“Red Rover, Red Rover, Send That Expert Right Over”: Clearing the Way for Parties to Introduce the Testimony of Their Opponents’ Expert Witnesses

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I. INTRODUCTION

"WOW," you say to yourself, "it doesn’t get any better than this."

Indeed, it does not, at least for a civil\(^1\) trial attorney like you. After your opponent informed you of the existence of a very important\(^2\) witness, you discovered that this witness agrees with your position on a critical, disputed issue in an upcoming trial. If that was not good enough, the witness has very close ties to your opponent, so the jurors will be quite likely to trust her testimony on this issue.\(^3\)

Thrilled with this good news, you make sure that the witness’s name is on your witness list and you prepare to present her testimony.\(^4\) In your opening statement, you work in a few references to this witness’s testimony and her close ties to your opponent. After all, these are matters

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1. Although controversies regarding expert witnesses who could provide testimony helpful to the opponents of the party who originally retained them could, and presumably do, occur in criminal trials, this article will discuss these issues in civil litigation.
2. See infra note 413.
3. See infra notes 256-67 and accompanying text.
4. Depending upon the circumstances, you might call the witness to the stand at trial or use her prior deposition testimony. See infra notes 63-66 and accompanying text.
that you fully intend to introduce during your case-in-chief.5

Before you get the chance to do so, though, your opponent files a motion that seeks to prevent you from presenting any testimony from this witness or, in the alternative, from presenting evidence establishing her ties to opposing counsel and her client. Your instincts and experience as a trial attorney tell you that this motion has little chance of success. After all, the jury is entitled to receive “every person’s evidence”6 and the bias of a witness is relevant.7

At the mid-trial hearing on the motion, however, the judge shocks you. She starts the hearing by saying that, at a minimum, she will grant the alternative relief sought by your opponent because she believes that evidence of the close relationship between the witness and your opponent would constitute “explosive prejudice” against your opponent.8 Despite your surprise, discretion leads you to thwart your instinct to remind the judge that evidence of bias, like all other evidence, is introduced for the purpose of “prejudicing” the other side’s case.9

Instead, you concentrate on the issue that the judge said she has not yet decided, i.e., whether you will be allowed to present the witness’s testimony. You argue that relevant testimony is generally admissible10 and that this testimony on a critical issue is certainly relevant.11 You remind the judge that your opponent has already introduced the testimony of a fact witness who has close ties to your client. “Your Honor,” you say in that voice of righteous indignation that you save for courtroom moments when something that seems patently unjust is about to happen, “I shudder to think what you would have said if I had objected on the grounds that it would have been ‘unfair’ to use our ‘own’ witness against us. No party should be given the right to unilaterally prevent the jury from receiving important evidence from a witness who is, by that party’s own declaration, qualified to present it, just by declaring that she ‘owns’ the witness.”12

After you finish, the judge announces her ruling. Believe it or not, she sustains your opponent’s objection because admitting her own expert’s testimony against her would be “unfair.”13 As you slump into your chair, you mumble to yourself, “Maybe it does get better than this after all.”

5. See infra notes 63-70 and accompanying text. In the opening statement, an attorney summarizes the evidence she will present during the trial. THOMAS A. MAUET, TRIAL TECHNIQUES 62 (5th ed. 2000) (advising attorneys to discuss their “side’s version of the disputed facts” in opening statements); Raphael E. Yalden II, Trial Practice in Dramshop Cases, in ILLINOIS DRAMSHOP ACT PRACTICE, ch. 5 (Ill. Inst. for Continuing Legal Educ. 2000) (instructing attorneys to “be as detailed as possible with regard to . . . testimony that certainly support[s] the attorney’s position” in opening statements).


7. See infra notes 257-65 and accompanying text.

8. See infra notes 251-52 and accompanying text.

9. See infra notes 269-71 and accompanying text.

10. See infra notes 96-101 and accompanying text.

11. See infra note 95 and accompanying text.

12. See infra notes 210-13 and accompanying text.

13. See infra notes 102-03, 176-77 and accompanying text.
Although this narrative may seem far-fetched, the decisions of several courts suggest that neither the circumstances nor the results outlined above are extraordinary. In several reported cases and, presumably, many more unreported cases, parties have attempted to introduce the testimony of retained experts who had been identified as potential trial witnesses by their opponents. Of course, while it is not entirely unprecedented for an identified expert witness to reach opinions favorable to the party opposing the one who hired her, this turn of events is also not common. As a result, perhaps, courts appear to be less than certain about how to handle such events, though most reported decisions constrain the parties who would present such testimony, by either prohibiting such testimony entirely or excluding evidence of the relationship between the expert and the party who initially hired her.

Part II of this article reviews these decisions, after delineating the general patterns of retention, disclosure, and discovery of expert witnesses. Part III examines the concerns that apparently have driven courts to restrict parties who seek to use the testimony of experts identified by their opponents. It also argues that none of these concerns justifies the courts’ restrictions. Part IV advocates an alternative approach that would gen-

14. This article discusses experts retained by the attorneys representing one of the parties in civil litigation. Experts who are employees of one of the parties are outside the scope of this article, though some of its analysis may be applicable to these experts. Also, the issues discussed in this article do not arise when an expert is neither retained nor employed by either party. See infra notes 22, 130 and accompanying text.

15. For purposes of simplification, this article will assume a simple two-party case, with one plaintiff and one defendant. Although many cases involve more than two parties, this should not change the analysis. For purposes of this discussion, all parties other than the one originally retaining an expert witness can be seen as “opposing” parties because any attempt to use the testimony of the expert might be opposed by the party who originally retained the expert. If the party who originally retained the expert does not object to another party’s use of that expert’s testimony, the disputes discussed in this article will not occur.


17. House, 168 F.R.D. at 238 (referring to “the vexing and surprisingly little explored question of whether one party should be able to depose or call at trial an expert designated by an opposing party as expected to be called at trial, but whom the designating party has announced it will not call at trial”); In re Vestavia, 105 B.R. at 684 (describing these conflicts as situations where judges “are called upon to make decisions on issues where there are two or more opposing but equally cogent arguments” that ultimately must be resolved based on “judicial hunch”); cf. Dayton-Phoenix Group, Inc. v. Gen. Motors Corp., No. C-3-95-480, 1997 WL 1764760, at *1 (S.D. Ohio Feb. 19, 1997) (“The few cases which have considered this question have not reached consistent results.”).

18. See infra notes 81-86 and accompanying text.

19. See infra notes 250-53 and accompanying text.

20. To some extent, this article focuses upon federal cases, because part of its analysis is based on the Federal Rules of Civil Procedure and the Federal Rules of Evidence. See infra notes 102-74, 187-205, 235-84 and accompanying text. However, this article also discusses policy considerations and related factors that are and should be considered by state courts facing controversies about attorneys pursuing and using evidence from and about
generally allow testimony from experts identified by opponents and evidence regarding the opponents' hiring of the experts presenting that testimony. Part V reviews the advantages of this proposal, including juror access to potentially valuable evidence that can help them resolve important factual disputes, elimination of unnecessary distinctions between expert and fact witnesses, clarification of the consequences of disclosing experts as possible trial witnesses, and making the often overly cozy relationship between attorneys and the experts they hire a bit less comfortable.

II. THE INDEFINITE STATE OF THE LAW REGARDING RED ROVER EXPERT WITNESSES

This section reviews the current law regarding parties' attempts to introduce the opinions of expert witnesses originally retained by opposing counsel and evidence of this retention. It begins with a review of the most common fact patterns that result in these situations, starting with an outline of the typical employment relationship between an attorney and an expert. It then identifies the decisions courts face about experts initially retained by parties other than the ones offering their testimony and surveys the varied decisions that courts have reached on these issues.

A. EXPERT WITNESS RETENTION, DISCLOSURE, AND DISCOVERY

Although the facts in which these issues arise vary from case to case, most cases fall somewhere in a defined set of patterns. Understanding these fact patterns requires a preliminary comprehension of the basic framework for the hiring and disclosing of expert witnesses in civil cases.

Often an attorney who is searching for an expert to testify at trial experts that were originally retained by their opponents. In addition, several states have disclosure, discovery, and evidence rules or statutes that parallel the Federal Rules of Civil Procedure and the Federal Rules of Evidence. As a result, the article does not ignore state civil cases.

21. For purposes of the issues discussed in this article, there is no significant difference between an attorney retaining the expert directly and the party itself retaining and paying the expert. Even if the client technically retains and directly pays the expert, the attorney is usually the person who searches for, chooses, informs, directs, and otherwise influences the expert. See infra notes 320-33 and accompanying text; Stephen D. Easton, Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure, 32 Ariz. St. L.J. 465, 492-99 (2000). Sometimes a particularly active client or client representative also exercises influence over the expert, but this influence is generally added to, rather than substituted for, the influence of the trial attorney. Id. at 494 n.88. This article will alternatively refer to either the attorney or the party retaining the expert.
initially retains the expert as a consultant, if the court’s deadline for the disclosure of experts who may testify at trial is not imminent. This common tactic gives the attorney time to have the expert review the available evidence, conduct an investigation, and reach preliminary opinions before the attorney decides whether to name the expert as a witness who might present trial testimony. If the expert’s preliminary opinions are not favorable to the party the attorney represents, the attorney does not list the expert as a trial witness and the expert remains a non-testifying consultant.

As long as the attorney never discloses the expert as a person who may present expert testimony at trial, there will usually be no discovery regarding this mere consultant. Under Rule 26(b)(4)(B) of the Federal

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22. This article concerns expert witnesses who are retained, i.e., hired and paid, by one of the parties or attorneys. While there can be expert witness who are not retained by either party, such as highway patrol officers, medical examiners, and fire marshals, see Stephen D. Easton, Can We Talk?: Removing Counterproductive Ethical Restraints Upon Ex Parte Communication Between Attorneys and Adverse Expert Witnesses, 76 Ind. L.J. 647, 653 n.25, 655-56 (2001), it seems unlikely that any party would claim the right to render such witnesses ineligible to testify at a deposition or trial because that claim is usually based upon a retaining party’s investment in, and allegedly resultant control over, a retained expert. See infra notes 174-78, 207-10 and accompanying text.


25. There are instances where an expert is initially hired as a trial witness rather than a consultant or where the attorney designates the expert as a trial witness before the expert has reviewed the available evidence, conducted her investigation or examination, and advised the attorney of her preliminary opinion. See, e.g., Peterson v. Willie, 81 F.3d 1033, 1036-38 (11th Cir. 1996); Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 453 (S.D.N.Y. 1997); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 238 (N.D. Iowa 1996). It is safe to assume that many of these instances involve either an attorney who is not aware of the tactical advantages to be gained by initially retaining the expert as a consultant or an attorney who has not retained an expert until shortly before, or sometimes even after, the applicable deadline for the naming of experts who are expected to be witnesses at trial. House, 168 F.R.D. at 247 (“All too often, parties designate expert witnesses as likely to testify at trial to meet a court-imposed deadline, even though they have not actually hired the expert, but are only planning to, and even though the expert has not conducted any examination of the opposing party, if necessary to the expert’s opinion, or even been provided with pertinent information from which the expert’s opinion will be derived.”).

26. Occasionally, attorneys become aware of consultants who have been retained by opposing attorneys outside of the regular discovery process. See infra note 30. Sometimes attorneys seek to deposes these experts or call them as trial witnesses. See, e.g., Koch Ref. Co. v. Jennifer L. Boudreaux MV, 83 F.3d 1178, 1181-83 (5th Cir. 1996); Good v. GAF Corp., No. 87-2195, 1989 WL 54017, at *1-3 (4th Cir. May 23, 1989); Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1979); Procter & Gamble Co. v. Hugen, 184 F.R.D. 410 (D. Utah 1999); Perry v. United States, No. CA3:96-CV-2038-T, 1997 WL 53136 (N.D. Tex. Feb. 4, 1997); Rocky Mountain Natural Gas Co. v. Cooper Indus., Inc., 166 F.R.D. 481 (D. Colo. 1996). This article will not address the interesting issues raised by efforts by one attorney to deposes or call experts who have been consulted, but never disclosed as possible trial witnesses, by opposing counsel. Instead, the recommenda-
Rules of Civil Procedure, a party is entitled to use interrogatories or depositions to discover information about an expert "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." In most instances, if the expert remains a mere consultant because the retaining attorney never identifies her as a likely trial witness, the opposing attorney will never even learn that she worked on the case.

For discussion regarding consultants, see Kathleen Michaela Brennan, Must the Show Go On? Defining When One Party May Call or Compel an Opposing Party's Consultative Expert to Testify, 78 MINN. L. REV. 1191 (1994); Maureen Geary, Riddled with Controversy: Calling Opposing Counsel's Non-Testifying Expert in Light of the Decision in Oregon v. Riddle, 63 UNIV. PITT. L. REV. 441 (2002); Jeffrey Messing, Expert Witnesses and Conflicts of Interest, ARIZ. ATT'Y, Nov. 2001, at 28.

To be complete, it should be noted that the Federal Rules also allow the discovery "as provided in Rule 35(b)." FED. R. CIV. P. 26(b)(4)(B). Rule 35(b) provides that parties are entitled to receive reports from doctors who conduct physical or mental examinations pursuant to the provisions of Rule 35(a). FED. R. CIV. P. 35.

The provisions of Rule 35(b) are, in most instances, outside the scope of this article, because these provisions define the parameters of discovery regarding persons who conduct Rule 35 physical or mental examinations only when those persons are not designated as witnesses by the attorneys who retained them. When the Rule 35 examiner is designated as a trial witness, the opposing party is entitled to receive information about her through disclosures and discovery. See Fed. R. Civ. P. 26(a)(2), 26(a)(5), 35(b)(3). In other words, while Rule 35(b) does provide a discovery device for undisclosed consultants that is not available for other undisclosed consultants, an undisclosed Rule 35 consultant is still not a person who was at any time disclosed by her employer as a person who was expected to present expert testimony at trial. This article argues that the disclosure of a person as an expert expected to testify at trial is the event that renders that person's testimony admissible when offered by the opposing party. See infra Part III.A. This argument does not necessarily apply to a Rule 35 examiner who is never so identified, because such a person may be the equivalent of an undisclosed expert consultant who did not conduct a Rule 35 examination. See infra notes 179-92 and accompanying text.

For discussions of issues raised when the persons conducting Rule 35 examinations are never listed as possible trial witnesses, see, for example, Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 671-72 (E.D. Wash. 2000) (citing previous cases); House, 168 F.R.D. at 243-45, 249.

FED. R. CIV. P. 26(b)(4)(B); see also House, 168 F.R.D. at 240 (quoting Rule 26(b)(4)(B)); In re Vestavia Assocs., 105 B.R. 680, 681 (Bankr. M.D. Fla. 1989) ("If the expert has been retained in anticipation of trial but will not be called as a witness, Rule 26 limits discovery to exceptional circumstances where the ability of the party to gather such information is impractical.").

It is possible, of course, that the opposing attorney will learn that the expert worked as a consultant through happenstance, even though the retaining attorney never disclosed her relationship with the consultant. See, e.g., Steele v. Seglie, No. 84-2200, 1986 WL 30765, at *2 (D. Kan. Mar. 27, 1986) (noting that defense attorney learned that doctors had examined real party in interest for plaintiff through use of medical records release signed by plaintiff); Healy v. Counts, 100 F.R.D. 493, 494 (D. Colo. 1984) (reporting that a physician asked by attorney to review medical records glanced at them, realized that he had been retained by opposing counsel in the same matter, and so informed the attorney who asked him to review the records); In re Vestavia, 105 B.R. at 682.

Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses, 622 F.2d 496, 501 (10th Cir. 1980) (noting that even the "identity" of an expert who serves only as a consultant is outside the scope of discovery); Scott D. Sheftall & Brian M. Torres, Expert Wit-
On the other hand, if the expert's conclusions are consistent with the positions that the attorney plans to advocate at trial, she may want to preserve the option of calling her as a trial witness. After the attorney decides the expert may testify at trial, she cannot keep her relationship with the expert hidden from opposing counsel. Instead, under Rule 26(a)(2)(A), "a party shall disclose to other parties the identity of any person who may be used at trial to present" expert witness testimony. Therefore, before the court's deadline has expired, the attorney must disclose the expert as a possible trial witness.

Once the expert is disclosed, the opposing attorney acquires information about her through various means. First, due to provisions added to

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nesses, in FLA. BAR, FLORIDA CIVIL TRIAL PRACTICE, ch. 12, § 12.3 (2001) (regarding protection of a consultant's "identity").

32. See infra notes 34-40 and accompanying text.


Parties sometimes claim that their retained experts have the dual status of both testifying experts and consultants to counsel and that communications between experts and attorneys that are solely concerned with the latter role are non-discoverable work product. Although some courts have accepted this notion, see W.R. Grace & Co., 2000 WL 1843258, at *6-12; Messier v. Southbury Training Sch., No. 3:94-CV-1706, 1998 WL 422858, at *2 (D. Conn. June 29, 1998); Nat'l Steel Prods. Co. v. Super. Ct., 210 Cal. Rptr 535, 542 (Cal. Ct. App. 1985), the decisions of other courts suggest that all information considered by an expert witness is discoverable, even if the expert is also serving as a consultant. Furniture World, Inc. v. D.A.V. Thrift Stores, Inc., 168 F.R.D. 61, 63 (D.N.M. 1996) (allowing non-disclosure of items considered by the expert only in her consulting capacity would create "an unmanageable situation by requiring a question-by-question analysis of an expert . . . to determine whether the work product doctrine applies"); cf. Culbertson v. Shelter Mut.
Rule 26 of the Federal Rules of Civil Procedure in 1993, the expert must prepare and sign a report setting forth her opinions, the reasons for her opinions, the information she considered in forming her opinions, the exhibits she will use, her publications in the previous ten years, and all cases in which she has testified in the last four years. The opposing attorney also has the right to depose the expert and to use other discovery devices to acquire information about the expert and her observations and conclusions, including interrogatories, requests for production, re-

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**Footnotes:**

36. The 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure changed several procedures regarding information about expert witnesses. These amendments eliminated the language in pre-1993 Rule 26(b)(4) outlining interrogatories about expert witnesses, see supra note 34, and inserted a provision giving a party the right to depose disclosed expert witnesses, see Fed. R. Civ. P. 26(b)(4)(A). The post-1993 version of Rule 26 also mandates disclosure, even in the absence of discovery requests, of specified information about expert witnesses, including mandatory reports written by experts. See Fed. R. Civ. P. 26(a)(2).

37. Retained expert witnesses must prepare and sign a report. See infra note 130.


quests for inspection, and requests for admissions.\footnote{40} In addition, the opposing attorney will often conduct her own independent investigation to acquire information about the expert, performing such tasks as reviewing the expert's publications and prior testimony.\footnote{41} In some instances, this investigation may include direct contact with the expert by the opposing attorney.\footnote{42}

Through these processes, the opposing attorney may become aware of observations, opinions, findings, or conclusions by the expert that are consistent with that attorney's positions.\footnote{43} If this occurs, the opposing attorney may engage in efforts to present the expert's observations and conclusions at trial, including taking the expert's deposition, if this has not already been done,\footnote{44} and including the expert on her own list of trial witnesses.\footnote{45} Although some have referred to these circumstances as instances of "side-switching experts,"\footnote{46} this terminology is misleading be-

\footnote{40} FED. R. CIV. P. 26(a)(5); see also Furniture World, Inc., 168 F.R.D. at 62 (holding that the combination of the Rule 26(a)(2) reporting requirement and the Rule 34(c) request for production of documents makes it "clear that all documents provided to a party's expert witness must be produced on request").

The rule also provides that the opposing party can obtain expert information through permission to enter land or property and physical and mental examinations, FED. R. CIV. P. 26(a)(5), but these discovery devices are presumably used only rarely to acquire information about experts.

Attorneys conducting investigations of experts use various techniques outside formal disclosure and discovery, including contacting of other experts and attorneys, searching of paper and electronic databases, reading of prior testimony and publications, and checking of expert credentials. See Edward J. Imwinkelried, The Methods of Attacking Scientific Evidence § 9-8(a), at 254 (3d. ed. 1997); Mauct, supra note 5, at 378 (advising attorneys to "obtain a copy of everything the expert has ever published"); Easton, supra note 22, at 691.

Attorneys conduct their own investigations of experts because the formal disclosure and discovery process has several substantial limitations and problems, including the efforts of retaining attorneys to limit the information provided in mandatory disclosures and discovery responses, cost, and delays in recovery information. See Easton, supra note 22, at 671-74.


\footnote{43} See infra notes 214-17 and accompanying text.


cause it suggests that the expert is the person who initiates the efforts that result in the presentation of her testimony at trial by the attorney opposing the one who initially retained her. Although this happens occasionally, it is more common for the opposing counsel to initiate these efforts, often against the wishes of the expert. To more accurately reflect the common dynamics of these situations, this article will refer to an expert whose testimony is offered by an attorney opposing the party who initially retained her as a “Red Rover expert.”

B. “DE-DISCLOSURE” Efforts and Their Impact on Discovery

Of course, these events do not occur in a vacuum. Instead, while the opposing attorney is reviewing the expert witness report, listening to the testimony at her deposition, reading her publications and prior testimony, and otherwise gathering information about her, the attorney who originally retained her is communicating with her, helping her prepare her report, listening to her deposition testimony, and otherwise acquiring information about her. Before or after the opposing attorney discloses her intent to use the expert’s testimony in her case-in-chief, the attorney who initially retained her might discern that the circumstances;


48. A shorthand term seems appropriate, so that the reader will be spared the burden of repeatedly wading through phrases like “an expert whose testimony is offered by an attorney opposing the party who initially retained her.”

49. In the children’s playground game of “Red Rover,” each of two teams forms a human barrier by holding hands. One team identifies a person from the other team who must attempt to run through this barrier by shouting, “Red Rover, Red Rover, send [the chosen person] right over.” The identified opposing team member then charges toward the shouting team’s human chain, trying to break through. If the chain holds, the person who attempted to break it joins the unbroken chain. As the game continues in this fashion, persons who were originally members of one team become members of the opposing team. See D.W. Crisfield, Pick-Up Games 164 (1993).

Thus, the Red Rover designation suggests that a person becomes a witness for the party opposing the one who initially retained her through the initiative of the party who now seeks to use that expert’s testimony.

50. See Gen. Motors Corp v. Jackson, 636 So. 2d 310, 313 (Miss. 1992) (noting that retaining attorneys learned that their expert disagreed with their theory through communications with the expert).

51. See Fed. R. Civ. P. 26(a)(2) advisory comm. notes (1993) (“Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed.”).

52. By virtue of the deposition notice required by Rule 30(b), the retaining attorney is given the opportunity to participate in the expert’s deposition. Fed. R. Civ. P. 30(b).
expert’s testimony could do her client53 more harm than good.54 If so, she may attempt to “de-disclose”55 the expert by issuing some

53. Red Rover-like discovery issues sometimes arise in other contexts. In Commerce & Indus. Ins. Co., 1999 WL 731410, at *1, the party that had disclosed the expert as a possible trial witness was dismissed via summary judgment. When another party noticed the deposition of the dismissed party’s expert, the dismissed party claimed that its dismissal converted the expert from a disclosed expert to a consultant who was outside the scope of discovery. Id. The court rejected this argument and allowed the deposition of the expert. Id. at *2. A Texas court reached the opposite conclusion, denying depositions and other discovery regarding the disclosed expert witnesses of a party who settled with another party pursuant to a settlement agreement that assigned these experts to the remaining party as consultants, see Axelson, Inc. v. McIlhany, 755 S.W.2d 170, 172, 173-74 (Tex. App.—Amarillo 1988, orig. proceeding), but the Texas Supreme Court reversed this decision and required the experts to testify in depositions, see Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556 (Tex. 1990); Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 552 n.3 (Tex. 1990) (noting that the Scott decision rendered the same day dealt with issues regarding depositions of redesignated experts). A California court dealing with facts similar to those faced by the Texas courts also allowed discovery regarding an expert previously disclosed by a party who had settled. See Williamson v. Super. Ct., 582 P.2d 126, 128 (Cal. 1978). A recent federal decision, however, refused to allow the deposition of an expert retained by a settling party where the settling party agreed to “withdraw its expert designation” and to not make the expert’s work product available to a non-settling party. FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1041 (E.D. Cal. 2002).

54. An individual expert witness may reach several germane opinions. When the attorney who retained the expert decides not to call that expert as a witness at trial, there is often at least one opinion that disagrees with a position the attorney wishes to take at trial. See infra notes 214-17 and accompanying text. When this is the case, the expert may have reached other opinions that are helpful to the attorney who retained her. See Collins v. Wayne Corp., 621 F.2d 777, 781 (5th Cir. 1980) (noting that expert reached opinions regarding the speed of an accident that were consistent with those reached by the opposing expert, but also reached opinions regarding the crashworthiness of the involved bus that were helpful to the attorney who retained him). It seems reasonable to assume that many of the attorneys who decide not to call experts they previously disclosed have concluded that their testimony will do their clients more harm than good, even if some of their opinions would indeed do some good.

55. The term “de-disclose” is an intentionally awkward one. It is derived from Rule 26(a)(2)(A)’s language, which requires a party to “disclose to other parties the identity of any person who may be used at trial to present” expert testimony. Fed. R. Civ. P. 26(a)(2)(A). Once this disclosure has taken place, a party seeking to somehow negate its effect is attempting to do something which is impossible, because once something is disclosed, it cannot somehow be returned to unknown status. Because the result that a party seeks when attempting to nullify its previous disclosure is illusory, it is perhaps best encapsulated in an intentionally unsound term like “de-disclose.”

The obvious alternative term would be “undisclose.” That verb would lead to the adjective “undisclosed,” however, and that adjective would be misleading. If an attorney discloses the identity of an expert who may present testimony at trial and later attempts to withdraw that disclosure, it is not correct to refer to the witness as an “undisclosed expert.” According to the primary definition in one dictionary, “un” is “a prefix meaning ‘not . . . .’” Random House, The Random House College Dictionary 1426 (rev. ed. 1982). Therefore, the term “undisclosed expert” would suggest an expert who had never been disclosed, not one whose disclosure had supposedly been withdrawn. The same dictionary suggests that “de” is “used as a prefix to indicate privation, removal, and separation (dehumidify), negation (demean; derange), descent (degrade; deduce), reversal (detract), and intensity (decompound).” Because the attorney who engages in an attempted withdrawal of a previous disclosure of an expert is hoping to reverse or negate the earlier disclosure, “de-disclose” is an appropriate verb. Its inherent awkwardness reflects the reality that once a piece of information is disclosed, it cannot truly be returned to its pre-disclosed status. The term also echoes at least one court’s similar nomenclature. See Castellanos v. Littlejohn, 945 S.W.2d 236, 239-41 (Tex. App.—San Antonio 1997, orig. proceeding) (observing that
type of declaration that she will not use the expert as a witness at trial.\textsuperscript{57}

If an attorney tries to de-disclose the expert she originally hired, the court will have to decide what consequence, if any, this attempted de-disclosure warrants.\textsuperscript{58} If the attempted de-disclosure occurs before the expert witness is deposed, the court must decide whether the opposing party retains the right to depose the expert.\textsuperscript{59} Some courts have held that a party’s de-disclosure does not extinguish the opposing party’s right to

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one party “attempted to ‘de-designate’ [an expert] as a testifying expert and instead name him as a consulting expert”).

Given the various stages of expert status, this article will attempt to be somewhat precise in its terminology regarding experts. An expert who has never been disclosed as a person who may present trial testimony will be called a consultant or an undisclosed expert. When an expert is disclosed as a person who may present trial testimony, she will be referred to as a disclosed expert or an expert witness. If a party attempts to de-disclose that expert witness, the expert may be referred to as a “de-disclosed expert,” but the terms disclosed expert and expert witness remain applicable to such an expert. “Red Rover expert” or “Red Rover” will refer to an expert whose testimony is sought (through a deposition) or offered (at trial) by a party other than the party whose attorney originally retained the expert. Of course, these terminology rules cannot and will not be applied to quoted language, unless changes to the quoted language are indicated with [brackets].

56. Although most de-disclosures concern the future, at least one was apparently issued in the present or past tense. In that case, a party listed an expert as a “will call” witness, but rested without calling him. Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1181 (5th Cir. 1996). Similarly, in a bankruptcy case involving a hearing rather than a trial, the retaining attorney’s de-disclosure did not occur until “the middle of [the] final evidentiary hearing.”\textit{In re Vestavia Assocs.}, 105 B.R. 680, 682 (Bankr. M.D. Fla. 1989).

57. \textit{See} Peterson v. Willie, 81 F.3d 1033, 1036-37 (11th Cir. 1996); Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984); Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 671 (E.D. Wash. 2000); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 238 (N.D. Iowa 1996); \textit{cf.} Collins, 621 F.2d at 780 (in a case that pre-dated the 1993 amendments to Rule 26, a party moved in limine to exclude the testimony of an expert it had previously identified as a witness, on the ground that the expert, who had been deposed, had become “a consultant whose opinions were not discoverable under Rule 26” after the deposition); Ross v. Burlington N. R.R., 136 F.R.D. 638, 638 (N.D. Ill. 1991) (in a case that pre-dated the 1993 changes to Rule 26, the expert “was originally designated by plaintiff as a testifying expert witness, but he has now been labelled a consulting expert witness”); Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (in a pre-1993 case, a party originally identified an expert as a likely trial witness on several issues, but later notified the other party that his testimony would be limited to one issue); County of L.A. v. Super. Ct., 271 Cal. Rptr. 689, 699 (Cal. Ct. App. 1990); Broward County v. Cento, 611 So.2d 1339, 1339 (Fla. Ct. App. 1993); Taylor v. Kohli, 642 N.E.2d 467, 468 (Ill. 1994); Reeves v. Boyd & Sons, Inc., 654 N.E.2d 864, 874 (Ind. Ct. App. 1996) (elimination of expert’s name from revised witness list in state case); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 313 (Miss. 1992) (state rule similar to pre-1993 version of Rule 26 of the Federal Rules of Civil Procedure); \textit{In re Doctors’ Hosp. of Laredo}, 2 S.W.3d 504, 506 (Tex. App.—San Antonio 1997, orig. proceeding) (noting that an expert was “re-designated” as a consultant under state rules); \textit{Castellanos}, 945 S.W.2d at 237 (similar).

