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# A Judicial Perspective on Expert Discovery under Federal Rule 26(b)(4): An Empirical Study of Trial Court Judges and a Proposed Amendment, 20 J. Marshall L. Rev. 377 (1987)

David S. Day

Charvin Dixon

# ARTICLES

# A JUDICIAL PERSPECTIVE ON EXPERT DISCOVERY UNDER FEDERAL RULE 26(b)(4): AN EMPIRICAL STUDY OF TRIAL COURT JUDGES AND A PROPOSED AMENDMENT

BY DAVID S. DAY*
AND CHARVIN DIXON**

## INTRODUCTION

Expert discovery is governed, on the federal level, by Rule 26(b)(4) of the Federal Rules of Civil Procedure.[1] Despite the impor-



* Professor of Law, University of South Dakota School of Law. B.A., University of Iowa, 1970; J.D., University of Iowa College of Law, 1977.

** B.B.A., University of South Dakota, 1983; J.D., University of South Dakota School of Law, 1986. Mr. Dixon was primarily responsible for the design of the Judges' questionnaire. This article was prepared while Mr. Dixon was a third-year student, University of South Dakota School of Law.

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1. FED. R. CIV. P. 26(b)(4). The full text of Rule 26(b)(4)(A) and (B) states:

(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 only 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.

tance of expert discovery to modern litigation, there has been relatively little scholarly examination of the subject. Although the use of empirical data to examine the legal issues arising under the actual operation of Rule 26(b)(4) in practice has been rare, the use of such empirical data can be quite valuable in examining how any rule of civil procedure operates in practice.[2] For example, Professor Michael Graham conducted a study in which he suggested that the actual practices of lawyers diverge—in significant ways—from both the substantive standards and the procedural limitations that the text of Rule 26(b)(4) established.[3]

In an effort to further empirical analysis of the actual practices used in expert discovery, two studies of expert discovery were conducted in South Dakota during the spring and summer of 1985. The first study surveyed South Dakota practitioners.[4] The second study, the subject of this article, surveyed the South Dakota trial court Judges.[5] As with the survey of the attorneys, the purpose of the Judges' Study was to gain insight into the actual practice of expert discovery. The Judges' Study sought, first, to determine whether the Judges' perception of expert discovery was consistent with the actual practices of the lawyers. Second, the Judges' Study sought to gain additional data regarding the "divergence hypothesis" proposed in previous studies.

This article is a preliminary report on the findings from the Judges' Study. Following a description of the Judges' Study[6] and an analysis of the text of Rule 26(b)(4),[7] the results of the Study are presented.[8] Some observations are then made about the degree of substantive and procedural divergence that was reported.[9] Finally, a

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Hereinafter, these provisions will be referred to as "Rule _" or "subsection _."

2. The earliest empirical study of expert discovery was conducted by Professor Michael Graham. *See* Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and A Proposal*, 1977 U. ILL. L.F. 169 [hereinafter Graham, *Part Two*]. Another empirical study was performed by the senior author of this article. *See* Day, *Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota*, 31 S.D.L. REV. 40 (1985). The South Dakota Attorneys' Study is a companion to the study described herein. *See generally* Teitelbaum, *An Overview of Law and Social Research*, 35 J. LEGAL EDUC. 465, 468 (1985).

3. Graham, *Part Two*, *supra* note 2, at 200.

4. *See* Day, *supra* note 2, at 40-41.

5. *See infra* Appendix A. The use of data from state jurisdictions has been recognized as a potentially valuable source of information about expert discovery. *See* Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 931 n.137 [hereinafter Graham, *Part One*].

6. *See infra* notes 12 to 31 and accompanying text.

7. *See infra* notes 32 to 65 and accompanying text.

8. *See infra* notes 111 to 159 and accompanying text.

9. *See, e.g., infra* notes 131 to 135 and accompanying text.

suggested reform of Rule 26(b)(4) is identified.[10]

## I. Description of the Judges' Study

In Professor Graham's seminal work on expert discovery under Rule 26(b)(4), he studied both attorneys and judges involved in the context of litigation practice in the federal district courts.[11] The Judges' Study herein attempted to avoid some of the semantic and analytical problems that are presented by using the same questions for a study of both the attorneys and the judges.

### A. The Judges' Study Questionnaire

The judicial perspective on discovery is necessarily different than the viewpoint of the counsel participating in discovery. For that reason, among others, the South Dakota Judges' Study was conducted with a separate questionnaire from that of the practitioners.[12] In order to promote comparative analysis, however, the questionnaire used in the Judges' Study mirrored the format of the questionnaire used in the attorneys' study.[13]

Certain assumptions underlie the Judges' Study. The initial assumption was the discovery practices in the South Dakota state courts would be substantially identical with those in federal courts under Rule 26(b)(4). This assumption was sound for the following reasons. First, the South Dakota Rule of Civil Procedure, SDCL 15-6-26(b)(4), is modeled on, and worded substantially the same as, Federal Rule 26(b)(4).[14] Second, there were no South Dakota Su-

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10. *See infra* notes 160 to 162 and accompanying text.

11. *See* Graham, *Part Two*, *supra* note 2, at 171. With respect to the responses from the judges, it was not clear that he had a high degree of response. Only 9.23 percent of the judges responded. *Id.* at n.7.

12. *See infra* Appendix A. *See also* Day, *supra* note 2, at 40-41.

13. *See* Day, *supra* note 2, at 57-65.

14. *See* Wilson, *Rules Pertaining to Discoverability of Expert Opinion Evidence in Federal Court*, 27 Trial Law. Guide, 411, 412-13 n.3 (1983). *See generally* McKusick, *State Courts' Interest In Federal Rulemaking: A Proposal For Recognition*, 36 Me. L. Rev. 253, n.2 (1984). In the full text, S.D.C.L. § 15-5-26(b)(4)(A), (B), and (C) state:

> (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 only as follows:
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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, 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

preme Court decisions reported that suggested any contrary interpretation of the Rule.[15] Third, to test the assumption, the authors included a question on the Attorneys Survey which had respondents identify any differences between their practice under SDCL section 15-6-26(b)(4) and Federal Rule 26(b)(4).[16] None of the attorney respondents identified any differences.[17] Finally, the fact that none of the responding South Dakota trial court judges suggested any difference[18] also confirmed the assumption that no identified differences exist.

Another assumption made for purposes of the Judges' Study was that, while operating under a substantially identical rule, the South Dakota trial court Judges' interpretation of the Rule would be consistent with the interpretation of the Federal Rule. This assumption was valid for two reasons. First, the South Dakota Rule had been the same as the federal rule for nearly eight years at the time of the Judges' Study, and the judges appeared to be familiar with it.[19] Second, there was no indication of a contrary interpretation in any of the data.

The primary tool for the Judges' Study was an anonymous, multipage questionnaire.[20] This questionnaire consisted of several parts. One part examined practices regarding discovery of testimonial experts under Rule 26(b)(4)(A).[21] This part of the questionnaire was designed to examine the manner and scope of discovery of testimonial experts and whether such discovery was subject to various

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subdivision (4)(C) of this section, 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 § 15-6-35(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 subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

15. *See* Day, *supra* note 2, at 40-41 n.6. *Cf.* Magbuhat v. Kovarik, 382 N.W.2d 43, 45 (S.D. 1986) (use of depositions under Rule 32).

16. *Id.*

17. *Id.*

18. Copies of the Judges' responses are on file with the senior author.

19. S.D.C.L. § 15-5-26(b)(4)(A) and (B) (1984).

20. *See infra* Appendix A.

21. *See infra* Appendix A, questions 8-26.

substantive standards and procedural constraints such as mutuality and timing.[22] In particular, the judicial perspective regarding policies such as "freeriding" was examined.[23]

Additionally, the Judges' Study questionnaire sought to determine the judicial perspective on discovery of nonwitness experts under Rule 26(b)(4)(B).[24] The questionnaire examined the use of the "exceptional circumstances" standard of Rule 26(b)(4)(B) and also the permissibility of discovery of the identity of nonwitness experts.[25] Another part of the Judges' Study questionnaire sought to determine the judicial perspective regarding the discovery of the pre-retention knowledge of both testimonial and nonwitness experts.[26] Finally, the questionnaire sought to ascertain the judicial perspective on the discovery of testimonial medical experts under Rule 35.[27]

### B. The Sample of the Judicial Perspective

The Judges' Survey was mailed to the thirty-four circuit court judges in South Dakota. As of May, 1985, these thirty-four judges constituted the entire trial bench.[28] Twenty-four judges returned the completed questionnaire.[29] Four other judges responded to the questionnaire indicating that, for one reason or another, they were not able to complete it.[30] The most common reason indicated for not returning the questionnaire at all was that the Judge's caseload did not involve sufficient occasions to examine the issues involved in expert discovery.[31] The response, however, was sufficient to provide some insight into the judicial perspective on expert discovery; and, with respect to the specific questions, data was collected accordingly.

