

CHAPTER 9

DISCOVERY OF EXPERTS

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CHAPTER 9

DISCOVERY OF EXPERTS

9.1 IN GENERAL

Virginia has long recognized that experts retained in anticipation of litigation should not be subject to the same liberal rules of discovery as ordinary witnesses. Restricting a party's freedom to discover opinions of an expert retained by an opponent prevents the perceived unfairness of a litigant procuring evidence from an adversary's expert who rendered an opinion unfavorable to the party who hired the expert.¹

Since the advent of liberal pretrial discovery, courts have struggled to reconcile discovery's goal of permitting all parties to obtain the "fullest possible knowledge of the issues and facts before trial"² with the belief that unfettered access to experts retained by an opponent is inappropriate. Federal courts resolved the tension between these two contradictory policies by the enactment, in 1970, of Rule 26(b)(4) of the Federal Rules of Civil Procedure (the Federal Rules).³

In 1972, the Supreme Court of Virginia adopted the discovery provisions of the Federal Rules. In doing so, it incorporated Federal Rule 26(b)(4) without modification, except for the addition of a special provision for eminent domain proceedings, into the Rules of the Supreme Court of Virginia (the Rules) as Rule 4:1(b)(4). It is instructive, when construing Rule 4:1(b)(4), to consider the legislative history⁴ and the federal decisions interpreting the pre-1993⁵ Federal Rule 26(b)(4).⁶ In the absence of Virginia decisions applying Rule 4:1(b)(4), this chapter includes citations to federal cases applying the provisions of the pre-1993 Federal Rule 26(b)(4).

¹ *Cooper v. Norfolk Redev. & Hous. Auth.*, 197 Va. 653, 657, 90 S.E.2d 788, 791 (1956).

² *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

³ Comment, *Discovery of Expert Information Under the Federal Rules*, 10 U. Rich. L. Rev. 706 (1976) [hereinafter 10 U. Rich. L. Rev. 706].

⁴ The primary source of history surrounding the drafting of Federal Rule 26(b)(4) is the Advisory Committee's Note, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 504-05 (1970) [hereinafter Advisory Committee's Note].

⁵ The Federal Rules of Civil Procedure were amended in 1993. Rule 26(b)(4), as adopted in 1970, was replaced with rules requiring retained experts who will testify at trial to prepare reports containing specified information and broadening the scope of permissible discovery from testifying experts. 8 Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* 2031.1 [hereinafter Wright, Miller & Marcus].

⁶ See 17 Michie's Juris. Va. & W. Va. Statutes, 77. In *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989), the court stated it would be instructive to consider the construction given by federal courts to a federal rule of evidence pertaining to expert testimony which Virginia adopted by statute. This chapter cites to relevant federal case law in discussing issues concerning the interpretation and application of Rule 4:1(b)(4). In these instances, the text will make generic reference to the subparts of the expert discovery rule, since pre-1993 Federal Rule 26(b)(4) and Rule 4:1(b)(4) of the Rules of the Supreme Court of Virginia are identical.

Facts known and opinions held by experts acquired or developed in anticipation of litigation may be obtained only by following the procedure set forth in Rule 4:1(b)(4).⁷

9.2 CLASSIFICATION OF EXPERTS UNDER RULE 4:1 4

The scope of discovery under Rule 4:1(b)(4)⁸ depends upon (i) when the expert formed his or her opinions and (ii) the nature of the expert's involvement in the case. The Rule also provides for the discovering party to pay the expert's fees and expenses, thereby precluding a party's benefitting from information discovered from an expert retained and compensated by an opponent. The nature and extent of any shifting of the expert's fees and expenses depends in large measure on the expert's status at the time the opinions were formed and whether the expert will testify at trial.

Rule 4:1(b)(4) demarcates four classes of experts:

1. Experts whose opinions are acquired or developed in anticipation of litigation or in preparation for trial and who are expected to be called as expert witnesses at trial by the party who retained the experts;
2. Experts retained or specially employed in anticipation of litigation but not expected to testify at trial;

⁷ *Flora v. Shulmister*, 262 Va. 215, 546 S.E.2d 427 (2001).

⁸ *Trial Preparation: Experts; Costs Special Provisions for Eminent Domain Proceedings*. 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) A party may depose any person who has been identified as an expert whose opinion may be presented at trial, subject to the provisions of subdivision (b)(4)(C) of this Rule concerning fees and expenses. (iii) 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 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 and expenses incurred in responding to discovery under subdivisions (b)(4)(A)(ii), (b)(4)(A)(iii), and (b)(4)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(iii) 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.

(D) Notwithstanding the provisions of subdivision (b)(4)(C) of this Rule, the condemnor in eminent domain proceedings, when it initiates discovery, shall pay all costs thereof, including without limitation the cost and expense of those experts discoverable under subdivision (b) of this Rule. The condemnor shall be deemed to have initiated discovery if it uses, or gives notice of the use of, any discovery method before the condemnee does so, even though the condemnee subsequently engages in discovery.

3. Experts informally consulted in preparation for trial but not retained; and
4. Experts whose information was not acquired in anticipation of litigation or in preparation for trial.⁹

The discoverability and terms and conditions of permissible discovery will be quite different depending on which of the above classifications applies to a particular expert. An expert may fall into more than one of these classes. Accordingly, judicial determination as to what discovery is permissible from an expert will focus more on whether the information held by the expert was acquired in anticipation of litigation than whether the expert was retained in anticipation of litigation.

9.3 DISCOVERY OF EXPERTS WHO MAY BE TRIAL WITNESSES

A party has a right to serve an interrogatory requiring another party to identify each person expected to be called as an expert witness at trial and to state the subject matter upon which each expert will testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds of the opinion.¹⁰

Most parties serve such an interrogatory as a matter of course early in the litigation. Once the interrogatory is served, the served party is to answer the interrogatory within the time specified by Rule 4:8 with information known to the party at that time. The party upon whom the interrogatory is served is also under a duty to promptly supplement its initial response if the party desires to call as a witness at trial an expert who was not previously identified or if the subject matter or substance of a previously identified expert's testimony has changed or expanded.¹¹

Since parties normally do not determine the identities of experts and the opinions to which the experts will testify until after conducting discovery of the facts germane to the controversy, the customary time for a party to reveal the identity and opinions of trial experts is later in the pretrial phase of the litigation by supplemental answers. The Rules do not define "prompt" supplementation. In order to avoid sanctions,¹² a party must provide the sought-after information about trial experts by a date deemed "prompt" by the court. In many instances, local "guidelines" or a pretrial order will specify a date by which the party should have identified persons to be called as expert witnesses at trial and the substance of their testimony. Prudent practice dictates reaching a stipulation with opposing counsel about the timing of expert designation absent a controlling rule or order.¹³

⁹ Wright, Miller & Marcus, *supra* note 5, 2029.