58. \textit{See} Williamson, 126 P.2d at 130 (“Big Four argues that its withdrawal of Kurt as a witness restored the immunity from discovery which Kurt’s report originally enjoyed.”).

59. Because a deposition generally is the preferred method to discover expert witness information, the controversy regarding the effect of de-disclosure on the opposing party’s discovery rights occurs most often in the context of attempts to depose de-disclosed experts. It is of course possible that the same issue could arise in the context of some other discovery effort pursued by the opposing party, such as an interrogatory or a request for production seeking information regarding the de-disclosed expert. \textit{See} FED. R. CIV. P. 26(a)(5) (authorizing several means of expert witness discovery).
Several other courts, however, have held that the opposing party has no right to depose a de-disclosed expert because the retaining attorney's de-disclosure returns the witness to consultant status.

C. RED ROVER ISSUES AT TRIAL

Red Rover issues are not always raised during discovery. It is not unusual for the retaining attorney to try to de-disclose the Red Rover expert or otherwise attempt to stop her opponent from acquiring or using her testimony after she has been deposed. Sometimes the retaining attorney objects to her opponent's attempts to introduce portions of the expert's testimony at trial. These objections are discussed in the following cases:

60. *House*, 168 F.R.D. at 240, 249; *Toni L. Scott, Inc.*, 798 S.W.2d at 557 (party cannot obtain control of another party's expert witnesses by settling with that party and then prevent depositions of the experts by "changing the designation of these experts from 'testifying' experts to 'consulting-only' experts"); cf. *Koch Ref. Co.*, 85 F.3d at 1182 (where party, rather than expert, switched sides, another party "could have deposed [the expert] at any time"); *Commerce & Indus. Ins. Co. v. Grinnell Corp.*, Nos. CIV.A.97-0775, 97-0803, 1999 WL 731410 (E.D. La. Sept. 20, 1999) (where party who had disclosed the expert had been dismissed from the case, party remaining in the case retained the right to depose the expert); *Harmschfeger Corp. v. Stone*, 814 S.W.2d 263, 265 (Tex. App.—Houston [14th Dist.] 1991, no writ) (permitting discovery about a firm whose employee had been disclosed as an expert witness in a "company suit," even though another employee of the firm was serving as a consultant in the case at hand); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 224 (Tenn. Ct. App. 1999). For a summary of the cases before 1996, see *House*, 168 F.R.D. at 242-44.

61. See *Callaway Golf Co. v. Dunlop Slazenger Group Ams.*, Inc., No. CIV.A.01-669(MPT), 2002 WL 1906628, at *4 (D. Del. Aug. 14, 2002) (disallowing deposition, except possibly regarding facts known by expert before being retained); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1048 (E.D. Cal. 2002); *Dayton-Phoenix Group, Inc. v. Gen. Motors Corp.*, No. C-3-95-480, 1997 WL 1764760, at *1 (S.D. Ohio Feb. 19, 1997) (disallowing general deposition of expert, but allowing deposition regarding expert's pre-litigation knowledge, because such a deposition would be allowed for consultants who had never been disclosed as experts); *Ross*, 136 F.R.D. at 638; *County of L.A.*, 271 Cal. Rptr. at 705; see also *Durflinger*, 727 F.2d at 891 (de-disclosed expert was a Rule 26(b)(4)(B) consultant); *Lehan*, 190 F.R.D. at 672; cf. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 26 (9th Cir. 1980) (prohibiting a deposition of an expert who had been identified as a potential trial witness in a case decided before the 1993 amendments to Rule 26, even though the expert had indicated a willingness to testify on behalf of the opposing party); *Bailey*, 57 F.R.D. at 13 (determining that a partially de-disclosed expert could not be deposed regarding issues upon which he had been de-disclosed, in a case predating the 1993 amendments to Rule 26); *Reeves*, 654 N.E.2d at 874-75 (affirming denial of deposition in state case decided under rule similar to pre-1993 Rule 26 of the Federal Rules of Civil Procedure); *Jackson*, 636 So. 2d at 313-14 (holding that a deposition should not have been allowed in a state case under a rule similar to pre-1993 version of Rule 26 of the Federal Rules of Civil Procedure); *In re Doctors' Hosp. of Laredo*, 2 S.W.3d at 506 (holding that de-disclosure returned an expert witness to consultant status under state rules and therefore prevented an opposing party from deposing the expert); *White*, 21 S.W.3d at 224 n.9 ("Courts construing rules similar to Tenn. R. Civ. P. 26 have held that a party may place a previously designated testifying expert beyond the reach of an opposing party by redesignating the expert from a testifying witness to a consultant prior to the witness's deposition.").

62. See *Peterson*, 81 F.3d at 1036-37; *Collins*, 621 F.2d at 780; *Lunghi v. Clark Equip. Co.*, 204 Cal. Rptr. 387, 388 (Cal. Ct. App. 1984); *Onti, Inc. v. Integra Bank*, 1998 WL 671263, at *1 (Del. Ch. Aug. 23, 1998); *Jackson*, 636 So. 2d at 313 (noting objection of retaining party to deposition of de-disclosed expert and retaining party's later objection to the use of deposition testimony at trial).
pert’s deposition at trial, to her opponent’s designation of a undisclosed expert as her own trial witness, or to her subpoenaing of the expert to the trial.

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63. See Lunghi, 200 Cal. Rptr. at 389; Oniti, Inc., 1998 WL 671263, at *1; Broward County v. Cento, 611 So.2d 1339, 1339 (Fla. Ct. App. 1993); Taylor v. Kohli, 642 N.E.2d 467, 468 (III. 1994); Jackson, 636 So.2d at 313; White, 21 S.W.3d at 222.

64. The portions of the Federal Rules that apply most frequently to an opposing party’s attempts to introduce portions of a Red Rover expert’s deposition testimony during that party’s case-in-chief provide:

Rule 32. Use of Deposition in Court Proceedings
(A) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
(A) that the witness is dead; or
(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

FED. R. CIV. P. 32; see also White, 21 S.W.3d at 226 (summarizing somewhat similar provisions of Tennessee law). Because expert witnesses often live a substantial distance from the site of a particular trial, parties sometimes offer portions of deposition transcripts under Rule 32(a)(3)(B) or similar state rules. Id. at 226; Taylor, 642 N.E.2d at 468.

65. See Lehan, 190 F.R.D. at 670; Lunghi, 200 Cal. Rptr. at 388; see also Kreymer v. N. Tex. Mun. Water Dist., 842 S.W.2d 750, 751 (Tex. App.—Dallas 1992, n.w.h.) (where both parties listed the same expert as a trial witness).

To be safe, some attorneys list their opponent’s experts as possible trial witnesses on their list of witnesses who may be called at trial. See FED. R. CIV. P. 26(a)(3)(A). If the expert has also been listed as a possible trial witness by the attorney that originally retained her, this precaution may not be necessary. FED. R. CIV. P. 26(a)(3) advisory committee’s note (1993).


Although the law is far from uniform, see DOUGLAS DANNER & LARRY L. VARN, 1 EXPERT WITNESS CHECKLISTS § 1:07 (2002); Mark Labaton, Note, Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas, 1987 DUKE L.J. 140, 146-49, courts often have held that an attorney cannot force an expert to form new opinions, but a subpoena can be used to compel an expert to testify to factual observations or opinions that she has already developed. See Aiper v. United States, 190 F.R.D. 281, 283 (D. Mass. 2000) ("Plaintiff has the right to command that Dr. Becker appear at trial . . . ."); Carter-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2d Cir. 1972) ("The weight of authority holds that, although it is not the usual practice, a court does have the power to subpoena an expert witness and . . . require him to state whatever opinions he may have previously formed."); quoted in Kaufman v. Edelstein, 539 F.2d 811, 817 (2d Cir. 1976); Cogdell v. Brown, 531 A.2d 1379, 1382 (N.J. Super. Ct. Law Div. 1987); Fitspatrick v. Holiday Inns, Inc., 507 F. Supp. 979, 980 (E.D. Pa. 1981);
There are also occasions when attorneys who surmise that some of their experts' testimony may hurt their cases do not remove them from their trial witness lists. If an attorney concludes that her expert’s testimony might still do more good than harm, she may wish to preserve the option of presenting the expert’s testimony at trial, despite the realization that some of the expert’s testimony will hurt her case. In an effort to control the presentation of the witness’s testimony, she may resist her opponent’s attempts to use the expert’s testimony in her case-in-chief.67

Because a plaintiff presents its case-in-chief before the defendant, usually it is a defense attorney who is objecting to a plaintiff’s attorney’s use of Red Rover opinions when the objecting attorney also desires to preserve the option of using the expert’s testimony in her own case-in-chief.68 Although the relative dearth of reported cases suggests that these types of maneuvers69 are less common than attempting to keep Red Rover testi-

Bryant v. Cary (In re: Cary), 167 B.R. 163, 166 (Bankr. W.D. Mo. 1994); see also, e.g., Mitzel v. Employers Ins. of Wausau, 878 F.2d 233, 235 (8th Cir. 1989); Estock v. Lane, 842 F.2d 184, 189 (7th Cir. 1988); Arkwright Mut. Ins. Co. v. Nat’l Union Fire Ins. Co of Pa., 148 F.R.D. 552, 557-58 (S.D. W. Va. 1993); United States v. Int'l Bus. Machs. Corp., 406 F. Supp. 175, 176-77 (S.D.N.Y. 1975); cf. Kaufman, 539 F.2d at 821 (“We can find no justification for a federal rule that would wholly exempt experts from placing before a tribunal factual knowledge relating to the case at hand, opinions already formulated, or, even, in the rare case where a party may seek this and the witness feels able to answer, a freshly formed opinion, simply because they have become expert in a particular calling.”).

Under Rule 45(c)(3)(B)(ii), a court faced with a timely motion to quash must quash a subpoena “requir[ing] disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party.” FED. R. Civ. P. 45(c)(3)(B)(ii). When an opposing party subpoenas a Red Rover expert, this provision is not applicable, because such an expert has studied the events in question at the request of a party.

67. In White, 21 S.W.3d at 222, the trial court ruled that the plaintiff could not introduce portions of the defendants’ expert’s deposition if the defendants decided not to call him during their case-in-chief. The appellate court disagreed with this ruling. Id. at 221.

In Onti, Inc., 1998 WL 671263, at *1, the defendant objected to the plaintiff’s designation of portions of the transcripts of depositions of experts the defendant called as witnesses in a bench trial. In a post-trial ruling, the court admitted the designated portions of the deposition. Id. Id.

68. See White, 21 S.W.3d at 222 (where defendants listed their retained expert as a possible witness and plaintiffs listed him as a potential witness, defendant objected to plaintiffs’ use of the expert in their case-in-chief); cf. Onti, Inc., 1998 WL 671263, at *1 (in a bench trial, defendant objected to plaintiff’s designation of portions of transcript of expert called by the defendant during the trial).

69. It is also possible that an attorney might present the expert’s testimony during her case-in-chief, then resist her opponent’s efforts to introduce certain opinions during cross-examination. Under Rule 611 of the Federal Rules of Civil Procedure, “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” FED. R. EVID. 611(b); accord UNIF. R. EVID. 611(b). If the court enforces this rule, an attorney might be able to present her expert’s testimony via direct examination, then object to cross-examination questions that ask the expert for testimony that is outside the scope of the direct examination. Several realities limit the effectiveness of such a strategy, however. First, it may be difficult to argue in any given case that the expert opinion presented during cross-examination actually is outside the scope of the direct examination, when the expert is testifying about the same general areas of expertise. Second, the above-quoted restriction is of little value to an attorney who seeks to prevent a jury from hearing an expert’s opinion on a given subject in many courtrooms. The next sentence of the rule provides, “The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” Id. Thus, an “outside the
mony entirely out of the trial through de-disclosure or wholesale objections to any Red Rover testimony at trial, they are not entirely extraordinary.\footnote{See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 238 (N.D. Iowa 1996) (noting that courts have "postulated no less than three different standards" for resolving Red Rover disputes); In re Vestavia, 105 B.R. at 683 (observing that courts "have come to two different policy conclusions regarding opponents calling opposing parties' expert witnesses"); White, 21 S.W.3d at 224 n.9 (placing previous cases into four different categories).}

In either event, a court can face Red Rover issues at trial, rather than in the pretrial discovery context. As the opening hypothetical passage suggests, two fundamental issues can arise at trial.

I. Admissibility of Red Rover Testimony

First, the court might be forced to decide whether to admit Red Rover testimony over the objection of the attorney who originally retained and disclosed the expert. There is a significant split of authority on this issue,\footnote{See infra note 87.} but almost\footnote{See House, 168 F.R.D. at 246 ("[T]he court does not find that . . . designation under the pre-1993 version of Rule 26 creates an 'entitlement' of the opposing party to depose or use another party's expert at trial."); White, 21 S.W.3d at 224 (similar).} all of the reported decisions stop short of giving free rein to attorneys who seek to introduce Red Rover evidence.\footnote{See Peterson v. Willie, 81 F.3d 1033, 1035 (11th Cir. 1996) (affirming admission of Red Rover testimony, but holding that admission of testimony about original retention of Red Rover was error, though harmless); Powell v. Super. Ct., 259 Cal. Rptr. 390, 391-92 (Cal. Ct. App. 1989) (where opposing party did not list Red Rover in her list of trial witnesses, California statutory law still allowed her to call him, because he previously had been designated as an expert by her opponent); Lunghi v. Clark Equip. Co., 200 Cal. Rptr. 387, 388-89 (Cal. Ct. App. 1984); Onti, 1998 WL 671263; Kreymer v. N. Tex. Mun. Water Dist., 842 S.W.2d 750, 752-53 (Tex. App.—Dallas 1992, n.w.h.) (where both parties desig-}
tial employer has attempted to de-disclose her as a trial witness. Several of the reported decisions reach this result only after engaging in balancing tests that could result in exclusion of Red Rover testimony in other circumstances. Some rely upon the discretion of the trial court, which could be exercised in favor of excluding Red Rover testimony in other cases. One case emphasizes that Red Rover testimony was admitted only because there was no ex parte contact between the opposing attorney and the expert, thereby implying that the presence of such contact would render Red Rover testimony inadmissible.

Other courts are even more openly hostile to Red Rover testimony. Several courts have held that an opposing party cannot introduce the testimony of a de-disclosed Red Rover expert at trial, even when this party


76. One commentator neatly summarized the tests applied by the courts to Red Rover issues while paraphrasing a leading decision:

The district judge in House noted that there are three possible standards to apply when determining whether a party should have access to an adversary's former expert. The first option is the "exceptional circumstances" standard in Federal Rule of Civil Procedure 26(b)(4)(B), which deals with consulting experts. The second is a "discretionary" or 'balancing' standard," which weighs the "interests of the [discovering] party and the court against the potential for prejudice to the party who hired the expert." The third and most lenient standard is an "entitlement" standard, drawn from a few cases holding that a party is entitled to call an adversary's expert notwithstanding the adversary's opposition.


78. See Peterson, 81 F.3d at 1037-38 & n.4 (finding that admission of Red Rover testimony was within trial court's discretion); House, 168 F.R.D. at 246; cf. White, 21 S.W.3d at 222-24 (noting that decisions about admissibility of evidence were within the trial court's discretion, but reversing decision to exclude Red Rover testimony).

79. In this article "ex parte contact" refers to communications between an attorney and an expert witness retained by that attorney's opponent, without the permission or knowledge of the retaining attorney. This article does not address ex parte contact between an attorney and a judge.

80. See Agron, 176 F.R.D. at 452 (noting the absence of a "violation of discovery rules"); accord White, 21 S.W.3d at 225; cf. Steele v. Seglie, No. 84-2200, 1986 WL 30765, at *4 (D. Kan. Mar. 27, 1986) (holding that inadvertent receipt of opposing party's consultant's report was not "a 'flagrant' violation" of the alleged prohibition of ex parte contact).


One court faced with a different situation reached a similar result. See Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3d Cir. 1995). In Raymark, the expert whose testimony was admitted at trial was never disclosed as a possible trial witness by a party and, apparently, never retained by a party in the case at hand. Instead, the expert had testified as an expert
itself designated the expert as a probable trial witness. Most of these cases rely upon balancing tests, the trial court's discretion, or the inherent power of courts to exclude expert testimony. Some courts have excluded Red Rover testimony where the opposing attorney engaged in ex parte contact with the expert witness.

2. Admissibility of Evidence About the Original Retention of the Red Rover Expert

If the court admits Red Rover testimony, it will then face the issue of whether to allow the opposing party to introduce evidence establishing that the expert was originally retained by the party who is now opposing for the party in "an unrelated" case. The Third Circuit reversed, finding that the expert's testimony from the previous trial was not admissible as an admission under Rule 801(d)(2)(C) of the Federal Rules of Evidence or as former testimony of an unavailable witness under Rule 804(b)(1). Id. at 163-66.

83. See FNC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1048 (E.D. Cal. 2002); Ferguson, 189 F.R.D. at 409.
84. See Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1183 (5th Cir. 1996); Durflinger v. Artiles, 727 F.2d 888, 890 (10th Cir. 1984); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980); In re Vestavia, 105 B.R. at 684 (observing that the competing "arguments are compelling and I have vacillated back and forth" and ultimately relying upon "judicial intuition"); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 314 (Miss. 1992); Axelson, Inc. v. McIlhany, 755 S.W.2d 170, 174 (Tex. App.—Amarillo 1988, orig. proceeding) (state case involving settlement by party that had previously disclosed expert), rev'd, Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556 (Tex. 1990), Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 552 n.3 (Tex. 1990) (noting that the Scott decision rendered the same day resolved expert discovery issues).
85. See Koch Ref. Co., 85 F.3d at 1181.
86. Id. (disqualifying de-disclosed expert who had ex parte communications with opposing attorneys, where party, rather than expert, switched sides); Durflinger, 727 F.2d at 891; Campbell Indus., 619 F.2d at 26, 27; County of L.A., 271 Cal. Rptr. at 705 (disqualifying attorney who engaged in ex parte communications with opposing party's disclosed expert witness); cf. Jackson, 636 So. 2d at 314 (asserting, in a decision affirming exclusion of Red Rover testimony on other grounds, that the state's "rule makes no provision for ex parte communication with an expert witness"). But cf. Durflinger, 727 F.2d at 891 ("In different circumstances, we recognize that a trial judge might not be required to exclude the testimony of witness [who was contacted ex parte by opposing counsel] in violation of the rules of discovery.").

These cases, along with another decision allowing Red Rover testimony due to the absence of ex parte contact, see supra note 80, suggest that ex parte contact between an attorney and an expert retained by the attorney's opponent somehow violates the discovery provisions of Rule 26 of the Federal Rules of Civil Procedure or similar state rules. Although other courts have also suggested this outside the Red Rover context, see Easton, supra note 22, at 687-89, this suggestion is incorrect. Because ex parte contact by an attorney is a means of gathering expert information that is not regulated by Rule 26's discovery provisions, nothing in Rule 26 prohibits ex parte contact. Id. at 690-700. In addition, the portion of Rule 26 relied upon by courts who believed that it banned ex parte contact was removed from Rule 26 in 1993 and replaced by provisions expanding discovery regarding expert witnesses and creating mandatory disclosure about expert witnesses. Id. at 701-04.

Therefore, despite sundry opinions to the contrary, the claim that ex parte contact violates Rule 26 is incorrect.
the admission of her testimony. Almost\textsuperscript{87} every federal\textsuperscript{88} court that has faced this issue has determined, incorrectly,\textsuperscript{89} that such evidence should not be admitted during the direct examination of the Red Rover expert because it is unfairly prejudicial to the party who originally hired her.\textsuperscript{90} A few of these courts have suggested that such evidence might be admissible on redirect examination, if the cross-examination by the attorney who originally retained the expert suggested that the expert was not qualified to render opinions.\textsuperscript{91}

Other courts have a different take on cross-examination by an attorney who originally retained the Red Rover expert. In their view, the predicament faced by an attorney's cross-examination of an expert she originally retained\textsuperscript{92} and the possibility that the jurors would be able to indepen-

\textsuperscript{87} In a case that predated the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure, see infra notes 129-31 and accompanying text, the Fifth Circuit held that the district court erred in excluding evidence about a Red Rover expert's initial retention, but held that this error was harmless. See Collins v. Wayne Corp., 621 F.2d 777, 780-83 (5th Cir. 1980).

\textsuperscript{88} In cases that usually involve experts who served as consultants whose reports were provided to the opposing party, a fact pattern that is admittedly outside the main focus of this article, see supra note 26, a few state courts have allowed the opposing party to introduce testimony from initially adverse experts and to establish that these experts were initially retained by the opposing party. See Broward County v. Cento, 611 So. 2d 1339, 1339 (Fla. Dist. Ct. App. 1993); Miller v. Marymount Med. Ctr., No. 2000-CA-000827-MR, 2001 WL 726798, at *6-8 (Ky. Ct. App. June 29, 2001) (review granted and opinion subject to revision or withdrawal) (Ky. June 5, 2002) (involving deposed expert witness); Mayor of Baltimore v. Zell, 367 A.2d 14 (Md. Ct. App. 1977); Fenlon v. Thayer, 506 A.2d 319, 323 (N.H. 1986); Cogdell v. Brown, 531 A.2d 1379, 1382 (N.J. Super. Ct. Law Div. 1987); Bd. of Educ. of S. Sanpete Sch. Dist. v. Barton, 617 P.2d 347 (Utah 1980); cf. Marple v. Sears, Roebuck & Co., 505 N.W.2d 715, 718-19 (Neb. 1993) (affirming that court's admission of evidence of Red Rover initial retention but doing so in part due to retaining party's failure to preserve its objection for appeal). However, one of these state courts admitted, "The few cases in other jurisdictions dealing with the issue tend to support the [initial consulting party's] position that it is prejudicial error to permit the disclosure of initial employment by the adverse party." Mayor of Baltimore, 367 A.2d at 16.

\textsuperscript{89} See infra notes 133-36 and accompanying text.


\textsuperscript{91} See Peterson, 81 F.3d at 1038 n.5; Granger v. Wisner, 656 P.2d 1238, 1243 & n.2 (Ariz. 1982). But see Agron, 176 F.R.D. at 451 (holding that "the Court's restrictions on defense counsel [to refrain from disclosing that plaintiff's attorney originally retained the Red Rover expert] will apply to redirect as well as direct examination").

\textsuperscript{92} See Ferguson v. Michael Foods, Inc., 189 F.R.D. 408, 410 (D. Minn. 1999) ("[D]efendants would be placed at an awkward disadvantage when conducting their cross-examination, forced to dance around the fact that his initial examination of plaintiff occurred because defendants hired him."); cf. Peterson, 81 F.3d at 1037 (admitting that its approach of permitting Red Rover opinion testimony, but excluding evidence of expert's original retention, "may inhibit adequate cross examination").

Not all courts agree that the original retaining attorney would be significantly handicapped in conducting a cross-examination if Red Rover opinion testimony was admitted, but evidence of the initial retention was excluded. See Agron, 176 F.R.D. at 452 ("Plaintiff may still impeach Deutsch's testimony by showing that it differed materially from state-
dently determine who initially retained the expert should result in the outright exclusion of Red Rover testimony.93

III. MISPLACED CONCERNS DRIVING BANS ON RED ROVER EVIDENCE

When courts exclude or limit Red Rover evidence, they typically94 do not do so on relevance grounds.95 Red Rover testimony, including evidence regarding the relationship between experts and their initial employers, usually exceeds by a rather significant margin the relevance test of "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."96 In reality, the more frequent concern is not that Red Rover evidence will have no tendency to establish a disputed fact, but that it will be so powerful that it will have too great a tendency to establish these facts.97

As relevant testimony, Red Rover evidence can help the jury98 determine which party is correct on a disputed factual issue. In other words,
Red Rover evidence can assist in the search for truth, which after all is a fundamental purpose for conducting the trial and for allowing discovery. Because Red Rover evidence is usually relevant, it usually should be admitted, unless some specific provision of the U.S. Constitution, a federal statute, the Federal Rules of Evidence, the Federal Rules of Civil Procedure, or other federal rules renders it inadmissible. Courts that exclude or limit Red Rover evidence generally do so on the basis of well-intentioned, but misguided, fairness concerns that do not meet this standard. As the remainder of this section will establish, none of these fairness concerns is sufficient to overcome the general policy in favor of giving the jury all available relevant evidence, so that it can determine the truth on the issues it must decide.

A. Confidentiality Anxiety

Several of the courts that have prohibited depositions of, or trial testimony from, de-disclosed experts based their decisions upon a concern that Red Rover depositions or trial testimony might unfairly lead to the exposure of the retaining attorney’s trial preparation or other allegedly


100. See Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 559 (Tex. 1990) (“The primary policy behind discovery is to seek truth so that disputes may be decided by facts that are revealed rather than concealed.”); Harnischfeger Corp. v. Stone, 814 S.W.2d 263, 265 (Tex. App.—Houston [14th Dist. 1991, no writ) (“The ultimate purpose of discovery is to seek the truth, thus allowing disputes to be decided by what the facts reveal and not by what facts are concealed.”).

101. The Federal Rules of Evidence provide:

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FED. R. EVID. 402; see also UNIF. R. EVID. 402.

102. See Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984) (contending that Rule 26(b)(4) “is designed to promote fairness by precluding unreasonable access to an oppos—
These decisions misapply the Federal Rules of Civil Procedure governing discovery, misinterpret Federal Rules provisions requiring disclosure of information reviewed by the expert, including trial preparation matters and other previously confidential information revealed to the expert by the retaining attorney, and fail to appreciate the significance of an attorney's disclosure of the expert as a person who may testify at trial.

1. Misapplication of Discovery Provisions to Trial Issues

As previously noted, the Federal Rules of Civil Procedure generally do not provide for discovery regarding experts who serve only as consultants to attorneys and are never disclosed as possible trial witnesses. Under Rule 26(b)(4)(b), interrogatories and depositions can be used to gather information about such persons only when the party seeking discovery can show "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." For purposes of analyzing whether parties should regularly have access to the testimony of experts who have been disclosed as possible trial witnesses by their opponents, the "exceptional circumstances" provision has little or no impact. Therefore, if Rule 26(b)(4)(b) applies to an expert who has been disclosed and later de-disclosed, it might limit the opposing party's access to that expert's testimony.

Several courts have applied Rule 26(b)(4)(b) in exactly that manner. Most of these courts have held that Rule 26(b)(4)(b) prohibits an opposing party from presenting a Red Rover expert's testimony at trial.


104. See supra notes 26-31 and accompanying text.

105. In Rule 26(b)(4)(B), such a consultant is defined as "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."


107. If a party in a particular case could demonstrate the required "exceptional circumstances," that party could then use interrogatories or depositions to acquire information about the expert in question. FED. R. Civ. P. 26(b)(4)(B). By definition, though, a case with "exceptional circumstances" is not a typical case. This article argues that parties should have access to Red Rover deposition and trial testimony in typical cases. The "exceptional circumstances" provision cannot be used to support policy for typical cases.

Others have held that Rule 26(b)(4)(B) prevents the opposing party from deposing the expert.\textsuperscript{109}

The former decisions incorrectly apply Federal Rules of Civil Procedure provisions that govern the discovery process to the trial itself. These courts seem to have forgotten that Rule 26(b)(4)(b) is a subsection of Rule 26(b), which is entitled "Discovery Scope and Limits,"\textsuperscript{110} and Rule 26(b) is itself a subsection of Rule 26, which is entitled "General Provisions Governing Discovery; Duty of Disclosure."\textsuperscript{111} As its title suggests, Rule 26 governs the discovery and disclosure process, but does not govern the conduct of the trial itself. More precisely, as some\textsuperscript{112} courts have noted, Rule 26(b)(4)(B)'s discovery provisions say nothing about whether an expert's testimony is admissible at trial.\textsuperscript{113}

The courts that have nevertheless held that these discovery provisions prevent the admission of Red Rover expert testimony at trial\textsuperscript{114} are simply incorrect.\textsuperscript{115} Because Rule 26(b)(4)(B) does not govern trials, it is not a rule that overcomes the baseline principle that relevant evidence is admissible.\textsuperscript{116}

\textsuperscript{109} See infra note 117.

\textsuperscript{110} FED. R. CIV. P. 26(b).

\textsuperscript{111} FED. R. CIV. P. 26.

\textsuperscript{112} One of the courts that correctly observed that the language of Rule 26(b)(4) does not apply to trials nonetheless found that this language prohibited the introduction of Red Rover testimony at trial. See \textit{Ferguson}, 189 F.R.D. at 409. Another court operating under a state rule similar to the pre-1993 version of Rule 26(b)(4) admitted that "[t]he rules of discovery do not address whether the testimony of a non-witness expert retained or dismissed by a party is admissible at trial," but nonetheless affirmed the trial court's exclusion of this testimony on other grounds. Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 314 (Miss. 1992).


\textsuperscript{114} See supra note 108.

