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EXPERT DISCOVERY FROM COAST TO COAST

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Introduction

This article will address the following subjects, all related to expert discovery, as supplemental material for the ALFA CLE panel:

I. The History of Expert Discovery, and Its Nearly Universal Standard

II. Mediation: An Alternative to Expert Discovery

III. Distinguishing Testifying and Consulting Experts

IV. Managing In-House Experts (Can an Employee be my Expert?)

V. Finding an Expert, and Avoiding Exposure

THE HISTORY OF EXPERT DISCOVERY, AND ITS NEARLY UNIVERSAL STANDARD

DISCOVERY REFORM, AND THE FEDERAL STANDARD FOR EXPERT DISCOVERY

In 1938, the promulgation of the Federal Rules of Civil Procedure (FRCP) extensively overhauled the discovery process. This transformation of civil procedure, colloquially termed the Discovery Reform, aimed to address the then-perceived problems of litigation: it was too expensive, lengthy, and unpredictable.[i] This unpredictability reinforced a growing impression that litigation was devolving into "trial by ambush," and attorneys increasingly needed to prepare for surprise and trickery inside the courtroom.[ii] Prominent procedural reform campaigner and Harvard Law School Dean Roscoe Pound famously called attention to this trickery in a 1906 American Bar Association annual meeting in St. Paul, Minnesota, espousing that "the common-law doctrine of contentious procedure… turn[ed] litigation into a game."[iii] Since the FRCP's enactment, the expansion of pretrial discovery has limited the surprise of unexpected evidence at trial, including the identities and opinions of expert witnesses.[iv]

FRCP 26's expert discovery was not originally as effective as it is now. While early renditions of FRCP 26 permitted the use of interrogatories, common practice was to answer these interrogatories with sketchy and vague answers.[v] Thus, to further alleviate evidentiary surprise through pretrial discovery, the 1993 amendments to the FRCP added an additional discovery requirement: expert reports. The amendment required testifying expert witnesses to provide signed, written reports disclosing the expert's identity; their opinions and reasonings; and the facts, data, and exhibits that contributed to their opinions and reasonings.[vi] However, this new requirement proved to be overly expansive, effectively requiring reports from every expert communicating with counsel. This promoted a new form of gamesmanship, where counsel would enact dodgy, inefficient communication with their experts to avoid having their legal strategies discoverable.[vii] To address this, the rule was amended in 2010 to only obligate expert reports from experts who intended to testify, thus establishing that communications between counsel and consulting experts are protected and undiscoverable work product.[viii] The rule has not since been amended in any substantive way.

THE STATES'/TERRITORIES' EQUIVALENT STANDARD

In every state and territory besides Oregon, the state's rules of civil procedure maintain a similar expert discovery rule. While verbiage can vary, ultimately each state's rules provide explicitly for discovery of a testifying expert's identities and opinions.[ix] However, in application, these similarities do not guarantee that the states maintain the same federal standards of what "discoverable work product" or an "expert" is.[x]

OREGON'S ALTERNATIVE STANDARD

Oregon's Rules of Civil Procedure (the ORCP) do not have an equivalent expert discovery rule to FRCP 26(a)(2)(B). Thus, in Oregon, "trial by ambush" is still the law of the land. In light of the lack of any statutory expert discovery procedures in Oregon, courts have determined that expert discovery is almost entirely unavailable, including discovery of both an expert's identity and the substance of their testimony.[xi] In Oregon, the first time counsel sees an opposing, testifying expert's file is usually the night before – or sometimes hours before – the expert takes the stand to testify. No expert reports are exchanged.

The only "expert discovery" available in Oregon is that of expert witness materials and impressions not generated in anticipation of litigation.[xii] Additionally, when expert witnesses are also fact witnesses,[xiii] those experts' testimonies can be taken but must be limited to the expert's factual observations.[xiv] This kind of deposition can require the expert witness (now a fact witness) to answer questions calling for application of their expertise to the observed facts – a very narrow loophole to Oregon's ban on expert discovery.[xv]

Because of the lack of formal expert discovery, Oregon lawyers have developed a workaround: sharing expert discovery through mediation "expert meetings." This type of information exchange has proved popular among Oregon attorneys and is even used in venues like Federal court and neighboring states that allow expert discovery. The scope of the mediation privilege generated from such expert meetings is addressed below.

MEDIATION: AN ALTERNATIVE TO EXPERT DISCOVERY

Most lawyers know the 408 Federal Rule of Evidence (FRE), and their state's equivalent, as a discovery protection rule that allows for candid settlement discussion. FRE 408 encourages settlement discussions by establishing that, if the discussion fails to result in settlement, nothing stated in that discussion can be admitted into evidence at trial and used against the party.[xvi] To take advantage of this rule, lawyers will sometimes write "subject to rule 408" on correspondence to protect a letter or email from discovery.[xvii] But FRE 408 can also allow counsel to informally reveal the identities and opinions of their experts without abandoning their protection from discovery. In Oregon, for example, FRE 408 can mitigate one of the worst aspects of trial by ambush: it can reveal damning expert testimony to a losing party, which might encourage settlement and avoid a drawn-out, unwinnable trial. However, FRE 408's discovery protection is not ironclad – the rule does not prevent opposing parties from using settlement statements to prove a witness's bias or prejudice, or to negate a contention of undue delay.[xviii] As such, lawyers are aware that using FRE 408 as informal expert disclosure comes with risk, and so many instead turn to mediation and its additional evidentiary safeguards.

