discovery of non-testifying experts retained in anticipation of prior litigation. The presence

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[53]The weight of authority supports the extension of the protections to materials prepared in anticipation of prior litigation. *See In re* Murphy, 560 F.2d 326, 334-35 (8th Cir. 1977); United States v. Leggett & Platt, Inc., 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 732-33 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); United States v. O.K. Tire & Rubber Co., 71 F.R.D. 465, 468 n.7 (D. Idaho 1976); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 516 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976); Midland Investment Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134, 138 (S.D.N.Y. 1973); 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[2] (2d ed. 1976); *See also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 200-01 (1970); Note, *Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412 (1983); Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799; Note, *Civil Procedure-Discovery-Work Product Privilege Extends to Subsequent, Unrelated Litigation*, 27 VAND. L. REV. 826 (1974).

[54]560 F.2d 326 (8th Cir. 1977).

[55]*Murphy*, 560 F.2d at 333-34.

[56]*Id.* at 334.

[57]Kokomo sought discovery of all investigation reports and notes made by American, or on its behalf, regarding the six prior building failures. 506 N.E.2d at 58.

of these policies compel a consistent application of Rule 26(B)(3) and (4).

B. *Discovery of Experts Under Rule 26(B)(4)*

Prior to the promulgation of Federal Rule 26, courts took differing approaches toward discovery of experts. Case law had not established a clear distinction between testifying and non-testifying experts, and discovery was often denied on the basis of the attorney-client privilege,[58] the work product doctrine[59] or unfairness.[60] The Federal Advisory Committee Notes to the proposed amendments to the Federal Rules of Civil Procedure relating to discovery reflect a dismissal of the first two bases for protecting expert information and rely upon the emerging doctrine of unfairness as the basis for restricting discovery of experts.[61]

Under Rule 26(B)(4) experts may be divided into four classes receiving different treatment: testifying experts; non-testifying experts retained in anticipation of litigation; non-testifying experts informally consulted in preparation for trial but not retained; and experts whose information was not acquired in preparation for trial. The distinctions between these classes concern different policy considerations under Rule 26(B)(4) and therefore will be discussed separately.

1. Testifying experts.—An opponent may learn by interrogatories the names of testifying experts and the substance of their testimony; further discovery, however, can only be had on motion and court order.[62] As reflected in the Federal Advisory Committee Notes, the need for discovery of testifying experts is paramount because effective cross-

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[58]*See, e.g.*, American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680, 685-86 (D.R.I. 1959); Schuyler v. United Air Lines, Inc., 10 F.R.D. 111, 113 (M.D. Pa. 1950); Cold Metal Process Co. v. Aluminum Co., 7 F.R.D. 684, 686-87 (D. Mass. 1947). *But see* United States v. Meyer, 398 F.2d 66, 73 (9th Cir. 1968).

[59]Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257, 261 (D. Neb. 1959). *But see* United States v. McKay, 372 F.2d 174, 176-77 (5th Cir. 1967).

[60]Cases which discuss the unfairness doctrine include United States v. 2001.10 Acres of Land, 48 F.R.D. 305, 308 (N.D. Ga. 1969); Walsh v. Reynolds Metal Co., 15 F.R.D. 376, 378-79 (D.N.J. 1954). *Cf.* Maginnis v. Westinghouse Elec. Corp., 207 F. Supp. 739, 742 (E.D. La. 1962); United States v. 284,392 Square Feet of Floor Space, Etc., 203 F. Supp. 75, 77-78 (E.D.N.Y. 1962).

[61]Advisory Committee on Rules of Practices and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery (1969), *reprinted in*, 48 F.R.D. 485, 503-05 (1969) [hereinafter Federal Advisory Committee Notes]. Because Federal Rule 26(b)(4) and Indiana Rule 26(B)(4) are identical, the Federal Advisory Committee Notes are relevant to the discussion of the policies surrounding the discovery of experts in Indiana. *See supra* note 52.

[62]Ind. R. Tr. P. 26(B)(4)(a).

examination of experts at trial requires advanced knowledge of their testimony.[63]

2. Non-testifying experts retained in anticipation of litigation.—Except as provided in Rule 35,[64] providing for discovery from an examining physician, the facts known and opinions held by non-testifying experts retained in anticipation of litigation can only be discovered upon a showing of exceptional circumstances.[65]

3. Non-testifying experts informally consulted in preparation for trial but not retained.—The rule does not address these types of experts and no discovery may be had of the names or views of such persons.[66]

4. Experts whose information was not acquired in preparation for trial.—This class of experts includes both employees of a party not specifically employed for litigation and also experts who were actors or viewers of the subject matter of the litigation. All facts known and

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[63]The Federal Advisory Committee expressly adopted this policy:

> Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, *Some Practical Problems in Proof of Economic, Scientific, and Technical Facts*, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy-and often fruitless-cross-examination during trial," and recommends pretrial exchange of such material. Calif. Law Rev.Comm'n [sic], *Discovery in Eminent Domain Proceedings* 707-710 (Jan. 1963). Similarly, effective rebuttal required advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

FEDERAL ADVISORY COMMITTEE NOTES *supra* note 61, at 503-04.

[64]Rule 35(B) provides in pertinent part:

> (1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

IND. R. TR. P. 35(B).

[65]IND. R. TR. P. 26(B)(4)(b).