\textsuperscript{115} To reach the apparently desired result of excluding Red Rover testimony at trial, these courts have to engage in a rather expansive reading of Rule 26(b)(4)(B). By its language, this provision actually allows interrogatories and depositions regarding consultants, but limits these discovery devices to cases involving exceptional circumstances. See FED. R. CIV. P. 26(b)(4)(B) ("A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert . . . only . . . upon a showing of exceptional circumstances . . . ."). Therefore, the courts that use Rule 26(b)(4)(B) to prohibit Red Rover trial testimony must read a provision that allows discovery in certain circumstances as a provision that prohibits certain actions during the trial. Given the policy considerations favoring the admission of Red Rover testimony at trial, see infra Part V, courts should not be overly creative in interpreting the language of the rule to prohibit Red Rover trial testimony.

\textsuperscript{116} See supra note 101 and accompanying text.
2. Unawareness of the Duty to Disclose Previously Confidential Information Considered by a Disclosed Expert

Not all of the anti-Red Rover decisions that rely on Rule 26(b)(4)(B) misapply its discovery provisions to the trial. Some of them do apply this provision to the discovery process. These decisions prohibit a party from deposing a de-disclosed expert.\footnote{117

Unfortunately, the reasoning in these decisions follows the reasoning in the decisions prohibiting Red Rover trial testimony,\footnote{118
See supra notes 108, 117. These decisions may have been valid at the time that they were made, see infra notes 124-28, but the 1993 Rule 26 amendments reduce or abolish their precedential value. See infra notes 129-46 and accompanying text.} and this reasoning is no longer\footnote{119
Some of the decisions prohibiting Red Rover testimony at trial or deposition were rendered before the 1993 changes to Rule 26 discussed below. See supra notes 108, 117. These decisions may have been valid at the time that they were made, see infra notes 124-28, but the 1993 Rule 26 amendments reduce or abolish their precedential value. See infra notes 129-46 and accompanying text.} valid. These courts believe that allowing depositions of, or trial testimony from, de-disclosed experts could unfairly disclose the trial preparation of the attorney who initially retained the expert.\footnote{120
See supra notes 102-03. Some might also be concerned more generally that work product or other confidential information revealed by the initially retaining attorney to the expert could be disclosed if Red Rover depositions and trial testimony were allowed. See supra note 103. As with trial preparation, which is a subset of attorney work product, once any work product or other confidential information is disclosed to the expert and the expert is disclosed as a possible trial witness, the opposing party is entitled to this information under the 1993 amendments to Rule 26. See Easton, supra note 21, at 537-43.} While this sentiment is laudable to some,\footnote{121

To evaluate the attorney trial preparation concern, one must delineate which elements of an attorney's trial preparation are put at risk of disclosure by depositions of, or trial testimony from, de-disclosed experts. Although the fact that an attorney has retained a particular expert in a specific field in and of itself reveals certain information about that attorney's trial strategy,\footnote{122
See supra notes 102-03. Some might also be concerned more generally that work product or other confidential information revealed by the initially retaining attorney to the expert could be disclosed if Red Rover depositions and trial testimony were allowed. See supra note 103. As with trial preparation, which is a subset of attorney work product, once any work product or other confidential information is disclosed to the expert and the expert is disclosed as a possible trial witness, the opposing party is entitled to this information under the 1993 amendments to Rule 26. See Easton, supra note 21, at 537-43.} this cannot be the type of work product that the

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See Dayton-Phoenix Group, Inc., 1997 WL 1764760, at *1 (citing Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984)) ("[T]he purpose of Rule 26(b)(4) is to promote fairness by preventing one party from obtaining access to the other party's trial preparation."); Ross, 136 F.R.D. at 639 (citing Durflinger).}

\footnote{119
Some of the decisions prohibiting Red Rover testimony at trial or deposition were rendered before the 1993 changes to Rule 26 discussed below. See supra notes 108, 117. These decisions may have been valid at the time that they were made, see infra notes 124-28, but the 1993 Rule 26 amendments reduce or abolish their precedential value. See infra notes 129-46 and accompanying text.}

\footnote{120
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\footnote{121
courts that prohibit Red Rover depositions or trial testimony are trying to protect. After all, if the opposing party is attempting to depose a certain expert or present her testimony at trial, that attorney already knows the identity of the expert. Instead, the courts that prohibit deposition or trial testimony must be concerned that such testimony could result in the opposing party learning about the thoughts, concerns, strategy, evidence, or other information that the retaining attorney has shared with the expert.\textsuperscript{123}

Although these types of information may\textsuperscript{124} be protected from disclo-

\textsuperscript{123}Although these types of information may be protected from disclosure of discovery regarding undisclosed experts “not only encompasses information and opinions developed in anticipation of litigation, but also insulates discovery of the identity and other collateral information concerning experts consulted informally”; Bergeson v. Dilworth, 132 F.R.D. 277, 281 (D. Kan. 1990) (documenting an attorney’s efforts to refrain from identifying an expert because the expert “had been retained for litigation but I was deciding not to use him”).

123. A deposition of a de-disclosed expert would raise the possibility of revealing thoughts and information that the retaining attorney has shared with her expert. If a deposition has already taken place and the court is deciding whether to allow Red Rover trial testimony, there may be a somewhat lessened probability that such items would be disclosed. If the Red Rover expert refused to participate in ex parte communication with opposing counsel, see infra note 304 and accompanying text, and opposing counsel sought only to introduce portions of the expert’s deposition at trial, there would be no disclosure of matters revealed by the retaining attorney to the expert, other than those already revealed at the expert’s deposition. Under these circumstances, which may be the most common, see supra note 46-47, infra note 304 and accompanying text, refusing to allow the introduction of the expert’s deposition testimony at trial does little or nothing to protect the retaining attorney’s trial preparation, because this trial preparation information has already been added to the opposing attorney’s knowledge base.

124. Significantly, the provisions of Rule 26(b)(3)’s work product rule are, by the terms of Rule 26(b)(3) itself, “[subject to the provisions of subdivision (b)(4) of this rule.” Fed. R. Civ. P. 26(b)(3). Rule 26(b)(4) allows depositions of experts “whose opinions may be presented at trial.” Id. at 26(b)(4). Therefore, the expert discovery provisions of Rule 26(b)(4) trump the protection of work product provided in Rule 26(b)(3). See B.C.F. Oil Ref., Inc. v. Consol. Edison Co., 171 F.R.D. 57, 66 (S.D.N.Y. 1997) (“[T]he first phrase of Rule 26(b)(3), the codification of the work product doctrine, has always been ‘Subject to the provisions of subdivision (b)(4) of this rule.’ This is further evidence that the drafter of the rule understood expert disclosure and the work product doctrine and have decided that disclosure of material generated or consulted by the expert is more important.”); Applegate, supra note 99, at 297 (“By providing for discovery of expert opinions ‘developed in anticipation of litigation,’ [pre-1993] rule 26(b)(4) carves out an exception to rule 26(b)(3) for ordinary (nonopinion) work product. Some courts have interpreted rule 26(b)(4) as simply overriding rule 26(b)(3) for experts who will testify.”). In other words, the work product doctrine is not applicable when the expert can be deposed, so the deposing attorney should be able to explore materials provided by the retaining attorney to the expert.
125. While the courts prohibiting Red Rover deposition and trial testimony have relied upon Rule 26(b)(4)(B), the primary protection for attorney trial preparation and other work product is found in Rule 26(b)(3). See 8 WRIGHT, MILLER & MARCUS, supra note 34, § 2022 (reviewing Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court case that first articulated the work product doctrine), § 2023, at 329 (reporting that Rule 26(b)(3) "was designed as a largely accurate codification of the doctrine announced in the Hickman case and developed in later cases in the lower courts"); cf. Toledo Edison Co. v. GA Tech. Inc., 847 F.2d 335, 338 (6th Cir. 1988) ("The law relating to work product... ").

However, since 1970, all of the standards and procedures for making claims of work product are embraced in [FED. R. Civ. P. 26(b)(3)].

Rule 26(b)(3) provides that, where the expert discovery provisions of Rule 26(b)(4) are inapplicable, see supra note 124, a party is not entitled to obtain discovery of work product, defined as items that are "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." FED. R. Civ. P. 26(b)(3); see also 8 WRIGHT, MILLER & MARCUS, supra note 34, § 2023, at 334-35 ("34 states have adopted verbatim copies of Rule 26(b)(3), and ten others have provisions that differ but appear very similar."). In 1986 the issue at hand involves an attorney's trial preparation, which is sometimes not reduced to tangible form, it should be noted that, although the rule itself states that "documents and tangible things" are outside the scope of discovery in the applicable circumstances when they were prepared in anticipation of litigation, FED. R. Civ. P. 26(b)(3), courts have not limited the reach of these work product provisions to tangible things. Instead, they have given work product protection to intangible data sources, such as the verbal statements and memories of persons. Id. at 337-38; Easton, supra note 22, at 706, n.224; see also Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D. Mich. 1995) (holding that work product may include unrecorded conversations between attorneys and retained experts).

Because almost every dispute about the discoverability of trial preparation or work product revealed to a disclosed expert witness focuses on whether discovery would expose an attorney's mental impressions or opinions, the terms "attorney work product" and "work product" are essentially interchangeable for this article. See 8 WRIGHT, MILLER & MARCUS, supra note 34, § 2024, at 360-66 (work product issues often concern whether formal or informal discovery would result in "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"); Easton, supra note 22, at 707, n.225; cf. Krisa v. Equitable Life Assurance Soc'y, 196 F.R.D. 254, 256-57 (M.D. Pa. 2000) (holding that work product does not protect drafts of opinions held, or reports or other items generated, by experts retained to testify).

126. Issues regarding the effect of the 1993 amendments on expert discovery and disclosure, including elimination of the argument that some work product and other confidential information revealed by attorneys to their retained experts remains outside the scope of discovery, are covered in greater depth in Easton, supra note 21, at 576-605.
have had some\textsuperscript{127} validity before 1993,\textsuperscript{128} the amendments to Rule 26 that

\textsuperscript{127} It is important to remember that the work product doctrine does not protect the underlying facts that are communicated to the expert when an attorney reveals trial preparation or other work product to her. See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) ("Of course, where the same [work product] document contains both facts and legal theories of the attorney, the adverse party is entitled to discovery of the facts."). followed by Haworth v. Miller, 162 F.R.D. 289, 295 (W.D. Mich. 1995); B.C.F. Oil Ref. v. Consol. Edison Co., 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997); 8 Wright, Miller & Marcus, supra note 34, § 2023, at 330-32, § 2024, at 337. Instead, even when the work product doctrine does apply, it protects only the work product itself, not the facts encapsulated within it. If an attorney is concerned about protecting the confidential status of her trial preparation or other work product, she merely needs to find a way to communicate the underlying factual information to the expert without revealing the work product. See Easton, supra note 22, at 711-12 & n.239.


became effective that year rendered these concerns moot. These amendments included a new provision that requires a party to furnish a report prepared and signed by each disclosed retained expert. The report must include a “complete statement” of “the data or other information considered by the witness in forming the opinions.” Although some courts have incorrectly failed to recognize the full impact of this

there is ample basis for arguing that attorney trial preparation or other work product revealed to experts is discoverable.


Several federal district courts resisted the 1993 amendments by adopting local rules or standing orders that attempted to negate some or all of the expert witness disclosure requirements. See Easton, supra note 22, at 703, n.210. These courts almost certainly did not have the authority to adopt these rules under the 1993 amendments to Rule 26, because the language allowing courts to opt out of other, non-expert, disclosure provisions in Rule 26 did not authorize local rules opting out of the expert witness disclosure provisions. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 19, 30 (Aug. 1998) (memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure (June 30, 1998)). In any event, the language allowing local courts to opt out of the 1993 non-expert disclosure provisions was taken out of Rule 26 by the 2000 amendments. H.R. Doc. No. 106-228, at 101, 118-19 (2000). Therefore, it is now rather clear that district courts cannot opt out of Rule 26’s expert witness disclosure provisions by local rule. See Fed. R. Civ. P. 26(a). Rule 26(a) now exempts certain proceedings from the initial disclosure requirements of subsection (a)(1), see Fed. R. Civ. P. 26(a)(1)(E), but this provision does not alter the expert witness disclosures required under subsection (a)(2).

130. To be complete, it should be noted that a report is required “with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2)(B). As noted above, this article concerns experts who are retained by one of the parties. See supra note 14. All retained, disclosed experts are required to prepare reports. Fed. R. Civ. P. 26(a)(2)(B).

To some extent, the analysis in this article may also be applicable to some experts who are employed, rather than retained, by parties, because disclosed expert witnesses who are employed for a given case or whose duties regularly involve giving expert testimony must also prepare expert reports, id., identifying all items they have considered, including input from attorneys, see infra notes 132-44 and accompanying text. To the extent that this article discusses ex parte contact between an attorney and a disclosed expert witness, see infra notes 304-05 and accompanying text, however, this discussion is not entirely relevant because the expert’s status as an employee may require an attorney to refrain from ex parte contact. See infra notes 306-08 and accompanying text; Easton, supra note 22, at 678, n.116.


provision, \textsuperscript{133} several others have held that it requires a party to disclose all tangible and intangible work product or other matters that were confidential before the retaining attorney ended their confidential status\textsuperscript{134} by

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\textsuperscript{134} Once a retaining attorney reveals part of her trial preparation or another confidential piece of information to a person who may testify at trial, the information is no longer "confidential." At most, it is "formerly confidential information."
sharing them with the expert.\textsuperscript{135} An Advisory Committee comment accompanying the 1993 amendments rather explicitly states that the expert witness report requirement compels the retaining attorney to divulge all work product and other previously confidential items that she showed to a disclosed expert, because all such matters were “considered by” the expert in forming her opinions.\textsuperscript{136} The practical effect of the 1993 amend-


\textsuperscript{136} In explaining the effect of the reporting requirement, the Advisory Committee stated:

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert’s opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.


One influential federal jurist, District Court Judge Sam C. Pointer, underscored the Advisory Committee’s comments:

The rules [as amended in 1993] make it clear that whatever you give to the expert is subject to being disclosed . . . [The amended Rule says] whatever the expert relies upon or considers. The lawyer’s obligation, in order to pre-
ments on claims of confidentiality for thoughts shared by an attorney with a disclosed expert is substantial. When the latter of two events—sharing of work product with the expert and disclosure of the expert as a witness who may present testimony at trial—occurs, the retaining attorney waives any protection provided by the work product doctrine and acquires an obligation to disclose the information to the opposing attorney. At the same time, the opposing party secures the right to receive disclosure of the work product and, by virtue of another provision that was added to Rule 26 in 1993, the right to explore this previously confidential matter through a deposition of the expert and other discovery devices.

137. If a previously disclosed expert has already prepared a report when she is exposed to additional information, the party retaining her must supplement the report by disclosing the newly considered information. See Fed. R. Civ. P. 26(a)(2)(c), 26(c)(1).


139. If an attorney wishes to retain the protection of the work product doctrine, she must refrain from disclosing her trial preparation or other work product to an expert who is disclosed as a possible trial witness, because such disclosure will render it discoverable. See supra note 136 (quoting Judge Pointer); Easton, supra note 22, at 722-24; Lieberman, supra note 128, at 7 ("I strongly suggest that you assume that whatever you give or disclose to your expert is subject to pretrial discovery and disclosure at trial and, therefore, limit any such communication to non-sensitive material, to the extent possible, and to communicate orally, rather than in writing."); cf. Waits, supra note 128, at 445 ("I believe we should follow the rule, often mentioned in other areas of legal ethics, that the lawyer should only use expert witness preparation techniques that she is willing to see exposed on the front page of the New York Times or revealed to her opponent.").

140. Under the pre-1993 version of Rule 26, expert witness discovery was supposedly limited to an interrogatory asking an opposing party to identify each expert the party expected to call as trial witnesses and to state the subject matter and substance of the expected testimony, as well as the grounds for the expert's opinions. See Easton, supra note 22, at 687 (quoting pre-1993 version of Rule 26(b)(4)(A)(ii)). In most jurisdictions, however, expert discovery was almost never this limited, because it was commonplace for attorneys to stipulate to the exchange of expert witness reports or to depositions of experts. Id. at 694. In addition, the pre-1993 version of Rule 26 allowed the court to "order further [expert] discovery by other means." Id. at 688 (quoting pre-1993 version of Rule 26(b)(4)(A)(ii)). Therefore, the 1993 changes can be seen, at least to some extent, as a codification of the actual relatively expansive expert information discovery practices before 1993. Fed. R. Civ. P. 26(b) advisory committee's note (1993) (stating that the expert deposition rule was designed to "conform[] the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard").

141. Subsection (a) of Rule 26, which was added in 1993, is entitled "Required Disclosures: Methods to Discover Additional Material." Fed. R. Civ. P. 26(a). The last subsection of subsection (a) states:

(5) METHODS TO DISCOVER ADDITIONAL MATTER. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examination; and requests for admission.

Id. Because this subsection is a portion of the rule outlining disclosure provisions, the plain language of the rule states that all matters that must be disclosed by a party, including
After the 1993 amendments to Rule 26, any court that refuses to require an expert to answer opposing counsel's deposition or trial questions out of concern for an attorney's trial preparation or other work product is protecting a right that no longer exists. With the 1993 changes, an attorney who wishes to prevent her opponent from acquiring her work product must either refrain from revealing it to her expert or refrain from identifying that expert as a person who might present expert opinion testimony at trial. Given the retaining attorney's ability to protect work product fully by simply exercising one of these two options, courts

information considered by a disclosed expert witness, may be explored by the opposing party on discovery. This expansive view of the scope of discovery is supported by Rule 26(b)'s statement that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party," even after a 2000 amendment to Rule 26(b)'s scope of discovery language. See Fed. R. Civ. P. 26(b)(1); see also Kri白沙 Equitable Life Assurance Soc'y, 196 F.R.D. 254, 261 (M.D. Pa. 2000) (holding, in a case decided before the 2000 amendment to Rule 26, that an opponent was entitled to discovery of non-work product documents considered, but not relied upon, by an expert witness due to "the broad ambit of discovery afforded by Rule 26(b)(1)".


143. See supra note 136; cf. Castellanos v. Littlejohn, 945 S.W.2d 236, 241 (Tex. App.—San Antonio 1997, orig. proceeding) ("A testifying expert could not review [materials] that are not conveyed to him .... ").

An attorney exercising this option does not necessarily have to forego communicating an important fact to the expert, if she can do so in a manner that does not disclose the work product itself. See Easton, supra note 22, at 712 n.239, 724 (observing that underlying fact often can be communicated to the expert by sharing a document that is not protected by the work product doctrine); supra note 127. However, the fact that the attorney revealed the fact to the expert and the form in which it was revealed would not be protected by the work product doctrine.


In a similar context, several courts have ruled that the naming of an attorney for the client as the client's expert witness in a patent dispute waives the protection of the attorney-client privilege regarding communications between the attorney and the client related to the attorney's opinions. Nat'l Steel Prods. Co. v. Super. Ct., 210 Cal. Rptr. 535 (Cal. Ct. App. 1985); Squealer Feeds v. Pickering, 530 N.W.2d 678, 684-85 (Iowa 1995); Kammerer v. W. Gear Corp., 618 P.2d 1330, 1334 (Wash. Ct. App. 1980), aff'd, 635 P.2d 708 (Wash. 1981); Brad Risinger, Comment, Waiver of the Attorney-Client Privilege, 3 Geo. J. Legal Ethics 125, 127-28 (1989). Therefore, a party who is considering disclosing either an attorney or a non-attorney as an expert witness must consider whether naming the expert as a witness is beneficial enough to outweigh the loss of confidentiality of matters the expert considered. See Easton, supra note 21, at 596-97.
should not go out of their way to protect the strategy, thoughts, and other information revealed by an attorney who chose to share them with a person who has been disclosed as a possible trial witness by that same attorney. Once the expert becomes a person who might present opinion testimony that could be affected by the information that was confidential before the retaining attorney revealed it to her, the jurors and, therefore, the opposing attorney,¹⁴⁵ are entitled to learn about all the information the expert considered.¹⁴⁶

3. Failure to Appreciate the Significance of Disclosing an Expert as a Possible Trial Witness

The courts that prevent opposing attorneys from acquiring or using the testimony of Red Rover experts also fail to understand the full significance of the retaining attorney's disclosure of the expert as a possible trial witness. For these courts to be correct, there must be a means by which an attorney can somehow reverse her earlier disclosure of the expert. The Rules of Civil Procedure do not,¹⁴⁷ and should not, permit this.

¹⁴⁵ The jury will in all likelihood not learn about any information considered by the expert unless the opposing attorney has the right to learn about it, because the attorney is the vehicle through which the jury will receive the information. Cf. W.R. Grace & Co. v. Zotos Int'l, Inc., No. 98-CV-8385(F), 2000 WL 1843258, at *5 (W.D.N.Y. Nov. 2, 2000) (noting that discovery enables opposing counsel to learn information about the retaining attorney's influence on expert testimony that counsel can communicate to the jury at trial); Easton, supra note 21, at 504-05 (observing that keeping information about a retained expert from the retaining attorney's opponent effectively keeps the information from the jury, because the jury relies upon the opposing attorney to bring forth information that the retaining attorney would prefer to keep from the jury).

¹⁴⁶ See W.R. Grace & Co., 2000 WL 1843258, at *4 (because the jury deserves to know whether the expert or the attorney is really testifying, "there is no reason to exclude from disclosure attorney communications submitted to testifying experts, who the jury may believe carry a degree of independence"); Waits, supra note 128, at 440-41 ("The attorney's opinions are irrelevant only as long as they remain in the attorney's head or files. Once those thoughts are shared with an expert witness, they may well become part of the witness's thoughts about the case, a highly relevant subject.").

¹⁴⁷ Courts that have discussed attempts to de-disclose experts in reported opinions have not been able to cite any provisions of the Rules of Civil Procedure that allow de-disclosure. Instead, they have merely observed that parties somehow attempted to de-disclose. See Peterson v. Willie, 81 F.3d 1033, 1036-37 (11th Cir. 1996) ("Peterson's current counsel subsequently withdrew the designation of Dr. Lichtblau as a trial expert and filed a motion in limine seeking to preclude him from testifying on behalf of the appellees."); Durlflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984) ("Plaintiffs had originally retained Dr. Dyck as a consultant, and designated him as a probable witness in presenting their case. Subsequently, they decided not to use him as a witness, and so informed defendants."); Lefhan v. Ambassador Programs, Inc., 190 F.R.D. 670, 671 (E.D. Wash. 2000) ("Defendant has represented to the Court that it does not intend to call Dr. Klein as a witness at trial even though he was named on Defendant's expert witness list."); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 238 (N.D. Iowa 1996) ("Combined has never formally withdrawn its designation of Dr. Taylor as an expert expected to be called at trial. However, Dr. Taylor has been dropped from defendant's witness list in the final pretrial order...and Combined has represented to the court...that it has no intention of calling Dr. Taylor at trial."); cf. Taylor v. Kohli, 642 N.E.2d 467, 468 (III. 1994) (noting, in a state case, disagreement between plaintiff and defendant regarding whether plaintiff informed defendant that he would not be calling a previously disclosed expert as a trial witness).
Instead of requiring a reversible declaration by the attorney that she will call an expert as a trial witness, Rule 26(A)(2)(A) provides for an irretrievable disclosure of experts who might testify at trial.\textsuperscript{148} Rule 26(A)(2)(A) dictates that “a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence,”\textsuperscript{149} which are the evidentiary rules outlining the requirements for expert opinion testimony.\textsuperscript{150} In other words, from the outset, the Rule 26(A)(2)(A) disclosure is not a statement that an attorney will call an expert as a witness at trial. Instead, this disclosure is a required statement that the expert might be called as a witness at trial.

When the attorney makes this disclosure, she changes the status of the expert.\textsuperscript{151} Before the disclosure, the expert ordinarily was a consultant\textsuperscript{152} to the attorney who was, absent extraordinary circumstances, a person about whom the other party had no right to demand information through discovery. Absent extraordinary circumstances, the attorney can prevent her opponent from acquiring information about the consultant expert simply by refraining from disclosing her as a person who might testify at trial.\textsuperscript{153} Once she discloses the expert as a possible trial witness, however, she has declared that the expert is no longer merely an aide to one of the

\textsuperscript{148.} A Rule 26(a)(2)(A) disclosure of the identity of a person who may present expert opinion testimony does not require an attorney to use the witness at trial. As the discussion throughout this article suggests, sometimes an attorney discloses an expert as a possible trial witness, but later decides not to introduce her testimony at trial. \textit{See, e.g., In re Hidden Lake Ltd. P’ship,} 247 B.R. 722, 724 (Bankr. S.D. Ohio 2000); \textit{Brooke Inns, Inc. v. S \& R Hi-Fi and TV}, 618 N.E.2d 734, 740 (Ill. App. Ct. 1993).

Rule 26(a)(2)(A) requires disclosure of all persons who “may” present expert testimony at trial, not all persons who “will” present expert testimony at trial. \textit{See Fed. R. Civ. P. 26(a)(2)(A).} Furthermore, a different provision of Rule 26, which outlines disclosures that must be made shortly before trial, does require attorneys to separately list the witnesses “whom the party expects to present and those whom the party may call if the need arises.” \textit{Fed. R. Civ. P. 26(a)(3)(A).} The existence of this separate provision of Rule 26 indicates that a party is not required to ultimately call all experts it identified as possible trial witnesses under Rule 26(a)(2)(A), because this separate pretrial witness list requirement would be superfluous with regard to expert witnesses if a party was required to call all previously disclosed expert witnesses.

\textsuperscript{149.} \textit{Fed. R. Civ. P. 26(a)(2)(A)} (emphasis added).

\textsuperscript{150.} \textit{See Fed. R. Evid.} 702, 703, 705.

\textsuperscript{151.} \textit{See Commerce \& Indus. Ins. Co. v. Grinnell Corp.,} Nos. CIV.A.97-0775, 97-0803, 1999 WL 731410, at *2 (E.D. La. Sept. 20, 1999) (distinguishing a prior case where the parties had not exchanged witness lists, thereby suggesting that disclosure of an expert is a critical event that changes the status of an expert); \textit{House,} 168 F.R.D. at 246 n.7 (holding that “whenever” an attorney designates an expert under the pre-1993 version of Rule 26, the court should no longer treat the expert as an undisclosed consultant); \textit{cf. Williamson v. Super. Ct.,} 582 P.2d 126, 130 (Cal. 1978) (observing that “the courts agree that the initial status of the expert as a consultant changes once the expert becomes a designated prospective witness”); \textit{Lunghi v. Clark Equip. Co.,} 200 Cal. Rptr. 387, 389 (Ct. App. 1984) (in a state case, “after one party has notified the other that the expert is likely to be called at trial[,] work product is no longer applicable.”); \textit{White v. Vanderbilt Univ.,} 21 S.W.3d 215, 224 (Tenn. Ct. App. 1999) (“The designation of these experts as testifying witnesses, even if that designation is subsequently withdrawn, takes opposing party's demand to depose and use the expert at trial out of the requirements of Tenn. R. Civ. P. 26.02(4)(B).”).

\textsuperscript{152.} \textit{See supra} notes 23-25 and accompanying text.

\textsuperscript{153.} \textit{See supra} notes 26-31 and accompanying text.
attorneys. By disclosing the expert as a possible trial witness under Rule 702 of the Federal Rules of Evidence, the attorney is advising the other parties that the expert "has scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." In other words, the attorney's disclosure of the expert as a possible trial witness implicitly and inherently declares that the expert is a person who can help the jury determine the


Before 2000, Rule 702 provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. . . ." Fed. R. Evid. 702, 28 U.S.C. App.—Rules of Evid. (1994) (amended 2000); see also Unif. R. Evid. 702; Easton, supra note 22, at 661, n.49 (citing state law provisions).

In 2000, amendments to the federal rule added provisions stating that an expert's testimony is admissible only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702; see H.R. Doc. No. 106-225, at 20 (2000). These additions incorporated, to some extent, the Supreme Court's holdings regarding the parameters of acceptable expert testimony in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). See Fed. R. Evid. 702 advisory committee's note (2000); Catherine E. Brixen & Christine E. Meis, Codifying the "Daubert Trilogy": The Amendment to Federal Rule of Evidence 702, 40 Jurimetrics J. 527, 529 (2000).

155. Put still another way, when an attorney discloses a retained witness as one who might present expert testimony at trial, she is divulging that, while acting on behalf of the party she represents, she believes that the witness had the credentials to reach opinions that might be helpful to the jury. If the attorney did not believe this when she first retained the expert, she would not have retained her and, presumably, spent her client's funds to educate her on the facts of the case, see infra notes 206-11, 213-14 328-29 and accompanying text. If the attorney did not still believe this when she disclosed her as a potential trial witness, she would not have identified her as a possible trial witness.

This admission is not "binding" in the sense of a binding judicial admission that a party cannot withdraw. The attorney or the party she represents may later change their minds about the expert's qualifications to render opinion testimony as an expert. If an opposing party offers the opinions of the expert at trial, the attorney or party who originally retained the expert may challenge the expert's qualifications. See infra notes 313-14 and accompanying text. In considering such a challenge, however, the court should factor in the attorney's previous implicit admission, in the form of the expert witness disclosure, that the expert was qualified. In addition, if the court admits the expert's opinion, it should also admit evidence indicating that the expert was initially retained by the party who now opposes her testimony. See infra note 311 and accompanying text. Although explaining away the previous implicit admission of the expert's qualifications will be difficult for the originally retaining party, particularly when the expert was selected by the attorney (who, if still representing the client at trial might be limited in her ability to present testimony, see Model Rule 3.7), this is appropriate. See infra notes 365-68 and accompanying text.