¹⁰ Va. R. 4:1(b)(4)(A)(i).

¹¹ Va. R. 4:1(e)(1).

¹² See 11.305, 11.9 of Chapter 11 of this book.

¹³ Courts frequently exclude expert testimony when the expert witness has not been identified or the expert designation fails to disclose an opinion or basis for the opinion by a date specified in a pretrial scheduling order. *See WC Broad., Inc. v. Cox Radio, Inc.*, 71 Va. Cir. 5 (Richmond 2006); *Belshé v. Pinecrest Cluster Ass'n*, 68 Va. Cir. 89

A question sometimes arises as to whether an expert to be called as a trial witness who did not acquire or develop his or her opinions in anticipation of litigation must be identified in response to the standard expert interrogatory.¹⁴ Some courts have held that identifying experts whose opinions were not acquired in anticipation of litigation is unnecessary.¹⁵ Although Rule 4:1(b)(4) was designed to govern discovery of expert information developed in anticipation of litigation, it acts as a limiting device on discovery of expert information within its ambit. All expert information outside the scope of Rule 4:1(b)(4) is as freely discoverable by any method (including interrogatory) as any other matter relevant to the subject matter of the action.¹⁶ An interrogatory calling for the identity of experts to be called as witnesses at trial without regard to when the expert acquired his or her opinions should be answered as to all experts and not simply those who acquired their information in anticipation of litigation.¹⁷

Rule 4:1(b)(4)(A)(ii) permits a party to depose an opponent's testifying experts, subject to subpart (C) regarding the witness's fee. The ability to depose an expert or the actual taking of the deposition does not lessen the obligation of a party to answer fully an interrogatory seeking the opinions of experts who testify at trial.

Rule 4:1(b)(4)(A)(i) imposes an affirmative burden on a party to disclose the substance of an expert's testimony. A party is not relieved of this burden of disclosure by showing that the opposing party had the opportunity to depose the expert or was familiar with the expert's opinions from prior litigation.¹⁸ Deposing counsel is entitled to a complete designation of the opinions on which the expert may testify and of the facts that support the opinion to facilitate an efficacious deposition.

Rule 4:1(b)(4)(A)(iii) requires a court order for further discovery from an expert to be called as a witness at trial when the expert's opinions were acquired in anticipation of litigation or in preparation for trial.¹⁹ The rule gives no guidance to the court on the criteria for deciding whether to grant a motion for further discovery. Thus, it is in the court's discretion as to what, if any, further discovery will be

(Fairfax 2005); *Bruley v. Bruley*, Ch. No. 24086, 2005 Va. Cir. LEXIS 111, 2005 WL 3369208 (Loudoun Cir. Ct. Sept. 2, 2005).

¹⁴ Common examples are treating physicians or employees of a party who formed their opinions during the events that are the subject of the litigation and not in anticipation of the litigation. This paragraph discusses the application of the discovery restrictions of Rule 4:1(b)(4) to these experts.

¹⁵ *Patel v. Gayes*, 984 F.2d 214, 217-18 (7th Cir. 1993) (applying pre-1993 Fed. R. Civ. P. 26(b)(4)).

¹⁶ Va. R. 4:1(b)(1).

¹⁷ *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985) (applying pre-1993 Fed. R. Civ. P. 26(b)(4)).

¹⁸ *John Crane, Inc. v. Jones*, 274 Va. 581, 591-594, 650 S.E.2d 851, 856-857 (2007); *Kirk Timber & Farming Co. v. Union Camp Corp.*, 56 Va. Cir. 335 (Suffolk 2001) (decided under former Rule 4:1(b)(4)(A), in which depositions were not a matter of right).

¹⁹ In *Marsh v. Jackson*, 141 F.R.D. 431 (W.D. Va. 1992), a party was not permitted to subpoena documents from experts without a court order under pre-1993 Federal Rule 26(b)(4). *Accord Newcomb v. Principal Mut. Life Ins. Co.*, No. 1:07cv345, 2008 U.S. Dist. LEXIS 79980, 2008 WL 3539520 (W.D.N.C. Aug. 11, 2008). *But see Expeditors Int'l of Wash., Inc. v. Vastera, Inc.*, No. 04-C-0321, 2004 U.S. Dist. LEXIS 2501 at *9, *10, 2004 WL 406999 at *3 (N.D. Ill. Feb. 20, 2004) (post-1993 Federal Rules) (party may subpoena records from an expert regarding prior testimony that could not be obtained directly from the party retaining the expert).

permitted under Rule 4:1(b)(4)(A)(iii). For example, in *Abujaber v. Kawar*,²⁰ the court concluded that the testimony of an expert real estate appraiser was not sufficiently complex to require that he comply with a subpoena duces tecum. But in a complex case, further discovery is more likely to be granted.

Obtaining documents prepared by or furnished to the expert in anticipation of litigation either by agreement of counsel or by court order can be difficult. The primary reason for this difficulty is the work product doctrine of Rule 4:1(b)(3).²¹ Although expert discovery is arguably not subject to the provisions of Rule 4:1(b)(3),²² many judges instinctively seek to protect materials collated by counsel or prepared at the direction of counsel and will set a high threshold for document production from an expert.

Rule 4:5(b)(1) empowers a party deposing a witness to require the deponent to produce documents at the deposition. This provision does not apply to the deposition of an expert who developed opinions in anticipation of litigation. Because of the concerns of unfettered access to materials protected from discovery by the work product doctrine, Rule 4:1(b)(4)(A)(iii) requires a court order before the expert can be compelled to produce documents at a deposition.