Most mediation experts agree that mediation requires candid conversation between the mediating parties, and that candidness cannot be realistically encouraged without guarantees of confidentiality.[xix] In adhering to this tenant, when compared to FRE 408, mediation affords lawyers broader, more extensive confidentiality. [xx] This confidentiality is conferred from various potential sources including statutes, court rules, orders, rules of alternative dispute resolution providers, judicial mediation and arbitration services, Federal Arbitration Inc., and private agreements.[xxi] While the extensiveness of this confidentiality can vary by state,[xxii] generally all communications made within mediations are privileged.[xxiii] Similar privilege extends to private mediations too, where parties sign a mediation agreement or use a private alternative dispute resolution provider and are subsequently bound to confidentiality provisions.[xxiv] As such, a lawyer can assume that any state which enables mediation has effectively provided an alternative to the FRE 408 settlement discussion.[xxv] However, because the degree of protection offered by mediation varies by jurisdiction, a lawyer should carefully review the laws of their jurisdiction before assuming that their client may speak freely to the opposing party without consequence.[xxvi]

Practitioners benefit from utilizing mediation's heightened discovery protections. Unlike FRE 408, which permits

the submission of settlement discussions to establish a witness's bias, mediation privilege prevents a party from using mediation communications for impeachment.[xxvii] And while FRE 408 undoubtably overlaps with mediation confidentiality protections in that both promote candid communication,[xxviii] mediation privilege is arguably an expansion of 408.[xxix] For example, when settlement communications are requested by unrelated third parties, FRE 408 would not prevent that discovery, but mediation privilege may.[xxx]

Ultimately, because Oregon does not require formal expert discovery or expert reports, practitioners have additional discretion in when, whether, and how to disclose their key experts to opposing counsel. But, because Federal Rule of Evidence 408 does not completely protect communications from discovery, practitioners of every jurisdiction should consider using the confidentiality protections of mediation when electing to disclose their expert witnesses to opposing counsel. While mediation law is still being interpreted and refined, undoubtably its current form augments FRE 408 and allow for a more potent confidentiality protection than previously afforded.

DISTINGUISHING TESTIFYING AND CONSULTING EXPERTS

The Federal Rules of Civil Procedure (FRCP), and state equivalent rules, broadly acknowledge that experts serve two distinct roles in litigation: as a testifying witness or a consultant. The discovery rules accordingly treat these two roles differently.

TESTIFYING WITNESSES

As stated in section I, FRCP 26 explicitly mandates disclosure of any expert expected to testify at trial.[xxxi] FRCP 26(a)(2)(B) further requires that parties provide a signed, written report disclosing information including the expert's identity, opinions, and the factual basis for those opinions.

CONSULTANTS

The FRCP acknowledge the existence of consultants, sometimes called "behind the scenes" experts, when addressing the scope and limitations of discovery for "experts employed only for trial preparation."[xxxii] Discovery of consulting experts is limited, and is only permitted where "exceptional circumstances" warrant disclosure of otherwise impractically acquirable facts.[xxxiii]

Additionally, consulting experts are implicitly acknowledged in FRE 502: attorney-client privilege and work product doctrine. While the rule itself is silent on experts, caselaw has addressed how communications with experts might become privileged communication or undiscoverable work product of an attorney. Both of these discovery protections apply to different aspects of a consultant's work: attorney-client privilege applies to a consultant's work as an inter-party translator, and work product doctrine applies to a consultant's input on legal strategy development. Attorney-client privilege protects communications between an attorney and a client,[xxxiv] or between representatives of either party.[xxxv] In theory, consultants can qualify as a representative for either party.[xxxvi] But consultants will more commonly be considered a "representative of the lawyer," in that the expert has been employed by the lawyer to assist the lawyer in providing legal services.[xxxvii] However, a consultant hired by a lawyer is not automatically a representative of the lawyer, but is one when they act essentially as a translator for the attorney.[xxxviii]

In contrast, the work product doctrine provides qualified immunity to any materials prepared by a party, a party's attorney, or another representative – like a consultant – as long as the material was prepared in anticipation of litigation.[xxxix] This doctrine extensively covers any aspect of advisement a consultant might provide to a party or their attorney that would aid in the development of a legal strategy. While the Federal Rules of Civil Procedure only establish that "tangible things" such as memorandums and notes are protected, common-law further establishes that oral communications can also be protected by the work product doctrine.[xl] Thus, an expert's

memorandum, notes, or oral communications can potentially be protected by work product doctrine, assuming it was prepared in anticipation for litigation.