Also, an attorney's disclosure of an expert as a possible trial witness should not be enough, standing alone, to make that expert available as a witness to parties in other cases. See Kirk v. Raymark Indus., Inc., 61 F.3d 147, 163-64 (3d Cir. 1995). Under the Federal Rules of Evidence, an admission is "a statement by a person authorized by the party to make a statement concerning the subject or . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(C) - (D). An attorney who represents a party in a given case can presumably make statements that are binding against her client in that case, including the implied statement that an expert is qualified to speak about the issues in that case, because she is acting within her authority when dealing with that case. Such a statement does not constitute an admission in a different case, because the attorney is not authorized to speak on behalf of the client in the other case. Furthermore, an attor-
truth at trial on one or more important factual issues, not just a consultant to one of the attorneys.¹⁵⁶

Once the expert is declared to be a potentially valuable source of information, the jury should be allowed to consider the potentially valuable information she can provide, even if one of the attorneys decides that she is no longer very enthralled with the tenor of that information.¹⁵⁷ At a minimum, an attorney seeking to foreclose from the jury a source of information that she herself previously declared to be potentially valuable¹⁵⁸ should be compelled to point to some provision of the Federal Rules of Civil Procedure or other law that allows her to do so, as Rule 402 of the Federal Rules of Evidence requires.¹⁵⁹ There is no such provision. Instead, Rule 26 contains language that supports the conclusion that a party's de-disclosure does not place an expert outside the scope of discovery. Rule 26(b)(4)(a) provides, "A party may depose any person who has been identified as an expert whose opinions may be presented at trial."¹⁶⁰ If the attorney who previously disclosed the expert as a possible trial witness had the right under the Rules to negate that disclosure and return the expert to the status of a consultant who cannot be deposed by opposing counsel, this Rule should say something akin to "A party may depose any person who is currently identified as an expert whose opinions may be presented at trial." Under the language that was chosen, even after the retaining attorney attempts to de-disclose the expert, the expert

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¹⁵⁶ See House, 168 F.R.D. at 245 ("[O]nce an expert is designated, the expert is recognized as presenting part of the common body of discoverable, and generally admissible, information and testimony available to all parties.").

¹⁵⁷ On a policy level, the same result should be reached even in those states that have not adopted disclosure and discovery rules that track the 1993 changes to Rule 26 of the Federal Rules of Civil Procedure. See supra note 36. In many such jurisdictions, some provision of law, be it the state discovery rules, local rules, or an order of the court, produces a process whereby an attorney discloses the identity of persons who may present expert testimony at trial. See supra note 34. Once an attorney makes such an identification, she is declaring that the person identified is a valuable source of information whose testimony might help the jury reach the correct result on a disputed issue of fact. Once this declaration is made, a system that values the search for truth should be open to the possibility that the opposing party may wish to present this expert's testimony.

¹⁵⁸ Of course, expert testimony must meet certain requirements to be admissible under the Federal Rules of Evidence. See Fed. R. Evid. 702. An attorney who is resisting the admission of Red Rover expert testimony might be able to point to defects in that testimony that have nothing to do with the expert's Red Rover status, such as an absence of qualifications or improper methodology. In response, the opposing attorney would no doubt remind the court that this attorney initially suggested that the expert and her methodology were valid, by disclosing her as a possible trial witness. While this argument will not necessarily carry the day, it will presumably be at least somewhat persuasive to a judge who is faced with a difficult decision about whether to exclude expert testimony.

¹⁵⁹ Rule 402 would permit exclusion of relevant evidence if mandated "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Fed. R. Evid. 402.

is still a "person who has been identified as an expert whose opinions may be presented at trial." 161

I do not mean to suggest that those who drafted the current expert witness provisions of Rule 26 explicitly considered the dynamics presented by Red Rover experts. To the contrary, it seems reasonable to assume that the expert provisions of Rule 26 were drafted and amended to deal primarily162 with the more typical circumstance of assisting an opposing attorney who is preparing to cross-examine an expert who is retained, disclosed, and then called as a trial witness by the same attorney.163 Nonetheless, in the absence of a provision in Rule 26 or another rule specifically outlining procedures for more unusual situations,164 the text of the rule should control.165 Attorneys and parties should be permitted to rely upon the actual language in the Rules of Civil Procedure, and courts should apply that language in resolving disputes among par-

161. Id. (emphasis added).

With regard to work product revealed by a retaining attorney to a disclosed expert, one might, at first glance, think that the Rule 26(b)(4)(A) deposition of a disclosed expert could not cover Rule 26(b)(3) work product. The provisions of Rule 26(b)(3) protecting work product from discovery, however, are in the language of Rule 26(b)(3), "[s]ubject to the provisions of subdivision (b)(4) of this rule." FED. R. CIV. P. 26(b)(3). Therefore, many, though not all, courts have correctly recognized that the deposition of a disclosed expert can cover work product revealed by a retaining attorney to an expert. See supra notes 135-46 and accompanying text.

162. One cannot say that the drafters of the rule thought only of experts who were retained, disclosed, and then called as trial witnesses by the same parties, however, because the text of Rule 26 includes provisions suggesting that its drafters considered other situations. For example, Rule 26(a)(2)(B)'s expert witness report requirement applies "to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." FED. R. CIV. P. 26(a)(2)(B). This restriction suggests that its drafters intentionally excluded some other experts, including experts who are neither retained nor employed by a party, see supra note 22, and experts who are employed by a party, but whose duties do not regularly involve giving expert testimony. Also, as outlined in more detail elsewhere, see supra notes 27-29 and accompanying text, Rule 26(b)(4)(B) contains provisions applicable to mere consultant experts. In addition, the Advisory Committee comments to the 1993 version of Rule 26 adopting the expert report requirement contain a reference to treating physicians who serve as expert witnesses, thereby documenting another category of experts considered by the drafters. FED. R. CIV. P. 26(a)(2) advisory committee's note (1993).

163. The Advisory Committee notes accompanying the 1993 adoption of the current expert witness report requirement state, "This paragraph imposes an additional duty to disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." FED. R. CIV. P. 26(a)(2) advisory committee's note (1993).

Although there is no reference in the Advisory Committee notes that explicitly covers experts retained by the opposing party, it is clear that the Advisory Committee was aware of, and not opposed to, the possibility that a witness listed as a trial witness by one party might be called by the other party. See FED. R. CIV. P. 26(a)(3) advisory committee's note (1993) ("Listing a witness does not obligate the party to secure the attendance of the person at trial, but should preclude the party from objecting if the person is called to testify by another party who did not list the person as a witness.").

164. See supra note 162.

165. According to Rule 1, the Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature . . . , with the exceptions stated in Rule 81." FED. R. CIV. P. 1.
The text of Rule 26 gives parties the authority to depose "any person who has been identified as an expert,"\textsuperscript{166} and nothing in the rule provides for de-disclosure of an expert.

Furthermore, when opposing counsel seeks to either depose a Red Rover expert or present her testimony at trial, the Red Rover is still "an expert whose opinions may be presented at trial."\textsuperscript{168} While it is true that in some cases the retaining attorney may wish to waive any opportunity to present the expert's opinions at trial by de-disclosing,\textsuperscript{169} the opposing attorney's efforts to depose the expert or offer her testimony mean that there is a very real possibility that the opinions will still be presented at trial, albeit by an attorney other than the one who initially retained the expert. In the instance of a previously undeposed expert who has been de-disclosed by the retaining attorney, the opposing counsel ordinarily would have no reason to depose the expert if she did not think that the deposition might lead to opinion\textsuperscript{170} testimony that she might want to introduce at trial. Of course, if the expert has already been deposed and the court is considering an effort by opposing counsel to introduce the expert's testimony, either live or through use of the deposition transcript

\textsuperscript{166} Rule 1 provides that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. As outlined elsewhere, I believe allowing parties to depose, and introduce evidence from and about, experts designated by their opponents will lead to more just results by giving jurors access to potentially valuable evidence, see infra part V.A, and will shorten litigation and trials and lessen litigation expenses by eliminating the need for parties to obtain their own experts when their opponents' experts have reached conclusions consistent with their positions, see infra notes 238-49 and accompanying text. Red Rover opponents would presumably argue that allowing a party to depose and introduce the testimony of experts deposed by their opponents would lead to unjust results, by allowing that party to benefit from its opponents' investment of an expert. See infra part III.B. Although I would contest that a result dependent upon hiding a potentially valuable witness from the jury is a more "just" result, I would concede that reasonable minds could differ regarding what decision regarding Red Rover issues would "secure the just, speedy, and inexpensive determination" of actions involving these issues. FED. R. CIV. P. 1. Therefore, as is commonly the case, Rule 1 does little to resolve these issues, because justice, speed, and inexpensiveness, like beauty, are in the eye of the beholder. Therefore, one is again left with the text of the Rule, even if that text was not written with the specific controversy in mind.

\textsuperscript{167} FED. R. CIV. P. 26(b)(4)(A) (emphasis added).

\textsuperscript{168} See FED. R. CIV. P. 26(b)(4)(A).

\textsuperscript{169} See supra notes 62-70 and accompanying text.

\textsuperscript{170} It is possible, of course, that there might be reasons why an opposing attorney would seek to depose an expert other than exploring whether the expert held opinions that the opposing attorney might want to introduce at trial. For example, the opposing attorney might want to explore whether the expert made factual observations that could be introduced at trial or otherwise used by the opposing attorney to build her case. See infra note 369. Even if some motivation other than exploring the possibility of potentially helpful opinions was the primary motivation for taking a deposition, however, it seems likely that the opposing attorney would also wish to inquire into the expert's opinions, in case some of them might also be of assistance in building her case. Even in the unlikely event that exploring the expert's opinions was not to any degree a reason for conducting the deposition, the deposition might lead to the discovery of opinions that the attorney might want to use at trial. Therefore, it is difficult to imagine a situation where an opposing attorney deposed a de-disclosed expert where there is not some possibility that the expert's opinions might be presented at trial.
or videotape, there is by definition a possibility that the expert’s opinions may be presented at trial. In either of these circumstances, the fact that the attorney who originally retained and disclosed the expert no longer will attempt to present that expert’s opinions at trial does not extinguish the possibility that those opinions may nonetheless be presented at trial.

De-disclosure is a futile gesture that should be given no effect under the Rules. Because an attorney who initially discloses the expert is not precluded by that disclosure from deciding not to use that expert at trial, there is no need for the attorney to de-disclose. If she tries to do so, however, the court should recognize that a de-disclosure is nothing more than the attorney’s declaration that she is no longer interested in presenting the expert’s opinions during the trial. The de-disclosing attorney cannot declare that the expert’s opinions will not be presented at trial, because the other parties might want to present those opinions.

B. FEAR OF FREELOADING

Despite the absence of a provision allowing de-disclosure, several courts have reached decisions that effectively give retaining attorneys the power to prevent their opponents from acquiring or using Red Rover testimony. Often these courts point to a belief that it would be unfair to the party whose attorney originally retained the expert to lose control over that expert and have her opinions on the merits used against that party. When they expound upon the alleged genesis of this unfair-
ness, these courts often articulate a belief that a party should not be able to take advantage of the investments of money, time, and other resources made by the retaining attorney and her client. These decisions fail to recognize the critical distinction between experts who are consultants to one party and experts who may be trial witnesses, overvalue the investment made by the expert’s original employer, and undervalue fairness to the opposing party.

1. Blurring the Distinction Between Consultants and Disclosed Witnesses

An expert who is retained by an attorney and at some point disclosed as a possible trial witness serves two conflicting roles. On the one hand, she works closely with the attorney who retains her as member of her trial team. Indeed, at the outset of her work with an attorney who initially retains her as a consultant, she serves only this role. However, if at some point (either immediately upon the attorney’s retention of her or, more commonly, after the passage of some time following her initial retention as a consultant) the attorney who retained her discloses her as a possible trial witness, she assumes a second role. As a possible witness, she has the obligation, if called upon, to tell the truth, even if the truth on a particular matter, including one of her opinions, conflicts with the position taken by the attorney who retained her.

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178. See Durlinger, 727 F.2d at 891 (emphasizing that expert “was paid by plaintiffs for his services”); Ferguson v. Michael Foods, Inc., 189 F.R.D. 408, 409 (D. Minn. 1999); Dayton-Phoenix Group, Inc., 1997 WL 1764760, at *1 (asserting that “the purpose of Rule 26(b)(4)(B) is to promote fairness by preventing one party from obtaining access to the other party’s trial preparation”); House, 168 F.R.D. at 241 (reviewing a prior decision that referenced the “unfairness of allowing an opposing party to benefit from a party’s effort and expense incurred in preparing its case”); In re Vestavia, 105 B.R. at 684 (“Here there is something more fundamental. A debtor unwilling to expend available funds to obtain its own expert witness seeks to use the expert of an opposing party.”); Williamson, 582 P.2d at 132 (Richardson, J., dissenting).

179. Applegate, supra note 99, at 295 (“The function of the expert witness is both the most neutral and the most partisan.”); Easton, supra note 22, at 656-57.

180. See infra notes 323-29 and accompanying text.

181. See supra notes 21-25 and accompanying text.

182. See supra note 25.

183. See supra notes 21-34 and accompanying text.


185. See Kirk v. Raymark Indus., Inc., 61 F.3d 147, 164 (3d Cir. 1995) (“In theory, despite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise.”), quoted in In re Hidden Lake Ltd. P’ship, 247 B.R. 722, 724 (Bankr. S.D. Ohio 2000); Great Lakes
A court that must decide whether to require or allow an expert to testify at a deposition or trial against the wishes of the attorney who initially retained her must determine which of these two roles is paramount. The courts that give the original retaining attorney the power to prevent a disclosed expert from being deposed or from testifying at trial often ground their decisions in a stated belief that a party should be able to control the expert that she originally retained. By basing their decisions on Red Rover controversies upon an alleged right of a party to control forever whether an expert will testify, these courts have determined that the expert's role as a member of a trial team is more important than her role as a witness who can help the jury resolve disputed issues of fact with truthful testimony based on her expertise.

In my opinion, this is the wrong resolution of the competing interests between the jury and the party who retained the expert, for disclosed witnesses. At the same time, it is often the correct resolution of these interests for experts who have not been disclosed as potential trial witnesses.

The same competing interests are at stake when the expert is

Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334, 338 (N.D. Ill. 1990) ("Experts are not advocates in the litigation sense but sources of information and opinions. Their role is to assist parties, and if they testify, to help the trier of fact understand the relevant evidence."); Taylor v. Kohli, 642 N.E.2d 467, 469 (Ill. 1994) ("Excepting for fraud, the employer can influence but cannot control the expert's thought processes."); LUBET, supra note 46, at 177 ("An expert is not the client's 'champion,' pledged faithfully to seek the client's goals. Indeed, in many ways the expert's role is precisely the opposite. She must remain independent of the client and detached, if not wholly aloof, from the client's goals.") (citing ABA Comm. On Prof'l Conduct, Formal Op. 97-407 (1997)).

An expert witness's obligation to testify only to opinions that she truly believes distinguishes the expert witness from an attorney, who is allowed to take positions in court that she personally does not believe, as long as there is a good faith basis for taking those positions and as long as the attorney does not knowingly make a false statement of fact or knowingly offer false evidence. See Great Lakes Dredge & Dock Co., 734 F. Supp. at 338 (citing Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 281 (S.D. Ohio 1988)) ("The attorney stands in a higher position of trust with its related fiduciary duties to the client than does an expert."); Id. ("Experts perform very different functions in litigation than do attorneys."); MODEL RULES OF PROF'L CONDUCT R. 3.1, 3.3 (2002); ABA Formal Op. 97-407, supra note 132, quoted in LUBET, supra note 46, at 177 n.8 ("'A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert.'"); Easton, supra note 21, at 598-601 (discussing differences between an attorney's and an expert witness's duties regarding the truth); Stephen D. Easton, The Truth About Ethics and Ethics About the Truth: An Open Letter to Trial Attorneys, 33 GONZ. L. REV. 463, 465-66 (1997-98) (discussing the rather low truth standard for attorneys).


Courts explaining the policy reasons for placing undisclosed consultants outside the scope of discovery have noted one or more of the following benefits: relieving attorneys of the concern that they will create discoverable evidence by using consultants; preventing other parties from benefiting from a party's expenditure of resources on consultants; and expanding the pool of available consultants to include those who do not wish to testify at trial. Id.; see Commerce & Indus. Ins. Co. v. Grinnell Corp., Nos. CIV.A.97-0775, 97-0803, 1999 WL 731410, at *1 (E.D. La. Sept. 20, 1999); Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 449 (S.D.N.Y. 1997); County of L.A. v. Super. Ct., 271 Cal. Rptr. 698, 702 (Cal. Ct. App. 1999). Courts that have allowed parties to return experts to consultant status by
serving only as a consultant to the attorney who retained her, because this undisclosed expert is nonetheless a potential source of valuable information for the jurors. We could adopt civil procedure rules that required an attorney to disclose and allow discovery of all persons she consulted, if we believed that the jury's interest in receiving the expert's knowledge exceeded the party's interest in being able to consult an expert without creating discoverable evidence for the opponent. We have not done so, though. Instead, Rule 26 allows an attorney to keep the fact that she consulted with an expert a secret from her opponent and therefore from the jury, absent exceptional circumstances. This is entirely reasonable because an attorney should have the opportunity to consult experts without automatically creating disclosable and discoverable evidence that could be used by the opposing attorney. As long as the expert remains only a consultant, her loyalty to the attorney employing and paying her should trump her potential value as a witness, absent unusual circumstances. Under this well-entrenched system, all that the retaining attorney ordinarily has to do to prevent the expert from testifying at a deposition or trial is simply to retain her as a consultant and refrain from disclosing her as a potential trial witness.

As soon as the attorney changes the expert's status from consultant to potential trial witness by disclosing her identity, however, there is a dif-

dischiding them have typically cited one or more of these three justifications, plus one other, preventing prejudice to the party who originally retained the expert. Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 672 (E.D. Wash. 2000); Dayton-Phoenix Group, Inc. v. Gen. Motors Corp., No. C-3-95-480, 1997 WL 1764760, at *1 (S.D. Ohio Feb. 19, 1997) (discussing “fairness”); In re Vestavia, 105 B.R. 680, 682 (Bankr. M.D. Fla. 1989); cf. Agron, 176 F.R.D. at 453 (recognizing the concern that experts may be reluctant to consult if opposing counsel can force them to testify); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 241 (N.D. Iowa 1996) (reviewing earlier decisions).

Each of the first three purposes can be accomplished by a system that allows Red Rover testimony by disclosed experts, because a party ordinarily can prevent Red Rover discovery and testimony simply by not disclosing a consultant as a testifying expert. See supra notes 26-31 and accompanying text. The final purpose, preventing prejudice, does not justify excluding Red Rover testimony or evidence about the expert's original retention. See infra Part III.C.2.

188. Cf. White, 21 S.W.3d at 224-25 (observing that insulating undisclosed consultants from discovery “runs contrary to the broad policy favoring the discovery of non-privileged information”).


190. See House, 168 F.R.D. at 245 (“Parties should be encouraged to consult experts to formulate their own cases, to discard those experts for any reason, and to place them beyond the reach of an opposing party, if they have never indicated an intention to use the expert at trial.”); White, 21 S.W.3d at 225 (“Without this protection, parties would be reluctant to consult experts because they would be forced to live or die based on the unknown opinion of the expert consulted.”); Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 559 (Tex. 1990) (“The policy behind the consulting expert privilege is to encourage parties to seek expert advice in evaluating their case and to prevent a party from receiving undue benefit from an adversary's efforts and diligence.”) (citing Werner v. Miller, 579 S.W.2d 455, 454 (Tex. 1979)).

191. See supra note 29 and accompanying text.

192. Absent extraordinary circumstances, because the opposing party will not even learn the identity of an unidentified consultant, that party will be in no realistic position to even try to seek out the expert's opinions. See supra notes 30-31 and accompanying text.
different resolution of the conflict between the interests of the jury and the interests of the retaining attorney, as there should be. Under the provisions of Rule 26, once a party discloses the expert as a person who may be used to present expert opinion testimony at trial, the other party and, therefore, ultimately the jury, is entitled to receive information about her through mandatory disclosures, depositions, and other discovery devices.

Fortunately, Rule 26's resolution of the conflict between an expert's loyalty to her original employer and her value to the jury is the correct one, for disclosed experts, just as Rule 26's different resolution of this conflict for undisclosed consultants is the correct one for that different set of circumstances. Once the attorney discloses an expert as a possible trial witness, there is a shift in the relative weights of the interest of the retaining attorney and the interest of the jury. If the system aspires to find the truth at trial, the jury must be allowed to hear from all persons who have valuable information to present, absent a narrowly tailored

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193. See House, 168 F.R.D. at 246 n.7 (determining that “whenever” an attorney designates an expert under the pre-1993 version of Rule 26, the court should no longer treat the expert as an undisclosed expert, but should consider whether to allow deposition and trial testimony from the expert); cf. W.R. Grace & Co. v. Zotos Int'l, Inc., No. 98-CV-8385(F), 2000 WL 1843258, at *4 (W.D.N.Y. Nov. 2, 2000) (rejecting the argument that an expert witness should be treated as “part of the defense ‘team’”).


195. See supra note 145.


197. See Fed. R. Civ. P. 26(b)(4)(A); House, 168 F.R.D. at 247 (although a party generally does not have the right to depose another party's “never-designated” consultants, it can depose disclosed experts); supra note 39 and accompanying text.

198. See Fed. R. Civ. P. 26(a)(5); supra note 40.

199. Because an expert who has been identified by one of the parties is a potentially valuable source of information for jurors who must resolve factual issues, courts should allow Red Rover depositions and trial testimony even in jurisdictions that do not have disclosure and discovery procedures tracking the post-1993 version of Rule 26, see supra note 36, unless these jurisdictions have discovery rules or other provisions of law that explicitly prevent Red Rover depositions or trial testimony, see supra notes 101, 159 and accompanying text.

200. See supra notes 187-92 and accompanying text.

201. See White v. Vanderbilt Univ., 21 S.W.3d 215, 2255 (Tenn. Ct. App. 1999) (“Most of the reasons in favor of shielding a consulting expert from discovery become attenuated once a party identifies or designates an expert as a witness expected to testify at trial.”).

202. Dean Wigmore outlined the classic view:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being many derogations from a positive general rule.

JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2192, at 70 (John T. McNaughton rev. 1961); see also JACk B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S FEDERAL EVIDENCE § 501.03[2][a] (Joseph M. McLaughlin, 2d ed., 2000) (“[T]here is a general duty to give testimony, because the public has a right to everyone's evidence.”).

In the context of expert witnesses, one court observed:

As a general proposition, no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is
and strictly construed\textsuperscript{203} privilege.\textsuperscript{204} The Federal Rules of Evidence demand no less.\textsuperscript{205} Therefore, it is not surprising that the Federal Rules of Civil Procedure contain no provision allowing a party to render a previously disclosed expert ineligible to testify by de-disclosing.

entitled to restrict an opponent’s access to a witness, however partial or important to him, by insisting upon some notion of allegiance. [Citations omitted.] Even an expert whose knowledge has been purchased cannot be silenced by the party who is paying him on that ground alone. Unless impeded by privilege an adversary may inquire, in advance of trial, by any lawful manner to learn what any witness knows . . . . Doe v. Eli Lilly & Co., Inc. 99 F.R.D. 126, 128 (D.D.C. 1983), cited in Donako v. Rowe, 475 N.W.2d 30, 36 (Mich. 1991).

203. Courts and commentators alike have emphasized that privileges and other doctrines that permit a party to suppress evidence must be narrowly tailored and strictly construed. See, e.g., NLRB v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965) (“The [attorney-client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.”), quoting WIGMORE, supra note 202, § 2292; Edward J. Imwinkelried, The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection, 68 WASH. U. L.Q. 19, 20 (1990); Richard L. Marcus, The Perils of Privilege: Waiver and the Litigator, 84 MICH. L. REV. 1605, 1605 (1986) (“Because the ‘sacred’ privileges contravene the maxim that the law has a right to every person’s evidence, American law has set its head against them since the mid-nineteenth century.”); cf. United States v. Nixon, 418 U.S. 683, 710 (1974) (privileges are “exceptions to the demand for every man’s evidence [that] are not lightly created nor expansively construed”).

204. At least in the majority of jurisdictions, there is no privilege protecting retained experts from being called as witnesses. See Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 314 (Miss. 1992) (“[N]o privilege exists to bar Marcosky’s testimony. Except in those instances where an expert was originally retained in another capacity, a majority of jurisdictions have held that the rules of privilege do not preclude calling an expert witness originally retained by the adverse party.”)

Those who value the relationship between an expert and the attorney and party retaining her more than I, see infra notes 407-08 and accompanying text, might suggest that the courts should establish an expert-attorney or expert-party privilege. Such a proposal is not likely to be implemented, because the courts resist new privileges, which inherently interfere with the ascertainment of truth at trial. See 3 WEINSTEIN, supra note 201, § 501.03[2][a] (“Courts are constrained not to recognize any privilege unless the need for it is clear and convincing.”); 8 WIGMORE, supra note 201, § 2192, at 73 (“[A]ll privileges of exemption from this duty [of all persons to give testimony] are exceptional, and are therefore to be discountenanced.”). Although there may be some value in the relationship between a disclosed expert and her employer, this relationship does not have the same type of intrinsic societal value as the relationships that are covered by the traditional common law privileges, such as that between doctor and patient, see id., ch. 86, wife and husband, see id., ch. 83; attorney and client, see id., ch. 82, and priest and penitent, see id., ch. 87. Even if the courts or other authorities established a privilege for communications between an expert and the attorney and party who retained her, that privilege would be trumped by the duty to disclose all matters considered by the expert, once the attorney disclosed the expert as a possible trial witness. Perhaps this is why the law has developed in its current fashion, giving work product protection to communications between undisclosed consultants and attorneys, see supra notes 124-25 and accompanying text, but ending this protection when the expert is disclosed as a possible trial witness, see supra notes 126-41 and accompanying text.

205. See supra note 101.
2. **Elevating Protection of a Party's Investment over the Search for the Truth**

Nonetheless, several courts have allowed parties to do just that, by holding that a party's investment in retaining, paying, and working with an expert\(^\text{206}\) justifies allowing that party to unilaterally decide that the expert will not testify.\(^\text{207}\) Although these courts have, in my view, over-emphasized the importance of the initially retaining party's financial investment in an expert witness, this investment is often substantial. Unlike a fact witness, a retained expert ordinarily does not become familiar with the facts of a particular case unless the party that retained her pays her to review those facts, which are usually provided by the retaining attorney.\(^\text{208}\) Therefore, by the time that the retaining attorney discloses the expert as a possible trial witness, the retaining party ordinarily has a substantial investment in that expert.

At the even later date when the opposing party seeks to use that expert as a Red Rover, the court must resolve the conflict between protecting the initial retaining party's investment in the expert and the jury's interest in receiving potentially valuable testimony from the Red Rover expert. Although it is not surprising that some courts instinctively attempt to prevent the opposing party from benefiting from this investment,\(^\text{209}\) this in-

\(^{206}\) See FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1048 (E.D. Cal. 2002) (referring to the "strong policy against permitting a non-diligent party from free-riding off the opponent's industry and diligence"); Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 672 (E.D. Wash. 2000) (asserting that "expert witnesses once retained remain the witness of the retaining party"); In re Vestavia Assocs., 105 B.R. 680 (Bankr. M.D. Fla. 1989) ("It is within Centrust's preogative to withdraw the witness . . . ."); White v. Vanderbilt Univ., 21 S.W.3d 215, 222 (Tenn. Ct. App. 2000) (quoting the trial court's view that the original retaining party "has the right" to render the expert ineligible to testify by de-disclosing); Axelson, Inc. v. McLlhany, 755 S.W.2d 170, 176 (Tex. App.—Amarillo 1988, orig. proceeding) ("Acting in the best interest of his client, the attorney must be free to make whatever use of an expert's opinion that will be most likely to produce good results for his client."); rev'd, Tom L. Scott, Inc. v. McLlhany, 798 S.W.2d 556 (Tex. 1990), Axelson, Inc. v. McLlhany, 798 S.W.2d 550, 552 n.3 (Tex. 1990) (noting that the Scott decision rendered the same day deal with issues regarding discovery of redesignated experts); cf. Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996) (making reference to the retaining party as the "master[ ] of the expert").

\(^{207}\) See supra notes 81-86 and accompanying text.

\(^{208}\) See infra notes 322-28 and accompanying text.

\(^{209}\) A similar instinctive effort to thwart an attorney from taking advantage of her opponent's efforts is suggested in the U.S. Supreme Court's classic attorney work product case, Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the Supreme Court refused to require an attorney to provide written or oral statements outlining the attorney's interviews with fact witnesses, though it suggested that written statements provided by witnesses might be discoverable in some cases. The Court noted that the attorney seeking the statements "frankly admit[ted] that he want[ed] the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing." Id. at 513. In holding that this was an "insufficient" justification for requiring disclosure of statements, id., the Court implied that, at least in some circumstances, one attorney should not be permitted to profit from her opponent's efforts.