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22. *See infra* Appendix A, questions 8, 9, and 15.
23. *See infra* Appendix A, question 8.
24. *See infra* Appendix A, questions 27-36.
25. *See infra* Appendix A, question 37.
26. *See infra* Appendix A, question 26, 34 and 35.
The text of Rule 26(b)(4) does not specifically address the topic of discovery of pre-retention knowledge of retained experts, and the courts interpreting the Rule have generally permitted full discovery of pre-retention knowledge of testimonial and nonwitness experts. Because we do not have sufficient data regarding the judicial perspective on this question, full analysis of this issue is beyond the scope of this article. *See infra* Appendix A, questions 26 and 34.
27. *See infra* Appendix A, question 20.
28. *See* "Membership List of the State Bar of South Dakota" (as of March 15, 1984) (copy on file with the senior author).
29. Copies of the returned questionnaires are on file with the senior author.
30. Copies of the letters are on file with the senior author.
31. In addition to the responses referenced in the text, several responding judges also mentioned, on the returned questionnaire, that they were not able to complete certain parts of the questionnaire or answer certain questions because of the lack of experience with the particular issue.

## II. THE STRUCTURE OF RULE 26(B)(4)

Rule 26(b)(4) is the governing section, in the federal system and in South Dakota, regarding pretrial discovery of expert witnesses.[32] Under Rule 26(b)(4), there is a common feature of all experts, that one of the parties must retain the experts.[33] Subsections (A) and (B) of the Rule govern discovery of such retained experts. Subsection (A) is directed at testimonial experts; subsection (B) governs discovery of nonwitness experts.[34] The degree of discovery the Rule permits is a function of two principle factors: (1) the need for an adversary to prepare for effective cross examination and rebuttal at the time of trial and (2) considerations growing out of the "fairness principle."[35]

### A. Testimonial Experts

A party may retain an expert, under Rule 26(b)(4)(A), as a testimonial expert.[36] Testimonial experts are essentially subject to full discovery, limited only by principles of relevance.[37] Since full discovery is generally regarded as necessary for the preparation of effective cross examination and rebuttal at trial, testimonial experts are subject to discovery of all the facts learned since they have been retained, all opinions they have generated since retained, and all materials they have reviewed and relied upon in developing their facts or opinions.[38]

#### 1. *Interrogatory Discovery of Experts: Rule 26(b)(4)(A)(i)*

Apparently concerned with protecting the work product of ex-

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32. FED. R. CIV. P. 26(b)(4); S.D.C.L. § 15-5-26(b)(4).

33. *See* Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 989 (D.C. Cir. 1980); Sipes v. United States, 111 F.R.D. 59 (S.D. Cal. 1986); Graham, *Part One, supra* note 5, at 937. *Cf.* Note, *Twisting the Purposes of Discovery: Expert Witnesses and the Deposition Dilemma*, 36 VAND. L. REV. 1615, 1642 (1983) (because a party has a right not to call a retained expert as a witness, experts are different from ordinary witnesses).

34. *In re* "Agent Orange" Product Liability Litigation, 104 F.R.D. 577, 580 (E.D.N.Y. 1985). *See* Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71, 79-81 (1984).

35. *See* Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984); Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122, 1138 (S.D. Tex. 1976).

36. FED. R. CIV. P. 26(b)(4)(A). *Compare* UTAH R. CIV. P. 26(b)(4) (1972) (no subdivision (A) provision).

37. *See* Dennis v. BASF Wyandotte Corps., 101 F.R.D. 301, 304 (E.D. Pa. 1983) ("experts hired solely to testify at trial are entitled to no greater protection than any other witness"); Graham, *Part Two, supra* note 2, at 200 ("Full discovery voluntarily conducted between counsels is the accepted [norm] with expert witness expected to be called at trial.").

38. *See* Heitmann v. Concrete Pipe Mach., 98 F.R.D. 740, 742 (E.D. Mo. 1983).

perts, the drafters mandated a two-step discovery procedure in the text of Rule 26(b)(4)(A).[39] The first step, under the text of Rule 26(b)(4)(A)(i), is for a party to serve "expert" interrogatories on an adversary.[40]

### 2. *"Further Discovery": Rule 26(b)(4)(A)(ii)*

The second stage of discovery, according to the text of the Rule, requires that "upon motion . . . the court may order further discovery by other means."[41] Absent an agreement between the parties, the text of Rule 26(b)(4)(A) requires that noninterrogatory discovery be undertaken only if the court grants a motion approving it.[42] The Rule, therefore, appears to require judicial supervision of any noninterrogatory discovery of testimonial experts.[43]

## B. Nonwitness Experts

Under Rule 26(b)(4)(B), a party may retain an expert as a nonwitness expert.[44] An expert retained under Rule 26(b)(4)(B) is given a greater degree of protection against discovery than a testimonial expert.[45] Under subsection (B), the court may order discov-

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39. FED. R. CIV. P. 26(b)(4)(A); Shackelford v. Vermeer Mfg. Co., 93 F.R.D. 512, 513 (W.D. Tex. 1982); Wilson, *Rules Pertaining to Discoverability of Expert Opinion Evidence in Federal Court*, 27 TRIAL LAW. GUIDE, 411, 432 (1983). *See* Graham, *Part One, supra* note 5, at 912.

40. FED. R. CIV. P. 26(b)(4)(A)(i). *See* United States v. International Business Machines, 72 F.R.D. 78, 81 (S.D.N.Y. 1976) (failure to serve interrogatories pursuant to subdivision (A)(i) resulted in denial of Rule 37 motion).

41. FED. R. CIV. P. 26(b)(4)(A)(ii).

42. *IBM*, 72 F.R.D. at 81. *See Shackelford*, 93 F.R.D. at 513; N. Georgia Lumber & Hardware v. Home Ins., 82 F.R.D. 678, 680 (N.D. Ga. 1979).

43. *See, e.g.*, Daniels, *Protecting Your Expert During Discovery*, 71 A.B.A. J. 50 (1985); Wilson, *Rules Pertaining to Discoverability of Expert Opinion Evidence in Federal Court*, 27 TRIAL LAW. GUIDE 411, 434 (1983); Graham, *Part One, supra* note 5, at 918. Although the text of the Rule calls for a "two-step" discovery process under Rule 26(b)(4)(A)(i) and (ii), many practitioners recognize that this procedure is often circumvented by informal agreements among counsel. *See Dennis*, 101 F.R.D. at 303 n.2. The Survey results confirm the divergence. *See infra* Appendix A, question 13a. *See also* Graham, *Part Two, supra* note 2, at 172, 177.

44. FED. R. CIV. P. 26(b)(4)(B). *See* Montolete v. Bolger, 56 F.R.D. 179, 181 (D. Ariz. 1982). Hereinafter the term "nonwitness expert" is used to refer to a "retained nonwitness expert" under Rule 26(b)(4)(B) or its South Dakota counterpart.

45. *See In Re* "Agent Orange" Product Liability Litigation, 105 F.R.D. at 580-81. The higher degree of protection extends, according to one recent decision, even to the facts surrounding the retention of a nonwitness expert. Grindel v. American Motors Corp., 108 F.R.D. 94, 95 (W.D.N.Y. 1985) (discovering party sought to depose nonwitness expert "regarding factual matters surrounding his relationship with [the other party], not his opinion as an expert.").

Regarding retention, it should be noted that a party is permitted, pursuant to its trial strategy, to change the status of an expert from testimonial to nonwitness. *See In Re* "Agent Orange" Product Liability Litigation, 105 F.R.D. at 580; *Mantolete*, 56 F.R.D. at 181.

ery of a nonwitness expert only when the discovering party can demonstrate the existence of "exceptional circumstances."[46] It appears that this greater degree protection is a function of the "consultive" role that nonwitness experts play.[47] The level of protection the exceptional circumstances standard provides for nonwitness expert discovery seems to be premised on the fact that, in contrast to the testimonial expert, there is normally no need for an adversary to prepare to cross-examine a nonwitness expert at trial. By definition, the nonwitness expert will not give testimony at the trial.

### 1. *The Substance of the "Exceptional Circumstances" Standard*

Although Rule 26(b)(4)(B) mandates the exceptional circumstances standard, relatively little has been written or decided about the substance of the standard.[48] In general, the court may order discovery under the exceptional circumstances standard when such discovery is necessary for a party's trial preparation, especially for cross examination or rebuttal.[49]

On the face of subsection (B), the substance of the exceptional circumstances standard is ambiguous.[50] The text only indicates that exceptional circumstances exist when it is "impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[51] Neither the Rule itself, nor the Advisory Committee Notes, give any examples of such "impracticabilities."

The courts and commentators, however, have provided some guidance as to the substance of the exceptional circumstances standard.[52] They have commonly identified two situations which give rise to exceptional circumstances. The first situation is "changed circumstances" where it is impossible for the discovering party to obtain or replicate expert discovery on the contested issue.[53] The sec-

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46. FED. R. CIV. P. 26(b)(4)(B). *See Marine Petroleum Co.*, 641 F.2d at 990; Hoffman v. Owens-Illinois Glass Co., 107 F.R.D. 793, 794-95 (D. Mass. 1985).

47. *See Marine Petroleum Co.*, 641 F.2d at 992-93; Graham, *Part Two, supra* note 2, at 194. *See also* Friedenthal, *Discovery and Use of An Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 481 n.138 (1962) ("Many 'facts' are discovered only because of the expert's training.").

48. *See* Graham, *Part One, supra* note 5, at 931-32.

