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# Discovery and Admissibility of Expert Testimony

Joseph M. McLaughlin\*

## I. Introduction

I am more or less reliably informed that about every 200,000 years the magnetic force fields surrounding the North and South Poles reverse themselves. Compasses point south instead of north. This phenomenon is known as geomagnetic pole reversal. A similar phenomenon of no less significance occurred in the federal courts in 1938.

On New Year's Day of 1938 and for much of the preceding century federal courts applied the rule of *Swift v. Tyson*,<sup>1</sup> enabling them in diversity cases to decide common law matters based on their own sense of law and justice. In April of 1938, *Erie Railroad v. Tompkins*,<sup>2</sup> without warning, held that federal courts sitting in diversity must thereafter apply the substantive common law of the state in which they sit.<sup>3</sup> The following September the Federal Rules of Civil Procedure became effective, establishing a uniform code of practice for the federal courts that up until then had largely followed the procedural rules of the state where the federal court sat.

The net result of the Federal Rules and *Erie* was a geomagnetic pole reversal in federal practice. Before 1938, federal courts in common law diversity matters had applied state procedure (under the Conformity Act<sup>4</sup>) and federal substance (under *Swift v. Tyson*). After 1938, federal courts in diversity cases applied federal procedure and state substance.

### A. History of Federal Civil Procedure

When the Republic was founded, the Congress delegated to the Supreme Court the power to regulate procedure. Choice of procedure, however, was muddled by the joint operation of the Rules of Decision Act<sup>5</sup> and the Process Act of 1792.<sup>6</sup> In actions at law, matters subject to the Rules of Decision Act were governed by the prevailing state procedural law, whereas matters subject to the Process Act were governed by the state procedural law in effect in 1789. It was not until 1872 that Congress passed the Conformity Act, requiring uniform application of the local state procedure in all actions at law.

While the federal courts were floundering before 1872 to decide what procedural rules to follow, state legislatures were being urged to

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1 41 U.S. (16 Pet.) 1 (1842), *overruled*, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

2 304 U.S. 64 (1938).

3 *Id.* at 78.

4 Act of June 1, 1892, ch. 255, §§ 5-6, 17 Stat. 196, 197.

5 Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92.

6 Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

streamline their procedure. By 1830, Jeremy Bentham had published his savage attack upon common law evidence and procedure.<sup>7</sup>

In the centuries before Bentham and the Federal Rules of Civil Procedure, trial by ambush was the standard way to do business. No discovery tools were available to ferret out information about an opponent's claim or defense. It was the function of the pleadings to identify and define factual issues.

To be entirely accurate, it should be mentioned that there were two statutes and two equity rules relating to discovery. The statutes permitted depositions of sick or otherwise unavailable witnesses<sup>8</sup> or of witnesses whose testimony had to be preserved to prevent a "failure of Justice."<sup>9</sup> Both discovery statutes, however, related only to a party's own case; discovery could not be used to pry into an adversary's claims or defenses.

Discovery, as we understand that term today, was a creature of equity. Of the two equity rules, Rule 47 permitted depositions of certain named witnesses for use at trial in exceptional circumstances. Equity Rule 58 permitted general discovery through written interrogatories, discovery of documents, and admissions. But, even in the equity courts, discovery devices were still not available to obtain information about the opponent's claim or defense.

### B. *Discovery After 1938*

The Federal Rules of Civil Procedure were adopted by the Supreme Court in 1937 and became effective in 1938.<sup>10</sup> Rule 1 trumpets their purpose: "to secure the just, speedy and inexpensive determination of every action" in actions at law or suits in equity, thereafter to be denominated civil actions. A new horizon was envisioned. Civil litigation would henceforth be a search for the truth; and this would best be served by a full development of all the facts prior to the trial presentation. Significantly the function of pretrial "issue focusing," formerly the exclusive role of the pleadings, was now delegated to pretrial discovery devices. Hollow protestations against "fishing expeditions," as the Supreme Court said in *Hickman v. Taylor*,<sup>11</sup> would no longer block a party from inquiring into the facts underlying his opponent's case.

During the last fifty years the federal courts have ceded the parties virtually unbridled discretion whether and when to file requests,<sup>12</sup> as well as the sequence and frequency of the requests.<sup>13</sup> The fundamental sea change worked by the 1938 Federal Rules was to minimize the pleadings as the nautical map of the lawsuit and to assign that role to a vastly expanded, no-holds-barred system of pretrial discovery.