POLICY REASONS FOR FRCP DISTINGUISHING TESTIFYING AND CONSULTING EXPERTS

As discussed in section I, the 1993 and 2010 amendments to the FRCP's expert discovery rules highlight key policy reasons for treating an expert's various roles in litigation distinctly. The 1993 amendments expanded the expert discovery rules to avoid undue surprise at trial and restrict an opposing counsel's gamesmanship of answering interrogatories with vague, unhelpful language.[xli] Then, the 2010 amendments saw that the 1993 amendments had been too expansive, and thus restricted expert discovery rules to avoid an alternative gamesmanship where counsel could bury opposing counsel in unrelated or sparsely-related discovery requests.[xlii]

Additional policy reasons support the FRCP expert distinction. First, the distinction considers what kind of discovery necessarily supports the legal adversarial system: some discovery of testimonial experts is necessary to prepare for cross-examination,[xliii] which is a non-consideration for experts not intending to testify.[xliv] Second, under the same reasoning, limiting expert discovery to only the most relevant information staunches the rising costs of discovery.[xlv] Third, if the FRCP allowed routine discovery of consultant expert communications and opinions, those rules would discourage counsels from freely discussing legal strategies with their consulting experts – thus discouraging thorough preparation of a case.[xlvi] Fourth, since consultants are exposed to a counsel's opinion work product throughout trial preparation, subjecting that consultant to discovery via an expert report might reveal insights that breach work product protection against discovery.[xlvii] Finally, this distinction limits the possibility of opposing council calling a counsel's consultant to reveal opinions that it finds beneficial – a problematic legal strategy that juries could find powerfully persuasive, where "the views of this expert may be afforded unique weight exactly because he or she was initially retained by the side against which the testimony is offered."[xlviii]

MANAGING IN-HOUSE EXPERTS (CAN AN EMPLOYEE BE MY EXPERT?)

In-house experts are employees of a client who are designated as experts in anticipation of litigation. A client may decide to convert an existing employee into a consulting or testifying expert due to concerns of timeliness, discretion, or cost. But regardless of justification, clients and counselors should be aware of the risks of utilizing in-house experts, namely that in-house experts do not automatically qualify for the beneficial discovery protections afforded to other non-testifying expert consultants.

IN-HOUSE EXPERT DISCOVERY REMAINS LARGELY UNEXPLORED

Statutes and caselaw provide little clarity on whether the identity and opinions of an employee turned in-house expert might be discoverable. FRCP 26 itself is silent on the issue. In 1990, after acknowledging that courts and legal authorities could not agree on whether an in-house expert is a consultant, the District Court of the Eastern District of Louisiana determined that "[w]hether an in-house expert is retained or specially employed must be decided case-by-case."[xlix] That same court reasoned that treating in-house experts as consultants was reasonable, and that doing otherwise would promote "economic waste" where employers would need to hire unnecessary independent experts to obtain the protection of FRCP 26(b)(4).[l] Despite this, generally, courts cede that "any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery."[li] Further, courts are cautious to grant broad protections for discovery where an obfuscation of an expert's materials might insulate the discovery of facts and materials made prior to their being specially employed as an expert.[lii] Further still, some courts find that employees are not "specially retained" in anticipation of litigation (as would be necessary for an expert to qualify as a consultant)

even where they are "specially employed" to investigate matters of liability.[liii] Additionally, some courts consistently deny that in-house experts qualify for consultant discovery privileges[liv] while others maintain that case-by-case evidence can determine whether in-house experts qualify.[lv] In fact, some states, like Kansas, have only recently addressed whether a consultant's privilege applies to in-house experts,[lvi] and others, like Oregon, still lack any guiding caselaw on the subject.

AN INTERPRETATION OF HOW FRCP 26 OBSERVES IN-HOUSE EXPERTS

In 1983, James R. Pielemeier explored how an employee-turned-expert fit (or perhaps did not fit) within the bounds of FRCP 26.[lvii] While Pielemeier's reflection on the plain meaning of FRCP 26(b)(4) lost some potency with the rule's amendment in 1993, the crux of his article still carries weight – that FRCP 26 could be interpreted as granting discovery privileges to in-house experts.[lviii]

While Pielemeier's argument positing that in-house experts could be totally immune to discovery[lix] were largely made moot with the 1993 amendments, another of his theories survives: that the language "specially employed" is key to in-house expert discovery.[lx] Pielemeier theorized that an in-house expert would need to be specially employed in order to benefit from discovery immunity like an expert consultant.[lxi] This theory is reflected in a recent Kansas court of appeals decision, which first acknowledged that multiple courts had developed tests to determine whether an employee had been specially employed.[lxii] Ultimately, the Kansas Appellate Court concluded that those tests persuasively answered whether an in-house expert was a consultant.[lxiii]

AN EXTERNAL EXPERT AVOIDS THE RISKS OF IN-HOUSE EXPERTS ENTIRELY

Regardless of a state's individual stance on in-house experts, undeniably the caselaw is far from fully developed. Given the variability in court attitudes on in-house expert discovery, lawyers should caution their clients of the risks of using a current employee as a consulting expert in anticipation of litigation.

Even back in 1983, before the FRCP imposition of the expert report, Pielemeier opined that perhaps in-house experts should receive no protection at all.[lxiv] Experts are, by nature, meant to be impartial, and employees cannot be impartial.[lxv] If a court were to find this argument persuasive, any otherwise confidential information the client had shared with its in-house expert would be in jeopardy.

The best practice for avoiding this risk may simply be to advise against the use of in-house experts. Significantly more caselaw exists discussing the dichotomy between testifying and consulting experts, rather than between external consultants and in-house experts. But, if a client decides to move forward with an in-house expert, then a lawyer should consider the factors that recent courts found persuasive in determining whether that employee was "specially employed." Those factors include:

1. Can the expert 'see all sides of a subject,' or must they owe their allegiance to the party employing him?

2. Was the employee put on payroll especially for the purpose of deriving facts and opinions for use in trial or in anticipation of litigation?

3. *Is* the expert simply a general employee, or *was* the expert a general employee prior to their being specially assigned to a specific litigation?