49. *See* Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122, 1138-39 (S.D. Tex. 1976); *In Re* "Agent Orange" Product Liability Litigation, 105 F.R.D. at 581; *Hoffman*, 107 F.R.D. at 794-95. *See generally* Day, *The Ordinary Witness Doctrine: Discovery of the Pre-retention Knowledge of a Nonwitness Expert Under Federal Rule 26(b)(4)(B)*, 38 ARK. L. REV. 763, 769 (1985) [hereinafter Day, *The Ordinary Witness Doctrine*]; Maurer, *supra* note 34, at 91.

50. *See* Day, *The Ordinary Witness Doctrine, supra* note 49, at 773-75.

51. FED. R. CIV. P. 26(b)(4)(B).

52. *See In Re* "Agent Orange" Product Liability Litigation, 105 F.R.D. at 581; Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 299 (E.D. Pa. 1980); Maurer, *supra* note 34, at 91 n.74.

53. *See* Delcastor, Inc. v. Vail Assocs., Inc., 108 F.R.D. 405, 407 (D. Colo. 1985)

ond commonly identified situation constituting "impracticability" is when the replication of the contested item or material is physically feasible, but the costs would be socially and judicially prohibitive.[54] Outside of these situations, it appears that the full substance of the exceptional circumstances standard has yet to be examined.

### 2. *The Scope of the Exceptional Circumstances Standard*

Apart from the substance of subsection (B)'s exceptional circumstances standard, questions arise pertaining to the scope of this provision. The leading decision, *Pearl Brewing Co. v. Joseph Schlitz Brewing Co.*,[55] has identified some of the parameters of the scope of this provision. It seems clear that, at a minimum, the exceptional circumstances standard is not an absolute degree of protection for nonwitness experts.[56] At most, Rule 26(b)(4)(B) provides only a qualified immunity against discovery of nonwitness experts.[57]

## C. Discovery of Nonwitness Expert's Identities

At least among the commentators, one of the currently debated issues in the area of expert discovery is the ability of a party to discover the identity of an adversary's nonwitness expert.[58] Discovery of a nonwitness expert's identity, of course, may lead to substantive discovery of such a nonwitness expert. The decisions have been largely split on the discoverability of the nonwitness expert's identity, although the federal Court of Appeals for the Tenth Circuit recently produced an appellate opinion on the issue.[59] In *Ager v. Jane C. Stormont Hospital & Training School for Nurses*,[60] the court held that the discovery of the identity of nonwitness experts, like discovery of the nonwitness in general, must be premised on a showing of exceptional circumstances.[61] Although the *Ager* decision may constitute the minority view, it is consistent with the policies

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(Kane, D.J.); Dixon v. Cappellini, 88 F.R.D. 1, 3 (M.D. Pa. 1980).

54. *See Pearl Brewing Co.*, 415 F. Supp. 1122, 1138-39 (S.D. Tex. 1976); 4 J. MOORE, J. LUCAS & G. GROTHER, JR., MOORE'S FEDERAL PRACTICE, § 26.66[4] (2d ed. 1984).

55. 415 F. Supp. 1122, 1138-39 (S.D. Tex. 1976).

56. *See In Re* "Agent Orange" Product Liability Litigation, 105 F.R.D. at 581.

57. *See Marine Petroleum Co.*, 641 F.2d at 990. *See generally* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2332 (1970).

58. *See* Comment, *Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 67 IOWA L. REV. 349, 351-52 (1982); Note, *Civil Procedure—Ager v. Jane C. Stormont Hospital: Discovery of a Nontestifying Expert*, 60 N.C.L. REV. 695 (1982).

59. Ager v. Jane C. Stormont Hospital, 622 F.2d 496 (10th Cir. 1980).

60. *Id.*

61. *Id.* at 503.

underlying Rule 26(b)(4)(B).[62]

### D. Discovery of Medical Experts

Perhaps it is an historical anomaly, but discovery of the reports of medical experts is the subject of a separate provision in Rule 35 of the Federal Rules of Civil Procedure.[63] When compared to Rule 26(b)(4), nothing in Rule 35 indicates that medical experts should be treated any differently than any other type of expert witness for purposes of discovery.[64] The South Dakota Judges' Study sought to determine whether such discovery of medical experts is conducted in a fashion consistent with that of nonmedical experts.[65]

## III. An Overview of Rule 26(b)(4): The Independent Preparation Policy

A fundamental purpose of the Federal Rules of Civil Procedure is the policy of insuring adequate trial preparation.[66] This is, however, not the only policy consideration. Another central, and sometimes competing, policy consideration underlying Rule 26(b)(4) is that each party must independently secure and prepare its own expert testimony.[67] Rule 26(b)(4) is premised on the idea that diligence will be rewarded and "freeriding" will be discouraged.[68]

From a policy perspective, the substantive standards that Rule 26(b)(4) established, as well as the procedural constraints, must be

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62. *See* Kuster v. Harner, 109 F.R.D. 372, 375 (D. Minn. 1986); Day, *The Ordinary Witness Doctrine*, *supra* note 49, at 795-96. *Compare* Comment, *supra* note 58, at 372.

63. Fed. R. Civ. P. 35(b).

64. *See* Fed. R. Civ. P. 26(b)(4); Fed. R. Civ. P. 35(b).

65. *See infra* Appendix A, question 20.

66. Tahoe Insurance Co. v. The Morrison-Knudsen Co., 84 F.R.D. 362, 363 (D. Idaho 1979). *See* Weiss v. Chrysler Motors Corp., 515 F.2d 449, 456-57 (2d Cir. 1975); Alvarez v. Wallace, 107 F.R.D. 658, 659 (W.D. Tex. 1985); *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 503-04 (1970) ("A party must as a practical matter prepare his own case . . ., for he can hardly hope to build his case out of his opponent's experts.") [hereinafter *Advisory Committee Notes*]. *See also* Fed. R. Civ. P. 1 ("They shall be construed to secure the just, speedy, and inexpensive determination of every action.").

67. *See* Pielemeier, *Discovery of Non-Testifying "In House" Experts Under Federal Rule of Civil Procedure* 26, 58 Ind. L.J. 597, 608-11 (1983); Day, *The Ordinary Witness Doctrine*, *supra* note 49, at 791. *See also* Granger v. Wisner, 138 Ariz. 377, 656 P.2d 1238, 1342 (1982) (construing Ariz. R. Civ. Proc. 26(b)(4)(B)).

68. Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111, 123 (1966). Although the Rule is designed to encourage independent preparation, attempts to "freeride" on an opponent's expert are common. *See* Hely, *Opponent's Experts Can Work for You*, Trial 64, 65 (Sept. 1985) ("plaintiffs' attorneys can make their case through the other side's expert by creative use of the Rules of Evidence").

seen as methods to control the scope of expert discovery.[69] For purposes of evaluating the effectiveness of the Rule, these various control mechanisms must be examined.

### A. Control of the Substantive Scope of Expert Discovery

In historical perspective, it is important to note that, prior to the 1970 adoption of the Rule, many courts imposed substantive limitations based on the attorney-client privilege or the work product doctrine. Moreover, one of the major issues both the courts and the commentators debated was the propriety of any limitation on the substantive scope of expert discovery.[70] The Advisory Committee Notes and the history of the various drafts of Rule 26(b)(4) point to three major sources the drafters relied upon in addressing the scope of discovery.[71] These sources are the *Knighton* decision,[72] and the articles written by Professor Friedenthal[73] and Mr. Long.[74] Although, as Professor Graham demonstrated,[75] these sources did not agree on the best approach to expert discovery, it is clear that Rule 26(b)(4) was adopted to eliminate the attorney-client or work product doctrines as substantive limitations.[76] It is not frequently recognized, however, that the text of the Rule resulted in the elimination of virtually all substantive limitations.

This approach was most significant regarding the scope of discovery of testimonial experts.[77] Prior to the adoption of the Rule in 1970, the critical issue regarding the scope of expert discovery was whether an adversary's discovery would be limited to the direct testimony which an expert would offer as well as the factual basis for that direct testimony.[78] The competing view was that there should be no such "direct testimony" limitation on the scope of discovery.[79]

The 1970 amendment resolved the question essentially in favor of the Friedenthal/Long position.[80] Rule 26(b)(4) does not place any substantive limitation on the scope of discovery other than the provision that discoverable facts and opinions must be prepared "in an-

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69. *See* Graham, *Part One*, *supra* note 5, at 899.
70. *See* Long, *supra* note 68, at 112.
71. *See* Graham, *Part One*, *supra* note 3, at 900-08.
72. Knighton v. Villian & Fassio, 39 F.R.D. 11 (D. Md. 1965).
73. *See* Friedenthal, *supra* note 47.
74. *See* Long, *supra* note 68.
75. *See* Graham, *Part One*, *supra* note 5, at 907.
76. *See Advisory Committee Notes*, 48 F.R.D. at 504-05; Graham, *Part One*, *supra* note 5, at 902.
77. *See* Graham, *Part One*, *supra* note 5, at 914.
78. *See id.*, at 906.
79. *See* Graham, *Part One*, *supra* note 5, at 906 n. 51; Long, *supra* note 68, at 112; Friedenthal, *supra* note 47, at 483-87.
80. FED. R. CIV. P. 26(b)(4)(A). *See* Graham, *Part One*, *supra* note 5, at 914.

ticipation of litigation."[81]

### B. Control Through Procedural Constraints

Apart from substantive limitations on the scope of discovery, other potential limiting mechanisms could be used to control expert discovery. Although they are labeled in this article as "procedural," it should be recognized that the impact of these procedural constraints can have a profound "substantive" impact on the development of a party's case, especially if the party delayed its discovery until the trial date would be close. The various procedural limitations create a strong incentive for parties to prepare their own expert case at an early state in the lawsuit. Because it discourages laziness, this incentive is consistent with the independent preparation policy underlying the Rule.[82]

As of 1970, the ideas of mutuality, timing, and other procedural constraints were available to the drafters to provide the incentive for independent preparation. These will be discussed in order.