Determining whether to order production of documents reviewed by an expert in the course of forming his or her opinions will also be influenced by section 8.01-401.1 of the Virginia Code, which provides that an expert testifying at trial may be “required to disclose the underlying facts or data on cross-examination.” To further this dictate in an efficient manner, pretrial production of such documents would seem to be appropriate. In *Moyers v. Steinmet*,²³ the court adopted this view. Citing section 8.01-401.1, the court concluded that correspondence from counsel to an expert witness must be produced to the extent that it contains any statements of facts “because the expert may be cross-examined on that subject at trial.”²⁴

9.4 DISCOVERY OF RETAINED EXPERTS NOT EXPECTED TO BE CALLED AS WITNESSES AT TRIAL

If a party decides not to call as a trial witness an expert retained by the party in anticipation of litigation, the opposing party’s need for discovery to prepare for cross examination vanishes. At the same time, the justification for restricting discovery of this same expert is stronger. It is the nontestifying expert with whom counsel most freely discusses the case, including trial strategy and impressions about the strengths and weaknesses of the case. Routine discovery of nontestifying experts whose information would then become available to a perhaps less industrious opponent or

²⁰ 17 Va. Cir. 398 (Loudoun 1989) (applying the pre-2002 Rule 4:1(b)(4)(A)).

²¹ See paragraphs 12.3 and 12.4 of Chapter 12 of this book for a discussion of the work product doctrine.

²² See *infra* 9.8.

²³ 37 Va. Cir. 25 (Winchester 1995).

²⁴ *Id.* at 29.

who may disclose the thoughts and activities of the counsel retaining the expert would discourage counsel from consulting with experts.²⁵

For these reasons, obtaining discovery from the nontestifying expert is exceedingly difficult. Information concerning an expert retained in anticipation of litigation or in preparation for trial who is not expected to be called as a witness may be discovered “only 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.”²⁶ Most courts hold that a showing of exceptional circumstances is required even to discover the identity of a nontestifying retained expert.²⁷

Exceptional circumstances may arise when the only known expert available on a particular subject has been retained by one party or, more frequently, when an opponent’s expert has conducted an examination or test which, due to a change of circumstances, can no longer be replicated by another expert.²⁸ The latter circumstance can arise either in the context of a change in condition caused by the expert examination or test²⁹ or simply a change in condition caused by forces beyond the control of the party and its expert.³⁰

A nontestifying expert’s report may be discovered when the expert’s data or test results are relied upon by another expert who will testify.³¹ Such a result could be reached either by applying the “further discovery” standard to the testifying expert or the “exceptional circumstances” standard to the nontestifying expert or finding a waiver of Rule 4:1(b)(4)(B) protection by furnishing the information to a testifying expert.

²⁵ Wright, Miller & Marcus, *supra* note 5, 2032.

²⁶ Va. R. 4:1(b)(4)(B).

²⁷ *State Auto Ins. Cos. v. Briley*, 140 F.R.D. 394 (E.D. Mo. 1992). This predominant view is supported by the Advisory Committee’s Note, *supra* note 4, which states, “a party may on a proper showing require the other party to name experts retained or specially employed.” “Proper showing” means exceptional circumstances. *Ager v. Jane C. Stormont Hosp. & Training Sch.*, 622 F.2d 496, 503 (10th Cir. 1980). *But see Eisai Co. v. Teva Pharm. U.S.A., Inc.*, 247 F.R.D. 440, 442-43 (D.N.J. 2007); *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179 (D. Md. 1976).

²⁸ 10 U. Rich. L. Rev. 706, *supra* note 3, at 717.

²⁹ In *Braun v. Lorillard Inc.*, 84 F.3d 230 (7th Cir.), *cert. denied*, 519 U.S. 992 (1996), discovery was permitted under Federal Rule 26(b)(4), as amended, from nontestifying experts about test results that had destroyed the lung tissue being tested. When equipment was altered by expert’s inspection, and the condition of the equipment was a central issue in litigation, exceptional circumstances existed warranting discovery of documents containing substantive information about the equipment’s condition. *Cooper v. Meridian Yachts, Ltd.*, Case No. 06-61630-civil, 2008 U.S. Dist. LEXIS 41902, 2008 WL 2229552 (S.D. Fla. May 28, 2008). The *Cooper* court, however, made an effort to exclude from production portions of documents constituting opinion work product.

³⁰ *Delcastor, Inc. v. Vail Assocs.*, 108 F.R.D. 405 (D. Colo. 1985) (permitting discovery of the report of an expert who had examined the scene of a mudslide shortly after its occurrence, because weather and human activity had changed the scene before an expert retained by an opposing party could examine the scene).

³¹ *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740 (E.D. Mo. 1983); *see also Papke v. Harbert*, 2007 S.D. 87, 738 N.W.2d 510 (2007) (nontestifying expert report reviewed but not relied upon by testifying expert not discoverable); *Valero Mktg. & Supply Co. v. Southcap Pipe Line Co.*, Case No. 3:06-cv-623 DGW, 2009 U.S. Dist. LEXIS 2776, 2009 WL 102437 (S.D. Ill. Jan. 15, 2009) (documents prepared by nontestifying experts and furnished to testifying experts must be produced, but documents relied on by the nontestifying experts are not discoverable due to lack of “exceptional circumstances”).

A nontestifying expert who has examined a party pursuant to Rule 4:10 may be subject to the discovery authorized by Rule 4:1 despite the decision of the party employing the expert not to call the expert as a witness at trial.³² However, the court in *In re All Asbestos Cases*³³ refused to require the defendants to produce the report of a nontestifying expert who had examined plaintiff's pathology slides because the report was subject to the exceptional circumstances requirement of Rule 4:1(b)(4)(B).

If an expert is identified as an expert who may testify at trial and is later removed as a trial witness by the party who retained the expert, Rule 4:1(b)(4)(B) may not prevent an opposing party from deposing the expert or from calling the expert as a witness at trial. Some courts have held that the initial disclosure of the expert and his or her opinions waives any right to later withdraw the expert as a witness and thereby thwart discovery from the expert.³⁴

9.5 INFORMALLY CONSULTED EXPERTS

Lawyers frequently contact experts to discuss the subject matter of a case informally for the purpose of receiving some insight helpful to their preparation or with an eye towards retaining the expert. These informal consultations are not subject to discovery.³⁵ This prohibition does not forbid discovery of an expert who had involvement in the subject matter of the litigation before a consultation deemed to be in anticipation of litigation.

9.6 EXPERT INFORMATION NOT ACQUIRED IN ANTICIPATION OF LITIGATION

Rule 4:1(b)(4) only applies to facts and opinions "acquired or developed in anticipation of litigation or for trial." Accordingly, many persons deemed to be experts, including parties, employees, and agents of a party and non-party witnesses such as treating physicians and service and repair personnel, will be privy to facts and will hold opinions relevant to the subject matter of the action that were not acquired in anticipation of litigation. Discovery of facts and opinions held by these experts will be

³² *Mann v. McAllister Towing of Va., Inc.*, 43 Va. Cir. 534 (Portsmouth 1997).