7 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827).

8 28 U.S.C. § 639 (1934).

9 28 U.S.C. § 644 (1934).

10 See FED. R. CIV. P. 86(a).

11 329 U.S. 495, 507 (1947).

12 FED. R. CIV. P. 26(a).

13 FED. R. CIV. P. 26(d).

### C. *Discovery from Experts*

Perhaps because experts were not ubiquitous in 1938, little attention was paid to the question of whether experts should be subject to the same bruising discovery as lesser mortals. It quickly became apparent that they were not. Several considerations were thought to protect experts from the incubus of pretrial discovery.

The most frequently cited reason is that to allow discovery enables one party to make use of another's trial preparation. The fear is that one party might try to build his case on the basis of the discovery of the opposition's expert.

This may be a problem with insurance companies and similar organizations that make careful investigations immediately following an accident. To make such defendants disgorge such valuable information does in effect allow one party to take advantage of the other's trial preparation. But, it may be asked, what has this to do with experts? Most such investigations would not be protected by a rule denying discovery of experts since the investigations are generally conducted by people with no special expertise. A party would certainly be entitled to the names and testimony of any lay witnesses interviewed by investigators.

In this connection, the "work product" doctrine of *Hickman v. Taylor* is often cited as dispositive. That doctrine certainly would seem to protect the opinion of the expert who is retained just to help the attorney prepare for trial but who is *not* expected to testify. With an expert who *is* expected to testify, however, it would seem wiser to permit discovery. As one court indicated concerning discovery of experts: "without prior discovery, cross-examination cannot be expected successfully to perform its historic function, and effective evidence in rebuttal, though perhaps in existence, cannot be produced forthwith upon the close of the claimant's defense. . . ."<sup>14</sup> The court felt this was a sufficient showing of necessity to allow discovery within the *Hickman v. Taylor* rule.<sup>15</sup>

Confusion also surrounded the discovery of reports and opinions of an opponent's experts. Some courts allowed discovery of not only names but also opinions of these experts,<sup>16</sup> while others refused to permit any discovery on the subject at all.<sup>17</sup> Generally, however, only those parts of the expert's reports setting out facts were ordered to be produced.<sup>18</sup> The basis for this conclusion is difficult to divine. Where a lay witness has an opinion that would be admissible evidence, it certainly is permissible to examine him in advance of the trial concerning that opinion. No reason is apparent for a different rule applying to experts.

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14 *United States v. 48 Jars, More or Less, Tranquilease*, 23 F.R.D. 192, 198 (D.D.C. 1958) (quoting *United States v. 132 Cartons Chloresium Tooth Paste* (D. Conn. Mar. 27, 1950)).

15 *See id.*

16 *E.g.*, *United States v. 38 Cases, More or Less, Mr. Enzyme*, 35 F.R.D. 357, 361-65 (W.D. Pa. 1964), *appeal dismissed*, 369 F.2d 399 (3d Cir. 1966); *Bergstron Paper Co. v. Continental Ins. Co.*, 7 F.R.D. 548, 550 (E.D. Wis. 1947).

17 *E.g.*, *United States v. 284,392 Square Feet of Floor Space*, 203 F. Supp. 75, 77-78 (E.D.N.Y. 1962); *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 684, 686 (D. Mass. 1947).

18 *E.g.*, *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 233-37 (S.D. Cal. 1953).

The conflict over discovery of expert witnesses came to a head in 1947 when the District Courts of Ohio and Massachusetts reached opposite conclusions about whether two experts working on the same case could be deposed. The Ohio court directed a professor from the Case Institute of Technology to submit to a deposition<sup>19</sup> while the Massachusetts court barred a similar deposition by a professor from M.I.T.<sup>20</sup> The Massachusetts court concluded that the M.I.T. expert had acted as the attorney's agent and because he was privy to exchanges of confidential information between the client and attorney, fell under the umbrella of the attorney-client privilege.<sup>21</sup> Ultimately, the Sixth Circuit held the Massachusetts expert in contempt for refusing to testify.<sup>22</sup>

The reasoning of cases insulating experts from discovery was criticized as ignoring the limited functions of attorney work product and the attorney-client privilege. The privilege and its related work product doctrine were meant to protect only communications, not facts. An expert's observations and conclusions, whether or not contained in a report, and even if partially based on communications with a client, are facts that, if relevant, constitute evidence. In any event such was the status of expert discovery until the 1960's. Then the problem roared into prominence.