#### 1. *The Use of "Mutuality" as a Control Mechanism*

In his influential article, Professor Friedenthal urged the use of a "mutuality" mechanism to largely govern expert discovery.[83] Friedenthal urged that, in conjunction with the use of timing constraints, mutuality be the major feature of expert discovery.[84] Friedenthal suggested that each party be required to engage in a mutual exchange of lists of expert witnesses at a "short time before trial."[85] Long's article essentially agreed with the use of mutuality as a control device.[86]

Despite the arguments for the use of mutuality, the Friedenthal/Long suggestion was not adopted. There is nothing in the text of Rule 26(b)(4), or in any of the Advisory Committee Notes, which requires mutuality in expert discovery.[87] An adversary's ability or willingness to conduct discovery in a reciprocal fash-

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81. FED. R. CIV. P. 26(b)(4). This so-called limitation, found in the prefatory statement in Rule 26(b)(4), ultimately is not meaningful because, if Rule 26(b)(4) would not apply to the discovery, then the relevance standard of Rule 26(b)(1) applies. Since the relevance standard is extremely broad in anticipation of litigation, the standard does not constitute a meaningful substantive limitation.

82. *See* Graham, *Part One*, *supra* note 5, at 904; Friedenthal, *supra* note 47, at 487.

83. Friedenthal, *supra* note 47, at 487.

84. *See id.*

85. *Id.*

86. *See* Long, *supra* note 68, at 139. In contrast, the *Knighton* decision had no reference to mutuality. 39 F.R.D. 11. *See* Graham, *Part One*, *supra* note 5, at 908.

87. FED. R. CIV. P. 26(b)(4); *Advisory Committee Notes*, 48 F.R.D. at 503.

ion is not a condition to a party's discovery of expert witnesses.[88]

The use of mutuality would be, moreover, a direct contradiction to the general approach of the Federal Rules of Civil Procedure. The Rules explicitly reject any type of prioritization and basically institute a race/notice discovery procedure.[89] The Judges' Study sought to determine whether mutuality has become an element of expert discovery as it is actually practiced.[90]

### 2. *The Use of Timing Constraints*

As early as 1962, Professor Friedenthal recognized that the use of procedural constraints on the timing of expert discovery can be a valuable tool.[91] Friedenthal urged that expert discovery be conducted only during the "short time" before trial.[92] The rationale for such timing constraints is that, if each side were prohibited from undertaking discovery of their adversary's experts until a "short time" before trial, each party will be forced to prepare their own case independently prior to that time.[93] No party would risk the chance of learning that, a short time before trial, there are significant deficiencies in the direct case, cross examination, or rebuttal.[94]

Some jurisdictions, namely California, have relied heavily on the use of timing as a control mechanism for expert discovery.[95] Although the California Rules of Civil Procedure do not limit expert discovery exclusively to the last few months before trial as Friedenthal suggested, the California Rule on expert discovery does rely on timing.[96]

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88. *See* FED. R. CIV. P. 26(b); *Advisory Committee Notes*, 48 F.R.D. at 506.

89. FED. R. CIV. P. 26(d) ("Method of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."); *Advisory Committee Notes*, 48 F.R.D. at 506-07.

90. *See infra* Appendix A, question 15.

91. Friedenthal, *supra* note 47, at 485-87 ("the timing of discovery is extremely important").

92. *Id.* Recent commentators, moreover, have continued to suggest that the regulation of the timing of expert discovery would be a salutory means of controlling expert discovery. *See* Note, *Discovery of Attorney Work Product Reviewed by An Expert Witness*, 85 COLUM. L. REV. 812, 834-35 (1985).

93. *See* Friedenthal, *supra* note 47, at 485. ("[An attorney] may need advice of his own experts to do so and indeed, in certain cases his experts may require time to make further inspections or analysis of their own.").

94. *See* Stacey v. Bangor Punta Corp., 107 F.R.D. 779, 780 (D. Md. 1985).

95. *See* CAL. CIV. PROC. CODE §§ 2037(a), 2037.2 (West 1984).

96. *See id.* The California Rule is more analogous to an early discovery cutoff date than it is to Friedenthal's suggestion. Discovery cutoffs are common in many jurisdictions and especially in the federal district courts. *See, e.g.*, Local Rule 9.4.8, Local Rules of the United States District Court for the Central District of California (1983); Rule 20, Local Rules of the United States District Court for the Eastern District of New York (1984) (special discovery cutoff date for expert discovery).

Friedenthal's suggestion of a timing limitation was not, however, adopted during the 1970 amendments.[97] Under Rule 26(b)(4), a party is not limited to any particular time frame in which to conduct the expert discovery.[98] The lack of timing constraints, combined with the unlimited scope of expert discovery, suggests that the Rule expanded the scope of expert discovery far beyond the drafters' initial attempts in 1966.[99] Outside of certain constraints on the plaintiff,[100] discovery is a "race," and as a practical matter, is subject to agreement between parties.[101]

The Judges' Study sought to determine whether the South Dakota Judges perceive the use of a timing limitation, such as Friedenthal advocated, as a constraint on the scope of discovery under the Rule.[102] The results are reported below.

### C. Other Procedural Constraints

In addition to the procedural mechanisms of mutuality and timing, it is possible to envision other types of procedural constraints which might be imposed upon expert discovery in pursuit of the goal of independent preparation. For example, Rule 26(b)(4) embodies at least one such procedural constraint.[103] Subdivisions (A)(i) and (ii) set up the procedural constraint commonly called the "two-step approach."[104] As Professor Graham noted, Rule 26(b)(4) has adopted, in this regard, the approach from the *Knighton* case.[105]

For present purposes, the important thing to recognize is that this two-step approach has potential implications for the way attorneys will conduct discovery. The two-step procedural constraint requires that, as a necessary first step in any meaningful type of discovery of an adversary's expert, a party must serve certain kinds of interrogatories.[106] A strict interpretation of Rule 26(b)(4)(A) would have profound consequences for expert discovery. The Judges' Study, along with the earlier South Dakota Attorneys' Study, sought to determine whether these potential implications have occurred in practice. Specifically, the Attorney's Study sought to determine

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97. FED. R. CIV. P. 26(b)(4); FED. R. CIV. P. 26(d).

98. Of course, Rule 26(d) specifically rejects the idea of priority. *See* FED. R. CIV. P. 26(d); *Advisory Committee Notes*, 48 F.R.D. at 506.

99. *See* Graham, *Part One*, *supra* note 5, at 912.

100. FED. R. CIV. P. 30(a).

101. *See* FED. R. CIV. P. 26(d); Day, *supra* note 2, at 48.

102. *See infra* Appendix A, question 15.

103. FED. R. CIV. P. 26(b)(4)(A)(i) and (ii).

104. *Id. See* Graham, *Part One*, *supra* note 5, at 915.

105. *See* Graham, *Part One*, *supra* note 5, at 907, 911.

106. FED. R. CIV. P. 26(b)(4)(A)(i). *See* Graham, *Part One*, *supra* note 5, at 915-16.

whether attorneys were following the two-step procedure.[107] The Judges' Study sought to determine whether the judges perceived the attorneys adhering to the two-step mechanism or diverging from this procedural constraint.[108] Again, the results are reported below.

## IV. The Judges' Study: Some General Observations

The Judges' Study asked the South Dakota Trial Court Judges to make observations about how discovery was actually conducted. Some questions, of course, asked the Judges to discuss the substantive standards which they apply when making decisions,[109] but many of the questions asked the Judges to comment on the substantive standards and procedural approaches the attorneys use when appearing before their courts.[110]

In general terms, the results of the Judges' Study indicate that the Judges agree with the attorneys. There is no substantial difference between what the attorneys say they are actually doing and the Judges' observations of the attorneys' practices. At the same time, however, the Judges' observations confirm what the attorneys report: the attorneys are diverging in both substantive and procedural ways from the text of Rule 26(b)(4).[111] These divergences are explored in more detail.

### A. The Independent Preparation Policy

As discussed above, the overriding policy consideration underlying Rule 26(b)(4) is that each party must independently secure and independently prepare its own expert testimony; the rule is designed to avoid "freeriding."[112] This policy concern is reflected in both the substantive and procedural provisions of Rule 26(b)(4).

It is apparent that the South Dakota Judges unanimously agree

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107. *See* Day, *supra* note 2, at 58-59 (questions 10a and b; question 13).

108. *See infra* Appendix A, questions 10 and 13.

109. *See infra* Appendix A, question 26.