4. Was the employee explicitly designated and assigned by a party to apply his expertise to a particular matter in anticipation of litigation or for trial?

5. What economic waste exists by otherwise requiring the client to hire an external expert consultant,

rather than use one in-house?

6. Is litigation assistance a usual duty for the employee? (If the assistance was a usual duty, the employee is less likely to be specially employed)

7. Were communications with the in-house expert limited appropriately to adhere to attorney-client privilege?[lxvi]

FINDING AN EXPERT, AND AVOIDING EXPOSURE

Practicing attorneys know their work product is often shielded. However, in circumstances involving experts, lawyers may mistakenly assume that their own involvement is required for those protections to apply. But work performed by an employee or a client-retained expert can still be protected, even without an attorney's involvement. However, as a best practice, clients should involve counsel early in the process.

WHILE UNLIKELY, INVESTIGATIVE WORK DONE BY AN EMPLOYEE COULD BE PROTECTED WORK PRODUCT

As stated in Section III, the work product doctrine can protect from discovery any materials generated by a representative of a client when done so in anticipation of litigation. In theory, this could include materials generated by an employee. While some attorneys might find this fact surprising, recall that the work product doctrine is a broader form of discovery protection than attorney-client privilege.[lxvii]

Typically, the work product doctrine protects documents and things a lawyer generates in anticipation of litigation.[lxviii] This protection from discovery acknowledges a lawyer's need for privacy in the formation of her legal theories and strategy,[lxix] and that such privacy is ultimately necessary for an adversarial legal system to effectively pursue truth-finding.[lxx]

However, despite the above justifications focusing on the lawyer's needs, the presence of an attorney is not required for work products to qualify for protection.[lxxi] An in-house employee turned expert can create materials protected from discovery under the work product doctrine. Therefore, lawyers should determine the product's "purpose of production" by asking their clients why they commissioned the in-house expert to create it. A client might request the work product due to concerns about impending litigation or to investigate potential liabilities. More often, however. Clients ask their employees to generate such materials because they need them to conduct ordinary business. In that case, the product would not receive protection.[lxxii]

A LAWYER DOES NOT HAVE TO RETAIN THE EXPERT FOR THE EXPERT'S WORK PRODUCT TO BE PROTECTED

Despite expert work product only qualifying for protection under the work product doctrine when it is prepared in anticipation for litigation, such product does not need to come from the behest of the attorney directly. Many practicing attorneys incorrectly assume that the work product doctrine can only extend to agents of the lawyer, and not to agents of the client. This is incorrect.[lxxiii] FRCP 26's protection of work product turns on whether the product was prepared for trial and what the origin and content of the material is, but not on who specifically the expert is a consultant for.[lxxiv] In theory, the expert being a consultant of the client, rather than a consultant of the attorney, does not alter the applicability of the work product doctrine.

However, while work product protections are expansive, an attorney should keep in mind some considerations

when discussing expert consultants with a client. First, while the work product doctrine does not hinge on whether the client or the lawyer hired the expert consultant, there is more legal precedence supporting the doctrine's applicability when the lawyer hired the expert.[lxxv] Second, lawyers may still prefer to hire experts directly, or at least be involved in the selection process, to assure that any arrangement between the parties complies with any relevant ethics rules.[lxxvi] Finally, some experts prefer to receive payment from the law firm rather than directly from the client who hired the firm.[lxxvii] In light of these benefits, attorneys should still consider directly hiring the expert whenever possible.

THE BEST PRACTICE IS STILL THAT A CLIENT "LAWYER UP" EARLY

As discussed in sections III and V, two different shields can protect consultants from discovery: the work product doctrine and attorney-client privilege. While both of these shields can extend to experts retained by the client, an attorney's involvement can only strengthen the argument that the desired information or work product is undiscoverable. Just as attorneys should be mindful that previously undiscoverable information can become discoverable when a consultant expert is converted into a testifying expert witness, so too should the attorney be mindful that seemingly protected consultant information can be declared discoverable if there is doubt whether that information was created in anticipation of litigation. As such, when in doubt, an attorney should encourage a client to limit communications whenever concerns of liability or pending litigation arise, and to use the attorney as a liaison between relevant experts. But lawyers can rest assured that when a client decides to operate outside of these suggested parameters, that client has not necessarily sacrificed strategic discovery advantages.