With the litigation explosion of the 1960's, particularly in the area of products liability, experts flocked to our courts like migrating geese. Some might say like invading locusts. In the back of every slick-covered legal magazine the same eye-catching classified ads appeared. In one, under the label "addictionologist," a physician offered, for a fee, to provide expert testimony on alcohol and drug issues.<sup>23</sup> In others, specialists offered expert advice or testimony on bicycle mishaps, battery or bottle explosions, hot-air balloon accidents, and radiation incidents.<sup>24</sup>

The business of being an expert has become a cottage industry. Individuals with knowledge in scores of obscure fields have joined tens of thousands of doctors, university professors and engineers in the expert witness industry. They can be hired to bring their learning to court by nearly anyone able to pay their rates, which can range from \$50 an hour for a law-enforcement expert to more than \$10,000 a day for a plastic surgeon.<sup>25</sup>

The Technical Advisory Service for Attorneys, established in 1961 and based in Fort Washington, Pa., is one of the oldest and largest of such enterprises, with a reported annual growth rate of 15 percent.<sup>26</sup> According to its president, Edwin H. Sherman, the service has developed a nationwide list of about 10,000 experts, grouped in 4000 categories.<sup>27</sup>

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19 See *Cold Metal Process Co. v. Aluminum Co. of Am.*, 7 F.R.D. 425, 428 (N.D. Ohio 1947), *aff'd*, 167 F.2d 570 (6th Cir. 1948).

20 See *Cold Metal Process Co.*, *supra* note 17, at 687.

21 *Id.*

22 *Sachs v. Aluminum Co. of Am.*, 167 F.2d 570, 570-71 (6th Cir. 1948).

23 See N.Y. Times, July 5, 1987, at 1, col. 1.

24 See *id.*

25 See *id.*

26 See *id.* at 13, col. 1.

27 See *id.*

It is self-evident that with this horde of experts recasting the mold of common law trials, the problem of discovery from experts, which had been a minor irritation and largely of academic interest, became a source of major concern by 1965. Not surprisingly, this resulted in the creation of a committee. This committee sorted out the problems, and made a proposal for change in 1966. By 1970 the committee had agreed upon a new rule to govern discovery of experts: Federal Rule 26(b)(4).

Mr. John P. Frank, a member of the committee, has expressed the view that the 1970 amendment to Rule 26(b)(4) was a compromise that envisioned a diversified approach to discovery of experts expected to be called: "The tussle in the Rules Committee was what developed into an eastern and western point of view. . . . The western practice [was] to the general effect that experts should testify just as exactly as other witnesses on discovery. They should not be uncompensated if they have to give special preparation, but otherwise it's just so much more discovery. In the East (3rd and 4th Circuits at least), this was not the going practice. Hence the compromise which the rule represents. . . ."<sup>28</sup>

The new rule is the exclusive way to get discovery from experts. The rule is configured with two kinds of experts in mind: those who are retained and are expected to be called at trial (subdivision A),<sup>29</sup> and those who are retained to prepare for litigation but who are not expected to be called (subdivision B).<sup>30</sup> Solely for pedagogical reasons—and intending no invidious comparison—I will refer to them as Class A and Class B experts.

## II. Class A Experts

It is immediately apparent that the thrust of Rule 26(b)(4) is to protect the trial-witness expert from being deposed. The rule requires a litigant to answer interrogatories identifying his expertise, summarizing the "subject matter" of his testimony and stating "the substance of the facts and opinions" to which he will testify and a "summary of the grounds for each opinion." Anything beyond that can be obtained only by court order.

While this may have been a commendable first step towards discovery in 1970, it has—at least since the promulgation of the Federal Rules of Evidence—become a Neanderthal tool in the chiselling of a lawsuit. Taking the rule on its own terms, it leaves too much to the imagination. What is a "subject matter?" What is the "substance of his anticipated testimony?" What are "facts?" What are "opinions?" These inquiries, more interesting to the philosophy faculty than the law faculty, generate sterile quibbles that only derail a suit.