110. *See infra* Appendix A, questions 29, 18 and 15. Under these circumstances, some of the Survey results are not based upon personal, first hand knowledge. However, any survey of trial court judges and their perspectives on civil discovery is, by its very nature, a "second hand" set of observations. To some extent, this lack of first hand information can be cured by comparing the Judges' observations about the attorneys with the attorneys' reports about their actual practices. To the extent that there is correspondence between what the attorneys report as their actual practices and what the Judges observe the attorneys are doing, this should be confirmation of the results that the attorneys reported. To the extent there is a difference between what the attorneys report as their practices and what the Judges observe them doing, there is a need for an explanation.

111. *See* Day, *supra* note 2, at 56.

112. *See supra* notes 72 to 73 and accompanying text.

with the independent preparation policy.[113] The Judges also indicated that, in practice, some transgressions of the independent preparation policy may occur; sixty-five percent of the Judges indicated that they had observed occasions where "one party has . . . been permitted to 'freeride' from the other party's expert . . . "[114] Although the Judges agree with the policy rationale underlying the Rule, they have observed instances where the rationale for the Rule is violated.[115] This would suggest that provisions of the Rule may need clarification.

### B. The "Mutuality" Principle

The Judges' Study inquired whether the principle of mutuality governed the discovery of testimonial experts.[116] As discussed, nothing in the text of the Rule requires mutuality in expert discovery.[117] Subject to judicial supervision, each party may proceed, pursuant to its own strategy, at its own pace.[118]

The results of the Judges' Study indicate that the Judges have observed the use of mutuality as a limitation on expert discovery as practiced before the court.[119] Eighty percent of the responding Judges observed that a form of mutuality is a governing principle of expert discovery.[120] The South Dakota attorneys had also reported that, apparently as a result of informal agreements, a form of mutuality is a common feature of expert discovery for South Dakota practitioners.[121] In this regard, the results of the Judges' Survey confirm the results of the Attorneys' Survey.

### C. The Use of "Timing Constraints" in Expert Discovery

The use of timing as a limiting device on expert discovery is, perhaps, an analytical subset of the mutuality concept. As with mutuality, Rule 26(b)(4) places no explicit timing limitation on the discovery of experts.[122] The observation of the South Dakota Judges is that, in general, attorneys are adhering to the Rule.[123] They are not

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113. *See infra* Appendix A, question 8. The South Dakota attorneys also overwhelmingly agreed, at least on the theoretical level, with the rationale of the independent preparation rule. *See* Day, *supra* note 2, at 47.
114. *See infra* Appendix A, question 25.
115. *See id.*
116. *See infra* Appendix A, question 9.
117. *See supra* notes 89 to 92 and accompanying text.
118. *See* FED. R. CIV. P. 26(d).
119. *See infra* Appendix A, question 9.
120. *Id.*
121. *See* Day, *supra* note 2, at 48.
122. *See supra* notes 105 to 110 and accompanying text.
123. *See infra* Appendix A, question 15. *See also infra* Appendix A, question 17a.

imposing extra-Rule timing constraints on the expert discovery process.

To the extent that the Judges' report that timing is not imposed as an extra-Rule criteria upon the expert discovery process, this is also consistent with the responses of the South Dakota attorneys. Nearly fifty percent of the South Dakota practitioners reported that they did not impose a timing limitation.[124] The attorneys were willing to permit discovery of their expert even before both sides had settled upon their testimonial experts.[125]

### D. The Discovery of Medical Experts

The trial court Judges were asked whether discovery of medical experts was conducted differently than discovery of other experts.[126] Over eighty-four percent of the Judges responding indicated that medical experts who would testify were subject to discovery in the same fashion as non-medical testimonial experts.[127] The Judges' observations indicate that the discovery of experts is conducted in a fashion consistent with the text of Rules 26(b)(4) and 35(b). The South Dakota attorneys also reported that they conduct discovery of testimonial medical experts in the same fashion as any other testimonial expert.[128] The Judges' observations on this question are, therefore, consistent with the attorneys' reports.

## V. The Judges' Study: Testimonial Experts

The text of Rule 26(b)(4)(A), as discussed above, requires that discovery of a testimonial expert occur pursuant to the "two-step" discovery procedure.[129] Expert interrogatories are a required threshold step; "further discovery" is then available only pursuant to court order.[130]

### A. The "Two-Step" Requirement

The South Dakota Judges have observed that, as a first step, the use of interrogatories is quite common.[131] The Judges' report,

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124. *See* Day, *supra* note 2, at 48.
125. *Id.*
126. *See infra* Appendix A, question 20.
127. *See id.*
128. *See* Day, *supra* note 2, at 49. These results are consistent with the responses Graham's study reported. *See* Graham, *Part Two, supra* note 2, at 183.
129. *See supra* notes 39 to 43 and accompanying text.
130. *See supra* notes 41 to 43 and accompanying text.
131. *See infra* Appendix A, question 10a. Similarly, 62.5 percent of the responding attorneys indicated that interrogatories were commonly used. *See* Day, *supra* note 2, at 49. Only 17 percent of the responding Judges indicated that interrogatories

however, that the"two-step" constraint that the Rule established is ignored in practice. Because the responding Judges unanimously agreed that it was "customary for discovery to occur in your court . . . without resort to [the] court as provided by subdivision (A)(ii)," these results indicate a significant procedural divergence from the literal interpretation of Rule 26(b)(4)(A)(i) and (ii).[132] The South Dakota practitioners had responded that they customarily conduct discovery without resorting to the court.[133] The observations of the Judges here seem to be consistent with the practices the attorneys reported.

### B. Testimonial Experts: The Adequacy of Interrogatory Discovery

The text of Rule 26(b)(4)(A) suggests that the use of expert interrogatories alone would, in most instances, constitute adequate discovery of an adversary's testimonial expert.[134] In the first study, the South Dakota attorneys had overwhelmingly disagreed with this contention; over eighty-eight percent of the practitioners reported that interrogatories alone would not be adequate.[135] Although without the same overwhelming margin, the South Dakota Judges indicated that interrogatory discovery by itself would not be adequate preparation for cross-examination and rebuttal of an adversary's testimonial expert.[136]

In this area, the results of the Judges' Study closely dovetail with the attorneys' reported results.[137] Rule 26(b)(4)(A) mandates a two-step procedure that the practicing Bar has apparently rejected. As both the attorneys and Judges recognize, the reason the two-step procedure is being ignored is that interrogatories, alone, do not provide adequate preparation for cross examination and rebuttal of an adversary's testimonial expert.[138]

### C. The Scope of Discovery of Testimonial Experts

The Judges' Study revealed certain perceptions about the scope of discovery of testimonial experts. The Judges report, first, that discovery of testimonial experts is not limited, as the *Knighton* deci-

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were "rarely used." *See infra* Appendix A, question 10c.

132. *See infra* Appendix A, question 13.

133. *See* Day, *supra* note 2, at 50.

134. *See supra* notes 39 to 43 and accompanying text.

135. *See* Day, *supra* note 2, at 51.

136. *See infra* Appendix A, question 23. Sixty-three percent of the Judges reported that they did not believe interrogatories alone would be adequate. *Id.*

137. *See* Day, *supra* note 2, at 51.

138. *See Dennis*, 101 F.R.D. at 303 n.2; Graham, *Part Two*, *supra* note 2, at 172.

sion would have required, to the facts and opinions the expert offers on direct.[139] Moreover, the Judges report that such discovery is not limited to impeachment matters.[140] Second, the Judges also report that the pre-retention knowledge of testimonial experts is subject to a mere "relevance" standard.[141] Since the discovery of the testimonial expert's post-retention knowledge is not limited to direct, or even to direct plus impeachment, it appears that discovery of testimonial experts under Rule 26(b)(4)(A) is, as with ordinary witnesses, wide-open.

The Judges' observation about the "free" scope of discovery of testimonial experts is consistent with the drafters' intent for Rule 26(b)(4)(A).[142] As noted above, the Rule appeared to reject the scope limitations used in the *Knighton* case.[143] The Study sought to determine whether a non-Rule gloss was being imposed. In this regard, however, it appears that expert discovery is being conducted in a fashion consistent with the text of the Rule.

### D. Testimonial Experts: The Adequacy of Current Practices

Although they rejected the two-step procedure due to its inadequacy, the South Dakota practitioners reported that their current practices—although divergent from the text of the Rule—permitted adequate preparation.[144] The South Dakota Judges overwhelmingly agree. Of the Judges responding, eighty-six percent believe that current discovery practices regarding "testimonial experts permits adequate preparation for cross examination and rebuttal at trial."[145] Although limiting expert discovery to the two-step procedure would be unsatisfactory, the results of the Judges' Study and the Attorneys' Study indicate that the current discovery practices provide an adequate basis for trial preparation.[146]

## VI. The Study Results: Nonwitness Experts

Lawyers primarily use nonwitness experts as a consultive mech-

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139. *See infra* Appendix A, question 17e. *See also* Knighton v. William & Fassio, 39 F.R.D. 11, 13-14 (D. Md. 1965).

140. *See infra* Appendix A, question 17.

141. *See infra* Appendix A, question 26a.