³³ 64 Va. Cir. 190 (Newport News 2004).

³⁴ See, e.g., *Bradley v. Cooper Tire & Rubber Co.*, No. 07-mc-001-JM, 2007 U.S. Dist. LEXIS 2458, 2007 WL 148764 (D.N.H. Jan. 11, 2007) (permitting discovery of withdrawn expert witness); *Agron v. Trustees of Columbia Univ.*, 176 F.R.D. 445 (S.D.N.Y. 1997). But see *Federal Ins. Co. v. St. Paul Fire & Marine Co.*, No. CO5-01878JW(HRL), 2008 U.S. Dist. LEXIS 25927, 2008 WL 761417 (N.D. Cal. Mar. 19, 2008); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023 (E.D. Cal. 2002) (quashing trial and deposition subpoenas of experts designated by a settling co-defendant who agreed as part of settlement not to make its experts available to the plaintiff); *Ross v. Burlington N. R.R. Co.*, 136 F.R.D. 638 (N.D. Ill. 1991) (holding that a party is entitled to change his mind about the status of a testifying witness to get procedural protections). In *Plymovent Corp. v. Air Technology Solutions, Inc.*, 243 F.R.D. 139 (D.N.J. 2007), the court reviewed the federal case law addressing "pulling back" experts after disclosure and held that evidentiary use of an expert at a preliminary injunction hearing would not effect a waiver of protection from discovery afforded by Fed. R. Civ. P. 26(b)(4)(B).

³⁵ Advisory Committee's Note, *supra* note 4, at 504. For federal cases forbidding discovery of such informal consultations and the identity of informally consulted experts, see Wright, Miller & Marcus, *supra* note 5, 2033 at 455 n.2.

governed not by the strictures of Rule 4:1(b)(4) but by Rule 4:1(b)(1), which permits discovery of any nonprivileged matter relevant to the subject matter of the action.³⁶

Federal courts have recognized this distinction and held the pre-1993 Federal Rule 26(b)(4), the federal counterpart to Rule 4:1(b)(4), inapplicable to treating physicians,³⁷ a coroner performing an autopsy,³⁸ a medical consultant to a railroad,³⁹ and an expert in prior litigation subsequently retained in pending litigation as to opinions held before being retained in pending litigation.⁴⁰

Many recent Virginia decisions regarding discovery of an expert's opinions and the facts on which those opinions are based pertain to a plaintiff's treating physician in a personal injury or medical malpractice action. These opinions address such issues as the patient-physician privilege, the fiduciary duty of a treating physician to his or her patient, payment of a treating physician's witness fee, and determining which portions of his or her testimony are opinion and which are fact. However, the courts' guidance may apply to non-physician experts in other contexts.

In *Pettus v. Gottfried*,⁴¹ the Virginia Supreme Court, interpreting section 8.01-399(B) of the Virginia Code,⁴² distinguished the factual portions of a treating physician's testimony from his or her opinion testimony. Only a physician's current opinions must reach the reasonable degree of medical probability standard. Thus, a physician can testify regarding his or her examination and observation of the patient and impressions and conclusions reached during the course of treating the patient

³⁶ "The subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness." Advisory Committee's Note, *supra* note 4, at 503.

³⁷ *Patel v. Gayes*, 984 F.2d 214, 217-18 (7th Cir. 1993); *Quarantillo v. Consolidated Rail Corp.*, 106 F.R.D. 435 (W.D.N.Y. 1985).

³⁸ *Harasimowic v. McAllister*, 78 F.R.D. 319 (E.D. Pa. 1978).

³⁹ *Congrove v. St. Louis-S.F. Ry.*, 77 F.R.D. 503 (W.D. Mo. 1978).

⁴⁰ *Barkwell v. Sturm Ruger Co.*, 79 F.R.D. 444 (D. Alaska 1978); see also *Bio-Technology Gen. Corp. v. Novo Nordisk A/S*, C.A. No. 02-235-SLR, 2003 U.S. Dist. LEXIS 7911, at *4, 2003 WL 21057238, at *1 -*2 (D. Del. May 7, 2003) ("Any rule to the contrary would allow a party to shield otherwise discoverable facts and opinions from discovery simply by retaining individuals knowledgeable about those facts.").

⁴¹ 269 Va. 69, 606 S.E.2d 819 (2005).

⁴² That section, as amended by Act of Mar. 23, 2005, 2005 Va. Acts ch. 649, provides:

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

because that testimony is factual rather than expert opinion. But any testimony regarding hypotheticals or testimony beyond the witness's medical records may be expert testimony subject to the reasonable degree of medical probability standard.⁴³ Accordingly, a defendant should be able to discover the conclusions, documented diagnoses, treatment plans, and facts known by a health care provider at the time of treatment.

Pettus suggests that a treating physician called only to testify about the plaintiff's medical treatment and conclusions reached during treatment that are consistent with the medical records need not be disclosed as an expert. Rule 4:1(b)(4), on the other hand, requires disclosure by interrogatory answer of all facts known as well as opinions held by an expert. Therefore, it would be prudent to identify the treating physician when he or she will testify about opinions formed during treatment.

If a treating physician will not render an expert opinion, the physician's discovery is not limited by Rule 4:1(b)(4). Consequently, a party may depose the physician without being subject to Rule 4:1(b)(4)(C) requiring that the witness be compensated.⁴⁴ Under this distinction, a treating physician may be free to testify against his or her patient concerning all facts placed in issue by the plaintiff and the physician's conclusions reached during the course of that treatment.

Courts have reached divergent conclusions about the applicability of the Rule to employees of a party who form opinions in anticipation of litigation.⁴⁵ Some courts have found that an expert regularly employed by a party can never be protected from discovery by the Rule.⁴⁶ Other courts have held that if an employee is assigned to apply his or her expertise to a particular matter in anticipation of litigation or in preparation for trial, the Rule governs discovery of the opinions formed and facts learned by the employee in the course of the assignment.⁴⁷

The latter view is probably correct. The drafters of the Federal Rule upon which Rule 4:1(b)(4) is modeled contemplated that employees, although usually not subject to the Rule, would sometimes be protected upon a proper showing. The drafters indicated that a general employee of a party is not protected unless "specially employed on the case" in anticipation of litigation or preparation for trial.⁴⁸ The justification for imposing Rule 4:1(b)(4) restraints on expert information developed in anticipation of litigation, according to the federal Advisory Committee's notes, should apply equally to the general employee who is specially employed and the retained expert.