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[i] Walter E. Oberer, *Trial by Ambush or Avalanche*, 1987 J. Disp. Resol. 1, 4 (1987).
[ii] *Id.*
[iii] Strategy for Strategy's Sake at 739 (quoting Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the American Bar Association (August 29, 1906), *in* 14 Am. Law. 445, 447 (1906)).
[iv] Strategy for Strategy's Sake at 746.
[v] Fed. R. Civ. P. 26(a)(2)(B) 1993 advisory committee's notes ("The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness.").
[vi] Fed. R. Civ. P. 26(a)(2)(B).
[vii] Fed. R. Civ. P. 26(a)(2)(B) 2010 advisory committee's notes (explaining that courts improperly construed the 1993 version of FRCP 26 to include all communications between counsel and expert witnesses, when ideally counsel has two different kinds of experts to rely on: consulting experts, who's communications are protected, and testifying experts, who's intended testimony is discoverable).
[viii] Fed. R. Civ. P. 26(a)(2)(B) 2010 advisory committee's notes.
[ix] *See* Appendix A. The only exception is perhaps Puerto Rico, where the rule only "may" allow disclosure of an expert's opinion.
[x] RESTATEMENT (THIRD) OF THE LAW GOV. LAWYERS § 136, comment I (AM. LAW INST. Tentative Draft No. 5 2024).
[xi] *Id.* at 404.
[xii] *See McReynolds ex rel. McReynolds v. Maupin Elementary Sch. Dist. No. 84*, 132 FRD 67, 69 (D Or 1990) (doctors' medical records were discoverable, despite containing otherwise privileged information, because those records were generated prior to those doctors being retained as expert witnesses).
[xiii] Imagine a circumstance where an expert witness was also on site during a construction incident. While, in Oregon, that expert could not be deposed to determine what they will testify as an expert, that expert can still be deposed to confirm their first-hand account of the incident.
[xiv] *Gwin v. Lynn,* 334 Or 65, 72 (2008).
[xv] *Ransom v. Radiology Specialists of* Northwest, 363 Or 552, 568.
[xvi] Fed. R. Evid. 408(a).
[xvii] *See* Christian C. Onsager, *The Ins and Outs of FRE 408*, Am. Bankr. Inst. J., May 2014 at 50, 50 (describing a common

assumption and practice among lawyers to subject any communication to opposing counsel to rule 408 to make the lawyer's frank statements inviolate).

[xviii] Fed. R. Civ. P. 408(b).

[xix] Hon. Raymond T. Lyons, *How Confidential Are Mediation Communications?*, Am. Bankr. Inst. J., Aug. 2017 at 1, 1 https://www.fedarb.com/wp-content/uploads/2020/07/Hon.-Raymond-T.-Lyons-How-Confidential-Are-Mediation-Communications.pdf; *See also Jurj v. Andersen*, no. 3:21-cv-00088-YY, 2022 WL 19349528 (Dist. Or. Sept. 16, 2022) at *6-*7 (analyzing the legislative history of Oregon's mediation statute, and that the Legislature intended for broad protections of confidentiality to protect a party's capacity to speak openly in mediation and without fear of those words being used against them later in a court of law).

[xx] *Id.*

[xxi] *Id.*

[xxii] *Id.* at 3-4 (When states' mediation systems are established by caselaw, the exceptions to confidentiality can vary wildly. For example, jurisdictions disagree as to whether there is a mediation privilege under federal common law, or whether third parties can access).

[xxiii] *See e.g.* UNIF. MEDIATION ACT § 4(a) (Nat'l Conference of Comm'rs on Unif. State Laws amended 2003) ("Except as otherwise provided … mediation communication is privileged … and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded…"); ORS 36.220(1)(a) ("Mediation communications are confidential and may not be disclosed to any other person.").

[xxiv] *Supra* note 24 Lyons at 3.

[xxv] *See* Nisbet "Ken" Kendrick, *Confidentiality, Wherefore Art Thou? (It Matters)*, Henningmediation.com (Sept. 4, 2023) https://www.henningmediation.com/blog/confidentiality-wherefore-art-thou-it-matters/ (explaining that Georgia legislature has created a statutory scheme of confidentiality, and that it stands on two separate, distinct legal doctrines: the state equivalent evidentiary law of FRE 408 and the state equivalent of the Uniform Mediation Act).

[xxvi] Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JURY TRIALS 555 § 5 (2025).

[xxvii] Charles W. Ehrhardt, *Confidentiality, Privilege, and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91, 119-20.

[xxviii] *Id.*

[xxix] Nisbet "Ken" Kendrick, *Confidentiality, Wherefore Art Thou? (It Matters)*, Henningmediation.com (Sept. 4, 2023) Kendrick views the adoption of the Uniform Mediation Act as the State expanding FRE 408's original allowance of confidentiality in mediations. And even for states that have not adopted the UMA explicitly, the state's enactment of mediation statutes can be seen as a comparable expansion of what the state deems permissible confidentiality in settlement procedures. For example, Oregon has not adopted the UMA but has enacted similar mediation statutes in ORS 36.220-36.238.

[xxx] *Supra* note 24 Lyons at 3-4. Where mediation statutes are young and lack sufficient clarifying caselaw, assessing a third-party's right to access mediation privilege remains largely speculative. Honorable Raymond Lyons addresses how the Second Circuit, in *Savage & Associates PC v. K&L Gates LLP (In re Teligent Inc.)*, created a test for permitting the discovery of confidential mediation communications. That test is also used to determine whether a third-party can discover mediation communications.

[xxxi] Fed. R. Civ. P. 26(a)(2).

[xxxii] Fed. R. Civ. P. 26(b)(4)(D).

[xxxiii] *Id.*

[xxxiv] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:13 (4th ed. 2023).

[xxxv] *Id.* at § 5:14, 5:15.

[xxxvi] *See* Davis B. "Pepper" Allgood, *Lawyer or Client: Does it Matter Who Hires the Expert?* 2 (Aug 28. 2017) https://www.joneswalker.com/a/web/1623/Pepper%20Allgood%20-%20ABA%20Summer%20Newsletter.pdf (explaining that attorney-client privilege can attach to experts retained either by the client or by the client's counsel).

[xxxvii] MUELLER & KIRKPATRICK, *Supra* note 43 at § 5:15.