142. *See Advisory Committee Notes*, 48 F.R.D. at 503-04. *See also Dennis*, 101 F.R.D. at 304 ("experts hired solely to testify at trial are entitled to no greater protection than other witness"); Graham, *Part One, supra* note 5, at 914.

143. *See supra* notes 82 and 83 and accompanying text.

144. *See* Day, *supra* note 2, at 52.

145. *See infra* Appendix A, question 21.

146. Professor Graham's study concluded that the two-step procedure "overwhelmingly is recognized as a totally unsatisfactory method of providing adequate preparation for cross-examination and rebuttal." Graham, *Part Two, supra* note 2, at 172.

anism.[147] Even in large, complex, multi-party litigation, questions regarding the discovery of nonwitness experts rarely surface.[148] The results of the South Dakota Judges' Survey indicate that the Judges have relatively little experience with discovery issues regarding nonwitness experts.[149] Under these circumstances, the discussion of the Judges' responses will be limited to the issues of the use of the exceptional circumstances standard and the question of the discoverability of the identities of nonwitness experts.

### A. The Use of the Exceptional Circumstances Standard

The Judges' Study inquired whether, in the Judges' courts, the practitioners had ever allowed "discovery of their nonwitness experts without a showing of 'exceptional circumstances.' "[150] This question was designed to determine whether the exceptional circumstances requirement that Rule 26(b)(4)(B) mandates was being utilized in practice. The Judges' responses indicate that the use of the exceptional circumstances requirement is not universal.[151] In fact, the exceptional circumstances standard is not regularly employed, despite the text of Rule 26(b)(4)(B).

The Judges' observations are consistent with, and confirm, the results the South Dakota attorneys reported; many South Dakota attorneys allowed discovery of their nonwitness experts without a showing of exceptional circumstances.[152] The failure to use the exceptional circumstances requirement as a protective device for nonwitness experts is a major substantive divergence from the text of the Rule.[153]

The South Dakota attorneys reported that the main reason they eschewed the high standard of protection Rule 26(b)(4)(B) grants was because this approach advanced a client's position.[154] For example, the attorney may wish to expose a nonwitness expert's report or opinions to an adversary as a vehicle for securing an early settlement of a matter. Foregoing the protection the Rule grants to achieve the interests of a client is, of course, a tactical decision that

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147. *See supra* notes 44 to 47 and accompanying text.

148. *See* Comment, *Discovery of the Nonwitness Expert Under Federal Rule of Civil Procedure 26(b)(4)(B)*, 67 IOWA L. REV. 349, 351-52 n.15 (1982).

149. *See infra* Appendix A, questions 27-37. The limited experience the South Dakota judges have with questions involving the discovery of nonwitness experts is consistent with the results of the South Dakota Attorneys' Survey. *See* Day, *supra* note 2, at 52 ("nonwitness experts are only used in a very small percentage of civil cases handled by South Dakota practitioners").

150. *See infra* Appendix A, question 29.

151. *See id.*

152. *See* Day, *supra* note 2, at 53.

153. *Id. See also* Graham, *Part Two*, *supra* note 2, at 192-93.

154. *See* Day, *supra* note 2, at 54.

the counsel and the client must make.

### B. The Discovery of the Identity of a Nonwitness Expert

The issue of the discoverability of the identity of a nonwitness expert probably does not arise frequently for most attorneys and Judges in South Dakota litigation practice. Even so it is revealing that nearly one-half of the responding Judges would require only a showing of relevance before granting such discovery.[155] Moreover, despite the recent *Ager* decision,[156] only one responding Judge would require a showing of exceptional circumstances.[157] These results indicate that the South Dakota Judges would favor wide-open discovery of experts, even though thorough analysis of the policies underlying subsection (B) suggests that the identities of nonwitness experts deserve greater protection.

## VII. A Proposed Amendment to Rule 26(b)(4)(A)

In light of the empirical studies and other commentary regarding discovery practices concerning testimonial experts under Rule 26(b)(4)(A)(i) and (ii), it seems appropriate to propose an amendment to those subsections of the Rule. The empirical studies have demonstrated that the two-step procedure is not currently used and, therefore, that it offers no meaningful assistance to the discovery process.[158] In addition, it should be noted that the Rule's two-step procedure, if not amended, could serve as a "trap" for counsel and could, in fact, function as an obstructionist device.[159] With the present wording of subsection (A), the potential for obstructionist conduct inconsistent with the policies underlying the discovery process is great and should be addressed.

The proposed amendment to subsection (A) seeks to make the remaining wording of subsection (A) consistent with the phrasing of

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155. *See infra* Appendix A, question 37e.

156. 622 F.2d 496, 502 (10th Cir. 1980).

157. *See infra* Appendix A, question 37a.

158. *See supra* notes 145 to 153 and accompanying text. *See also* Graham, *Part Two*, *supra* note 2, at 199-201.

159. *See, e.g.*, *Shackelford*, 93 F.R.D. at 514 (deposition of plaintiff's testimonial expert denied because defendant failed to make the required motion under subdivision (A)(ii); *N. Georgia Lumber & Hardware*, 82 F.R.D. at 680 (motion to compel production of "expert documents" denied because plaintiff did not make required motion under Rule 26(b)(4)(A)(ii)); *IBM*, 72 F.R.D. at 81 (motion to compel production of "expert" documents denied because defendant did not comply with "procedure required by that Rule"). Taken together, this line of cases suggests that counsel may obstruct or, at least, stall discovery of their testimonial experts by requiring the discovering counsel to jump through various Rule 26(b)(4)(A) "hoops." *See also* Daniels, *Managing Litigation Experts*, 70 A.B.A. J. 64 (1984).

subsection (B).[160] Although this choice of wording is not necessary to the proposed amendment's goal of eliminating the essentially defunct "two-step" procedure, the results of the Surveys suggest that harmonizing the wording of these provisions would reduce confusion and potential litigation. In this same vein, as shown in Appendix B, Rule 26(b)(4)(C) should, in certain technical respects, be amended to correspond to the wording of the proposed amendment to Rule 26(b)(4)(A).

*Proposed Amendment to Rule 26(b)(4)(A)*

> (A) 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 whom the other party expects to call as an expert witness at trial by any means otherwise permitted by these rules. Discovery of such experts shall be subject to the provisions of subdivision (b)(4)(C) of this rule concerning fees and expenses and to such restrictions regarding the scope of discovery which, upon motion pursuant to subdivision (c) of this rule, the court may order.

## CONCLUSION

The study of South Dakota Trial Judges reveals that the attorneys practicing before the South Dakota courts have diverged from the procedures and substantive standards that the text of Rule 26(b)(4) established.[161] The Judges' Study presents two major conclusions with respect to discovery of testimonial experts. First, the Judges recognized that the lawyers have ignored the "two-step" procedure under Rule 26(b)(4)(A).[162] Second, the Judges confirm that the practitioners almost always avoid resorting to the court under Rule 26(b)(4)(A)(ii).[163] Together, these results demonstrate a significant divergence from the procedural constraints the Rule established.

In addition, the South Dakota Trial Judges noted the divergence between the text of Rule 26(b)(4)(B) and the practices of South Dakota attorneys.[164] The Judges recognized that the attorneys regularly allow discovery of nonwitness experts without the imposition of the discovery immunity the exceptional circumstances requirement of subdivision (B) provided.[165] In this regard, the South Dakota Judges confirm that the South Dakota practitioners are di-

160. *See infra* Appendix C.
161. *See supra* notes 134 to 138 and accompanying text.
162. *See supra* notes 137 to 138 and accompanying text.
163. *See supra* notes 131 to 133 and accompanying text.
164. *See supra* notes 150 to 153 and accompanying text.
165. *See supra* notes 150 to 151 and accompanying text.

verging from the Rule's substantive standard. The South Dakota Trial Court Judges, in general, confirm that the actual practices of attorneys do allow for adequate pretrial discovery of testimonial experts.[166] Although the attorneys' practices diverge from the Rule's established standards, the attorneys are able, largely through informal agreements, to pursue discovery in a satisfactory fashion.[167]

The results of the South Dakota Judges' Study demonstrate that, to advance the interests of their clients, the discovery practices of attorneys will diverge from the literal interpretation of Rule 26(b)(4). Because various procedural and substantive divergences exist and because both attorneys and judges believe the system works well, the results of the Surveys suggest that an amendment to Rule 26(b)(4)(A) would be appropriate. In fact, an amendment which makes the text of Rule 26(b)(4)(A) consistent with the actual practice will eliminate the prospect that the text of the Rule will someday be the source of unnecessary litigation.

166. *See infra* Appendix A, question 21.
167. *See* Day, *supra* note 2, at 56.

## APPENDIX A

[Appendix A represents the questionnaire sent to the South Dakota Trial Judges. The collected answers are presented numerically in the blanks originally provided for the Judges' responses. For certain questions the total number of responses is indicated by the "T = ___" notation. The "T" figure does not include responses which indicated a lack of experience. For certain questions, the numerical responses are also characterized as percentages of the total responses for that question.]

South Dakota Circuit Court Judges'
Survey of Expert Witness Discovery

I. Introduction:

This survey is designed to identify some of the prevailing practices regarding civil discovery of experts in South Dakota and the role played in that process by the South Dakota Rules of Civil Procedure (SD RCP). For each question, please respond as discovery has usually proceeded in your Court. Please mark an -X- ___ in the space provided.