⁴³ *Pettus, supra*.

⁴⁴ *Villar-Gosalve v. Villar-Gosalve*, 65 Va. Cir. 96 (Albemarle 2004) (requiring that the physician be paid her fee for deposition testimony because she had spent time reviewing her patient's file with his attorney prior to her deposition, evidencing that some opinions were obtained for the purpose of litigation, and because the questioning during her deposition extended beyond treatment of her patient into her "realm of expertise."); *but see infra* 9.9.

⁴⁵ Wright, Miller & Marcus, *supra* note 5, 2033 at 463-67.

⁴⁶ *E.g., Dallas v. Marion Power Shovel Co.*, 126 F.R.D. 539 (S.D. Ill. 1989); *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 406-10 (E.D. Va. 1975).

⁴⁷ *E.g., In re Shell Oil Refinery*, 132 F.R.D. 437 (E.D. La. 1990).

⁴⁸ Advisory Committee's Note, *supra* note 4, at 504.

Even when a party does retain or specially employ an expert who is also an employee, a former employee, or other person with knowledge of facts or events giving rise to the action to provide services in anticipation of litigation, Rule 4:1(b)(4) will only apply to the information developed in anticipation of litigation. The expert is subject to full discovery as to facts and opinions not acquired in anticipation of litigation.⁴⁹

A recurring controversy in medical malpractice and similar litigation is the discoverability of opinions held by parties. Virginia trial courts have reached varying results when confronted with this issue. The Supreme Court of Virginia has never spoken about whether a party who possesses expertise can invoke Rule 4:1(b)(4) as a basis for refusing to respond to discovery. Most federal courts and the courts of other states have found that an opposing party may freely discover opinions held by a physician party that are based on facts known by the physician.⁵⁰

9.7 EXPERTS UNCONNECTED WITH LITIGATION

Experts unconnected with the litigation as either retained experts or as actors in or viewers of transactions or occurrences underlying the action are sometimes the target of discovery efforts. The rationale for seeking discovery from an uninvolved expert is either the unique knowledge of the expert or the reliance by a testifying expert upon research conducted by the uninvolved expert.

Rule 4:1(b)(4) does not contain any prohibition against discovering information from an expert who is unconnected with the litigation. It has been held that an expert enjoys no evidentiary privilege protecting opinions held by the expert from disclosure.⁵¹ Other courts have suggested a scholar's research may be qualifiedly privileged.⁵²

According to one circuit court, an expert witness's consultant is not subject to discovery absent a showing, after the expert has been deposed, of exceptional circumstances under Rule 4:1(b)(4)(B).⁵³ This opinion does not address the possibility that the nontestifying consultant's work may have an impact upon the trial, such as when the consultant's work forms the basis of the testimony of the expert witness who engaged the consultant.⁵⁴ The requirement of section 8.01-401.1 of the Virginia Code that the facts or data underlying the expert witness's opinions be subject to disclosure on cross-examination supports permitting discovery of a nontestifying consultant engaged by the expert witness. This would seem to be an "exceptional circumstance" justifying discovery from the expert even if Rule 4:1(b)(4)(B) applies to the expert.

⁴⁹ *E.g.*, *Atari Corp. v. Sega of Am.*, 161 F.R.D. 417 (N.D. Cal. 1994).

⁵⁰ See cases cited in Wright, Miller & Marcus, *supra* note 5, 2033 at 463 n.22 and in A.S. Klein, Annotation, *Scope of Defendant's Duty of Pretrial Discovery in Medical Malpractice Action*, 15 A.L.R.3d 1446 (1967).

⁵¹ *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976).

⁵² See *In re American Tobacco Co.*, 880 F.2d 1520, 1528-30 (2d Cir. 1989).

⁵³ *Port Royal Condominium Unit Owners Ass'n v. Crossland Sav. F.S.B.*, 23 Va. Cir. 4, 7-8 (Alexandria 1990).

⁵⁴ See, *e.g.*, *Long-Term Capital Holdings v. United States*, 93 A.F.T.R.2d (RIA) 862 (D. Conn. 2003).

Although the Supreme Court of Virginia has never ruled on the specific question of the discoverability of opinions held by experts with no involvement in the litigation, it has discussed the issue of compulsion of expert testimony from an unwilling expert:

There is a conflict among the decisions as to the right of an expert to decline to give his expert opinion when called to testify on matters under judicial inquiry. Apparently a majority of courts which have dealt with this question hold that the expert may be compelled to testify as to an opinion he is qualified to give by reason of his prior training and experience and without having to make any special preparation to qualify to do so. Many of the cases taking that view have involved the right of the expert to demand extra compensation for testifying.⁵⁵

In recent years, most disputes about the discovery of the uninvolved expert have arisen in product liability litigation in instances where a testifying expert is relying upon the published research of a scientist or scholar who has no knowledge of the litigation and has not consented to serve as an expert for any party to the litigation. Courts have reached divergent results about the permissibility of deposing the author of the research or requesting the production of the data underlying the author's publication.⁵⁶

When a court is confronted with efforts to obtain discovery from an expert uninvolved in the litigation, the most apt framework for decision-making is a balancing of the need for discovery against the burdens imposed upon the expert and the impact upon society as a whole if the discovery is permitted. Virginia courts are empowered to engage in such a balancing by the provisions of Rule 4:1(b)⁵⁷ and (c).⁵⁸

⁵⁵ *Cooper v. Norfolk Redev. & Hous. Auth.*, 197 Va. 653, 655, 90 S.E.2d 788, 789 (1956).

⁵⁶ See *In re American Tobacco Co.*, 880 F.2d 1520 (2d Cir. 1989); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984) (cases permitting discovery of data under Fed. R. Civ. P. 26(b)(4)). An interesting saga concerns the travails of a researcher of utility vehicle crashes whose work was relied upon by an expert for the plaintiffs. His efforts to thwart an auto manufacturer's efforts to depose him and discover his data ultimately triggered litigation in multiple jurisdictions with split results. For the details of this struggle between the discovering party and its quarry and other authorities, see Wright, Miller & Marcus, *supra* note 5, 2033 at 459-60.