[66]FEDERAL ADVISORY COMMITTEE NOTES, *supra* note 61, at 504.

opinions held by such experts are freely discoverable and do not fall within the provisions of the rule.[67]

The policies which support discovery of testifying experts—*i.e.*, promoting effective cross-examination of expert witnesses, narrowing issues at trial, and eliminating surprise—do not support discovery of facts known and opinions held by non-testifying experts retained in anticipation of litigation. As the Federal Advisory Committee Notes recognized, unfairness would result when a party built its case from its opponent's experts:

> Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in [Rule 26(B)(4)(a)] holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he could hardly hope to build his case out of his opponent's experts.[68]

Unrestricted discovery of an adversary's non-testifying expert would discourage proper trial preparation and might result in the "sharp practices" that the Supreme Court in *Hickman* sought to avoid.[69] The limited discovery permitted for testifying experts is a compromise of competing concerns whereby the adversarial process is benefitted through preparation for cross-examination and trial. No such policy concerns support the discovery of non-testifying experts retained in anticipation of trial whether in the case in which retained, or in any subsequent litigation.

The importance of restricting discovery of non-testifying experts retained in anticipation of prior litigation is particularly acute in products liability litigation. A manufacturer might retain an expert in anticipation of litigation to investigate a product and a particular incident involving that product. If the protections afforded under Rule 26(B)(4) are not extended to the facts known and opinions held by that expert in subsequent litigation, future plaintiffs might be free to build their case on the trial preparation efforts of the manufacturer.

The unfairness of this result was recognized in *In re Agent Orange Product Liability Litigation*[70] which involved complex multi-district lit-

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[67]*Id.*

[68]*Id. See also* 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) (noting that liberal discovery of experts would be detrimental to party who had prepared in advance and would aid the party who did not retain expert).

[69]*See supra* note 45 and accompanying text.

[70]105 F.R.D. 577 (E.D.N.Y. 1985).

igation.[71] In that case, the court found that facts acquired and opinions developed in anticipation of litigation by experts retained by the manufacturers in one of the pending actions would be protected in other pending actions under Federal Rule 26(B)(4).[72] The court found it reasonable to interpret the rule to apply to a closely related case "[g]iven the legal and factual similarities, the involvement of many of the same parties, and the procedural realities of the [multidistrict litigation] process . . . ."[73]

Legal and factual similarities are often presented in products liability cases. One way to avoid the result in *American Buildings* would be for manufacturers to simply retain experts for any and all pending *and future* litigation. This precaution has been interpreted to extend the protections of the rule to litigation subsequent to the litigation for which the expert was retained.[74]

It is possible, if not likely, that abuses may occur under Rule 26(B)(4) whereby a litigant might retain experts and label them "non-testifying" in order to insulate the experts from the reach of its adversary.[75] Such a tactic is no more likely, however, in the case where an expert has been retained for a single suit than in the case where expert is retained for all pending and future litigation and does not justify the free discovery of non-testifying experts retained in prior litigations.

Much of the abuse or hardship that may arise under the rule can be remedied upon a showing of "exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means."[76] Exceptional circumstances should be found when a party retains all the experts in a specialized field or all the experts likely to be sympathetic to its opponent.[77] Further instances

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[71]*See* 28 U.S.C. § 1407(a) authorizing the Judicial Panel on Multidistrict Litigation to consolidate and transfer certain actions for purposes of pretrial efficiency and convenience.

[72]*In re* Agent Orange, 105 F.R.D. at 581. Implicit in this finding is the fact that the plaintiffs did not make "a showing of exceptional circumstances under which it is impracticable . . . to obtain facts or opinions on the same subject by other means." *Id.* at 580. The court did, in fact, allow these experts to be deposed by plaintiffs as to facts acquired and opinions developed by them that were not readily available from any other source, in addition to " 'facts known and opinions held by' them prior to their initial consultation or employment by defendants . . . ." *Id.* at 581.

[73]*Id.* at 580.

[74]*See, e.g.*, Hermsdorfer v. American Motors Corp., 96 F.R.D. 13, 15 (W.D.N.Y. 1982) (noting that the language of the rule is not inconsistent with applying the rule to protect expert information obtained for pending and future litigation).

[75]*See* Note, *A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained*, 12 U. MICH. J.L. REF. 533, 551 (1979).

[76]IND. R. TR. P. 26(B)(4)(b).

[77]Note, *supra* note 75 at 551 n.72.

of exceptional circumstances include where the condition of evidence has been altered and only one party's expert has viewed the evidence in its unaltered state[78] and where information is sought from the expert to prove the parties knowledge of a particular fact.[79] Reasonable use of the exceptional circumstances test can protect against abuses under Rule 26(B)(4) while protecting from discovery the pretrial efforts of litigants.

IV. Conclusion

The extension of the discovery protections afforded trial preparation materials under Rule 26(B)(3) to materials prepared in anticipation of prior litigation furthers the goals of encouraging pretrial preparation and discouraging litigants from seeking to benefit from the efforts of their adversaries. Similarly, the discovery protections afforded experts under Rule 26(B)(4) should be extended to restrict discovery of facts known and opinions held by experts retained in anticipation of prior litigation in order to serve those same goals.

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[78]Nemetz v. Aye, 63 F.R.D. 66, 68 (W.D. Pa. 1974).

[79]Roesberg v. Johns-Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980).