Some of the questions call for you to estimate what the parties have done with respect to expert discovery. We realize that, in many cases, you can only make an educated guess and that you will not have data to verify these estimates. Nevertheless, we believe your impressions are significant, and we ask that you provide your "best estimate". Please skip any question which is not clear to you.

We request that you limit your responses to the time period since you have become a Circuit Court Judge. Please do not make any response which would interfere with the otherwise anonymous nature of this survey.

For your convenience, we have attached a copy of SD RCP 15-6-26(b)(4) to this Survey as Appendix A. If you would be unable to complete this survey, please just return the cover sheet in the enclosed envelope. Thank you.

II. Preliminary Questions:

1. How many years were you in practice before taking the Bench?

T = 24

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| a. | 1-5 | 5 | d. | 16-20 | 4 | g. | More than 30 | 1 |
| b. | 6-10 | 6 | e. | 21-25 | 1 | | | |

c. 11-15 6 f. 26-30 1

2. How many years have you been a Circuit Court Judge in South Dakota?

T = 24

a. 1-5 4 d. 16-20 2 g. More than 30 ——

b. 6-10 8 e. 21-25 ——

c. 11-15 9 f. 26-30 1

3. What percentage of your current (i.e., last five years) caseload is civil litigation?

T = 24

a. 10% —— d. 40% 3 g. 70% 5

b. 20% 2 e. 50% 2 h. 80% 2

c. 30% 5 f. 60% 5 i. 90% ——

j. 100% ——

4. With respect to your civil litigation caseload, in what percentage of the cases do the parties retain experts they expect to call as witnesses at trial under SD RCP 15-6-26(b)(4)(A)?

T = 24

a. 10% 9 e. 50% 2 i. 90% ——

b. 20% 4 f. 60% 1 j. 100% ——

c. 30% 4 g. 70% —— k. Don't know 2

d. 40% 1 h. 80% 1

5. With respect to your civil litigation caseload, in what percentage of the cases do the parties retain experts whom they do not expect to call at trial under SDRCP 15-6-26(b)(4)(B)?

T = 23

a. Never —— e. 40% —— i. 80% ——

b. 10% 6 f. 50% —— j. 90% ——

c. 20% 1 g. 60% —— k. 100% ——

d. 30% —— h. 70% —— l. Don't know 16

6. When the parties retain either type of expert, what percentage of the time would you estimate that they use a written retention agreement (such as a letter or contract)?

T = 24

| | | | | | |
|---|---|---|---|---|---|
| a. Unknown | 22 | e. 40% | ___ | i. 80% | 1 |
| b. 10% | ___ | f. 50% | 1 | j. 90% | ___ |
| c. 20% | ___ | g. 60% | ___ | k. 100% | ___ |
| d. 30% | ___ | h. 70% | ___ | | |

7. What is the approximate population of your circuit?

T = 24

a. 10 greater than 100,000 in population

b. 14 less than 100,000 in population

III. The following questions deal with discovery of experts expected to be called at trial ("testimonial experts").

8. Do you believe that, as the discovery of testimonial experts is normally conducted in your Court, each litigant is effectively required to obtain and prepare his own expert testimony?

T = 20

a. 20 Yes b. ___ No

9. Do you believe that, as the parties normally conduct discovery of testimonial expert witnesses in your Court, such discovery is governed by a principle of mutuality, i.e., simultaneous or near simultaneous exchange of reports and/or closely scheduled depositions?

T = 20

a. 16 Yes 80% b. 4 No 20%

10. (Please check only one)
The parties' usual pattern of discovery of an adverse party's testimonial expert in your Court can best be described as:

T = 24

a. 15 62.5% The use of interrogatories as required by SD RCP 15-6-26(b)(4)(A)(i), which requires the adverse party to identify each expert expected to be called at trial, and to state the substance of the facts and opinions upon which the expert is expected to testify.

b. 2 8.3% Having proceeded according to SD RCP 15-6-26(b)(4)(A)(i), but having found the results unsatisfactory, they move the court for further discovery by other means.

c. 4 16.7% Interrogatories are rarely used and the expert's report is usually furnished by the adversary in response to a demand for production of documents.

d. 3 12.5% The use of some other informal means of discovery not provided in the SD RCP.

11. During the course of discovery of an adverse party's testimonial expert in your Court, demands for the expert's reports are made, interrogatories propounded and answered, reports furnished and/or the expert is deposed in the following percentage of cases.

T = 19

a. Demand for the expert's reports made in 3 10%, 1 20%, 2 30%, —— 40%, 2 50%, —— 60%, 2 70%, 2 80%, 5 90%, 2 100% of the cases occurring.

T = 18

b. Interrogatories Propounded in 2 10%, 3 20%, —— 30%, 3 40%, 1 50%, 2 60%, 2 70%, 2 80%, 2 90%, 1 100% of the cases occurring.

T = 18

c. Interrogatories Actually Answered in 2 10%, 2 20%, —— 30%, 1 40%, 1 50%, 1 60%, 3 70%, 2 80%, 5 90%, 1 100% of the cases occurring.

T = 17

d. Expert's Report Furnished in 1 10%, 1 20%, —— 30%, 2 40%, 3 50%, 1 60%, 2 70%, —— 80%, 5 90%, 2 100% of the cases occurring.

T = 18

e. Depositions are taken in 1 10%, —— 20%, 1 30%, 2 40%, 3 50%, —— 60%, 2 70%, 4 80%, 4 90%, 1 100% of the cases occurring.

12. In what percentage of cases in your Court involving testimonial experts are both the expert's report furnished and the expert deposed?

T = 17

a. 10% or less 2 11.8%
b. 20% 3 17.7%
c. 30% 2 11.8%
d. 40% ——
e. 50% 4 23.5%
f. 60% ——
g. 70% 1 5.9%
h. 80% 2 11.8%
i. 90% 3 17.7%
j. 100% ——
k. Unknown 5 29.4%

13. Is it customary for discovery to occur in your Court as stated in response to questions 10,11 and 12 without resort to your Court as provided by SD RCP 15-6-26(b)(4)(A)(ii)?

T = 22

a. 22 100% Yes. b. —— No.

14. If your answer to question 13 was No, what form does your order allowing discovery take?

T = 2

a. —— Expert deposed.
b. —— Expert's Report furnished.
c. 2 Both a and b above.
d. —— Other.
e. —— No experience.

15. Is it customary in your Court to say that the expert's reports are discoverable only after both sides have settled upon experts expected to be called?

T = 23

a. 4 17.4% Yes. b. 19 82.6% No.

16. If the parties' practice, in your Court, at any time would include discovery of the adverse expert's reports, which statement best describes the circumstances surrounding discovery of the report (answer both a and b; select only one response)?

    a. Manner of Disclosure:

    T = 23

    1. 17 73.9% Provided, pursuant to local custom, in response to an informal request for a copy of the expert's report.
    2. 2 8.7% Provided, pursuant to local custom, in reply to an interrogatory instead of an answer.
    3. 2 8.7% Provided, pursuant to local custom, in addition to answer to interrogatory.
    4. —— Other.
    5. 2 8.7% Unknown.

    b. Timing of Disclosure:

    T = 21

    1. 12 57.1% Provided prior to deposition of expert.
    2. 4 19% Provided at deposition of expert.
    3. 1 4.8% Provided prior to pretrial conference.
    4. —— Provided for first time at pretrial conference:
        A. 4 19% Pursuant to local custom.
        B. —— Pursuant to local court rule.
    5. —— Provided for the first time at trial.
    6. —— Other.
    7. 6 28.6% Unknown.

17. If the parties' practice, in your Court, at any time would include the deposition of the adverse party's testimonial expert, such a deposition usually (answer each of parts a - i; more than one question may be answered yes):

    a. Takes place only after both sides have settled upon experts expected to be called.

    T = 17

1. 7 41.2% Yes. 2. 10 58.8% No.

b. Takes place after an exchange of expert reports.

T = 16

1. 13 81.3% Yes. 2. 3 18.7% No.

c. Is not limited in scope.

T = 19

1. 17 89.5% Yes. 2. 2 10.5% No.

d. Is limited in scope only by rules generally governing discovery (i.e., relevance).

T = 15

1. 10 66.7% Yes. 2. 5 33.3% No.

e. Is limited in scope to facts, opinions and the grounds therefore to be offered by the expert upon direct examination, (i.e., the scope excludes examination of the expert to develop matters to be used for impeachment and inquiring into matters not relied upon by the expert in forming his opinion supportive of the examining party's case).

T = 12

1. 1 8.3% Yes. 2. 11 91.7% No.

f. Is limited in scope to facts, opinions and grounds therefore to be offered upon direct examination and matters to be used for impeachment, (i.e., the scope excludes inquiry into matters, not relied upon by the expert, supportive of the examining party's case).

T = 11

1. 2 18.2% Yes. 2. 9 81.8% No.

g. Is limited other than as specified in (e) or (f).

T = 9

1. 1 Yes. 2. 8 88.9% No.

h. Results in the deposing party having to pay the expert a reasonable fee for time spent in responding to discovery.