⁵⁷ Subject to the provisions of Rule 4:8(g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

⁵⁸ *Protective Orders*. Upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or city where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

9.8 INTERACTION BETWEEN RULE 4:1(b)(3) AND THE WORK PRODUCT DOCTRINE

The work product protection provided by Rule 4:1(b)(3)⁵⁹ is often invoked in disputes about the discoverability of information held by experts retained in anticipation of litigation.⁶⁰ The language of Rule 4:1(b)(3) seemingly invites application to retained experts by extending work product protection to documents and tangible things prepared by or for a party or the party's representative including the party's consultants.

Rule 4:1(b)(3), however, makes clear that its provisions are subject to the provisions of Rule 4:1(b)(4). The drafters of Federal Rule 26(b)(4) "reject[ed] as ill-considered [prior] decisions which have sought to bring expert information within the work-product doctrine."⁶¹ For these reasons, a number of federal courts have looked solely to the requirements of Rule 26 (b)(4) in determining the discoverability of documents and tangible things from an expert retained in anticipation of litigation.⁶²

Other courts have held that discovery of documents prepared in anticipation of litigation by an expert is governed by the limitations set forth in the work product rule in Rule 4:1(b)(3).⁶³ In *Covington v. Calvin*,⁶⁴ the court applied Rule 4:1(b)(3) to prohibit the discovery of a report prepared by an accident reconstruction expert, but noted "Rule 4:1(b)(4) sets forth the discovery procedures for ascertaining facts and opinions held by experts, especially those experts who are expected to be called as witnesses at trial."⁶⁵

Whether a court applies the work product standard of Rule 4:1(b)(3) can be significant in determining the discoverability of documents and tangible things from experts retained in anticipation of litigation. It can be especially important for experts who may testify at trial. The trial judge applying Rule 4:1(b)(4) has complete discretion to order further discovery from the testifying expert. If the trial judge deems Rule 4:1(b)(3) to apply to the expert, documents prepared by the expert can

⁵⁹ *Trial Preparation: Materials*. Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

⁶⁰ The work product doctrine is discussed in detail in paragraphs 12.3 and 12.4 of Chapter 12 of this book.

⁶¹ Advisory Committee's Note, *supra* note 4, at 505.

⁶² *Heitmann v. Concrete Pipe Mach.*, 98 F.R.D. 740 (E.D. Mo. 1983); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39 (N.D. Cal. 1977); *Quadrini v. Sikorsky Aircraft Div.*, 74 F.R.D. 594, 595 n.1 (D. Conn. 1977).

⁶³ *Crockett v. Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974); *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202 (N.D. Miss. 1972); *Wilson v. Resnick*, 51 F.R.D. 510 (E.D. Pa. 1970).

⁶⁴ 40 Va. Cir. 489 (Spotsylvania 1996).

⁶⁵ *Id.* at 494.

only be discovered if the party seeking discovery has substantial need of the documents and is unable to obtain the substantial equivalent without undue hardship. A common result of this approach is seen where a court permits an expert to be deposed but rebuffs efforts to discover the expert's report on the ground that the "substantial need" required by Rule 4:1(b)(3) has not been shown.

The portion of Rule 4:1(b)(3) creating a protection from discovery for the mental impressions, conclusions, opinions, or legal theories of counsel is often invoked in a bid to prevent disclosure of attorney work product furnished to an expert who may testify at trial. Tension between the policy of encouraging lawyers to freely explore all aspects of the subject matter of the representation without fear of disclosure and the need to fully discover the basis of a testifying expert's opinion and possible influences on the expert's opinion has led courts to reach varying results when confronted with a request to produce documents prepared by an attorney and furnished to a testifying expert. Some federal courts, applying Federal Rule 26(b)(4), have permitted full discovery of attorney work product furnished to the expert, while others have accorded protection to matters deemed opinion work product.⁶⁶

The Supreme Court of Virginia indicated, in *Jones v. Ford Motor Co.*,⁶⁷ that the work product doctrine may protect communications between experts and counsel. The court held that the trial court properly excluded questioning of a corporate employee testifying as an expert witness about conversations between the expert and counsel for the corporation on the grounds that they concerned matters protected by both the attorney-client privilege and the work product doctrine. It is not clear how far the Virginia Supreme Court will go in extending work product protection to an expert who is not an employee of a party or what the court would deem "substantial need" for lifting the protective effect of the work product doctrine.

Virginia circuit courts have considered the discoverability of information furnished to or prepared by an expert expected to testify at trial. In *Moyers v. Steinmet*,⁶⁸ the court resolved the question by ordering production of a letter from counsel to the expert if it contained any statement of facts or data about the case. However, counsel could edit the letter to remove any mental impressions, conclusions, opinions, or legal theories of counsel. Similarly, in *Wilson v. Rogers*,⁶⁹ the court reviewed *in camera* materials prepared in anticipation of litigation that were contained in the files of an expert witness. The court permitted discovery of documents relating to the preparation of the expert testimony but refused to permit discovery of documents prepared by the expert that suggested possible theories of defense to counsel who had employed the expert. These opinions demonstrate a judicial desire to assure full discoverability of the basis of the expert's opinions while protecting material falling within the scope of "opinion work product."

⁶⁶ See *Elm Grove Coal Co. v. Director, Office of Workers Compensation Program*, 480 F.3d 278 (4th Cir. 2007) (draft reports prepared by counsel and furnished to testifying expert are not entitled to work product protection); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302 (W.D. Va. 1998); *Musselman v. Phillips*, 176 F.R.D. 194 (D. Md. 1997); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633 (N.D. Ind. 1996); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All West Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993).

⁶⁷ 263 Va. 237, 258, 559 S.E.2d 592, 603 (2002).

⁶⁸ 37 Va. Cir. 25 (Winchester 1995).

⁶⁹ 53 Va. Cir. 280 (Portsmouth 2000).

Moyers and *Wilson* indicate that Virginia courts may draw a distinction between factual allegations reviewed by an expert, which are discoverable, and opinion work product, which is not. However, the trend in the federal courts is to apply a bright line rule that any documents provided to a testifying expert are discoverable.⁷⁰ Therefore, counsel should assume that any document or information furnished to a testifying expert may be discoverable. If counsel wishes to discuss with an expert certain theories or data that need to remain confidential, he or she should consider retaining an expert who will not testify at trial to serve as a consultant. Fear of disclosure leads many attorneys to communicate orally with retained experts, eschewing written communication whenever feasible.