In *Rupp v. Vock & Weiderhold, Inc.*,<sup>31</sup> for example, defendant was not at all pleased with plaintiffs' answers to his interrogatories. In their origi-

<sup>28</sup> Letter from John P. Frank to Michael H. Graham, Mar. 1, 1976 (quoted in 1976 Ill. L.F. 895, 920-21).

<sup>29</sup> See FED. R. CIV. P. 26(b)(4)(A).

<sup>30</sup> See FED. R. CIV. P. 26(b)(4)(B).

<sup>31</sup> 52 F.R.D. 111 (N.D. Ohio 1971).

nal response, plaintiffs listed four experts as prospective witnesses and described as their subject matter: "The machine design, electrical circuitry, and human factors engineering."<sup>32</sup> The plaintiffs expressly refused to state the substance of the experts' facts and opinions and a summary of the grounds for the opinions on the ground that the defendant had not yet listed any of its experts as possible witnesses.<sup>33</sup> The court, after stating that mutuality is not prerequisite to discovery pursuant to Rule 26(b)(4)(A), ordered a supplemental response to include more precise statements of the experts' expected testimony and the required "substance and summary."<sup>34</sup>

The most obvious way to end a talmudic debate over whether the interrogatories comply with the rule is to obtain an order for discovery and inspection and perhaps even for a deposition. Here, however, we set sail for *terra incognita* because there are few reported decisions by which to chart our compass. Doubtless this is due to the federal rule that discovery orders are rarely appealable. In any event, it leaves district court judges almost unfettered discretion to do whatever they want; and my impression is that most district judges have a visceral reluctance to impose upon experts by making them submit to further discovery. There are occasional intimations to the contrary,<sup>35</sup> but *Wilson v. Resnick*<sup>36</sup> is the more typical response to a discovery motion aimed at an expert.

In *Wilson*, the plaintiff wanted the report of a physician whom the defendant had retained as an expert witness. The physician had not examined the plaintiff but planned to base his trial testimony on his review of all prior medical records in the case. The plaintiff contended that the defendant's answers to the interrogatories were insufficient.<sup>37</sup>

The court disagreed, but it also stated that, even if the answers to interrogatories were insufficient, it would still *not* order production of the expert's report.<sup>38</sup> The court considered interrogatories to be the *only* means authorized by Rule 26(b)(4) to obtain initial discovery of facts known and opinions held by expert witnesses. Turning then to Rule 26(b)(4)(A)(ii), the court stated that reliance upon a mere allegation of insufficient answers as the basis for compelling production of documents would circumvent the procedures of Rule 26(b)(4)(A).<sup>39</sup> The unarticulated assumption of *Wilson* is that the sole remedy for inadequate answers to interrogatories is, at least initially, an order compelling more specific answers to the interrogatories.

This "give them nothing and damn little of that" mindset is at odds with everything that the Federal Rules of Civil Procedure set out to accomplish fifty years ago. But when it meets the Federal Rules of Evidence at the intersection a major collision occurs.

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32 *Id.* at 112.

33 *Id.* at 113.

34 *Id.* at 113-14.

35 *See* *Herbst v. IT&T*, 65 F.R.D. 528, 530-31 (D. Conn. 1975).

36 51 F.R.D. 510 (E.D. Pa. 1970).

37 *See id.* at 511.

38 *Id.*

39 *Id.*

Rules 702 and 703 of the Federal Rules of Evidence state the basic conditions for admitting expert opinions. Under Rule 702, a person who is "qualified as an expert" may give opinion testimony. His qualifications may come from "knowledge, skill, experience, training or education," and he is permitted to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact issue. Under Rule 704, an expert may base his opinion upon facts or data perceived by or made known to him either at or before the hearing. Those facts or data need not be admissible in evidence provided they are of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject.

Contrasting the rules for lay opinions with those for expert opinions is revealing. While Rule 701 limits a lay witness' opinion testimony to opinions rationally based on his perception, Rule 703 permits an expert to base his opinions upon "facts or data" perceived by him, or learned by him either at or before his testimony. This broad language encompasses everything that the expert may know, not only in general, but about the particular case. Most significantly, the expert may rely on facts or data that are inadmissible evidence, provided they are of a type reasonably relied upon by experts in the field.