In application, this concern apparently has little power, at least when the opposing concern involves the jury's right to receive potentially valuable evidence. Courts readily allow parties to profit from the efforts of their opponents who acquire information through discovery and investigation. See infra note 212 and accompanying text.
distinct should not overrule the more fundamental value of making a trial an effective mechanism for discovering the truth.\textsuperscript{210} In other contexts, courts do not permit a party's investment in potential evidence to trump the systemic interest in presenting evidence to the jury. For example, an attorney who asks a question at a deposition that results in an answer that is favorable to her opponent cannot validly object to a reiteration of that testimony at trial by saying "my opponent never would have thought of that question if I had not asked it," even if this is true. Similarly, assuming the standard interrogatory asking for the identity of each potential fact witness, a party who has conducted a substantial and costly factual investigation must disclose the name of a potential fact witness unknown to that party's opponent because the courts will not tolerate a claim that the investigating party "owns" the fact witness\textsuperscript{211} due to his investment in an investigation that identified a person who, absent that investigation, would not have been available as a witness for either party.\textsuperscript{212} In contrast, the decisions that allow a party to prevent the testimony of an expert due to that party's investment in that expert inappropriately allow a party to "own" a witness.\textsuperscript{213}

Even \textit{Hickman} does not allow one party to keep a potential witness off the stand. Instead, the witnesses interviewed by the attorney in \textit{Hickman} were apparently identified and available to be called to testify. \textit{Id.} at 498. In fact, the \textit{Hickman} Court indicated that production of statements "might be justified where the witnesses are no longer available or can be reached only with difficulty." \textit{Id.} at 511. Therefore, while \textit{Hickman} stands for the proposition that one attorney is not necessarily entitled to inquire into an opposing attorney's thought processes in discovery, it does not elevate concerns for protection of one party's investment over all other concerns. To the contrary, it seems to suggest that presenting available information to the jury would trump even attorney work product concerns.

\textsuperscript{210} See \textit{supra} notes 99-100, 155-56, 202-03, \textit{infra} notes 219-21, 310 and accompanying text.

\textsuperscript{211} Cogdell v. Brown, 531 A.2d 1379, 1381 (N.J. Super. Ct. Law Div. 1987) ("No party to litigation has anything resembling a proprietary right to any witness's evidence.").


\textsuperscript{213} See \textit{United States v. Meyer}, 398 F.2d 66, 76 (9th Cir. 1968) ("It would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial."); Doe v. Eli Lilly & Co., Inc. 99 F.R.D. 126, 128 (D.D.C. 1983) (absent a privilege, a party should not be permitted to prohibit testimony from its expert solely because it originally purchased the expert's knowledge); Norfin, Inc. v. Int'l Bus. Machs. Corp., 74 F.R.D. 529, 533 (D. Colo. 1977), \textit{quoting} Seven-Up Bottling Co. v. United States, 39 F.R.D. 1, 2 (D. Colo. 1966) ("It would...appear that the underlying factor which causes the courts to treat expert testimony somewhat differently from testimony of other witnesses is that the party has an investment in the witness. Somehow it is believed that he has bought and paid for the witness and the other party should not share in his property. We cannot accept this 'oath helper' approach to discovery. It is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or the most resourceful litigant.").
After all, one should not lose sight of the reason why a party would de-disclose an expert. Assuming that courts are correct in themselves assuming that a party often has a substantial investment of time, money, and other resources in a retained expert at the time the party attempts to de-disclose, that party presumably would not wish to abandon this investment without some powerful countervailing consideration. Often that countervailing consideration is the retaining attorney's belief that the expert's opinions will do more harm than good to the attorney's case. In other words, the retaining attorney will not ordinarily even try to de-

214. See supra note 206.

215. Of course, there are other reasons why an attorney might decide not to call a previously disclosed expert at trial, including the attorney's judgment that the expert will make a poor trial witness, a decision to discontinue paying fees to that witness, or a determination that another expert can handle areas previously assigned to the de-disclosed expert. Regardless of the retaining attorney's motivation for de-disclosure, the opposing attorney might be interested in presenting testimony from that expert, and that testimony might be helpful to the jury in resolving factual disputes.

216. This article concerns cases where one or more of the opinions of an expert retained by one party are in agreement with the positions taken by the opposing party. A slightly different scenario could arise in a smaller number of cases, because sometimes there will be more than two possible answers to a question addressed by experts, even when there is only one correct answer, see infra notes 346-49 and accompanying text.

For example, assume that a homeowner has sued her insurer for failing to reimburse the homeowner for her losses after a fire. Assume further that the insurer has refused to pay because its expert regarding the cause and origin of fires concluded, after her investigation, that the homeowner committed arson by starting a fire in the garage that is attached to the home. In such a case, the critical issue probably will be how and where the fire started. Assume that the plaintiff's first expert on the fire's cause and origin opined in her report and her deposition testimony that the fire started in the master bedroom. Finally, assume further that, for some reason, the plaintiff (or, more likely, the plaintiff's attorney) lost confidence in this expert and hired a second cause and origin investigator, who ultimately concluded that the fire started in the kitchen. At the time of trial, then, the insurer is asserting that the fire started in the garage and the homeowner is asserting that the fire started in the kitchen. Both parties call their current experts to support their positions.

In this scenario, should the insurer be allowed to present the testimony (probably through the deposition transcript) of the plaintiff's first expert, who concluded that the fire started in the master bedroom? Unlike the classic Red Rover testimony that is the subject of this article, this Red Rover opinion is not entirely in agreement with the position of the insurer. In addition to the restrictions that some courts have placed on the use of classic Red Rover testimony, see supra Part II.C, some might suggest that Model Rule 3.3(a)(3) constrains an attorney who would consider making such an offer. Under Model Rule 3.3(a)(3), an attorney may not "offer evidence that the lawyer knows to be false." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2002). Some might suggest that an attorney who believes that a fire started in the garage cannot also believe that the fire started in the master bedroom. On the other hand, one could argue that this is not the type of offer that Model Rule 3.3(a)(3) is designed to address, because the attorney offering the testimony is not attempting to convince the jury that the fire started in the master bedroom, but is instead simply trying to establish that even the homeowner's first expert concluded that it did not start in the kitchen. Such an offer seems analogous to the use of a prior inconsistent statement of a witness during cross-examination, see FED. R. EVID. 613, 801(d)(1)(A); accord UNIF. R. EVID. 613, 801(d)(1)(i), because the attorney conducting the cross-examination is not always contending that the prior statement is entirely correct, but may instead be contending only that the witness's current testimony is incorrect. Also, if the insurer's attorney had been thorough in her deposition of the homeowner's first expert, her deposition questions would have required the expert to testify about why she eliminated every other possible location as the origin of the fire, including the kitchen. To the extent that the first expert opined that the fire did not start in the kitchen, that opinion is consistent with the position taken by the insurer on the issue of whether the fire started in the
disclose her expert witness unless she agrees with the opposing party on one or more important issues.\footnote{217} As discussed more fully below, the fact that an expert has reached opinions contrary to the ones desired by the attorney who retained her is potentially powerful evidence that the opposing party is correct on these issues.\footnote{218} If we truly are interested in a system where the jury is given access to evidence that will assist it in correctly resolving factual disputes, it is difficult to defend the exclusion of powerful evidence,\footnote{219} solely be-

kitchen, even though the initial expert’s opinion about where the fire did start is not consist-
tent with the position taken by the insurer.

Beyond this brief and admittedly incomplete discussion, the interesting issues created by
the use of Red Rover testimony that is not consistent with the positions taken by the
offering party at trial are beyond the reach of this article, though some of this article’s
analysis may be applicable in this situation.

\footnote{217} See Collins v. Wayne Corp., 621 F.2d 777, 781 (5th Cir. 1980) (noting plaintiffs’
assertion that defendant’s de-disclosed expert’s deposition “testimony on the speed of the
bus and the tractor trailer impact was fairly close to the estimates of the plaintiff’s expert”);
House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 239 n.3 (N.D. Iowa 1996) (finding that
the magistrate was probably correct in concluding that the defendants’ expert’s
“opinions must not be favorable to the defendants’ position”); Bailey v. Meister Brau,
Inc., 57 F.R.D. 11, 14 (N.D. Ill. 1972) (noting defendant’s claim that plaintiff’s expert’s
opinion “was allegedly adverse to plaintiff”); Litchen v. Clark Equip. Co., 200 Cal. Rptr.
387, 389 (Cal. Ct. App. 1984) (cataloguing defense design expert’s areas of agreement with
plaintiff’s theories in products liability case); Broward County v. Cento, 611 So. 2d 1339,
1339 (Fla. Ct. App. 1993) (“The [defendant’s] doctor gave his opinion that [plaintiff] had
suffered a permanent injury as a result of the auto accident.”); Gen. Motors Corp. v. Jack-
son, 636 So. 2d 310, 313 (Miss. 1992) (noting that the retaining attorneys’ de-disclosure
came after the expert “presented an opinion similar to that espoused by [the opposing
(delineating area where defendants’ expert agreed with plaintiffs’ theories in a medical
malpractice case).

In another case, one must read between the lines a bit to determine the reason for the
de-disclosure, but the reported facts suggest that the retaining attorney concluded that
the expert had agreed or would agree with the opposing party on one or more critical issues.
See Peterson v. Willie, 81 F.3d 1033, 1036 (11th Cir. 1996) (“Shortly before his scheduled
deposition noticed by defendants and not objected to by Peterson, Dr. Lichtblau reexam-
ined Peterson, without Peterson’s attorneys’ instructions or knowledge. Dr. Lichtblau then
testified at the deposition that, as a result of his second examination, his opinion concern-
ing Peterson’s future placement had changed.”); Lehan v. Ambassa-
dor Programs, Inc., 190 F.R.D. 670, 670 (E.D. Wash. 2000) (“Since emotional distress dam-
ages are not recoverable under the claims brought by Mr. Lehan, Defendant has
represented to the Court that it does not intend to call Dr. Klein as a witness at trial . . . .”);
House, 168 F.R.D. at 238-39 & n.3 (N.D. Iowa 1996) (noting, but discrediting, defendant’s
claim that it de-disclosed because it had moved to disqualify the plaintiff’s expert and be-
cause it initially listed an expert as a witness only to preserve the option of rebutting the
testimony of the plaintiff’s expert, because the plaintiff’s outline of her expert witness’s
testimony was vague). Because the opposing parties in these cases were interested in ob-
taining or using these witness’s testimony, there is at least some suggestion that these op-
posing parties believed that the experts in question might provide testimony that would be
helpful to them.

\footnote{218} See infra Part V.A.

\footnote{219} See Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 450 (S.D.N.Y. 1997) (“One of
the primary concerns of any trial court is the desire for probative information and the
search for truth. Naturally, such a truth-finding mission favors the admission of testimony
by an expert who could assist the trier of fact in determining complex issues.”); House, 168
F.R.D. at 246 (recognizing “the court’s interest in the proper resolution of issues”); cf.
cause one party with ties to the witness does not care for the testimony that witness will present.\textsuperscript{220} Indeed, our justice system generally starts by giving quite short shrift to a party's attempt to object to the testimony of a witness based on the party's ties to a witness,\textsuperscript{223} but it does not stop there. It also prohibits or at least discourages efforts by a party to keep a potential witness from testifying with criminal statutes,\textsuperscript{224} professional responsibility rules,\textsuperscript{225} and court decisions\textsuperscript{226} outlawing payments to a potential witness to keep

\textit{Lehan}, 190 F.R.D. at 672 (reviewing decisions that have reasoned that if an expert “will advance the examined party’s advocacy of the truth of the issue, then pursuit of the truth requires that he be allowed to call that witness”); \textit{White}, 21 S.W.3d at 221 n.6 (noting that the Red Rover expert in question was the lead authority on the subject matter in the case).

220. The fact that the retaining party does not care for the opinions reached by her expert does not, by itself, render those opinions unfairly prejudicial to that party. See \textit{Agron}, 176 F.R.D. at 453; \textit{White}, 21 S.W.3d at 228.\textsuperscript{221}

221. It is no secret that the general public holds the judicial system and the attorneys who inhabit it in fairly low esteem, see Susan Daicoff, \textit{Asking Leopards To Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes}, 11 GEo. J. LEGal ETHICS 547, 547 (1998), in part because non-lawyers believe that lawyers are too willing to win at all costs, even if it requires playing games that hide the truth from jurors. See Albert W. Alschuler, \textit{Explaining the Public Wariness of Juries}, 48 DEPAUL L. REV. 407, 410 (1998) (observing the public perception of “lawyers” adversarial game-playing”); John A. Humbach, \textit{The National Association of Honest Lawyers: An Essay on Honesty, ‘Lawyer Honesty’ and Public Trust in the Legal System}, 20 PACE L. REV. 93, 93 (1999) (“[A] kind of partial-truth advocacy [has emerged], in which the lawyer knowingly distracts attention from the truth and fosters misconceptions in the minds of jurors and others. In the end, lawyers frequently succeed in creating false impressions or discrediting the truth and, as a result, people feel they cannot trust lawyers to be straight.”); Janee Kerper & Gary L. Stuart, \textit{Rambo Bites the Dust: Current Trends in Deposition Ethics}, 22 J. LEGAL PROF. 103, 109 (1998) (“In the legal arena, zealous advocacy has produced verdicts which appear to the public as aberrant or excessive.”); Ralph A. Fine, \textit{Object at Your Own Risk}, 20 ST. BAR BULL., Apr. 1998, at 19, 19 (“Jurors not only believe that the lawyers know the ‘truth,’ but they also recognize that the jury will never hear much of what is critical to their decision.”).

Allowing attorneys to render experts ineligible to testify at trial by the simple expedient of de-disclosing them provides fuel for this criticism. The end result of this maneuver is the hiding of a portion of the available data, i.e., the expert’s testimony, from the jurors. Furthermore, the attorney’s motivation for engaging in the maneuver is winning. Cf. Williamson v. Super. Ct., 582 P.2d 126, 131 (Cal. 1978) (warning against “the ‘gamesmanship’ involved in the suppression of evidence” through a settlement agreement that sought to convert disclosed experts to consultants); Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 560 (Tex. 1990) (referring to attempts to “redesignat[e]” experts as non-testifying consultants as “offensive”); \textit{White}, 21 S.W.3d at 223 (“The first, and perhaps more important, policy [behind the Tennessee Rules of Civil Procedure] is that discovery should enable the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering.”).

222. See United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968).

223. The only common exceptions are situations where a party can point to a privilege that allows it to object to the testimony of other specified persons, such as attorneys, spouses, and priests. See supra notes 202-05 and accompanying text.

224. See Williamson, 582 P.2d at 131; Smith v. Super. Ct., 49 Cal. Rptr. 2d 20, 26 (Cal. Ct. App. 1996); Ignatow, supra note 202, § 2194b, at 78 (“[I]n every criminal code penalizing the obstruction of justice, that offense is deemed to include agreements or attempts to suppress testimony.”); infra notes 227, 229-30.

225. See infra note 230.

226. See Smith, 49 Cal. Rptr. 2d at 26.
her from testifying, hiding of potential witnesses, persuading potential witnesses to avoid the subpoena power of a particular court or to fail to testify when subpoenaed, and threatening or discouraging potential witnesses from testifying. A system that goes to such great lengths to give the jury the evidence it needs from potential witnesses should not sanction the unilateral attempt of a party to silence an expert witness that the same party previously identified as a potentially valuable source of evidence.

In a California case, one defendant agreed to indemnify another defendant in exchange for the second defendant's disclosure of an expert. See Williamson, 582 P.2d at 128-29. Over the objections of the defendant, the court allowed discovery regarding the disclosed expert, saying, "Agreements to suppress evidence have long been held void as against public policy, both in California and in most common law jurisdictions." Id. at 131. In another case involving an attempt to silence expert witnesses through partial settlement and attempted recodification of the dismissed parties' experts as consultants, the Texas Supreme Court agreed. See Tom L. Scott, Inc., 798 S.W.2d at 560. According to the Texas Supreme Court, "The redesignation of the experts in this case was an offensive and unacceptable use of discovery mechanisms intended to defeat the salutary objectives of discovery." Id. Although at least one court disagrees, see County of L.A. v. Super. Ct., 271 Cal. Rptr. 698, 703 (Cal. Ct. App. 1990) (distinguishing Williamson because the case at hand involves "one party who, for tactical reasons and in its own interest, has chosen not to call one of its witnesses"), if two parties cannot agree to silence an already disclosed expert, one party acting alone should also not be able to silence an already disclosed expert.


Model Rule 3.4(a) prohibits an attorney from unlawfully obstructing another party's access to evidence. Model Rules of Professional Responsibility Rule 3.4(a) (2002). This Model Rule provision incorporates and expands the predecessor Model Code provision stating that an attorney "shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness ... ." Model Code of Professional Responsibility Disciplinary Rule 7-109(B) (1989). Pursuant to these provisions, ethics authorities have determined that attorneys cannot attempt to persuade witnesses not to testify. See Or. State Bar Legal Ethics Comm., Formal Op. 1992-132, at 6-7 (1992); Standing Comm. on Legal Ethics of the Va. State Bar, Op. 1678, at 2 (1996) ("The committee believes that it is not ethically permissible for a lawyer directly to advise the other party's expert witness not to testify, or indirectly through another acting at the lawyer's request to cause the other party's expert witness not to testify."); ABA/BNA Manual, supra note 132, at 61-701 (1995) ("With respect to witnesses, Model Rule 3.4(a)'s prohibition against obstructing access to evidence bars a lawyer from procuring the absence of a witness. More subtle efforts to dissuade a witness from testifying may also violate Rule 3.4(a), as well as other professional conduct rules.").

See supra note 202.
information for the jury. While ordinarily it may be acceptable for a party to own a consultant, no party should be entitled to own and unilaterally control a witness.

3. **Discounting Fairness to the Opposing Party**

Although the courts reaching anti-Red Rover decisions have, in my view, miscalculated concerns for fairness to the parties who initially retained Red Rover experts, these courts' interest in fairness is laudable. Unfortunately, however, these courts tend to have an overly narrow view of fairness concerns because they focus only on fairness to the party that initially retained the expert. Although these are the most obvious fairness concerns, courts should also realize that the opposing party may also have fairness claims. Anti-Red Rover decisions ignore or discount the burdens that their decisions place upon the opposing party.

After an expert has been disclosed by the retaining attorney, muzzling that witness may be unfair to the opposing party for several reasons. In the first place, a party ordinarily should be able to count on the availability of the testimony of a person who has been declared to be a potential witness at trial. Because Rule 26 rather explicitly tells the opposing party to expect both automatic disclosures about a disclosed expert and a deposition of a disclosed expert, the opposing party should be able to rely on receiving information that can be introduced at trial. The opposing party who reads Rule 26 should not have to speculate that a court might read into it non-existent provisions that will prevent that party from gathering or using the expert's opinions at trial.

In addition, a system that values efficiency should not require a party to hire and pay fees to its own expert when the expert witness disclosed by its opponent has taken a position that agrees with its position on a critical issue. According to Rule 1 of the Federal Rules of Civil Proce-

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232. See United States v. Meyer, 398 F.2d 66, 72 n.6 (9th Cir. 1968) ("Professor Louisell has said, 'the notion that expert knowledge relevant to adjudication is but a species of private property, within the owner's exclusive domain * * * seems to strain the adversary system to the breaking point, and to become morally intolerable.") (quoting DAVID W. LOUISELL, MODERN CALIFORNIA DISCOVERY § 11.04, at 332 (1963)).

233. See supra notes 188-92 and accompanying text.


237. Cf. Easton, supra note 22, at 699-700 (contending that attorneys should be able to rely upon the language in rules without having to anticipate court decisions stretching the rules beyond recognition).

238. Several reported cases contain language suggesting that Red Rover testimony is unnecessary, because the party offering it could simply retain and pay its own expert witnesses. See Koch Ref. Co. v. Jennifer L. Beaudreaux MV, 85 F.3d 1178, 1183 (5th Cir. 1996) ("Courts have considered whether another expert is available and whether the opposing party had time to hire him before trial."); Durlinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984); Agron, 176 F.R.D. at 453; Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 14 (N.D. Ill. 1972); In re Vestavia Assocs., 105 B.R. 680, 682 (Bankr. M.D. Fla. 1989).
dure, the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Requiring a party to hire, pay, and enlighten an expert when that party has no disagreement with the expert disclosed by its opponent will waste the time and money of both parties. In addition, there are circumstances when no new expert that the party could retain will be able to reach opinions as reliable as those already reached by the opposing party's expert because the original expert is uniquely qualified or because she had access to evidence that is no longer available.

Finally, allowing a party to suppress the opinion testimony of an expert it retained and disclosed will unfairly punish those attorneys who do a good job of deposing experts. The deposition of an expert witness may be the event that exposes the issues on which the expert agrees with the opposing party. If the retaining attorney is allowed to prevent the introduction of the expert's opinions on these issues by simply de-disclosing the expert after the deposition, the opposing attorney will be punished for exposing these issues at the deposition. In a system that values the

240. See Agron, 176 F.R.D. at 453.
241. Requiring an unnecessary expert will force unnecessary expenses not only on the party that would otherwise not need to retain and pay an expert, but also on that party's opponent, who will ordinarily undergo the expense of deposing the unnecessary expert. See supra note 39 infra note 310.
243. See Agron, 176 F.R.D. at 453 ("Although Defendant could have retained an expert after Plaintiff withdrew Deutsch, the passage of time makes any evaluation of Plaintiff to determine her condition at the time of the alleged discrimination inherently less reliable. In that respect, Deutsch possesses knowledge that cannot be replicated by a new expert."); cf. FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1048 (E.D. Cal. 2002) (recognizing the possibility of instances where Red Rover experts' "studies are incapable of being reproduced").
244. See Peterson v. Willie, 81 F.3d 1033, 1036 (11th Cir. 1996) ("Dr. Lichtblau then testified at the deposition that, as a result of his second examination, his opinion concerning Peterson's future placement had changed.").
245. Again, the contrast with fact witnesses is striking. When an attorney conducts a deposition of a fact witness disclosed by her opponent, she can do so with confidence that she ordinarily will be able to present her testimony at trial, including testimony that is favorable to the attorney conducting the deposition.
246. Perhaps an already deposed expert presents the strongest case for admission of Red Rover testimony. Some may believe that an opposing party's fairness argument based upon its reliance on the opportunity to use the deposition transcript at trial is stronger than an argument based upon a perceived right to depose a previously undeposed witness or to present an undeposed witnesses' testimony at trial. An opposing party that has secured deposition testimony supporting that party's position on a necessary element of the case might have the best argument of all, because prohibiting it from using that deposition testimony might prevent it from making its case at trial, particularly if the de-disclosure occurred during, or shortly before, trial. In addition, the introduction of a deposition at trial presents no risk of disclosure of previously confidential information, and even live trial testimony from a previously deposed witness often presents little such risk. See supra note 123. Therefore, some who are more concerned than I about a party's investment in a witness, but at least somewhat persuaded by concerns for fairness to the opposing party, might propose allowing de-disclosure up until the deposition of an expert, as some courts have suggested. See White v. Vanderbilt Univ., 21 S.W.3d 215, 224 (Tenn. Ct. App. 1999) (citing other courts that have allowed de-disclosure "prior to the witness's deposition");
“speedy” and “inexpensive”\textsuperscript{247} resolution of civil disputes, including appropriate settlement of cases that should be settled,\textsuperscript{248} it is rather disingenuous to punish an attorney for doing a good job of exposing undisputed issues that might lead to settlement or to a proper resolution of these issues at trial.\textsuperscript{249}

Axelson, Inc. v. McIlhany, 755 S.W.2d 170, 174 (Tex. App.—Amarillo 1988, orig. proceeding) (involving settlement by party that had previously disclosed expert) (affirming a trial court’s decision “permitting] Apache and El Paso to change the designation of these witnesses on the morning their depositions were scheduled”), rev’d, Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556 (Tex. 1990) (allowing depositions), Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 552 n.3 (Tex. 1990) (noting that the Scott decision rendered the same day dealt with the deposition issue).

Although prohibiting de-disclosure after a deposition would be a step in the right direction for courts that currently allow de-disclosure at any time, it does not go far enough. There are significant problems with such an approach, including its creation of an incentive to delay the information-gathering that occurs in a deposition. Under Rule 26(b)(4)(A), “If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.” Therefore, if a court allowed a party to de-disclose until the expert’s deposition is taken, the party could extend the time during which it held this right by simply delaying the creation of the expert report. Even after the expert report is produced, a party could extend its right to de-disclose by delaying the expert’s deposition. A system that values the timely exchange of information should be leery of creating incentives to delay such exchanges. Also, allowing a party to de-disclose up until the taking of the deposition would create an incentive for game playing, such as de-disclosure on the eve of an expert’s deposition, after the opposing attorney has invested the time to prepare for the deposition. See Axelson, Inc., 755 S.W.2d at 174. More fundamentally, any system that permits de-disclosure ignores the absence of authority for de-disclosure in the Federal Rules of Civil Procedure. See supra notes 147, 160-61 and accompanying text.

The final argument is equally applicable to any other proposed deadline for de-disclosure, such as the start of trial or the filing of the Rule 26(a)(3) pretrial list of anticipated trial witnesses. In the absence of a provision in Rule 26 providing for de-disclosure, any court that allows de-disclosure is arguably violating Rule 1’s requirement that the Federal Rules govern procedural issues in federal cases and is adding uncertainty that can be avoided by following the text of the Rules. See supra note 165. The possibility that a court will allow de-disclosure up until a deadline not specified in the Rules has passed might lead an opposing party to incur the otherwise unnecessary expense of retaining its own expert, even though the other side’s expert agrees with this party’s position. See supra notes 238-41 and accompanying text. After all, as long as there is the possibility that the court will allow de-disclosure, the opposing party cannot be certain that it will be allowed to present the testimony of the Red Rover expert.

Of course, these problems could be avoided by amending Rule 26 to provide textual authorization for de-disclosure and to state a deadline for de-disclosure. In the absence of such provisions, however, those who are troubled by fairness concerns claimed by the opposing party can find little or no support in the Rules for allowing de-disclosure up until any deadline they propose. Without a Rule providing for it, de-disclosure should not be allowed, and a disclosed witness should ordinarily be subject to being deposed and called as a witness at trial. See supra part III.A.3.

\textsuperscript{247} FED. R. CIV. P. 1.

\textsuperscript{248} The acquisition of information can lead to settlement. See Franks v. Nat’l Diary Prods. Corp., 41 F.R.D. 234, 237 (W.D. Tex. 1966) (“[U]nless the position of each party is known along with the basis for taking such position, no intelligent evaluation can be made for settlement purposes.”); Trans-World Invs. v. Drobny, 554 F.2d 1148, 1151 (Alaska 1976) (informal methods of acquiring information “are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting decrease in litigation costs, and represent further the wise application of judicial resources.”); Donako v. Rowe, 475 N.W.2d 30, 36 (Mich. 1991).

\textsuperscript{249} See infra Part V.A.
Although some courts do not accept the argument that admitting a Red Rover's opinions unfairly prejudices the party who originally retained the expert, even these courts generally exclude evidence about the original retention of the expert. These courts believe that evidence regarding the original retention would be unfairly or even "explosively" prejudicial to the party who originally retained the expert. Therefore, they exclude this evidence under Rule 403 of the Federal Rules of Evidence, which states that a court "may" exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Therefore, they exclude this evidence under Rule 403 of the Federal Rules of Evidence, which states that a court "may" exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." 

While the desire of these courts to prevent prejudice is understandable, these decisions suffer from several flaws. First, these courts ignore and therefore fail to distinguish the rather well-established admissibility of evidence proving the relationship between a witness and one of the parties which is frequently referred to as "bias" evidence. Also, they incorrectly assume that the prejudice a party would suffer from admission of this bias evidence is unfair prejudice and incorrectly and often implicitly believe that this prejudice substantially outweighs the probative value of the bias evidence. Finally, they forget or downplay the jury's need to receive relevant evidence that will help it resolve factual disputes, including bias evidence.

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250. See supra notes 74-45, 77-80 and accompanying text.


252. See Peterson, 81 F.3d at 1037 (allegedly "explosive" prejudice); Ferguson v. Michael Foods, Inc., 189 F.R.D. 408, 410 (D. Minn. 1999); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 243 (N.D. Iowa 1996); cf. Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 450-51 (S.D.N.Y. 1997) ("potentially substantial prejudice"); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 315 (Miss. 1992) (excluding Red Rover testimony, but stating that allowing such testimony along with evidence of expert's original retention would have been "highly prejudicial").

253. FED. R. EVID. 403; accord UNIF. R. EVID. 403.

254. In the common circumstance of an attorney retaining the expert on behalf of the party, see supra note 21, the direct relationship is between the expert and the attorney. Nonetheless, a relationship between a witness and an attorney is an admissible form of bias. See Flores v. Miami-Dade County, 787 So.2d 955, 957-59 (Fla. Dist. Ct. App. 2001); Gold, Vann & White, P.A. v. DeBerry, 639 So.2d 47, 55-56 (Fla. Dist. Ct. App. 1994); State v. Solven, 371 S.W.2d 328 (Mo. 1963); Watson v. Isern, 782 S.W.2d 546, 549-50 (Tex. App.—Beaumont, 1999, writ denied); cf. Butler v. Rigsby, No. CIV.A.96-2453, 1998 WL 164857, at *3 (E.D. La. April 7, 1998) (observing, in the context of a discovery dispute, that "[e]vidence of a special relationship between an expert witness and legal counsel is relevant to demonstrate the possible bias of the expert witness"). Furthermore, in the case of an expert retained by an attorney on behalf of a party, the attorney's relationship with the witness is rather closely tied to her duties on behalf of her client, so there is at least an indirect relationship between the party and the witness.
1. Disregarding the Admissibility of Bias Evidence

There is little doubt about why an attorney offering Red Rover testimony would want to introduce evidence establishing that her opponent originally retained the expert or, for that matter, why the attorney who originally retained the expert would vigorously object to such evidence. Both parties, as well as the courts that have reached this issue, recognize that this evidence tends to establish that the expert was at least somewhat predisposed to reach opinions that favored her original employer. In other words, both parties recognize that evidence establishing the ties between a witness and one of the parties is evidence of bias.