9.9 PAYMENT OF THE EXPERT'S FEES

A party seeking discovery of expert opinions developed in anticipation of litigation is required to pay the expert a reasonable fee for the expert's time and expenses in responding to any discovery beyond answering an interrogatory served pursuant to Rule 4:1(b)(4)(A)(i). Additionally, the court *may* require payment to the party retaining an expert who is expected to testify at trial of a "fair" portion of the fees and expenses reasonably incurred by the party retaining the expert in obtaining facts and opinions from the expert. If the retained expert is not expected to be called as an expert witness at trial, the court *shall* require payment by the discovering party of a portion of the fees and expenses incurred by the retaining party. This system of assessing fees for conducting expert discovery will prevail unless the discovering party can show "manifest injustice would result."⁷¹

Rule 4:1(b)(4)(D) creates a special fee-shifting rule for experts in eminent domain proceedings. If the condemnor initiates discovery, the condemnor is required to pay all the costs of the discovery, including the cost and expense of experts discoverable under Rule 4:1(b)(4). However, the condemnee may recover only expenses incurred by its expert in directly responding to the condemnor's discovery requests; expenses incurred by the expert in preparing to respond to discovery and to develop his or her work product are not recoverable under Rule 4:1(b)(4)(D).⁷²

Controversies often arise as to whether the fee sought by the expert is reasonable. As noted by Professors Wright, Miller, and Marcus in their review of federal decisions, courts "have resisted efforts by experts to charge opposing parties unreasonable amounts."⁷³

The usual practice in Virginia has been for parties to pay the reasonable fees and expenses incurred by an expert in attending and giving a deposition. Although efforts to obtain compensation for an expert's time in preparing to give a deposition are rare

⁷⁰ *Pavlak v. Dyer*, 59 Pa. D. & C.4th 353, 363-66 (Pike County Ct. C.P. 2003) (comparing numerous state and federal cases).

⁷¹ Va. R. 4:1(b)(4)(C).

⁷² *Commonwealth Transp. Comm'n v. Coffey*, 31 Va. Cir. 354 (Fairfax 1993).

⁷³ Wright, Miller & Marcus, *supra* note 5, 2034, at 470; see also *McCulloch v. Hartford Life & Accident Ins. Co.*, Civ. No. 3:01CV1115 (AHN), 2004 U.S. Dist. LEXIS 23046, 2004 WL 2601134 (D. Conn. Nov. 10, 2004).

in Virginia practice, federal courts that have ruled on such requests have split on awarding fees for deposition preparation time.⁷⁴

Payment of fees to experts for time devoted to responding to discovery of opinions and data not developed in anticipation of litigation has been a source of recurring controversy. Experts whose opinions, germane to a matter in litigation, are not acquired in anticipation of litigation, often demand compensation when they are subpoenaed to give depositions. Most court decisions concerning these demands involve physicians who treated a party and are deposed concerning their treatment and diagnoses. Courts construing the federal version of Rule 4:1(b)(4)(C) have held that treating physicians are not entitled to compensation beyond the fees and expenses allowable to any witness.⁷⁵ The basis for this holding is the language of Rule 4:1(b)(4), limiting its scope to facts and opinions “acquired or developed in anticipation of litigation or for trial.” The opinions held by treating physicians are “based on the physician’s personal knowledge of the examination, diagnosis and treatment of a patient”⁷⁶ and are, therefore, not subject to the fee and expense payment provisos of Rule 4:1(b)(4)(C).

In *Villar-Gosalve v. Villar-Gosalve*,⁷⁷ the court reviewed the deposition of a treating physician designated as an expert and found that the opposing party taking the deposition had gone beyond an examination of the opinions formed during treatment by posing questions requiring formation of opinions during the deposition itself. For this reason, the court required the deposing party to pay the physician a reasonable fee for the time spent giving the deposition.

Resolution by a Virginia court of an expert’s fee request for giving a deposition about opinions developed during the ordinary course of business may be influenced by section 17.1-612 of the Virginia Code, which permits awards of fees and expenses to experts testifying at trial.⁷⁸ Reasoning that section 17.1-612 evinces a policy of affording professionals compensation for time devoted to complying with subpoenas for their testimony and that time spent giving a deposition diverts the expert from his or her profession as does a trial appearance, a judge may well rule the expert is entitled to a protective order pursuant to Rule 4:1(c), conditioning the taking of the expert’s deposition upon payment of a professional fee to the expert.

⁷⁴ According to *Fleming v. United States*, 205 F.R.D. 188, 190 (W.D. Va. 2000), “it is well established that time spent by an expert in preparing for his or her deposition by opposing counsel is part of a reasonable fee.” See also *Packer v. SN Servicing Corp.*, 243 F.R.D. 39 (D. Conn. 2007); *Boos v. Prison Health Servs.*, 212 F.R.D. 578 (D. Kan. 2002) (reviewing case law and permitting compensation for time expert spent reviewing records to prepare for deposition; expert did not seek compensation for time spent conferring with counsel in preparing for the deposition). See also *McCulloch*, *supra*.

⁷⁵ *McDermott v. FedEx Ground Sys., Inc.*, 247 F.R.D. 58 (D. Mass. 2007); *Fisher v. Ford Motor Co.*, 178 F.R.D. 195 (N.D. Ohio 1998); *Mangla v. University of Rochester*, 168 F.R.D. 137 (W.D.N.Y. 1996); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348 (D. Colo. 1995); *Congrove v. St. Louis-S.F. Ry.*, 77 F.R.D. 503 (W.D. Mo. 1978). But see *Scheinolt v. Bridgestone/Firestone, Inc.*, 187 F.R.D. 221 (E.D. Pa. 1999); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627 (E.D.N.Y. 1997).

⁷⁶ *Baker*, 163 F.R.D. at 349.

⁷⁷ 65 Va. Cir. 96 (Albemarle 2004).

⁷⁸ “Every witness who qualifies as an expert witness, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may, if requested in its discretion, order . . . but the same shall be paid by the party in whose behalf he shall testify.”

9.10 EX PARTE COMMUNICATIONS WITH AN OPPONENT'S EXPERT

The propriety of ex parte contact with experts retained or consulted by an opposing party has been the subject of litigation. Concern that an expert may be privy to confidential information has led a number of courts to frown upon the practice of counsel's communicating outside the bounds of court-sanctioned discovery with an expert retained or consulted by an opposing party.