A moment's reflection indicates that the modern evidence rules permit an expert to rely upon the literature, studies, tests, experiments, and other hearsay matters that form the basis for nearly every recognized area of expertise. It goes further, however, in permitting, for example, a physician to give a diagnosis or prognosis based on a variety of sources, including statements by patients and relatives; reports and opinions from nurses, technicians, and other doctors; hospital records; and x-rays. The rule obviates the need for calling many witnesses to authenticate the documents. While pretrial discovery could reveal deficiencies in the underlying data, the cases under Rule 26(b)(4) have been positively stingy in allowing such discovery beyond the artfully meager answers to interrogatories. This makes no sense.

The problem is compounded by Rule 705 of the evidence rules. Rule 705 is directed at the form of an expert's testimony. Before the Federal Rules, most courts required experts to respond to a hypothetical question, an artificial device that caused confusion, delay, and frustration. Under Rule 705, the hypothetical question may be avoided; all that is required is that the expert first be qualified and then state his opinion. Nothing requires him on direct examination to give the reasons for his opinion, let alone the underlying facts or data.

This marked change in the form of expert testimony is a welcome development in trial practice, but it places additional burdens on adversary counsel. In order to determine how to attack an expert's opinion, and whether to explore the reasoning behind it or the facts underlying the opinion, the opposing attorney in a civil case must learn all that information in advance. For Rule 705 to operate fairly, therefore, extensive pretrial discovery of experts is essential. Thus far there is little indication that such broad discovery is generally available.



### III. Class B Experts

Rule 26(b)(4)(B) governs discovery from expert witnesses who are retained by an adversary but who are not expected to testify at trial. A party may obtain discovery from such an expert only on a showing of "exceptional circumstances." The advisory committee note defines exceptional circumstances as circumstances "under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."<sup>40</sup>

A threshold inquiry of enormous significance is how a party goes about learning who has been consulted by his adversary. Wright and Miller have interpreted the advisory committee note to mean that a party ordinarily may discover the names of an adverse party's retained or specially employed experts who are not to be called at trial.<sup>41</sup> Wright and Miller conclude that a "proper showing" by "ancillary procedure" (presumably an interrogatory) is defeated only if the party resisting disclosure establishes either that the names of the experts are irrelevant or that a valid reason exists for nondisclosure of those names.<sup>42</sup>

The court in *Sea Colony, Inc. v. Continental Insurance Co.*<sup>43</sup> adopted the Wright and Miller view and concluded that the identity of a non-witness retained expert must be disclosed.<sup>44</sup> The court in *Sea Colony* did not require "exceptional circumstances" to obtain the name, but it volunteered that the test of "exceptional circumstances" would apply to discovery of any reports prepared by the expert.<sup>45</sup>

In *Perry v. W.S. Darley & Co.*,<sup>46</sup> however, another court disagreed, concluding that the "exceptional circumstances" test applied even to discovery of the mere identity of non-witness experts.<sup>47</sup> In both decisions discovery of the identity of the expert was coupled with, or thought to be preliminary to, an attempt to obtain disclosure of the expert's reports. Of course, both courts agreed that the "exceptional circumstances" test would apply to discovery of the expert's reports.

Having discovered the name of an expert whom the adversary consulted but does not now intend to call as a witness, a healthy curiosity will often lead to an interview with the expert. There is nothing unethical in this, although at least one federal court concluded that it can be a violation of Rule 26(b)(4).<sup>48</sup> The odds are at least even that this will uncover proof that the expert concluded that the adversary who retained him was in fact at fault. Then we are at the Rubicon: May the expert now be called as witness against the party who initially retained him (and presumably paid him for an unfavorable report)? Not surprisingly, competing notions of ethical values have compelled different results.

40 FED. R. CIV. P. 26, note to 1970 amendment.

41 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032, at 255 n.31 (1970).

42 *Id.*

43 63 F.R.D. 113 (D. Del. 1974).

44 *Id.* at 11±.

45 *Id.*

46 54 F.R.D. 278 (E.D. Wis. 1971).

47 *Id.* at 280.

48 *Ager v. Jane C. Stormont Hosp. & Training School*, 622 F.2d 496, 501-02 (10th Cir. 1980).