[xxxviii] *Id.* Attorney-client privilege can attach to communications with experts when the expert essentially acts as a "translator" and assists in the lawyer's understanding or explanation of complex material. For example, a communication between an attorney, client, and accountant might be protected if the accountant was included so as to better explain the client's

financial state to the attorney, which the lawyer then uses when offering legal advice to the client. In contrast, if the lawyer and client retained the accountant to obtain the accountant's own advice and impressions of the client's financial state, that accountant was hired to help with a pending investigation and not to serve as a translator. In such circumstances, the communication with that accountant would not be privileged. This rule is sometimes called the Kovel doctrine. Davis B. "Pepper" Allgood, *Lawyer or Client: Does it Matter Who Hires the Expert?* 2-3 (Aug 28. 2017).

[xxxix] MUELLER & KIRKPATRICK, *Supra* note 43 at § 5:15; *United States v. Nobles*, 422 U.S. 225, 238-239 (1975) (explaining that the work product doctrine is a practical privilege which necessarily protects the work product of an attorney's agents); *In re Grand Jury Proceedings*, 601 F.2d 162, 171-72 (5th Cir. 1979) (an accountant's work done to aid a lawyer in assessing a client's liability was protected by work product doctrine).

[xl] *In re Grand Jury Proceedings,* 43 F.3d 966 (5th Cir. 1994).

[xli] Fed. R. Civ. P. 26(a)(2)(B) 1993 advisory committee's notes.

[xlii] Fed. R. Civ. P. 26(a)(2)(B) 2010 advisory committee's notes.

[xliii] However, Oregon maintains that "trial by ambush" is an appropriate litigation form. In Oregon, counsel hears the content of opposing counsel's expert for the first time during direct examination. Mary-Anne S. Rayburn, *But, You Cannot Do That*, NAMWOLF https://namwolf.org/but-you-cannot-do-that/ (last viewed Jun. 6, 2025). Counsel is then given a brief recess to read the expert's report and prepare a cross. *Id.*

[xliv] Richard L. Marcus, *Expert Witnesses—Discovery as to Specially–Retained Experts Who Will Not Be Called*, in 8A Fed. Prac. & Proc. Civ. § 2032 (3d ed.) https://www.westlaw.com/Document/Ia19015c54b1211dab83abce0f17e0f80/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (last updated May 21, 2025).

[xlv] *Id.*

[xlvi] *Id.*

[xlvii] *Id.*

[xlviii] *Id.*

[xlix] *In re Shell Oil Refinery*, 132 F.R.D. 437, 441-42 (E.D. La. 1990).

[l] *Id.* at 441.

[li] *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, Inc.*, 171 F.R.D. 57, 62 (S.D. N.Y. 1997).

[lii] *Ely v. Cabot Oil & Gas Corporation*, no. 3:09-CV-2284 2015 WL 6447557 *4 (M.D. Penn. Oct. 26, 2015).

[liii] *Tellabs Operations, Inc. v. Fujitsu Ltd.*, 283 F.R.D. 374, 388 (N.D. Ill. 2012).

[liv] *Hartsock v. Goodyear Dunlop Tires North America LTD*, no. 2:13-cv-00419-PMD *3 n. 1 (D. S.C. May 5, 2014).

[lv] *Tapia v. Naphcare Inc.* no C22-1141-KKE 2024 WL 1209735 *3 (W.D. Wash. Mar. 21, 2024).

[lvi] *Flaherty v. CNH industrial America, LLC* 446 P.3d 1078, 1087 (Ct. App. Kan. 2019).

[lvii] James R. Pielemeier, *Discovery of Non-Testifying "In House"' Experts Under Federal Rule of Civil Procedure 26*, 58 IN. L. J. 597, 597 (1984).

[lviii] *Id.* at 602.

[lix] *Id.* at 602-03.

[lx] *Id.* at 605.

[lxi] *Id.*

[lxii] *Flaherty v. CNH industrial America, LLC*, 446 P.3d 1078, 1088-90 (Ct. App. Kan. 2019).

[lxiii] *Id.* at 1090.

[lxiv] *Supra* Pielemeier at 603-04.

[lxv] *Id.*

[lxvi] These factors were distilled from the reasoning in *Flaherty v. CNH Industrial America, LLC*, one of the most recent in-depth analyses of in-house expert discovery. *Flaherty v. CNH industrial America, LLC* 446 P.3d 1078, 1088-91 (Ct. App. Kan. 2019).

[lxvii] *United States v. Nobles*, 422 U.S. 225, 237-238 (1975).

[lxviii] Fed. R. Civ. P. 26(b)(3).

[lxix] *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

[lxx] *Khandji v. Keystone Resorts Management, Inc.*, 140 F.R.D. 697, 699 (D. Colo 1992).

[lxxi] *See* MUELLER & KIRKPATRICK, *Supra* note 43 at § 5:15 ("Material prepared by someone other than the lawyer, or by someone outside the lawyer's office or permanent staff, warrants more careful scrutiny to determine whether it really was prepared

for the purpose of litigation as opposed to business purposes or to discharge a reporting requirement.")
[lxxii] *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 68 (N.D. Ill. 1982).
[lxxiii] Allgood *Supra* note 39, at 1.
[lxxiv] *Id.*
[lxxv] *Id.* at 3. See also *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 1972 (finding that work product created not at the behest of an attorney is presumed to be created within the ordinary scope of business). *But see Harriman v. Maddocks*, 518 A.2d 1027, 1033 (Me. 1986) (rejecting *Thomas Organ Co*'s conclusive presumption of work product, finding that an attorney's involvement in the creation of the work product was not determinative).
[lxxvi] Allgood *Supra* note 39, at 1.
lxxvii Id.