Bias evidence is almost always relevant and admissible. While such evidence is often introduced on cross-examination, it is not unusual for an attorney conducting a direct examination to establish the biases of a witness. See Collins v. Wayne Corp., 621 F.2d 777, 781 (5th Cir. 1980) ("Plaintiff's counsel thought that this expert testimony would not help the plaintiffs' case if it could not be attributed to Wayne."); Lunghi v. Clark Equip. Co., 200 Cal. Rptr. 387, 388-899 (Cal. Ct. App. 1984) ("Appellants... contend that they 'could have made much' of [Red Rover expert's] testimony because he had originally been retained by respondent."); Bd. of Educ. of S. Sanpete Sch. Dist. v. Barton, 617 F.2d 347, 350 (Utah 1980) (involving consultant) ("Ogden's appraisal was made under the direction of the party adverse to the party who sought to adduce Ogden's testimony and thus carried a mark of objectivity that may not have been commanded by the other experts."); Benny Agosto, Jr., Should Clinical Medical Testimony Be Subject to Daubert Analysis?, TEX. B.J., Jan. 1999, at 30, 34 (noting "the unfortunate fact that experts are nearly always biased toward those who pay their fees"); cf. Peterson, 81 F.3d at 1038 n.6 (noting that the attorney presenting Red Rover testimony "purposefully elicited the fact that [the expert] had been originally retained by [opposing counsel]"); Ferguson, 189 F.R.D. at 410 (noting the court's concern about the allegedly "'explosive' unfair prejudice that would likely result if the jury were to discover that the expert called by one party had originally been hired by the other"); Agron, 176 F.R.D. at 450 ("Plaintiff argues that she will suffer irreparable prejudice if Deutsch takes the stand and reveals that he was previously retained by Plaintiff in this litigation."); House, 168 F.R.D. at 248 ("[T]he court sees a tremendous potential for prejudice to United States v. Abel, 469 U.S. 45, 52 (1984) ("Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest."); Butler v. Rigsby, No. 96-2453 § R (5), 1998 U.S. Dist. LEXIS 4618, at *7 (E.D. La. Apr. 7, 1998) ("Evidence of a special relationship between an expert witness and legal counsel is relevant to demonstrate the possible bias of the expert witness . . . .")").

Indeed, bias evidence is considered valuable enough that it is preferred over other evidence regarding the believability of witnesses. See Abel, 469 U.S. at 52 ("The 'common law of evidence' allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to 'take the answer of the witness' with respect to less favored forms of impeachment."); Wealot, 948 F.2d at 500 ("Potential bias is not a collateral issue."); United States v. Fusco, 748 F.2d 996, 998 (5th Cir. 1984) ("Bias, as opposed to general veracity, is not a collateral issue. . . . Evidence of past behavior that proves or disproves bias is therefore admissible notwithstanding Rule 608(b).").

See, e.g., Lynn, 856 F.2d at 432 n.3.
In considering the admissibility of evidence regarding the retention and payment of Red Rover experts on direct examination by the party offering Red Rover opinion testimony, it is important to remember that it is basically beyond dispute that an attorney conducting the cross-examination of a non-Red Rover expert is entitled to question the expert about her relationship with the attorney who is employing and paying her and the extent of the fees she has received and will receive. See, e.g., Butler, 1998 U.S. Dist. LEXIS 4618, at *7-8; Navarro de Cosme v. Hosp. Pivia, 922 F.2d 926, 932-33 (1st Cir. 1991); D.B. v. Ocean Township Bd. of Educ., 985 F. Supp. 457, 479 (D.N.J. 1997); infra note 314. We allow such questions during cross-examination of an expert for the same reason that we admit other evidence establishing the biases of witnesses, i.e., because we believe that jurors can more properly evaluate a witness's testimony when they are given full information about her biases. If evidence regarding an expert's biases is admissible during cross-examination, it is difficult to see why the very same type of evidence regarding the expert's biases—evidence regarding the relationship between the expert and the retaining attorney—should not be admissible during direct examination.


At common law, courts often prohibited a party from presenting evidence bolstering a witness's credibility before an opposing party attacked that witness's credibility. See Mayor of Baltimore v. Zell, 367 A.2d 14, 27 (Md. Ct. App. 1977); John H. Wigmore, 4 Evidence in Trials at Common Law § 1124 (Chadbourn ed. 1972). Courts that still apply this guideline strictly might disallow evidence of a Red Rover's retention during direct examination.

It is not clear that this guideline is applicable under modern evidence rules and codes, however. For example, the Federal Rules of Evidence provide:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611(a). Neither subsection (1) nor subsection (3) should lead to the exclusion of evidence of the Red Rover's initial retention. As discussed elsewhere, evidence of the initial retention is information that the jury can use in determining whether to believe an expert. Furthermore, though many Red Rovers are reluctant witnesses, it would be an exaggeration to suggest that evidence of their initial retention would be harassing or embarrassing. Therefore, the best arguable basis for prohibiting initial retention evidence during direct examination of a Red Rover expert would be that this evidence could needlessly waste time.

In fact, concerns over time appear to be the basis of the common law rule prohibiting pre-attack bolstering. H. Wigmore, supra, at § 1124. In the event that a witness's credibility was never attacked, any evidence bolstering the witness's credibility could be considered unnecessary and irrelevant. See Mayor of Baltimore, 367 A.2d at 17; H. Wigmore, supra, at § 1124.

This concern is generally not applicable to expert testimony because an expert's credibility is almost always in issue when that expert testifies in a manner inconsistent with the testimony of another expert on a critical issue. In these circumstances, the jury will be asked to determine which of the experts is more believable. Therefore, when an expert testifies on a hotly disputed issue, evidence regarding her credibility is relevant. See Fenlon v. Thayer, 506 A.2d 319, 323 (N.H. 1986) ("In this case, as in all cases which depend on expert testimony, the credibility of the experts is a paramount issue."); Cogdell v. Brown, 531 A.2d 1379, 1382 (N.J. Super. Ct. Law Div. 1987) ("Whether an expert is a 'hired gun' or one whose opinions have greater foundations of objectivity is an issue to be litigated by counsel and considered by the jury."); Bd. of Educ. of S. Sanpete Sch. Dist. v. Barton, 617 P.2d 347, 350 (Utah 1980) (concluding that an expert's initial "employment bore directly on the all-important issue of his objectivity or bias").

Perhaps as a result of the inherent relevance of issues regarding the credibility of an expert witness, courts routinely allow parties presenting such testimony to bolster that credibility before it is attacked by presenting the expert's testimony about her education,
It is important to remember why our system is so adamant about the admissibility of bias evidence. We admit evidence about a witness’s relationship with one of the parties because we believe that such evidence might help the jurors determine whether the witness’s testimony is credible. We expect jurors to at least consider discounting any testimony by the witness in favor of the party she favors and to give credence to testimony by the witness that goes against that party. In other words, we believe that bias evidence, like other relevant evidence, “make[s] the existence of [a] fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” because it might help jurors evaluate the testimony of biased witnesses on those factual issues. Certainly it is not always true that a biased witness’s testimony is incorrectly shaded in favor of the preferred party, so the admission of bias evidence in a particular instance could possibly lead to an incorrect decision by the jury in a particular instance, just as the admission of any other form of relevant evidence may on occa-
sion lead to an incorrect decision. Nonetheless, we believe that evidence of bias will help the jury correctly resolve factual issues often enough to be rather unyielding in our view that bias evidence is admissible.

All of these policy considerations that have led to the admissibility of other bias evidence are equally applicable to evidence about the initial retention of a Red Rover expert by the party who later opposes introduction of her testimony. As discussed more fully below, the fact that such an expert has overcome the strong forces that usually lead to an expert reaching opinions that favor her employer is a significant indicator of the reliability of these opinions even though there certainly will be some cases where an expert’s opinions counter to those sought by her original employer are incorrect opinions. Evidence of an expert’s biases is at least as relevant as evidence of a fact witness’s biases.

2. Inflating Prejudice into Unfair Prejudice

Evidence of the original retention of a Red Rover expert who has testified or will testify to opinions favoring the opposing party is prejudicial to the party originally retaining her, because it decreases that party’s chances of convincing a jury that it is correct on issues where its original expert agrees with the other party. Under Rule 403, however, a court cannot exclude evidence merely because it is prejudicial. Most, if not all, relevant evidence is presumably somewhat prejudicial, because the party offering it would not bother doing so unless it decreased its opponent’s


265. See Abel, 469 U.S. at 51-52 (1984); Wealot v. Armontrout, 948 F.2d 497, 500 (8th Cir. 1991); Clark v. O’Leary, 852 F.2d 999, 1004 (7th Cir. 1988) (citing Abel) (“The Supreme Court ruled that bias is always relevant . . . ”); Ellis v. Capps, 500 F.2d 225, 227 (5th Cir. 1974).

266. See infra notes 318-37 and accompanying text.

267. The Fifth Circuit’s pattern jury instruction explicitly tells jurors they may consider bias evidence in evaluating the testimony of an expert witness:

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an expert witness and his income from such testimony represents a significant portion of his income.


268. See supra notes 255-56 and accompanying text.
chances of success. Instead, Rule 403 allows the exclusion of relevant evidence only when "its probative value is substantially outweighed by the danger of unfair prejudice." Evidence of a Red Rover expert's initial retention does not meet this standard.

The courts that have excluded this evidence have often asserted that it would be "explosively prejudicial" to the party who originally retained the expert. Curiously, this conclusion seems to flow not from a belief that evidence of the initial retention has little probative value, but that it has too much potential probative value in the eyes of the jurors, because jurors might tend to give too much credence to the opinions of an expert who was originally retained by the party who now opposes those opinions.

269. See Perry v. Ethan Allen, Inc., 115 F.3d 143, 151 (2d Cir. 1997); United States v. Gelzer, 50 F.3d 1133, 1139 (2d Cir. 1995); Davidson Oil Country Supply Co. v. Klockner, Inc., 908 F.2d 1238, 1245 (5th Cir. 1990) ("Merely because the testimony is adverse to the opposing party does not mean it is unfairly prejudicial. Frequently relevant testimony hurts as the opposing party hopes.") (citations omitted); United States v. Fahey, 769 F.2d 829, 841 (1st Cir. 1985) ("This evidence may have been prejudicial in the sense that it was damaging to the defense, but it was not unfairly prejudicial . . . ."); Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977) ("Of course, 'unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'"); In re Davis, 246 B.R. 646, 654 (B.A.P. 10th Cir. 2000) (quoting Dollar).

270. Rule 403 also permits the exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403; accord Unif. R. Evid. 403. With rare exceptions, such as Ferguson v. Michael Foods, Inc., 189 F.R.D. 408, 410 (D. Minn., 1999) and Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 314 (Miss. 1992) (applying a state's version of Rule 403, which mirrored the federal rule), courts usually do not rely upon these portions of Rule 403 when excluding evidence regarding the original retention of a Red Rover expert, though some courts have suggested that there may be little to be gained by admitting such evidence if it is cumulative of other expert testimony. See Peterson v. Willie, 81 F.3d 1033, 1036 n.4 (11th Cir. 1996) ("While it may generally be possible to permit a party to call a witness without disclosing the fact of his or her prior engagement by the opposing party, there may be little reason to require this effort if other expert witnesses are readily available."); Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 450 (S.D.N.Y. 1997) (Red Rover testimony admissible because it was not cumulative of other expert testimony); cf. Lunghi v. Clark Equip., Co., 200 Cal. Rptr. 387, 389 (Cal. Ct. App. 1984) ("[T]he substance of the deposition testimony was cumulative. We cannot say that its inclusion would probably have resulted in a decision more favorable to appellants.").

271. FED. R. EVID. 403 (emphasis added); accord Unif. R. Evid. 403; see also Robinson v. Runyon, 149 F.3d 507, 514 (6th Cir. 1998) ("Federal Rule of Evidence 403 prohibits the admission of evidence if there is a danger of unfair prejudice, not mere prejudice."); Perry, 115 F.3d at 151; United States v. Morales, 815 F.2d 725, 740 (1st Cir. 1987) ("The question is one of 'unfair' prejudice—not of prejudice alone."); Fahey, 769 F.2d at 841; Dollar, 561 F.2d at 618; Lanni v. New Jersey, 177 F.R.D. 295, 302 (D.N.J. 1998) ("For testimony to be excluded, it must be prejudicial as well as unfair.").

272. See supra note 252 and accompanying text.

273. In similar contexts, courts have thwarted efforts by parties to keep evidence from the jury on the basis that it was inflammatory. See Robinson, 149 F.3d at 515 ("[T]he [defendant] seems to argue that the evidence is unfairly prejudicial simply because it is racially inflammatory. Such an argument is clearly insufficient to exclude evidence under Rule 403."); Gelzer, 50 F.3d at 1140 (2d Cir. 1995) (rejecting defendant's request for exclusion of evidence because of "its highly inflammatory and prejudicial nature"); Trevino v. Texas Dep't of Protective & Regulatory Servs., 893 S.W.2d 243 (Tex. App.—Austin 1995, orig. proceeding) ("It is true that the confession and the facts surrounding the death of
There are several problems with this analysis. First, the same reasoning could apply to almost any bias evidence establishing a relationship between a witness and a party, and the courts have routinely allowed this evidence because it has significant probative value, even though all such evidence might have some danger of unfair prejudice. Second, if a particular piece of evidence has considerable, as opposed to minimal, probative value, it should generally be admitted under Rule 403 because evidence with considerable probative value is less likely to be "substantially outweighed" by the danger of unfair prejudice. Finally, re-

Leon constitute evidence that is inherently inflammatory and prejudicial; however, Texas Rule of Civil Evidence 403 requires that relevant evidence must be substantially outweighed by the danger of unfair prejudice to be excluded.

274. The authors of Rule 403 and the courts applying it have noted that the type of unfair prejudice that it is designed to prevent generally consists of the potential use by the jury of a particular piece of evidence to influence its determination on an issue other than the issue on which the evidence is probative and, therefore, properly considered by the jury. See Fed. R. Evid. 403 advisory committee’s note (1972) (‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”); Robinson, 149 F.3d at 515 (stating that unfair prejudice involves evidence that could lead to a decision on an improper basis); Perry, 115 F.3d at 151 (similar); Gelzer, 50 F.3d at 1139 (explaining that “[t]he prejudice that Rule 403 is concerned with” concerns a detrimental influence beyond proof of the proposition that validates the evidence’s admission); Fahey, 769 F.2d at 841 (remarking that Rule 403 exclusion is proper only when controversial evidence would lead to irrational behavior by jurors); Lanni, 177 F.R.D. at 302 (quoting Advisory Committee notes). In the typical Red Rover case, this is not a concern, because the jury would be expected to use the evidence of the Red Rover’s initial retention for the exact purpose on which it is probative, i.e., to lend a certain amount (to be determined by the jury) of believability to the expert’s opinions that are contrary to the ones desired by her original employer.

In a similar context, the Supreme Court approved the use of evidence regarding the relationship between a witness and a party who were members of the same criminal group:

[T]he type of organization in which a witness and a party share membership may be relevant to show bias. If the organization is a loosely knit group having nothing to do with the subject matter of the litigation, the inference of bias arising from common membership may be small or nonexistent. If the prosecutor had elicited that both [the defendant] and [witness] Mills belonged to the Book of the Month Club, the jury probably would not have inferred bias even if the District Court had admitted the testimony. The attributes of the Aryan Brotherhood—a secret prison sect sworn to perjury and self-protection—bore directly not only on the fact of bias but also on the source and strength of Mills’ bias. The tenets of this group showed that Mills had a powerful motive to slant his testimony towards respondent, or even commit perjury outright.

United States v. Abel, 469 U.S. 45, 54 (1984). In a similar manner, evidence of the initial retention of the Red Rover expert establishes the point for which this evidence is offered, i.e., the possibility that the expert was biased toward reaching an opinion favorable to her employer. In other words, the probative value of the evidence of the relationship between the expert and her initial employer stems from the very inference that the original employer suggests is prejudicial—the witness’s “powerful motive to slant [her] testimony towards” her original employer. Id. As the Advisory Committee, the Supreme Court, and other courts have emphasized, this is not the type of prejudice that Rule 403 prevents.

275. See supra notes 261-67 and accompanying text.

276. See Fed. R. Evid. 403 (emphasis added); accord Unif. R. Evid. 403; see also Perry, 115 F.3d at 151 (“As the terms of the Rule indicate, for relevant evidence to be excluded on this basis, the imbalance must be substantial, and the prejudice must be unfair.”); Fahey, 769 F.2d at 841 (similar).

277. In a recent decision based upon one state’s version of Rule 403, the court stressed:
jecting this evidence may be more unfair to the party offering the Red Rover testimony than admitting it would be to the party that originally retained the expert. Without the evidence of the initial retention, the expert’s opinions are often cumulative of the testimony of other experts retained by the party who is offering the Red Rover testimony. In other words, the primary purpose of introducing the Red Rover testimony may be to establish not the opinions themselves, because these opinions can be offered by other experts, but to establish that an expert

During the first phase of the analysis, the court must determine whether the countervailing factors in Tenn. R. Evid. 403 “substantially outweigh” the probative value of the evidence. The trial court has no discretion to exclude evidence under Tenn. R. Evid. 403 unless it concludes that the probative worth of the evidence is substantially outweighed by one or more of the countervailing factors. Thus, a trial court should not exclude evidence under Tenn. R. Evid. 403 when the balance between the probative worth of the evidence and the countervailing factors is fairly debatable.


278. At least in some cases, an attorney who seeks the admission of Red Rover testimony has more confidence in the credentials, analysis, and persuasiveness of her own expert, because she chose that expert. In such cases, the attorney’s primary goal in presenting Red Rover testimony is not presenting an opinion from an expert, because the attorney’s own expert can accomplish this without help from the Red Rover expert.

Of course, there are also cases where the attorney believes that the Red Rover expert is, for some reason, a more persuasive witness than the expert she retained. See White, 21 S.W.3d at 221 n.6 (noting that the Red Rover doctor was preeminent in the field at issue in the case); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 243 n.5 (N.D. Iowa 1996) (“House’s own expert is a social worker, not a psychiatrist”), discussed in Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 673-74 (E.D. Wash. 2000). In other cases, there are different primary reasons for calling the expert. See Lehan, 190 F.R.D. at 671, 673 (noting, but discrediting, attorney’s claim that he sought to introduce one doctor’s testimony to thereby introduce other doctors’ medical records allegedly relied upon by the first doctor). Even in these cases, however, admission of evidence about the original retention of the expert could enhance her credibility in the eyes of the jurors. See supra notes 261-67 and accompanying text.

279. See Peterson, 81 F.3d at 1037 (documenting original retaining party’s argument that Red Rover testimony was cumulative of testimony by other experts and therefore inadmissible); Collins v. Wayne Corp., 621 F.2d 777, 781 (5th Cir. 1980); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) (affirming exclusion of Red Rover testimony where party presented testimony from its own expert “on precisely the issues that [the Red Rover expert] would have covered”); Callaway Golf Co. v. Dunlop Slazenger Group Am., Inc., No. CIV. A. 01-669 (MPT), 2002 WL 1906628, at *4 (D. Del. Aug. 14, 2002) (predicting exclusion of Red Rover testimony “if cumulative, especially of evidence provided by [the adverse party’s experts]’); Lunghi, 200 Cal. Rptr. at 389; cf. Mantolette v. Bolger, 96 F.R.D. 179, 182 (D. Ariz. 1982) (prohibiting plaintiff from deposing defendant’s de-disclosed expert in pre-1993 case, because the plaintiff “has retained her own rehabilitation engineer”); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 314 (Miss. 1992) (holding that Red Rover testimony was inadmissible under a state’s evidence rules because it was cumulative of the testimony presented by witnesses retained by the party offering the Red Rover testimony).

280. Of course, there can be related reasons for offering Red Rover testimony in some cases, but sometimes these reasons also will go unfulfilled if evidence of the Red Rover’s initial retention is not admitted. See Collins, 621 F.2d at 781 (“Second, plaintiffs’ counsel wanted to use [defendant’s de-disclosed expert] Greene’s deposition as an admission because Greene acknowledged that Derwyn Severy, the plaintiff’s expert, was perhaps the foremost authority in the country in the field of bus design. Plaintiff’s counsel thought that this testimony would not help the plaintiff’s case if it could not be attributed to [the defendant]”).
hired by the opposing party has reached these opinions. Depriving the party offering the Red Rover evidence of the probative value of evidence of the initial retention may deprive that party of the real value of introducing the testimony.282

Given all of these considerations, while evidence of a Red Rover expert's initial retention is "prejudicial," it is not "unfairly prejudicial" to a degree that permits its routine exclusion. As many have noted, courts should be leery of using Rule 403 to exclude relevant evidence because such decisions by definition deprive jurors of relevant evidence. Evidence of Red Rover retention is not an appropriate place for the exercise of Rule 403 discretion to exclude relevant evidence.283

281. See Peterson, 81 F.3d at 1037; Collins, 621 F.2d at 781 (after court ruled that Red Rover opinions were admissible, but evidence about the initial retention of the Red Rover expert was not, the party offering the opinions "decided not to offer [the expert's] deposition into evidence"); In re Vestavia Assocs., 105 B.R. 680, 681 (Bankr. M.D. Fla. 1989) ("[T]he Debtor intended Centrust to be hoisted on its own petard."); Bd. of Educ. of S. Sanpete Sch. Dist. v. Barton, 617 P.2d 347, 351 (Utah 1980) (involving consultant) ("Having been denied the right to examine the witness properly and to adduce evidence of employment, the defendant cannot be faulted for not having called the witness to testify solely to the amount of his appraisal.").

282. Some might argue that offering the testimony of a Red Rover expert primarily to establish that the expert agrees with the opinions offered by an expert who was initially retained by the party offering both experts' testimony is cumulative. Rule 403 does allow courts to exclude evidence when "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. There may be limited cases where admitting testimony from two experts would be cumulative, particularly when the party that initially retained the Red Rover expert is not contesting the issues on which the two experts opine. However, if the party that initially retained the Red Rover expert has or will present a differing opinion from a new expert, see infra notes 343-44, it is difficult to see how the Red Rover expert's testimony would constitute a "needless presentation of cumulative evidence." The fact that an expert initially retained by the opposing party reached the same opinion as the expert retained by the party now offering the Red Rover testimony is a significant factor that the jury may use to resolve a disputed issue. See infra notes 358-60 and accompanying text. If such an occurrence did not have substantial probative value, it is unlikely that parties or courts would argue that evidence of this occurrence was explosive. See supra notes 97, 252, 255 and accompanying text.

283. See United States v. Rodriguez, 192 F.3d 946, 949 (10th Cir. 1999) ("Rule 403 is an extraordinary remedy and should be used sparingly."); Westcott v. Crinklaw, 68 F.3d 1073, 1077-78 (8th Cir. 1995); United States v. Fahey, 769 F.2d 829, 841 (1st Cir. 1985) ("the standard [for excluding evidence under Rule 403] is a high one"); In re Davis, 246 B.R. 646, 654 (B.A.P. 10th Cir. 2000); cf. Trevino v. Tex. Dep't of Protective & Regulatory Servs., 893 S.W.2d 243 (Tex. App.—Austin 1995, orig. proceeding) (similar reasoning under Texas equivalent of Rule 403 of the Federal Rules of Evidence); White, 21 S.W.2d at 227 (emphasizing that Tennessee Rule 403 balancing "begins by recognizing that the rules of evidence favor the admissibility of relevant evidence," that "relevant evidence is admissible unless otherwise provided," that "excluding relevant evidence under Tenn. R. Evid. 403 is an extraordinary remedy that should be used sparingly," and that "persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion").

284. Because exclusion is an extreme remedy reserved for drastically unfairly prejudicial proof, the courts have noted that the better course, in many cases, is to admit controversial evidence and then to allow the opposing party to lessen its potential impact, if possible, by conducting a vigorous cross-examination, offering contrary evidence, and requesting appropriate jury instructions. See Abel, 469 U.S. at 54 (approving of the district court's offer of a limiting instruction); Robinson v. Runyon, 149 F.3d 507, 515 (6th Cir. 1998); United States v. Geier, 50 F.3d 1133, 1139-40 (2d Cir. 1995) (affirming a district court decision to admit controversial evidence and instruct the jury about the proper use of
3. Depriving Jurors of Valuable Evidence

It is not the party offering Red Rover testimony that who suffers the most from exclusion of evidence regarding the expert's original retention. Instead, the jurors suffer from the exclusion of relevant information that could help them make difficult factual determinations about disputed issues.

Consider the state of the evidence available to jurors if a court admits Red Rover testimony, but excludes testimony establishing that the other party originally retained the expert. The jurors have now seen an attorney introduce an expert's opinions, but have heard nothing about who retained that expert. In the absence of this evidence, they might rather reasonably, but incorrectly, conclude that the attorney who offered the expert's testimony originally retained this expert.

Surprisingly, several courts have suggested that such an incorrect conclusion is desirable because it lessens the impact of the Red Rover testimony and therefore reduces the prejudice that the originally retaining party would otherwise experience. Similarly, other courts have expressed the fear that jurors might correctly conclude that the initially retaining party was indeed the initially retaining party and correctly surmise that the initially retaining attorney was hoping to hide the expert's opinion from the jury. In a system that is designed to be a search for the truth, it is rather remarkable, and quite discomforting, for a court

285. See Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 452 (S.D.N.Y. 1997) (“In the absence of any reference to who retained Deutsch, the jury is more likely to [incorrectly] conclude that Defendant, rather than Plaintiff, retained the expert that it called to testify at trial.”); House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 248 (N.D. Iowa 1996) (“House's own emotional distress expert, Ms. Burrows, is a ‘treating’ professional, and the jury is likely to [incorrectly] assume unless told otherwise, on the basis of Dr. Taylor’s examination of House, that he too became involved in this case to treat or evaluate House.”).

286. See Ferguson v. Michael Foods, Inc., 189 F.R.D. 408, 410 (D. Minn. 1999) (“[E]ven if the court were to order plaintiff not to mention who hired [the expert] originally, there is a substantial risk that the jury would be able to figure out how the expert became involved in the case.”); Dayton-Phoenix Group, Inc. v. Gen. Motors Corp., No. CIV.A.C-3-95-480, 1997 WL 1764760, at *2 (S.D. Ohio Feb. 19, 1997) (“[T]here is a significant risk of unfair prejudice to the Defendant in any trial testimony of Walters, to wit: The danger that the jury might learn that it initially retained him.”).

287. Courts sometimes express concern that introduction of evidence about the Red Rover's original retention will prejudice the originally retaining attorney's client because the jury might conclude that the attorney was not bringing forth evidence she was required to provide. See Peterson, 81 F.3d at 1037; Ferguson, 189 F.R.D. at 410; House, 168 F.R.D. at 243 (citing Peterson); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 315 (Miss. 1992); White, 21 S.W.3d at 228-29. While it would be incorrect for jurors to conclude that a party retaining an expert was required to introduce her conclusions at trial, a court could remedy this misconception with a jury instruction advising the jurors that no such obligation exists. Because an instruction would be sufficient to cure this problem, the courts should not let it prevent admission of Red Rover bias evidence. See Fed. R. Evid. 403 advisory committee's note (1972) (“In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.”); supra note 284.
to suggest that it hopes that the finder of fact will reach incorrect factual findings or that it fears that the finder of fact will reach correct factual findings. Instead, the court should seek to admit evidence that will lead to correct factual findings. As the courts that have excluded evidence of the initial retention of the expert have acknowledged, Red Rover bias evidence is the type of evidence that can lead to correct factual findings because exclusion of this evidence may lead the jurors to incorrect conclusions.

The inherent value of this evidence is also established by the musings of some courts about its potential admissibility on redirect examination. Two of the courts that have held that a party offering Red Rover opinion testimony cannot establish the initial retention of the expert by opposing counsel during direct examination have suggested that this evidence may be admissible on redirect examination, if the cross-examination by the attorney who originally retained the expert questions the expert's quali-

One suspects that these courts instead may have been concerned, as some courts admitted were, that jurors would conclude not that attorneys must bring forth the opinions of experts they retained, but that a failure to do so suggests that the attorneys would prefer that the jurors not hear from these experts. See Peterson, 81 F.3d at 1057 ("agree[ing] with the original retaining party's contention that evidence of the original retention "gave the jury the . . . inference . . . that something was being hidden from them by [original retaining party's] counsel"); Agron, 176 F.R.D. at 451 ("If the fact of the prior retention is revealed, jurors may assume that Plaintiff's counsel tried to suppress or hide evidence which it considered unfavorable."); In re Vestavia Assocs., 105 B.R. 680, 682 (Bankr. M.D. Fla. 1989) ("A jury might think evidence is being hidden . . ."). That conclusion, unlike the somewhat different one outlined in the previous paragraph, is correct. Cf. White, 21 S.W.3d at 224 n.9 (noting that some courts have concluded that parties attempting to de-

disclose "are undertaking to suppress evidence"). Indeed, it is precisely the type of conclu-

sion that juries are given the right to make under some standard jury instructions. See, e.g., John M. Dinse et al., California Jury Instructions: Book of Approved Jury In-

structions §§ 2.12, 2.03 (8th ed. 2000); Va. Model Jury Instructions § 2.080 (1998) ("If you believe that a party, without explanation, failed to call an available witness who has knowledge of necessary and material facts, you may presume that witness's testimony would have been unfavorable to the party who failed to call the witness."); Taylor v. Kohli, 625 N.E.2d 64, 68 (Ill. Ct. App. 1993), aff'd, 642 N.E.2d 467 (Ill. 1994) (reversing trial court's giving of standard jury instruction in the case at hand, without holding that this instruction was per se invalid) ("The plaintiff has failed to produce an expert witness Dr. L. Andrew Koman, who is within the plaintiff's power to produce; you may infer that the testimony of Dr. Koman would be adverse to the plaintiff."); see also Williamson v. Super. Ct., 582 P.2d 126, 130 n.2 (Cal. 1978) (quoting Breland v. Taylor Eng'g & Mfg. Co., 126 P.2d 455, 461 (Cal. Ct. App. 1942)) ("A defendant is not under a duty to produce testi-

mony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse."). If such conclusions are allowed for other types of evidence, it is difficult to see why a court would exclude bias evidence to prevent such conclusions with regard to expert testimony. 288. See Miller v. Marymount Med. Ctr., Inc., No. 2000-CA-000827-MR, 2001 WL 726798, at *8 (Ky. Ct. App. June 29, 2001) (review granted and opinion subject to revision or withdrawal) (Ky. June 5, 2002) (admitting evidence of Red Rover's initial retention because "we are persuaded by the simple, almost universally-accepted principle that 'a trial is essentially a search for the truth'" (quoting Cogdell v. Brown, 531 A.2d 1379, 1381 (N.J. Super. Ct. Law Div. 1987))). Because the Kentucky Supreme Court has granted re-

view of the Kentucky Court of Appeals' decision in Miller, this decision might be reversed, if the Kentucky Supreme Court fails to recognize the importance of Red Rover and bias evidence.