Some courts have held that an expert may be disqualified from testifying as a result of prior consultation with an opposing party. Some judges have used a two-part analysis:

1. Was it objectively reasonable for the first party consulting the expert to conclude that a confidential relationship existed?
2. Was any confidential or privileged information disclosed by the first party to the expert?

If the answer to both of these questions is "yes," a number of federal courts have held that the expert will be disqualified.⁷⁹ The Supreme Court of Virginia adopted this standard in *Turner v. Thiel*⁸⁰ in disqualifying a defendant's expert. The court found a confidential relationship existed since the expert reached an agreement with plaintiff's counsel whereby plaintiff's counsel provided information to the expert who then evaluated the information and discussed his evaluation with counsel. The court disqualified the expert because plaintiff's counsel had communicated to the expert information deemed to be trial strategies and mental impressions of counsel. One circuit court has applied *Turner* to disqualify an expert who had detailed discussions with both parties even though the party seeking to call the expert had made the first contact with the expert.⁸¹

In *Lacroix v. Bic Corp.*,⁸² the court refused to disqualify an expert because of his prior employment by the defendant that antedated the incident which was the subject of a personal injury claim since the expert had received no confidential information related to the subject matter of the case. The court, however, prohibited the expert from testifying about or using for purposes of the litigation any information received by the expert during his years of employment by the defendant.

In *Hewlett-Packard Co. v. EMC Corp.*,⁸³ the court found that no confidential information had been imparted to the expert sought to be disqualified. The court was

⁷⁹ *Wyatt v. Hanan*, 871 F. Supp. 415 (M.D. Ala. 1994); *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498 (D. Colo. 1993); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (E.D. Va. 1991); *Mayer v. Dell*, 139 F.R.D. 1 (D.D.C. 1991); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990). In *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271 (S.D. Ohio 1988), a federal district court added a third requirement to the analysis: that the expert has used or may use the confidential information to the advantage of the adverse party.

⁸⁰ 262 Va. 597, 553 S.E.2d 765 (2001). In *Kitt v. Cosby*, 277 Va. 396, 672 S.E.2d 851 (2009), the court affirmed application of the *Turner* criteria to disqualifying a surveyor expert.

⁸¹ *Lee v. Kaiser Found. Health Plan of Mid-Atlantic States*, 65 Va. Cir. 389 (Fairfax 2004).

⁸² 339 F. Supp. 2d 196 (D. Mass. 2004).

⁸³ 330 F. Supp. 2d 1087 (N.D. Cal. 2004).

apparently concerned that a party might retain experts in a discipline with limited numbers of credentialed experts simply to create “conflicts” and “lock up” the experts, thereby preventing employment of the experts by opposing parties.

In *Syngenta Seeds, Inc. v. Monsanto Co.*,⁸⁴ the court reviewed the factors considered by courts in determining whether a fiduciary relationship exists between an expert and a party:

1. The length of the relationship and the frequency of contact;
2. Whether the moving party funded or directed the formation of the opinion to be offered at trial;
3. Whether the parties entered into a formal confidentiality agreement;
4. Whether the expert was retained to assist in the litigation;
5. Whether the expert was paid a fee; and
6. Whether the expert was asked to agree not to discuss the case with opposing parties or counsel.

The expert exclusionary rules do not embrace the imputation rules found in attorney-client conflict jurisprudence but have a lower standard focusing solely on the expert and not entities with which the expert is affiliated.⁸⁵

Under some circumstances, an expert who has had ex parte contact with an opposing party may not be completely disqualified from testifying at trial. For example, in *Wang Laboratories, Inc. v. CFR Associates, Inc.*,⁸⁶ the expert was permitted to testify as a fact witness at trial.

Where an expert is privy to confidences of the party or counsel who initially consulted with the expert and a danger exists of disclosure of this information to opposing counsel who subsequently conferred with the expert, disqualification of opposing counsel may be deemed an appropriate remedy.⁸⁷

Courts have disagreed over whether the federal version of Rule 4:1(b)(4), which restricts formal discovery, applies to informal ex parte contact with experts retained in anticipation of litigation. In *Campbell Industries v. M/V Gemini*,⁸⁸ the court held that it was a “flagrant abuse” of the discovery process to contact an expert in order to cause the expert to be disqualified from testifying at trial. Conversely, in *Riley v. Dow*

⁸⁴ Civ. No. 02-1331-SLR, 2004 U.S. Dist. LEXIS 19817, 2004 WL 2223252 (D. Del. Sept. 27, 2004).

⁸⁵ See *Casey Indus., Inc. v. Seaboard Sur. Co.*, 1:06cv249 (JCC), 2006 U.S. Dist. LEXIS 74589, 2006 WL 2850652 (E.D. Va. Oct. 2, 2006).

⁸⁶ 125 F.R.D. 10 (D. Mass. 1989).

⁸⁷ Andrea S. Ordin & Michael C. Lieb, *Avoiding Conflicts in the Retention of Consultants and Experts*, 537 Practising Law Institute, Litigation 173, 182 (1995).

⁸⁸ 619 F.2d 24 (9th Cir. 1980).

Chemical Co.,⁸⁹ the court found that Federal Rule 26(b)(4) did not limit the right of a party to call as its witness at trial a person consulted by the opponent.

Ex parte communications with a party's treating health care providers is governed by statute in Virginia. Section 8.01-399 prohibits a lawyer or anyone acting on behalf of the lawyer from obtaining information from a treating health care provider without the patient's consent except through discovery pursuant to the Rules of the Supreme Court of Virginia.⁹⁰

The Virginia Rules of Professional Conduct do not prohibit ex parte communications with an adverse party's expert.⁹¹ Other states do impose ethical bars to such communications.⁹²

⁸⁹ 123 F.R.D. 639 (N.D. Cal. 1989); see also *Procter & Gamble Co. v. Haugen*, 184 F.R.D. 410 (D. Utah 1999).

⁹⁰ Section 8.01-399 does not prevent indirect ex parte communications through the medium of the health care provider's own attorney. See *Archambault v. Roller*, 254 Va. 210, 491 S.E.2d 729 (1997).

⁹¹ LEO No. 1076. (Decided under the former Virginia Code of Professional Responsibility, but still accurate.)

⁹² See, e.g., *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996); *Cramer v. Sabine Transp. Co.*, 141 F. Supp. 2d 727 (S.D. Tex. 2001).