In my own State of New York the courts have wrestled with their consciences only to arrive at different results. In *Gugliano v. Levi*,<sup>49</sup> for example, the defendant in a malpractice action retained a Doctor Roen who gave the defendant a report that devastated his case. Plaintiff learned about this and then subpoenaed the doctor to compel him to testify for the plaintiff.<sup>50</sup> Reversing, the New York Appellate Division wrote:

The plaintiff's use of Dr. Roen and his report constituted a basically improper trial tactic. It enabled plaintiff to turn unfairly to his advantage the opinion of an expert for the defense who had already been engaged by his adversaries and had reported to them, though plaintiff himself lacked no expert testimony in proof of his own cause of action. It permitted plaintiff indirectly to contravene the interdictions contained in the present practice code covering discovery procedures, which absolutely prohibit the utilization of an attorney's work product by his adversary and which conditionally bar his use, without prior leave of the court, of the opinion of an expert who had been retained by an opposing party. . . . In our judgment, where the expert called is a person who has been employed by the opposing party, and where, in a discovery proceeding prior to trial, the court had not made any finding of difficulty in obtaining other expert testimony, there is no warrant . . . to allow one party to subpoena as a witness the other party's expert and to admit into evidence such expert's report to his employer. The practice thrusts the expert into the intolerable position of working for both sides, and into violation of his "ethical obligation not to accept a retainer from the other side."<sup>51</sup>

This ethical sensitivity does not appear to have infected the federal courts in New York, where the Second Circuit has on at least two occasions expressly sanctioned the practice of compelling experts to testify against the party who first retained them. The earlier case is *Carter-Wallace, Inc. v. Otte*,<sup>52</sup> where the precise issue was whether the testimony of an expert witness given in a prior trial was admissible in a second trial when the expert was not unavailable. The argument was that the prior testimony should be admissible because the trial court could not compel the expert's testimony. This contention was rejected. According to the late Judge Friendly, the weight of authority is that federal courts have the power to subpoena any expert witness and require him to state whatever opinions he previously has formed.<sup>53</sup>

In *Kaufman v. Edelstein*,<sup>54</sup> Judge Friendly reinforced *Carter-Wallace* by rejecting the contention that an expert has a "privilege" not to testify solely on the basis that the expert "owns" his knowledge and may suffer financially by being called often to testify.<sup>55</sup> Despite the paucity of federal authority, the view expressed by Judge Friendly is supported by

49 24 A.D.2d 591, 262 N.Y.S.2d 372 (2d Dep't 1965).

50 *Id.* at 591, 262 N.Y.S.2d at 374.

51 *Id.* at 591-92, 262 N.Y.S.2d at 374 (quoting 3 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.52, at 31-48 (citations omitted)).

52 474 F.2d 529 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

53 *See id.* at 536.

54 539 F.2d 811 (2d Cir. 1976).

55 *Id.* at 821.

commentators and the majority of state courts. Coincidentally, the New York Court of Appeals has recently entered the majority camp, noting that there can really be no ethical dilemma when the expert is merely being compelled to tell the truth.<sup>56</sup>

If it has now become the majority rule that a party may compel his opponent's expert to testify, it may seriously be questioned whether the rule that a class B expert is immune from discovery (absent exceptional circumstances) should continue. It is certainly an interesting notion that an expert may be subjected to a trial subpoena, but not to a discovery subpoena.

#### IV. Conclusion

While the general rules governing pretrial disclosure in federal courts are now fairly well understood, their application to discovery from experts remains enshrouded in obscurity. The problem has been exacerbated with the advent of the Federal Rules of Evidence, which just about free experts from the evidentiary rules that govern lesser mortals. Superimposing the stingy discovery provision of Rule 26(b)(4) upon the free-floating rules of Article 7 of the Rules of Evidence, the trial lawyer is often compelled to undertake cross-examination by entering a minefield, not knowing when he is going to step on the one question that will blow his case into eternity.

Rule 26(b)(4) should be totally recast to make discovery against experts freely available, the rule rather than the exception. Not only will this remove the gamesmanship from cross-examination of experts, but it will also increase the likelihood of settlements, which to a trial judge are much closer to godliness than is cleanliness.

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<sup>56</sup> See *Gilly v. City of New York*, 69 N.Y.2d 509, 512, 508 N.E.2d 901, 902-03, 516 N.Y.S.2d 166, 167-68 (1987) (per curiam).