289. See supra note 285.
Presumably these courts believe that such evidence is relevant during redirect examination because it establishes that the expert is a reliable source of information for the jurors. If this is the case, and it no doubt is, such evidence is also relevant during direct examination to establish the very same thing.291

Jurors who face the daunting task of resolving disputed issues of fact deserve all relevant, reasonable evidence that can help them make these determinations. Because evidence of the relationship between an expert and the party who initially retained her, like other bias evidence, can assist the jurors in making these difficult determinations, courts should admit it.

IV. PROPOSAL: ADMISSION OF RED ROVER TESTIMONY AND EVIDENCE OF INITIAL RETENTION

Both Red Rover opinion testimony and proof of the original retention of the expert constitute relevant and potentially valuable evidence. Therefore, courts should remove the barriers that exclude this evidence and facilitate its introduction at trial.292

Amendment of the Federal Rules of Civil Procedure is not necessary because proper implementation of the current Rules will lead to these results.293 Pursuant to the provisions of Rule 26 of the Federal Rules of

290. See Peterson, 81 F.3d at 1038 n.5; Granger v. Wisner, 656 P.2d 1238, 1243 & n.2 (Ariz. 1982). But see Agron, 176 F.R.D. at 451 (refusing to allow inquiry into Red Rover's original retention on redirect examination).
291. Though initial retention evidence is relevant, some courts might not allow it during direct examination. See supra note 259.
292. Courts should enforce all requirements of the Federal Rules of Evidence that control the admission of all evidence, such as relevance and hearsay restrictions. See White, 21 S.W.2d at 226 ("[W]e must decide whether the portions of Dr. Kostuik's testimony that the Whites' [sic] desired to use were relevant."). Relevance will not ordinarily be a problem, because both Red Rover opinions, see Lunghi, 200 Cal. Rptr. at 389; White, 21 S.W.3d at 227, and evidence about the relationship between the expert and her original employer, see supra Part III.C.1, are probative. When the expert's testimony is presented live or through a valid offer of a deposition, see supra note 64, hearsay restrictions often will not prevent admission of the testimony. See Collins v. Wayne Corp., 621 F.2d 777, 781-82 (5th Cir. 1980). In some circumstances, even an offer of the expert witness's report may suffice, because it may constitute an admission by a party opponent under Rule 801(d)(2) of the Federal Rules of Evidence or similar state evidence law provisions. Some, but not all, courts have held that an expert's statements are admissible as non-hearsay admissions by a party, because an expert is an agent of the party that retained her. Id. at 782 ("In this case, Greene was [defendant] Wayne's agent as Wayne employed Greene to investigate and analyze the bus accident. Greene's report on his investigation and his deposition testimony in which he explained his analysis and investigation was an admission of Wayne."); Onti, Inc. v. Integra Bank, No. CIV.A.14514, 1998 WL 671263, at *1 (Del. Ch. Aug. 25, 1998). But see Kirk v. Raymark Indus., Inc., 61 F.3d 147, 163-64 (3d Cir. 1995) (excluding testimony from a previous trial by an expert retained by the party in that case, because the expert witness was not controlled by the party and was therefore not the party's agent); In re Hidden Lake Ltd. P'ship, 247 B.R. 722, 724 (Bankr. S.D. Ohio 2000) (following Kirk in rejecting deposition testimony of an expert witness taken in the same case); Taylor, 642 N.E.2d at 468-69 (similar reasoning and result, under state law). 293. To prevent potential unfairness to parties responding to claims made by other parties, courts adopting disclosure and discovery schedules should heed the Advisory Committee's admonition that "in most cases the party with the burden of proof on an issue should
Civil Procedure, courts should require reports from, and allow depositions of, all disclosed experts. Because there is no provision in Rule 26 allowing de-disclosure of expert witnesses, courts should make it clear that a party’s de-disclosure will have no effect.

In the same vein, courts should admit Red Rover opinions at trial when offered via deposition, live testimony, or other acceptable means. An attorney who desires to present Red Rover testimony live should be allowed, but not required, to use a subpoena to secure the expert’s presence at trial. To facilitate voluntary trial testimony, an attorney disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue. As the Advisory Committee noted, “broad, vague, and conclusory allegations [are] sometimes tolerated in notice pleading—for example, the assertion that a product with many component parts is defective in some unspecified manner . . . .” A party responding to such a claim should not be required to disclose its possible expert witnesses until the party pursuing the claim has first disclosed its experts, because a deadline in advance of the pursuing party’s expert witness disclosure deadline could force a responding party to decide whether to convert a consulting expert into a possible trial witness (and therefore a possible Red Rover expert) before that party is reasonably aware of the allegations against it.


296. Cf. House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 248 (N.D. Iowa 1996) ("Because the court concludes that House is entitled to call Dr. Taylor as a witness at trial . . . , the court will allow the pretrial deposition of Dr. Taylor by House . . . .").

297. See supra notes 147, 160-61 and accompanying text.

298. A state court suggested that de-disclosure must have effect, because “[o]therwise, a party could never redesignate an expert witness who was or became adverse to the party’s position.” Axelson, Inc. v. McIlhany, 755 S.W.2d 170, 176 (Tex. App.—Amarillo 1988, orig. proceeding). That statement rather precisely outlines the current version of Rule 26 of the Federal Rules of Civil Procedure, correctly interpreted. Based upon a later decision of the Texas Supreme Court, it appears that this statement also outlines Texas law, at least under the circumstances presented in Axelson. See Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556, 557 (Tex. 1990) (allowing depositions of an expert that had been designated as a testifying expert and later "redesignated" as a "consultant-only" expert after a partial settlement); Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 552 n.3 (Tex. 1990) (noting that the Scott decision rendered the same day dealt with issues regarding discovery of redesignated experts).

299. Of course, courts should demand compliance with all requirements for the use of deposition testimony at trial, unless these requirements are waived. See Fed. R. Civ. P. 32; supra note 64.

300. In some circumstances, some courts might admit the report of a Red Rover expert. See supra note 292.

301. Absent unusual circumstances, see infra note 312, Rule 403 balancing should not be undertaken by courts faced with offers of Red Rover opinion testimony. Concerns about previously confidential information shared with experts should not thwart admission of this testimony. See supra Part III.A.

302. Courts have suggested that experts can voluntarily testify at trial for a party other than the one who initially retained them. Cf. Kirk v. Raymark Indus., Inc., 61 F.3d 147, 165 (3d Cir. 1995) (when a party wished to call an expert retained by the party’s opponent in a previous case, the party may be required to contact the expert and “request his attendance at trial”); Taylor v. Kohli, 642 N.E.2d 467, 469 (Ill. 1994) (stating that, under Illinois law, once a party abandoned a witness, the party no longer controlled that witness); Cogdell v. Brown, 531 A.2d 1379, 1382 (N.J. Super. Ct. Law Div. 1987) (noting that an expert initially consulted by a defendant voluntarily testified for the plaintiff).

303. See supra note 66.
also should be allowed\(^3\) to contact the expert directly,\(^4\) unless\(^5\) the expert is represented by her opponent\(^6\) or other counsel in the matter.\(^7\) If the expert is not willing to form additional opinions or do addi-

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\(^3\) An attorney's contact with an expert originally retained by her opponent will, of course, not always lead to voluntary testimony or even to any discussion between the attorney and the expert, because contractual obligations to the initially retaining attorney or party, agency law, or the standards of the expert's profession may prevent such a discussion, or the expert might simply chose not to assist the attorney voluntarily. See Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F. Supp. 334, 339 (N.D. Ill. 1990) (discussing confidential duties of experts); Johnston v. Nat'l Broad. Co., 356 F. Supp. 904, 910 (E.D.N.Y. 1973) (noting that "any witness has the right to refuse to be interviewed if he so desires"); Lubet, supra note 46, at 177; Easton, supra note 22, at 741, n.352; Lubet, supra note 42, at 471-74; cf. Kaveney v. Murphy, 97 F. Supp. 2d 88, 89-90 (D. Mass. 2000) (requiring attorney conducting ex parte interviews to remind witnesses that they have the right to refuse to participate). Under the Model Rules of Professional Responsibility as currently constituted and construed, the retaining attorney retaining the expert may even ask the expert not to participate in ex parte communications, as long as the expert is an agent of the attorney's client. See Model Rules of Prof'l Responsibility R. 3.4(f) (2002); Easton, supra note 22, at 724-25, 738-40. The attorney could also ask such an expert not to discuss any previously confidential materials with the opposing attorney, but could not ask the expert to destroy these materials. See W.R. Grace & Co. v. Zotos Int'l, Inc., No. 98-CV-8385(F), 2000 WL 1843258, at *6-12 (W.D.N.Y. Nov. 2, 2000) (holding that retaining attorney's instructions to expert to destroy drafts of the expert's report were improper, despite attorney's claim that work product doctrine protected drafts and conversations between attorney and expert regarding changes in report); Easton, supra note 22, at 725-26 & n.285.

\(^4\) See Phila. Bar Assn. Prof. Guidance Comm., Guidance Op. 94-22, at *1 (1995) (concluding that the Pennsylvania Rules of Professional Conduct do not preclude ex parte contact with opposing expert); cf. Kirk, 61 F.3d at 165 (suggesting, in a case where a party wished to present the testimony of an expert retained by the party's opponent in a previous case, that the attorney for that party had an obligation to make an "independent attempt to contact" the expert).

In a previous article, I argued that attorneys are and should be allowed to engage in ex parte communications with retained experts who have been disclosed by their opponents as possible trial witnesses. See generally Easton, supra note 22. As discussed at length in that article, despite some decisions by courts and opinions by other ethics authorities to the contrary, id. at 680-82; see also Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719, 724 (7th Cir. 2000); Sewell v. Maryland Dep't of Transp., 206 F.R.D. 311 (D. Md. 2002), no provision of either the Model Rules of Professional Conduct or the Federal Rules of Civil Procedure prohibits an attorney from contacting an expert retained by her opponent without notifying that opponent. Easton, supra note 22, at 676-704. Although that article's discussion focused upon efforts by an attorney to gather information about the expert that would help the attorney effectively cross-examine the expert, id. at 674-76, it is equally applicable to experts who have reached or may reach opinions helpful to the contacting attorney. In either instance, the attorney making the ex parte contact is attempting to gather information that will advance her case, and therefore harm the opponent's case, at trial. In either case, there is no provision of law that prohibits ex parte contact, id. at 676-704, except in the states of Idaho, id. at 698-700, and Texas, see Cramer v. Sabine Transp. Co., 141 F. Supp. 727, 730 n.5 (S.D. Tex. 2001).

\(^5\) In making ex parte contact with an expert, an attorney must avoid improper conduct, including hiding the attorney's role, making false statements, implying that the expert must participate in ex parte communications, harassing the expert, and falsifying evidence. Easton, supra note 22, at 735-36.

\(^6\) Unless the expert is herself a party or is an employee or, in the view of some ethics authorities, a former employee of a party, see Easton, supra note 22, at 678, n.116, she will not ordinarily be represented by the contacting attorney's opponent. See Lubet, supra note 42, at 485 ("Retaining counsel is not the [expert] witness's lawyer.""). Since the expert is not a party to the case, the expert is not represented by either of the attorneys.)

\(^7\) See Model Rules of Prof'l Conduct R. 4.2 (1999) (prohibiting ex parte contact with persons who are represented by counsel in the matter at hand); Restatement
tional work on the case, neither the court nor the opposing party can force her to do so, though the expert may be forced via subpoena to attend the trial and testify about factual observations and opinions she has already formed. In addition, neither the court nor the initially opposing party can require the expert to do additional work without additional compensation. Therefore, if acquiring or presenting Red Rover opinions will require the expert to spend additional time on the matter, the party calling the expert should be permitted and required to pay reasonable fees to the expert.

THIRD OF THE LAW GOVERNING LAWYERS § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a non-client whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100 . . . ."); Easton, supra note 22, at 676, n.110 (citing the Model Code predecessor to Model Rule 4.2 and the state professional responsibility rules based upon Model Rule 4.2 or its Model Code predecessor).

Several courts have held that an expert who is unwilling to form new opinions cannot be forced to do so, even with a subpoena, but a subpoena can be used to require an expert to testify about factual observations and opinions she has already formed. See supra note 66.

Under Rule 26, a party seeking discovery from an expert is required to pay the expert a reasonable fee for time spent responding to discovery, absent manifest injustice. See FED. R. CIV. P. 26(b)(4)(C). Therefore, if a party has not yet deposed an expert, it should expect to pay expert witness fees for the deposition. Cf. Quaranitutto v. Consol. Rail Corp., 106 F.R.D. 435, 437 (W.D.N.Y. 1985) (approving of defendant's offer to pay plaintiff's expert witness "a reasonable fee for the time he spends during the deposition"). If a party will call the expert as a live witness at trial, it cannot expect the other party to continue to pay the expert's fees. House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 249 (N.D. Iowa 1996). ("[I]n the interest of fairness, if House calls Dr. Taylor, House will be required to pay his expert witness fee."); cf. Kirk, 61 F.3d at 165 (where a party wished to call an expert retained by his opponent in another case, the party wishing to call the witness should "offer him his usual expert witness fee").

Some courts have indicated rather grave concern about the possibility that an expert might receive fees from a party other than the one who originally retained her. Even when an attorney did not pay any fees to an expert retained by the opposing party, but did suggest the possibility of retaining him to do an inspection in an unrelated matter, the Ninth Circuit stated:

In layman's terms, [the pro se plaintiff] labeled the employment offer [by defense counsel] to Dr. Grimm as a bribe. This may not be a fair characterization. However, attorneys must use their common sense to avoid conduct which could appear to be an improper attempt to influence a witness who is about to testify. We will never know Combs' actual motivation in making an offer of employment to Dr. Grimm. Regardless of Combs' motive, at a minimum, the offer of employment put Dr. Grimm in the position of having divided loyalties. Quite simply, this court chooses to abide by the ageless wisdom that a person cannot serve two masters.

These concerns seem rather inconsistent with viewing the trial as a search for truth. If the Ninth Circuit is correct, even the possibility of payment of fees to an expert, and certainly the actual payment of fees, might reduce the expert's bias in favor of the party who initially retained her. Although the suggestion that payments affect biases is certainly correct, this concern is at least equally applicable to the payment of fees by the party who initially retained the expert. See supra notes 255-67 and accompanying text. A court system that is concerned about the possible effect of bias on a witness's testimony, see supra notes 255-67 and accompanying text, should be pleased by the negation of this initial bias through the payment of fees by the other party. Only a system that has more concern for the protection of a party's investment in an expert witness than in the potential truth-
The party offering Red Rover testimony should be allowed to introduce evidence establishing that the other party originally retained her. As a general rule, courts should not entertain arguments that typical evidence of the relationship between the expert and the party who initially retained her should be excluded under Rule 403. However, a court faced with unusual circumstances may have to consider whether to exclude this evidence or the opinion testimony itself. Of course, the originally retaining party should be allowed to attack this testimony with all traditional means used to discredit experts, including introduction of bias evidence about the relationship between her opponent and the expert and any fees paid by her opponent to the expert.

enabling effects of countering this investment could suggest that the payment of witness fees by the initially opposing party constitutes "witness tampering." Erickson, 87 F.3d at 303. If the system seeks the truth, it should tolerate some risk to a party's investment in a particular expert. See Norfin, Inc. v. Int'l Bus. Machs. Corp., 74 F.R.D. 529, 533 (D. Colo. 1977) (quoting Seven-Up Bottling Co. v. United States, 39 F.R.D. 1, 2 (D. Colo. 1966)); Easton, supra note 22, at 742, n.358.

311. See supra Part III.C.

312. In some unusual cases, a party might be able to establish that introduction of this evidence would result in particular and uncommon prejudice. For example, if one party established a relationship with an expert who was then sent to the opposing party as a spy without in the role of a consultant and, later, a disclosed expert, the court could find that presentation of her opinions would unfairly prejudice the party who hired her without knowing that she was a spy. See Lubet, supra note 46, at 179 (noting that a court might bar the use of an expert who "deliberately sets out to switch sides"); cf. Miles v. Farrell, 549 F. Supp. 82, 83 (N.D. Ill. 1982) (barring the testimony of a doctor "who treated the plaintiff, a blind child, both before and after he was retained as an expert by one of the defendants, without disclosing his relationship with the defendant"). Other egregious circumstances, such as an expert initiating contact with opposing counsel in an effort to auction her services to the highest bidder among the parties, might result in exclusion of the expert's testimony. A court might also provide relief to a party who could establish that the original disclosure of the expert as a possible trial witness resulted from a clerical or other error. See Castellanos v. Littlejohn, 945 S.W.2d 236 (Tex. App.—San Antonio 1997, orig. proceeding).

In ordinary circumstances where the only claims of prejudice are the typical ones associated with the retention of an expert who later reaches opinions helpful to the opposing party, the court should reject arguments based on Rule 403.

313. See Collins v. Wayne Corp., 621 F.2d 777, 782 (5th Cir. 1980) ("[Defense expert] Greene's deposition testimony was not, of course, a binding judicial admission, and had the district court admitted Greene's deposition as an admission Wayne would have had an opportunity to explain why some of Greene's conclusions were not consistent with Wayne's position at trial."); cf. Fenlon v. Thayer, 506 A.2d 319, 323 (N.H. 1986) (noting that the party that initially consulted an expert whose testimony would be offered by the opposing party on remand "will have the opportunity to counter the weight of such testimony").

314. See TV-3, Inc. v. Royal Ins. Co. of Am., 193 F.R.D. 490, 492 (S.D. Miss. 2000) ("[B]oth the expert's compensation and his 'marching orders' can be discovered and the expert cross-examined thereon."); Emergency Care Dynamics, Ltd. v. Super. Ct., 932 P.2d 297, 300 (Ariz. Ct. App. 1997) ("Just as an expert witness's sources remain a proper subject of cross examination, so do the expert's relations with the hiring party and its counsel.") (citations omitted); Stearrett v. Newcomb, 521 A.2d 636, 638 (Del. Super. Ct. 1986) ("It is inherent in the testimony of the expert that he would be called upon to divulge all facts and information upon which he bases his opinion, and any limitations placed upon his retention as an expert."); supra note 258.
V. ADVANTAGES OF ADMISSION OF RED ROVER EVIDENCE

As the discussion outlining the problems with decisions excluding Red Rover opinions and bias evidence has demonstrated, the primary advantage of admitting both of these types of Red Rover evidence is providing the jury with information that will be valuable in its resolution of disputed factual issues. Regular admission of both types of Red Rover evidence will also have other\(^\text{315}\) advantages over the current inconsistent court rulings.

A. RED ROVER EVIDENCE WILL HELP JURIES RESOLVE FACTUAL DISPUTES

Perhaps the most important reason to admit both Red Rover opinions and testimony about the initial retention of Red Rover experts is the value of this evidence to the jury in its often difficult task of resolving contested factual issues.\(^\text{316}\) Although all relevant evidence has this benefit,\(^\text{317}\) the special circumstances of cases involving Red Rovers make Red Rover evidence particularly helpful to jurors.

To understand the potential value of Red Rover evidence, one must first appreciate the circumstances in which it comes into existence. Red Rover experts, after all, start out as experts retained by one of the attorneys.\(^\text{318}\) In the usual pattern of attorney retention of experts who are ultimately disclosed as possible trial witnesses, there are many realities that tend to lead to the expert reaching opinions that are helpful to the attorney who hired her.\(^\text{319}\)

These realities start before the expert herself has anything to do with the case. When an attorney searches for an expert witness, she may try to locate a person who is likely to reach opinions that will help her cli-

\(^{315}\) One court noted what was, in its view, an advantage of allowing Red Rover testimony other than the ones outlined in this section. According to this court, one of the policy objectives advanced by allowing Red Rover testimony was "allowing experts to pursue their professional calling." Koch Ref. Co. v. Jennifer L. Beaudreaux MV, 85 F.3d 1178, 1183 (5th Cir. 1996) (quoting English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498, 1504-05 (D. Col. 1993)). Given the rather substantial marketplace for experts, see, e.g., Edward J. Imwinkelried, Should the Courts Incorporate a Best Evidence Rule into the Standard Determining the Admissibility of Scientific Testimony?: Enough Is Enough Even When It Is Not the Best, 50 CASE W. RES. L. REV. 19, 49 (1999), this may not be a very important policy concern.

\(^{316}\) If courts allow parties to render disclosed experts ineligible to testify by de-disclosing them, there will be instances when juries are deprived of the testimony of experts whose special expertise cannot be matched by any of the experts the juries will hear at trial. See White v. Vanderbilt Univ., 21 S.W.3d 215, 221 n.6 (Tenn. Ct. App. 1999) (noting that the Red Rover expert in question allegedly had written "the 'preeminent medical article' on the primary contested issue in the case).

\(^{317}\) See supra notes 262-64 and accompanying text.

\(^{318}\) See supra notes 21-34 and accompanying text.

\(^{319}\) See Lubet, supra note 46, at 171 (1998) ("After all, advocates typically retain experts with one purpose in mind: to win the case.").
Although trial attorneys presumably vary in the extent to which they seek an expert who is prone to reach certain opinions, many, if not most, have at least some desire to find an expert who is at least somewhat likely to reach the opinions desired by the attorney.\textsuperscript{321}

The conditions that tend to lead to expert opinions consistent with the positions taken by the attorney retaining the expert continue during the relationship between the retaining attorney and the expert. First, the attorney hires the expert witness and thereby enters into an employer-employee relationship with her.\textsuperscript{322} As noted above, the expert becomes, at least to some extent, a member of the trial team headed by the attorney, thereby becoming a member of a group whose goal is success in the litigation at hand.\textsuperscript{323} The attorney also directs the flow of information to the expert, by deciding which data to share with her.\textsuperscript{324} In the interaction

\begin{itemize}
  \item \textsuperscript{320} Attorneys who are looking for expert witnesses often ask other attorneys to recommend potential experts. See Christine D. Bakeis, Selecting and Handling Expert Witnesses in Litigation, \textit{For the Def.}, Jan. 1997, at 15; Tim Hallahan, Everything You Need to Know About Expert Witnesses, \textit{Prac. Litigator}, Sept. 1997, at 41, 43. The contacted attorney is more likely to recommend an expert who reached an opinion favorable to that attorney than one who reached an opinion that hurt that attorney. See Lee Mickus, Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure, 27 CREIGHTON L. REV. 773, 774 (1993-94). Therefore, to the extent that an expert hopes to earn fees from regularly being retained by attorneys, there will be significant incentives for her to regularly reach opinions helpful to the attorneys who retain her. \textit{Id.} at 774 n.6. Because an attorney is likely to recommend an expert who helped her achieve a favorable result in previous litigation, which generally presumes the expert testified to an opinion that favored the recommending attorney's client, the possibility that a current attorney may someday become a recommending attorney creates incentives for experts to favor their employers when reaching their opinions. See Wroblewski v. de Lara, 727 A.2d 930, 934 (Md. 1999); Easton, \textit{supra} note 21, at 493 n.84; Mickus, \textit{supra}, at 774, 790 n.69.

  \item \textsuperscript{321} See Charles W. Wolfrum, \textit{Modern Legal Ethics} § 12.4.6, at 652 (1986); Ellen E. Deason, Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Defiance, 77 OR. L. REV. 59, 93 (1998); John H. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 835 (1985) ("The more measured and impartial an expert is, the less likely he is to be used by either side."); cf. Onti, Inc. v. Integra Bank, No. CIV.A.14514, 1998 WL 671263, at *2 (Del. Ch. 1998) (concluding that "the fact that the party has the right to choose the expert in the first place" supports the conclusion that the expert is an agent of the party).

  \item \textsuperscript{322} See Marcus, \textit{supra} note 203, at 1644-45; Mickus, \textit{supra} note 320, at 789-90; Plunkett, \textit{supra} note 125, at 482. While the association between the attorney and the expert is often an independent contractor relationship, this is a form of employment relationship. See Easton, \textit{supra} note 21, at 494 n.87; cf. Taylor v. Kohli, 642 N.E.2d 467, 468 (Ill. 1994) (noting that relationships can include "employer/employee, principal/agent, or owner/independent contractor").

  \item \textsuperscript{323} See Easton, \textit{supra} note 21, at 497; Langbein, \textit{supra} note 321, at 835 (documenting the "subtle pressure" on an expert witness "to join the team"); Mickus, \textit{supra} note 320, at 779 (noting the fundamental issue of whether experts should "be allowed to play a role on the litigation team and participate as advocates").

  \item \textsuperscript{324} An attorney's ability to influence a retained expert's opinions by determining which information will be forwarded to the expert should not be underestimated. In the typical case, the expert relies upon the attorney to provide most or all of the information she will consider in forming her opinions, because the attorney acquires this information through discovery, disclosures, and investigation. \textit{See In re Air Crash Disaster at Stapleton Int'l Airport}, 720 F. Supp. 1442, 1444 (D. Colo. 1988); Applegate, \textit{supra} note 99, at 295-96; Easton, \textit{supra} note 21, at 495. Although a retained expert may engage in some of her own research and investigation, she usually will do so only after obtaining the approval of the
between the attorney and the retained expert, the attorney may direct and even alter the expert's views, by subtly\textsuperscript{325} or not so subtly\textsuperscript{326} advising the expert about the opinions the attorney wishes to present at trial.\textsuperscript{327} Perhaps most significantly, the attorney decides whether the expert will continue to earn fees from the case.\textsuperscript{328} An experienced or otherwise aware expert who is initially retained by an attorney as a consultant will usually realize that her continued ability to earn fees from a case may depend upon her willingness to reach opinions helpful to her attorney who is employing her, because a failure to receive this approval may lead to the attorneys' refusal to pay for this work. \textit{Id.} As a result, the attorney controls the flow of information to the expert both by providing certain information and by effectively foreclosing access to other information. See Mickus, supra note 320, at 788-89 (noting that "counsel controls the expert's access to information about the case"). Because the expert is allowed to rely upon inadmissible information in forming her opinions, see \textsc{Fed. R. Evid.} 703, \textit{infra} note 379, the attorney can affect the expert's opinions by carefully selecting the information she forwards to the expert. See Applegate, supra note 99, at 296; Waits, supra note 128, at 441 ("It can hardly be said that documents reviewed by the expert prior to his testimony are irrelevant, particularly when they were produced by someone so keenly interested in moving the witness's testimony toward a particular conclusion.").

325. See Applegate, supra note 99, at 297 ("Practical guides for litigators emphasize that lawyers must . . . carefully prepare experts . . . to minimize any doubts, uncertainties, or unfavorable views."); Easton, supra note 21, at 497-99; Mickus, supra note 320, at 790 (noting attorneys' "overt or covert suggestions about how the expert should structure his opinion"); Plunkett, supra note 125, at 482 ("Attorneys may seek to . . . redirect[ ] the expert's emphasis . . . .").

326. See Oneida, Ltd. v. United States, 43 Fed. Cl. 611, 619 (1999) ("Opinions or instructions made by an attorney to his expert may include . . . suggestions—perhaps strong suggestions—on what conclusions should be drawn and in what terms."); \textit{W.R. Grace & Co. v. Zotos Int'l, Inc.}, No. 98-CV-8388(S), 2000 WL 1843258, at *4 (W.D.N.Y. Nov. 2, 2000) ("[A]lthough consultation with counsel may assist an expert in achieving 'clarity in the preparation of the required written report,' such communications, including the attorney's mental impressions and legal theories, may nevertheless influence the expert's consideration of the issues in matters of substance as well as form.").

For examples of rather brazen efforts by attorneys to lead experts to desired opinions, see A. Terzi Prods., Inc. v. Theatrical Protective Union, Local No. One, No. 97 CIV.3615 RCC DFE, 1999 WL 33296 at *2 (S.D.N.Y. Jan. 22, 1999) (noting that the retaining attorney "apparently then wrote the report and the expert signed it"); Kennedy v. Baptist Mem'l Hosp.-Booneville, Inc., 179 F.R.D. 520, 521-22 (N.D. Miss. 1998) (reviewing an expert's significant changes to an opinion letter, after apparently extensive communications between the retaining attorney and the expert), and Musselman v. Phillips, 176 F.R.D. 194, 201 (D. Md. 1997) (observing that a retaining attorney "provided detailed instructions to the experts about how to present their opinions and supporting bases, in order to comply with the disclosure requirements of Rule 26(a)(2)(B)—going as far as to outline the specific facts to be included in the opinions"). In another case, the brazenness of the attorney's influence was unclear, but "[t]he court's [in camera] review of the documents shows that . . . some of the revisions [were] plainly directed to matters of substance." \textit{W.R. Grace & Co.}, 2000 WL 1843258, at *5.