Jurisdiction	Rule permitting Expert Discovery	Can Expert Be Deposed?
Alabama	**Al RCP 26(b)(5)**: allows discovery of EW's opinion, **(6)(e)** allows discovery of EW's identity	**Al RCP 26(b)(5)(A)**: Yes, with court order
Alaska	**Ak RCP 26(a)(2)(A)**: allows discovery of EW's opinion, **(B)** EW's opinion via expert report	**Ak RCP 26(a)(5):** Yes
Arizona	**AZ ST RCP 26 (b)(4)(A)**: allows discovery of EW's identity and opinion	**AZ ST RCP 26 (b)(4)(A)**: Yes
Arkansas	**Ark RCP 26(b)(4)(A)**: allows discovery of EW's identity and opinion	**Ark RCP 26(b)(4)(A):** Yes
California	**CA Civ Pro 2034.260; 843**: allows discovery/mandates disclosure of EW's identity and opinion	**CA Civ Pro 2034.410:** Yes
Colorado	**CRCP 26(a)(2)(A)**: allows discovery of EW's identity, **(B)** EW's opinion	**CRCP 26 (b)(4)(A):** Yes
Connecticut	**CT R Super CT CIV 13-4(a)**: allows discovery of EW's identity, **(b)(1)** EW's opinion	**CT R Super CT CIV 13-4(c)(1):** yes
D.C.	FRCP rules apply	**FRCP 26(b)(4)(A):** Yes
Delaware	**DE R Super CT RCP 26(b)(4)(A)(i)**: Allows discovery of EW's identity, **(B)** EW's opinions	**DE R Super CT RCP 26(b)(4)(A)(i)**: Yes, with court order
Florida	**Fla RCP 1.280(c)(5)(A)(i)**: Allows discovery of EW's identity and opinions	**Fla RCP 1.280(c)(5)(A)(ii)**: Yes
Georgia	**Ga. Code Ann 9-11-26(b)(4)(A)(i)**: Allows discovery of EW's identity, **(B)** EW's opinion	**Ga. Code Ann 9-11-26(b)(4)(A)(ii)**: Yes
Guam	**Gu St Super Ct RCP 26(a)(2)(A):** Allows discovery of EW's identity. **(B)** EW's opinion	**Gu St Super Ct RCP 26(b)(4)(A):** Yes
Hawaii	**Hi R RCP 26(a)(2)(A)(i)**: Allows discovery of EW's identity, **(ii)** EW's opinion	**Hi R RCP 26(b)(5)(A)**: Yes
Idaho	**IRCP 26(b)(4)(A)**: Allows discovery of EW's identity, **(i)** EW's opinion	**IRCP 26(b)(4)(A)(iii)**: Yes
Illinois	**ILCS S Ct R 213(f)(2),(3):** allows discovery of EW's identity and opinion	**ILCS S Ct R 202:** Yes for discovery depositions, or for an evidence deposition if made with an order/notice/stipulation
Indiana	**Indiana Trial P R 26(B)(4)(a)(i):** allows discovery of EW's identity, **(b)** EW's opinion	**Indiana Trial P R 26(B)(4)(a)(ii):** Yes
Iowa	**IA R 1.500(2)(a):** allows discovery of EW's identity, **(b)(1)** EW's opinion	**ICA R 1.501(1):** Yes
Kansas	**KSA 60-226(b)(6)(A):** allows discovery of EW's identity, **(ii)** EW's opinion	**KSA 60-226(b)(5)(A):** Yes
Kentucky	**KY ST RCP 26.05(a)(ii):** allows discovery of EW's identity and opinion	**KRCP 30.01:** Yes