T = 13

1. 7 53.8% Yes. 2. 6 46.2% No.

i. Results in the deposing party having to pay the other party a fair portion of the fees and expenses reasonably incurred by the retaining party in obtaining facts and opinions from the expert.

T = 11

1. 3 27.3% Yes. 2. 8 72.7% No.

18. If a medical examination were conducted pursuant to SD RCP 15-6-35 or upon agreement of the parties, is it customary in your Court for the party against whom the order is made to request a copy of the report? (A copy of SD RCP 35 is attached as Appendix B.)

T = 20

a. 19 95% Yes. b. 1 5% No.

19. If your answer to question 18 was Yes, and the report is delivered pursuant to SD RCP 15-6-35(b), does the party causing the examination usually request a like report of any examinations, previously or thereafter made, of the same condition.

T = 19

1. 19 Yes. 2. —— No.

20. In your Court, is the discovery of an adverse party's medical expert expected to be called at trial the same as that followed for non-medical testimonial experts?

T = 19

a. 16 84.2% Yes. b. 3 15.8% No.

21. In your Court, do you believe discovery under SD RCP 15-6-26(b)(4) of testimonial experts permits adequate preparation for cross-examination and rebuttal at trial?

T = 22

a. 19 86.4% Yes. b. 3 13.6% No.

22. If your answer to question 21 was No, inadequate discovery for cross-examination and rebuttal is most frequently a result of (answer a - e separately; more than one question may be answered yes):

a. Lack of a deposition of the expert.

1. 4 Yes. 2. —— No.

b. Lack of a report of the expert.

1. ___ Yes. 2. 3 No.

c. Not receiving the expert's report in a timely fashion.

1. 1 Yes. 2. 2 No.

d. Lack of adequate responses to interrogatories.

1. 2 Yes. 2. ___ No.

e. Lack of cooperation by opposing counsel.

1. 2 Yes. 2. 2 No.

f. ___ Other.

g. ___ Unknown.

23. In your Court, do you believe that, by themselves, an adversary's answers to interrogatories pursuant to SD RCP 26(b)(4)(A)(i) would permit adequate preparation for cross-examination and rebuttal of an adversary's testimonial expert?

T = 22

a. 8 36.4% Yes. 14 63.6% No.

24. If your answer to Question 23 was yes, in what percentage of cases in your Court do you believe that the interrogatories provide sufficient preparation for cross-examination and rebuttal of an adversary's testimonial expert?

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| a. | 10% | 2 | d. | 40% | ___ | g. | 70% | 2 |
| b. | 20% | 2 | e. | 50% | 1 | h. | 80% | 2 |
| c. | 30% | ___ | f. | 60% | ___ | i. | 90% | ___ |
| | | | | | | j. | 100% | ___ |

25. Do you believe that, in your Court, one party has ever been permitted to "freeride" (prepare their case) from the other party's expert?

T = 20

a. 13 65% Yes. b. 7 35% No.

26. In cases before your Court under SD RCP 15-6-26(b)(4)(A), what has been your ruling as to the scope of discovery of the testimonial expert's "pre-retention" knowledge (information your expert acquired prior to his retention)?

T = 20

a. 19 95% The testimonial expert's pre-retention knowledge is freely discoverable (only a showing of relevance need required).

b. 1 5% Before discovery of the testimonial expert's pre-retention knowledge, a showing of "good cause" is required.

c. —— Before discovery of the testimonial expert's pre-retention knowledge, a showing of "substantial need" is required.

d. —— Before discovery of the testimonial expert's pre-retention knowledge, a showing of "exceptional circumstances" is required.

e. —— Other.

IV. The following questions deal with SD RCP 15-6-26(b)(4)(B) and discovery of experts not expected to be called at trial ("nonwitness experts"). (If you answered "Never" to question #5, do not answer questions 27 through 37).

27. With respect to nonwitness experts, in what percentage of cases before your Court does discovery of such experts occur?

| | | | | | |
|---|---|---|---|---|---|
| a. Never | 2 | e. 40% | 1 | i. 80% | —— |
| b. 10% | 1 | f. 50% | 1 | j. 90% | —— |
| c. 20% | 1 | g. 60% | —— | k. Always | —— |
| d. 30% | 1 | h. 70% | —— | l. Unknown | 9 |

28. Do you normally require a showing of "exceptional circumstances" (under which it is impracticable for the party to obtain facts or opinions on the same subject by other means) before discovery of nonwitness experts may be taken?

T = 11

a. 4 36.4% Yes. b. 7 63.6% No.

c. 5 No experience.

29. Do parties before your Court ever allow discovery of their nonwitness experts without a showing of "exceptional circumstances" by their adversary?

T = 11

a. 10 90.9% Yes. b. 1 9.1% No.

c. 5 No experience.

30. If your answer to question 29 was Yes, what showing have you required?

a. 4 No showing; the nonwitness expert is discoverable in the same manner as the testimonial expert under SD RCP 26(b)(4)(A).

b. 2 Good Cause. c. ___ Substantial Need.

d. 2 Other.

31. If your answer to question 29 was Yes, in what percentage of cases in your Court do parties allow discovery of their nonwitness expert without a showing of "exceptional circumstances"?

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| a. | 10% | 2 | e. | 50% | 1 | i. 90% | 1 |
| b. | 20% | 1 | f. | 60% | ___ | j. 100% | ___ |
| c. | 30% | 1 | g. | 70% | ___ | k. Unknown | 4 |
| d. | 40% | ___ | h. | 80% | 1 | | |

32. If parties have permitted discovery of their nonwitness expert without a showing of "exceptional circumstances", what do you believe is the reason (more than one may be checked)?

a. 9 Their customary procedure.

b. 6 Convenience of the parties.

c. 4 Belief that their client's position will be helped.

d. 7 Informal agreement between parties without regard to the rule.

e. 3 Unknown.

33. In the cases before your Court, what has constituted "exceptional circumstances" satisfying SD RCP 15-6-26(b)(4)(B)? (You may respond to more than one answer).

a. 4 Changed circumstances where it has been impossible for the expert to view or analyze the item changed (e.g., the machine that has caused personal injury has been destroyed after one party's expert was able to view, test or analyze why the machine caused the injury).

b. 2 Discovering party's expert could not properly understand, except at the expense of an inordinate amount of time, money and resources, the object of discovery.

c. 2 Facts are present which indicate that the party may be proceeding with litigation without adequate basis in fact to maintain the action.

d. 2 Party is attempting to suppress otherwise relevant information.

e. 3 Party being discovered had not suggested a practicable alternative method by which party seeking discovery could obtain the information sought.

f. —— Other.

g. 10 No experience.

34. In your experience as a Circuit Judge, has the nonwitness expert's pre-retention knowledge been freely discoverable as though it were the information known by an ordinary witness? (See Question 26 for definition of pre-retention knowledge).

T = 10

a. 8 80% Yes. b. 2 20% No. c. 5 No experience.

35. If your answer to question 34 was Yes, did it appear to you that the parties made a careful distinction between the expert's pre-retention knowledge and that knowledge obtained in "anticipation" of litigation?

a. 3 Yes. b. 6 No.

36. In the course of discovery of an adverse party's nonwitness expert, demands for reports are made, interrogatories propounded and answered, reports furnished and/or the expert is deposed in what percentage of cases before your Court?

a. Demands for reports made in —— 10%, —— 20%, 1 30%, —— 40%, 4 50%, —— 60%, 1 70%, 2 80%, —— 90%, —— 100% of the cases occurring.

b. Interrogatories Propounded in 2 10%, —— 20%, 1 30%, —— 40%, 1 50%, 1 60%, 3 70%, —— 80%, —— 90%, —— 100% of the cases occurring.

c. Interrogatories actually answered in 1 10%, — 20%, 1 30%, — 40%, 2 50%, — 60%, 2 70%, — 80%, 1 90%, 1 100% of the cases occurring.

d. Expert's Report Furnished in 1 10%, 1 20%, — 30%, — 40%, 2 50%, — 60%, 4 70%, — 80%, — 90%, — 100% of the cases occurring.

e. Depositions are taken in 1 10%, — 20%, — 30%, 1 40%, 1 50%, 1 60%, 3 70%, 1 80%, — 90%, — 100% of the cases occurring.

37. In your Court, as a condition of the discovery of the identity (name and address) of a party's nonwitness experts, what showing have you required?

T = 15

| | | | |
|---|---|---|---|
| a. | 1 | 6.7% | Exceptional circumstances |
| b. | 2 | 13.3% | Substantial need |
| c. | 3 | 20% | Good case |
| d. | 2 | 13.3% | Other |
| e. | 7 | 46.7% | Only relevance |

V. Essay Question (Optional).

38. Please feel free to make any further observations or comments on the back as necessary.

## APPENDIX B

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

## APPENDIX C

(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 only as follows:

(A) A party may *discover facts known or opinions held by an expert who has been retained in anticipation of litigation or preparation for trial and* ~~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~~ *by any means otherwise permitted by these rules. Discovery of such experts shall be* subject to such restrictions as to scope and the provision *of* pursuant to subdivision (b)(4)(C) of this rule concerning such fees and expenses, *and to such restrictions regarding the scope of discovery which, upon motion pursuant to subdivision (c) of this rule*, the court may ~~deem appropriate~~ *order.*

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