Louisiana	**LSA CCP 1425(A):** Allows discovery of EW's identity, **(B)** EW's opinion	**LSA CCP 1425(D)(1):** Yes
Maine	**ME R RCP 26(4)(A)(i):** allows discovery of EW's identity and opinions	**ME R RCP 26(4)(A)(ii):** Yes
Maryland	**MD R RCP 2-402(g)(1)(A):** allows discovery of EW's identity and opinions	**MD R RCP 2-402(g)(1)(A):** Yes
Massachusetts	**Mass RCP 26(b)(4)(A)(i):** allows discovery of EW's identity, **(B)** EW's opinion	**Mass RCP 26(b)(4)(A)(i):** Yes, with court order. But generally, "depositions of adverse party's experts are not permitted." LAURIAT, MCCHESNEY, GORDON AND RAINER, DISCOVERY § 8.14 (49 Mass. Prac. 2024).
Michigan	**MI R RCP 2.302(B)(4)(a)(i):** allows discovery of EW's identity and opinion	**MI R RCP 2.302(B)(4)(a)(ii):** Yes
Minnesota	**MN ST RCP 26.02(e)(1)(A):** allows discovery of EW's identity and opinion	**MN ST RCP 26.02(e)(1)(B):** Yes, with court order
Mississippi	**MS R RCP 26(b)(4)(A)(i):** allows discovery of EW's identity, **(ii)** EW's opinion	**MS R RCP 26(b)(4)(A)(iv):** Yes, after first obtaining interrogatories
Missouri	**MO R RCP 56.01(b)(6)(A):** allows discovery of EW's identity and opinion	**MO R RCP 56.01(b)(6)(B):** Yes
Montana	**Mont RCP 26(b)(4)(A)(i):** allows discovery of EW's identity, **(ii)** EW's opinion	**Mont RCP 26(b)(4)(A)(ii):** Yes
Nebraska	**NE R Disc 6-326(c)(1):** allows discovery of EW's identity, **(A)(i)** EW's opinion	**Neb Ct R Disc 6-326(c)(5):** Yes, after expert report is provided
Nevada	**NRCP 16.1(a)(2)(A):** Allows discovery of EW's identity, **(B)** EW's opinion	**NRCP 26(b)(4)(A):** Yes
New Hampshire	**NH Rev Stat 516:29-b(I)** (previously NH RCP 27): Allows discovery of EW's identity, **(II)(a)** EW's opinion	**NH Rev Stat § 516:29-b(IV):** Yes, after export report is provided
New Jersey	**NJ R Ct R 4:10-2(d)(1)**: allows discovery of EW's identity,	**NJ R Ct R 4:10-2(d)(2):** Yes
New Mexico	**NMRA 1-026(B)(6)(a)**: allows for discovery of EW's identity and opinion	**NMRA 1-026(B)(6)(b)**: Yes
New York	**NY CPLR 3101(d)(1)(i)**: allows discovery of EW's identity and opinion (exception: no need to provide the names of medical, dental or podiatric experts)	**NY CPLR 3101(d)(1)(i)**: Only by party consent, but see New York County's Commercial Rule 13(c), which obligates certain expert witness disclosures
North Carolina	**NC ST RCP 26(b)(4)(a)(1)**: allows for discovery of EW's identity, **(2)** EW's opinion (while (2) is optional, (3) allows opposing party to compel disclosure)	**NC ST RCP 26(b)(4)(b)(1)**: Yes

North Dakota	**ND RCP 26(b)(4)(A)(i)**: allows discovery of EW's identity and opinion	**ND RCP 26(b)(4)(A)(ii)**: Yes
Ohio	**OH ST RCP 26(B)(7)(a)**: allows discovery of EW's identity, **(b)** EW's expert reports	**OH ST RCP 26(B)(7)(e)**: Yes, after expert reports are exchanged
Oklahoma	**OKl st ann 3226(B)(4)(a)(1):** allows discovery of EW's identity, **(3)** EW's opinion	**OKl st ann 3226(B)(4)(a)(2):** Yes, after expert report is provided
Oregon	N/A	N/A
Pennsylvania	**PA RCP 4003.5(a)(1)(A):** allows discovery of EW's identity, **(B)** EW's opinion	**PA RCP 4003.5(a)(2):** Yes, by court order
Puerto Rico	**PR ST T. 32A RCP 23.1(c)(1)**: allows discovery of EW's identity, and acknowledges that discovery of EW's opinion "may" be allowed	**PR ST T. 32A RCP 23.1(c)(1):** Yes, by court order
Rhode Island	**RI RCP 26(b)(4)(A):** allows discovery of EW's identity and opinion	**RI RCP 26(b)(4)(A):** Yes
South Carolina	**SCRCP 26(b)(4)(A):** allows discovery of EW's identity, **(B)** EW's opinion	**SCRCP 26(b)(4)(A):** Yes
South Dakota	**SDCL 15-6-26(b)(4)(A)(i)**: Allows discovery of EW's identity and opinion	**SDCL 15-6-26(b)(4)(A)(i):** Yes
Tennessee	**TN RCP 26.02(4)(A)(i):** Allows discovery of EW's identity and opinions	**TN RCP 26.02(4)(A)(ii):** Yes
Texas	**TX RCP 192.3(e)(1):** Allows discovery of EW's identity, **(4)** EW's opinions	**TX RCP 192.1(g):** Yes, *see also* **TX Civ Prac & Remedies Code 74.351** (limits pre-expert report depositions)
Utah	**UT RCP 26(a)(4)(A):** mandates disclosure of EW's identity and opinions	**UT RCP 26(a)(4)(B):** Yes
Vermont	**VT RCP 26(b)(5)(A)(i)(I):** allows discovery of EW's identity, **(II)** EW's opinions	**VT RCP 26(b)(5)(A)(ii):** Yes
Virgin Islands	**VI ST R CIV PRO 26(a)(2)(A):** mandates disclosure of EW's identity, **(B)(i)** EW's opinions	**VI ST R CIV PRO 26(b)(4)(A):** Yes
Virginia	**VA Sup Ct R 4:1(b)(4)(A)(i):** Allows discovery of EW's identity and opinions	**VA Sup Ct R 4:1(b)(4)(A)(ii):** Yes
Washington	**WA Super Ct CR 26(b)(5)(A)(i):** Allows discovery of EW's identity and opinion	**WA Super Ct CR 26(b)(5)(B):** Yes
West Virginia	**WV RCP 26(a)(2)(A):** mandates discovery of EW's identity, **(B)(i)** EW's opinions	**WV RCP 26(b)(4)(A):** Yes
Wisconsin	**WSA 804.01(2)(d)(1):** allows discovery of EW's identity, **(2)** EW's opinion	**WSA 804.01(2)(d)(1):** Yes
Wyoming	**WY RCP 26(a)(2)(A):** mandates disclosure of EW's identity, **(B)** EW's opinions	**WY RCP 26(b)(4)(A):** Yes