327. An attorney's efforts to direct a witness's testimony are sometimes referred to as preparing, coaching, or even "horseshedding" the witness. See Hodes, supra note 99, at 1349 (1999). These efforts are not considered unethical, when conducted properly. See \textit{Musselman}, 176 F.R.D. at 201 ("It is not improper for an attorney to assist a retained expert in developing opinion testimony for trial."); \textit{Lubet, supra} note 46, at 173-74; Easton, supra note 21, at 502; Marcus, supra note 203, at 1645. Instead, some argue that trial attorneys must coach their witnesses. See Hodes, supra note 99, at 1350; Marcus, supra note 203, at 1645; Richard H. Underwood, \textit{The Professional and the Liar}, 87 Ky. L.J. 919, 954 & n.122 (1998-1999).

328. See Easton, supra note 21, at 496.
Finally, the attorney decides whether to disclose the expert as a possible trial witness under Rule 26(b)(a)(2)(A). Usually the attorney will reach this decision only after she has had the opportunity to assert some or all of the opinion-shaping influences outlined in the previous paragraph. Of course, the attorney may continue to assert most of these influences after she discloses the expert as a possible trial witness.

Although the extent to which attorneys use these means to influence the opinions of experts varies, almost all use them to some extent, sometimes without even realizing that they are doing so. The relationship between an attorney who chooses, hires, befriends, informs, coaches, pays, and considers censoring an expert is inherently a coercive one.

329. See Hodes, supra note 99, at 1346-47; Langbein, supra note 321, at 835 ("Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune."); Mickus, supra note 320, at 789-90; Plunkett, supra note 125, at 482; John M. Curtis, Expert Witnesses Can Never Truly Be "Disinterested," Los Angeles Daily J., Dec. 12, 1997, at 6, 6 ("When services are purchased, the service-provider will feel pressure to deliver only results—no matter how scientific or objective they appear—that satisfy the buyer.").

The potential for an attorney to influence an opinion through her ability to control the flow of fees and future recommendations, see supra note 320, is perhaps increased when the expert is among the many whose careers are dedicated largely or exclusively to serving as experts in litigation. See Easton, supra note 22, at 665, n.61. Many courts have observed that there is a ready supply of "hired-gun" expert witnesses, see, e.g., Wolfram, supra note 321, at 652; Curtis, supra, at 6, who are willing to reach the opinions their employers need, even if there is little basis for these opinions. See, e.g., In re Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1234 (5th Cir. 1986) ("[T]he professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and not is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury . . . ."); Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1407 (D. Or. 1996) (concluding that an expert's "well-traveled opinions are no more than educated guesses dressed up in evening clothes"); In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1506-07 (D. Kan. 1995) (decrying an expert's ignoring "of well-accepted scientific principles and methodology"); Lipsett v. Univ. of P.R., 740 F. Supp. 921, 924 (D.P.R. 1990) (quoting Air Crash Disaster regarding experts who were "available to the highest bidder").

330. In deciding whether to identify an expert as a possible trial witness, perhaps the single most important factor for the attorney to consider is whether the expert's opinions are likely to help the attorney at trial. Trial attorneys are well aware of the problems that can be caused by an expert who reaches opinions helpful to opposing counsel. See Easton, supra note 21, at 499; Mickus, supra note 320, at 784 ("Unless counsel thought that the expert's testimony supported her position, she would not call that expert as a witness at trial."); Gerard Mantese et al., The Effective Use of Experts During Discovery and Trial, 75 Mich. B.J. 832, 832 (1996) ("There is almost nothing worse than having your own expert take a damaging position contrary to your client's interests."); W. Brent Wilcox, Plaintiff's Experts: Finding, Preparing and Presenting an Expert Witness, Utah B.J., Nov. 1995, at 38, 38 ("Don't be afraid to discard an expert if he can't help you.").
Given the conditions of the attorney-expert relationship, it is a rather remarkable event when a retained expert reaches an opinion that harms the retaining attorney's case. 338 It is even more amazing when the expert who reaches such a conclusion has not only been retained, but also disclosed, by that attorney. 339 When this occurs, an expert who has been carefully selected, at least somewhat influenced, and evaluated by the retaining attorney has overcome all of these influences to reach an opinion disliked by her employer. This turn of events suggests rather strongly that the disliked opinion is correct. 340

Such an opinion is worthy of careful consideration by the body assigned the responsibility of deciding factual disputes related to the opinion. In a civil trial, that body is the jury. 341 If the jury is asked to resolve a factual dispute where such an opinion is germane, it will presumably be faced with the differing opinion of another expert retained by the party who originally retained the Red Rover expert. If the party who originally retained the Red Rover expert did not now contest her opinion on one or more factual issues, there would be no reason for the jury to have to evaluate the Red Rover's opinions. If there was no contest on the issue on which the expert opines, the party opposing the one who initially retained the expert would be entitled to a stipulation or jury instruction resolving the issue in its favor or, if the issue was fundamental to the case, to summary judgment. 342 Therefore, if the party originally opposing the

338. See Karn v. Ingersol-Rand Co., 168 F.R.D. 633, 639 (N.D. Ind. 1996) (opining that expert witnesses "are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune is desired"); WOLFRAM, supra note 321, at § 12.4.6, at 652 ("The tarnished ideal of expert testimony is testimony based entirely on the witness' honest scientific data and opinion. In truth, however, many expert witnesses are as much hired-gun advocates as are the lawyers for whom they work."); Applegate, supra note 99, at 348 n.368 (commenting that "it is generally recognized that the lawyer explains to the expert more less exactly what needs to be said"); Langbein, supra note 321, at 835 (observing that many refer to experts as "'saxophones,'" because "the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes").

339. See Easton, supra note 21, at 493 n.83; cf. Onti, Inc. v. Integra Bank, 1998 WL 671263, at *2 (Del. Ch. Aug. 25, 1998) (noting that "a party has control over whether or not to introduce the expert and testimony supported by him").

340. Even a court that disallowed evidence regarding the initial retention of the expert seemed to recognize the significance of an opinion by such an expert that was consistent with the position taken by the party opposing the one who hired him. See White v. Vanderbilt Univ., 21 S.W.3d 215, 228 (Tenn. Ct. App. 1999) ("The probative value of [defendants' expert] Dr. Kosutik's opinions regarding the actions of [the defendants] is significant because it is consistent with the expert opinion of the only neurosurgeon testifying for [the plaintiffs]").

341. Of course, it also possible that the trier of fact in a given civil case is the judge, but this article assumes a jury, rather than a bench, trial. See supra note 98.

342. If the party who originally retained the expert who has become a Red Rover with regard to one or more issues is unable to find another expert who reaches a different opinion on these issues, the originally retaining party ordinarily will be unable to contest these issues at trial. If "there is no genuine issue as to any material fact" and the party who is now calling the Red Rover expert "is entitled to a judgment as a matter of law," the party who originally retained the expert may suffer an adverse summary judgment. See FED. R. CIV. P. 56(c). This, of course, is exactly the result that a system designed to be a search for truth should desire. If all of the experts that have been retained on a critical
Red Rover expert is now offering her testimony at trial on a disputed issue of fact, it is safe to assume that the opposing party will be offering a competing opinion from a new, or at least a different, expert.

When a jury is faced with such a dispute among experts, Red Rover evidence can be particularly valuable. As I have outlined in a previous article, a case where opposing experts testify to diametrically opposed opinions often involves a critical question with only one correct answer, like whether a plaintiff was wearing a seat belt when the relevant automobile accident occurred. In these cases, when the expert or experts for one party answer the question “yes” and the expert or experts for the other party answer the question “no,” only one set of experts is correct and the other is, by definition, wrong. In such a case, the jury’s resolution of the dispute among the experts may be crucial because the jury is likely to return an incorrect verdict if it believes the wrong experts.

There are two types of “one-correct-answer” cases. The first category of these cases are those that involve, in my prior nomenclature, a precise question with one clear answer. In such a case, an exacting review of
the evidence would lead the vast majority of qualified experts to the same answer if the experts reviewed the evidence outside the context of litigation.\textsuperscript{351} The second category of cases involve a precise question that does not have a certain answer.\textsuperscript{352} In this second category, the available evidence or scientific knowledge is sketchy enough that careful, qualified experts could reach different conclusions, even outside the litigation context.\textsuperscript{353}

The problem for the civil justice system, of course, is that it can be rather difficult to tell whether a particular case is a "one clear answer" case or a "one uncertain answer case."\textsuperscript{354} In either circumstance, the party opposing the correct answer will claim that its position is justified, and it will point to its expert's testimony to support this claim.\textsuperscript{355} Although it is of course not a perfect indicator, Red Rover opinion testimony strongly suggests that the case at hand is a "one clear answer" case that should be resolved in favor of the party offering the Red Rover opinion at trial.\textsuperscript{356}

Put another way, if the question confronting the jurors is one that can have only one correct answer, Red Rover evidence can be tremendously helpful to them. After all, the jurors are asked in such a case to decide whether the experts telling them that "yes" is the answer are correct or experts telling them that "no" is the answer are correct. First, simply by receiving a Red Rover's testimony that her opinion is, for the sake of analysis, "yes," the jury acquires relevant information that can help it decide whether the answer is indeed "yes," even if the attorney offering the Red Rover's opinion is also offering the testimony of other experts, because the opinion is one more piece of relevant information.\textsuperscript{357} Perhaps more importantly, by learning the fact that one of the experts (or the only expert) who now says "yes" was originally hired and influenced by the party who is arguing "no,"\textsuperscript{358} the jury obtains information that may lead it to conclude that the answer is, more likely than not, "yes."\textsuperscript{359} In many

\textsuperscript{351} \textit{Id.}
\textsuperscript{352} \textit{Id.} at 521.
\textsuperscript{353} \textit{Id.}
\textsuperscript{354} \textit{Id.} at 514. In reality, cases with one answer occupy a spectrum, with one clear answer cases at one end of the spectrum and one uncertain answer cases at the other end. With enough information, one could place a particular dispute at the correct place on this spectrum. Often the factors that would be critical to correctly placing the dispute at its proper place on the spectrum would be the quantity and quality of available evidence and the extent to which experts agree about proper analysis of this evidence. \textit{Id.} at 523-24.
\textsuperscript{355} See Easton, \textit{supra} note 21, at 514-15, 521.
\textsuperscript{356} To state the point a bit more precisely, the presence of an opinion by an expert contrary to the one desired by her original employer suggests that the case is closer to the one clear answer end of the spectrum between one clear answer cases and one unclear answer cases. \textit{See supra} note 354.
\textsuperscript{357} As outlined above, however, when the Red Rover's opinion is cumulative of the opinion of another expert, the opinion itself has substantially less value than evidence of both the opinion and the fact that the person reaching that opinion was originally hired by the offering party's opponent. \textit{See supra} notes 278-79 and accompanying text.
\textsuperscript{358} \textit{See supra} notes 318-37 and accompanying text.
\textsuperscript{359} \textit{See supra} Part III.C.
such cases, this conclusion will be correct, because the fact that an expert reached an opinion contrary to that desired by her original employer suggests that the relevant question had one certain answer. Thus, the admission of both the Red Rover opinion itself and evidence about the Red Rover's relationship with her original employer will, in many cases, lead to a correct verdict.\footnote{360}

There certainly will be "one uncertain answer" cases where the Red Rover's opinions are incorrect. In other words, when an expert overcomes the inherent coercion of the expert-attorney relationship and reaches an opinion contrary to that desired by her original employer, that opinion might still be incorrect. Thus, in some cases, admission of the Red Rover's testimony and of evidence regarding her bias toward her original employer may lead jurors to an incorrect resolution of the disputed issue. However, presumably every conceivable category of relevant evidence might in an individual case lead a jury to reach an incorrect resolution of a disputed issue. This is certainly true of all bias evidence because a biased witness is not necessarily wrong in her testimony.\footnote{361} Nonetheless, as discussed above, we believe that bias evidence ordinarily will help the jurors who must evaluate a witness's testimony,\footnote{362} so we have a strong presumption in favor of admitting this evidence.\footnote{363} Both Red Rover opinion testimony and evidence about the Red Rover's biases are worthy of the jury's consideration as it resolves factual issues because they will often lead to correct results.\footnote{364}

\footnote{360} Admission of Red Rover evidence may be needed in some one clear answer cases, because juries do not always reach the correct answer in these cases. A review of appellate decisions reveals several where the appellate court negated jury verdicts based upon expert opinions that were so deficient that the appellate court ruled that the opinions should not have been admitted at trial. See, e.g., Weisgram v. Marley Co., 169 F.3d 514, 521-22 (8th Cir. 1999), aff'd, 528 U.S. 440 (2000); Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 567-70 (D.C. Cir. 1993); Andrews v. Metro N. Commuter R.R., 882 F.2d 705, 708-10 (2d Cir. 1989); In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1233-24, 1237 (5th Cir. 1986); cf. Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 829-33 (D.C. Cir. 1988) (affirming a trial court's granting of judgment notwithstanding a verdict that was based on improper expert testimony). Such cases suggest that juries can reach incorrect decisions even in one clear answer cases, by relying upon faulty expert testimony that contradicts the one clear answer. See Easton, supra note 21, at 516-17 & n.160. Admission of Red Rover evidence may lessen the probability of these incorrect verdicts.

\footnote{361} See supra note 264 and accompanying text.


\footnote{363} See supra notes 257-65 and accompanying text.

\footnote{364} In addition to the two types of one clear answer cases discussed in the text, there is a third category of cases where experts reach diametrically opposed opinions. In my previous categorization, such a case was identified as one involving an imprecise question with possibly disputable answers. See Easton, supra note 21, at 524. In some, but not all, of these cases, both of the answers given by the experts are reasonable, because the question the experts are asked to address is malleable enough to allow different experts to reach different answers, even if they agree on the underlying evidence. Id. at 524-25. For example, design experts in a product liability case might disagree about whether a certain risk of injury renders the product "unreasonably dangerous," or doctors in a medical malpractice case might disagree about whether a procedure with certain benefits and risks met the appropriate standard of care. Id. at 524-25 n.177.
Admission of Red Rover opinions and bias evidence will not always lead to a loss by the party who originally retained the Red Rover expert. As noted above, if the party is able to retain another expert to testify to opinions that dispute the Red Rover's opinions, neither summary judgment nor a stipulation conceding an issue to the other party would be appropriate. Instead, jurors in such cases will be asked to resolve the factual disputes raised by the contradictory expert opinions. The party opposing the Red Rover's opinions will certainly face a tougher battle in the face of Red Rover opinions and related bias testimony, but this is appropriate and desirable when an expert that it declared competent and influenced has reached an opinion other than the desired one. When the original retaining party is able to present another expert's opinion, admitting Red Rover evidence will not foreclose the possibility that the original retaining party will win, but it will suitably make winning more difficult.

B. Experts Will Be Treated Like Other Witnesses

Admission of Red Rover evidence will eliminate the unnecessary distinctions between expert and fact witnesses that are inherent in the decisions that exclude Red Rover opinions or Red Rover bias evidence.

Even in such a case, jurors can benefit from receiving Red Rover evidence. In the first place, some of these cases do not involve legitimate disputes among experts, because even flexible concepts like "unreasonably dangerous" can only be stretched so far. Id. at 525-26. When the experts for one party have used the cover of an imprecise question to proffer unjustifiable opinions, the contrary justified opinion of an expert hired and later replaced by the same attorney may lead jurors to correctly dismiss the unjustified opinions. Even when this is not the case, the jurors will still have to determine which expert or experts are correct. The fact that an expert hired by an attorney reached an opinion contrary to the one desired by her employer, despite the significant influence of the attorney over the expert, see supra notes 318-37 and accompanying text, may appropriately lead the jurors to conclude that this opinion is correct.

365. _See supra_ notes 342-45 and accompanying text.
366. _See supra_ notes 33-34 and accompanying text.
367. _See supra_ notes 318-37 and accompanying text.
368. The jury may need Red Rover testimony in a one uncertain answer case even more that it needs it in a one clear answer case. In a one clear answer case, the attorney who is on the correct side of the dispute may be able to establish the correct answer for the jury through a presentation of her own expert's testimony and an effective cross-examination of the expert who is pushing the incorrect answer. _See_ Easton, _supra_ note 21, at 522. In a one uncertain answer case, these techniques may not be as effective, because well-qualified experts might disagree about the proper answer. _Id._ at 522-23. In such a case, a Red Rover's correct opinion could be a crucial factor in the jury's resolution of the dispute among the experts.

369. The Federal Rules of Evidence have separate provisions governing opinion testimony based on a witness's own observation and opinion testimony based in whole or in part on sources outside the witness's personal observations. Those who are not qualified to serve as expert witnesses can testify only to "opinions or inferences which are . . . rationally based on the perception of the witness." _See_ FED. R. EVID. 701; _see also_ UNIF. R. EVID. 701; Easton, _supra_ note 22, at 658, n.44 (cataloguing state law). This restriction does not apply to experts who are qualified "by knowledge, skill, experience, training, or education" to offer "scientific, technical, or other specialized knowledge [that] will assist the trier of fact . . . to determine a fact in issue." _FED. R. EVID._ 702; _see also_ UNIF. R. EVID. 701; Easton, _supra_ note 22, at 661, n.49 (outlining state law). Experts are allowed to base their opinions not only on their own observations, but also upon information "made known to
Admitting the opinions of a competent expert witness will honor the tradition that the court and the jury are entitled to every person’s evidence, absent an applicable privilege. Allowing bias evidence will place the expert on par with fact witnesses, because evidence regarding the biases of fact witnesses is routinely admitted.

In addition, allowing depositions of de-disclosed experts will treat these witnesses in a manner similar to fact witnesses. Although attorneys sometimes reveal work product and other previously confidential information to persons that they later disclose as fact witnesses, attorneys representing parties other than the ones who disclose the existence of fact witnesses are allowed to take their depositions and use other discovery devices to acquire information about them. Experts who have been disclosed as possible trial witnesses should be treated the same way. Indeed, if any distinction is justified, more disclosure and discovery should be allowed with regard to experts due to the substantial influence of the expert at or before the hearing.”

FED. R. EVID. 703; infra note 379; see also Unif. R. Evid. 703; Easton, supra note 22, at 660, n.45 (outlining state law).

If a witness is presenting non-opinion testimony, the party offering the testimony must establish that the testimony is based upon the witness’s personal knowledge. FED. R. EVID. 602; see also Unif. R. Evid. 602; Easton, supra note 22, at 658 n.44 (citing state evidence law provisions similar to Federal Rule 602). This restriction applies to both a “lay” and an “expert” witness, when either is presenting non-opinion testimony. See Fed. R. Evid. 602 (stating that the personal knowledge requirement is not applicable when an expert is presenting opinion testimony under Rule 703); Unif. R. Evid. 602 (similar).

Therefore, although at least one court seems to have dismissed the notion in the case before it, see Agron v. Trs. of Columbia Univ., 176 F.R.D. 445, 448-49 (S.D.N.Y. 1997), it is possible that an expert’s testimony will consist not only of her opinions, but also of her factual observations. See H.R. Doc. 106-225, at 38 (2000); Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719, 724 (7th Cir. 2000). Quaratillo v. Consol. Rail Corp., 106 F.R.D. 435, 437 (W.D.N.Y. 1985); Delcastor, Inc. v. Vail Assoc., 108 F.R.D. 405, 408 (D. Colo. 1985). This possibility provides an additional reason to eliminate distinctions between “fact” and “expert” witnesses.

370. Of course, the mere fact that the attorney who retained the expert has suggested that she is competent by disclosing her as a possible trial witness does not necessarily mean that the witness is indeed competent. If there are crucial problems with the expert’s qualifications or analysis, the court should exclude her opinions. See supra note 292.

371. See supra notes 202-05 and accompanying text.

372. See supra notes 257-65 and accompanying text.

373. See Easton, supra note 22, at 713.

374. Fed. R. Civ. P. 26-37; see also Fed. R. Civ. P. 26(a) advisory committee’s notes (1937) (noting that Rule 26 was originally drafted to follow the practice of several states that “authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts”); Fed. R. Civ. P. 26(b) advisory committee’s notes (1946) (“The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.”).

375. See Easton, supra note 21, at 565-68 (arguing for similar treatment of fact and expert witnesses regarding reporting of bases for opinions).

376. Cf. State ex rel. Tracy v. Danendar, 30 S.W.3d 831, 834 (Mo. 2000) (en banc) (noting that privileged or work product documents used to refresh the recollection of fact witnesses may be outside the scope of discovery, but such documents shown to experts are discoverable because “[t]he documents, materials, and other information provided to him are the sources of the facts that he knows”).

377. See Waits, supra note 128, at 441 n.198; cf. Easton, supra note 22, at 714, 721, n.270 (arguing the same point regarding ex parte contact with fact and expert witnesses).
ence attorneys have over the experts they hire\textsuperscript{378} and to an important privilege that experts enjoy,\textsuperscript{379} that fact witnesses do not\textsuperscript{380}—relying on information provided to them by attorneys in reaching their opinions.\textsuperscript{381} If the system allows attorneys to affect expert witness testimony, it should protect against the dangers of this influence by encouraging and allowing disclosure of, discovery about, and trial testimony from these biased witnesses.

C. A CLEAR RULE WILL FACILITATE ATTORNEY PLANNING AND DECISION MAKING

As outlined in greater detail above, the current case law is a hodgepodge of decisions allowing Red Rover opinions in some instances and in some courtrooms and disallowing it in other instances and in other

\textsuperscript{378} See supra notes 318-37 and accompanying text.

\textsuperscript{379} Experts are allowed to base their opinions not only upon their own observations, but also upon information provided to them, including inadmissible data. The pre-2000 version of Rule 703 stated:

\begin{quote}
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
\end{quote}


Many states have evidence law provisions identical or substantially similar to the pre-2000 version of Federal Rule 703. See Easton, supra note 22, at 660, n.45; see also \textbf{Unif. R. Evid.} 703.

Before 2000, federal courts disagreed about whether a party offering an expert’s testimony could inform the jury about the inadmissible bases of the opinion. See \textbf{Fed. R. Evid.} 703 advisory committee’s note (2000). In 2000, provisions were added to Rule 703 to make it clear that the data supporting an expert’s opinion are not necessarily admissible. See \textbf{Fed. R. Evid.} 703 (“Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”); \textbf{H.R. Doc.} 106-225, at 53-54 (2000).

\textsuperscript{380} Under the Federal Rules of Evidence, a fact witness cannot base her testimony upon information provided to her by an attorney or anyone else. Instead, Rule 602 states, “A [fact] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” \textbf{Fed. R. Evid.} 602; see also \textbf{Unif. R. Evid.} 602; Easton, supra note 22, at 658 n.44 (outlining state law).

The personal knowledge requirement is not the only evidence law doctrine that prevents a fact witness from basing her testimony on information provided by attorneys. To the extent that a fact witness, as opposed to an expert witness, is testifying to an opinion or inference, Rule 701(a) provides that the opinion must be “rationally based on the perception of the witness.” \textbf{Fed. R. Evid.} 701; see also \textbf{Unif. R. Evid.} 701; Easton, supra note 22, at 658, n.44 (cataloguing state law).

\textsuperscript{381} Because attorneys are well aware of an expert’s license to rely upon inadmissible information in forming their opinions, see supra note 379, they provide substantial quantities of such information to the experts they retain. See \textit{In re Air Crash Disaster at Stapleton Int’l Airport}, 720 F. Supp. 1442, 1444 (D. Colo. 1988); \textit{Applegate}, supra note 99, at 295-96 (“The Federal Rules of Evidence contemplate some degree of preparation by the sponsoring party. . . . The basis of the expert’s testimony can be ‘facts or data . . . made known . . . at or before the hearing.’ Witness preparation usually provides the foundational material for the testimony.”) (quoting \textbf{Fed. R. Evid.} 703); Easton, supra note 21, at 495-96; \textit{Lubet}, supra note 42, at 469; \textit{Mickus}, supra note 320, at 788-89.
courtrooms. Many of these decisions rely upon the trial court’s discretion or upon balancing tests that do not lead to predictable results. The results of decisions regarding the admissibility of Red Rover bias evidence are somewhat more uniform, but the courts’ reliance upon Rule 403 in these decisions again suggests less than completely predictable results in future cases.

Although trial courts can and should exercise discretion on evidentiary matters, they should strive to treat like cases alike. When rules regarding the admissibility of categorical types of evidence are inconsistent, attorneys must make decisions without knowing the full consequences of these decisions. 

382. The current less-than-clear law is nicely illustrated by a case where a magistrate judge held that a de-disclosed expert could not be deposed, because the magistrate judge believed that the district judge’s holding in a previous case required this result, only to be reversed by the very same district judge, who allowed the deposition. See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 238-39 (N.D. Iowa 1996).

383. See supra notes 77-78, 83 and accompanying text.

384. See supra notes 87, 89-90 and accompanying text.

385. See supra notes 250-53 and accompanying text.


387. Cf. Vacco v. Quill, 521 U.S. 793, 799 (1997) (stating that the Equal Protection Clause “embodies a general rule that States must treat like cases alike”); Tax Analysis v. IRS, 117 F.3d 607, 614 (D.C. Cir. 1997) (“Treating like cases alike is, we have said, ‘the most basic principle of jurisprudence.’ LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc).”); Koff v. United States, 3 F.3d 1297, 1300 (9th Cir. 1993) (noting the importance of uniformity in the court’s decisions); In re Garcia, 844 F.2d 1528, 1538 (11th Cir. 1988) (“In such technical areas of civil procedure, we should choose one, clear rule.”); Keasler v. United States, 766 F.2d 1227, 1233 (8th Cir. 1985) (asserting that inter-circuit uniformity is desirable); Jones v. Mabry, 723 F.2d 590, 596 (8th Cir. 1983) (“A fundamental duty of courts of justice is to decide like cases alike . . . .”); George H. Brown, Environmental Lawyers and the Public Interest: A Response to David Dana, 74 OR. L. REV. 85, 85 (1995) (bemoaning the “unpredictable results” that come from unclear rules); Joel Slawotsky, Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered National Uniformity, 104 DICK. L. REV. 471, 501 (2000) (asserting, in the discovery sanction context, that “[c]ourts and attorneys need clear rules to follow to reduce the potential for inconsistent decisions”).

388. Cf. State ex rel. Tracy v. Dandurand, 30 S.W.3d 831, 836 (Mo. 2000) (en banc) (extolling the benefits of an expert discovery “‘bright line’ rule” that “is clear, understandable, and does not require the application of a multi-prong test”); Steven R. Bough, Splitting in a Judge’s Face: The 8th Circuit’s Treatment of Rule 37 Dismissal and Default Discovery Sanctions, 43 S.D. L. REV. 36, 54 (1998) (“Judges and trial attorneys need clear rules to follow.”); Brown, supra note 387, at 95 (asserting that “lawyers need clear rules”); Easton, supra note 21, at 569-72 (discussing the preference for clear rules among attorneys who must otherwise make strategic decisions based upon inconclusive precedent); Roberta K. Flowers, A Code of Their Own: Updating the Ethics Codes To Include the Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. REV. 923, 963-64 (1996) (promoting specific, clear regulations); Slawotsky, supra note 387, at 501 (2000) (making a similar argument in the discovery sanction context); Mary-Alice Brady, Note, Balancing the Rights of Debtors and Creditors: § 522(f)(1) of the Bankruptcy Code, 39 B.C. L. REV. 1215 (1998) (“The bankruptcy laws must, at a minimum, set forth clear rules and provide for predictable results so that creditors, debtors and their attorneys can plan their future relationships.”).
For example, in the current system an attorney must decide whether to disclose an expert she has consulted as a possible trial witnesses without knowing whether such disclosure will make the expert available as a witness to her opponent. Similarly, attorneys who receive a disclosure of an expert do not know whether the court will permit them to use the witness at trial. Therefore, even if they are fully satisfied with the expert's opinions, they may be forced to retain an otherwise unnecessary expert of their own to present the same opinions. Court adoption of a clear policy of admitting Red Rover evidence, absent unusual circumstances, would clarify these matters for all attorneys other than the few who actually do face unusual circumstances.

Attorneys who know that the experts they disclose as possible witnesses will be available as witnesses for any party will think very seriously about whether a particular expert should be disclosed. Because many attorneys now believe, with some justification, that they can de-disclose a previously disclosed expert, they may make decisions that will later haunt their clients in jurisdictions where courts do allow Red Rover opinion testimony.

Similarly, a system that allows Red Rover evidence will sometimes lead to reduced expert witness expenses for litigants. Under this system, an attorney who would otherwise hire an expert in a particular field may refrain from doing so if she learns that opposing counsel has designated an expert who will provide the opinions she desires as a Red Rover. This is particularly likely if the attorney knows that the court will allow testimony about the expert's relationship with her original employer, because the jury might be more likely to credit the Red Rover's opinions than the opinions of an expert who worked at all times for the attorney who is presenting her testimony at trial. Although the presence of helpful Red Rover opinions will not always lead to a decision not to hire an expert, it will save the parties the expense of retaining and deposing

389. See supra notes 238-43 and accompanying text.
390. See supra notes 311-14 and accompanying text.
391. See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 247 (N.D. Iowa 1996) ("The court's holding [allowing a deposition of a de-disclosed expert] will serve the salutary policy of requiring parties to give some thought and care to their expert witness designations, because once those designations are made, the party will have to live with the consequence that the opposing party will likely be given the opportunity to depose the expert or even to call the expert at trial on their own behalf.").
392. Id. at 248.
393. See supra notes 43-45 and accompanying text.
394. See supra Part III.C.1.
395. In some cases, the party who plans to use the Red Rover expert may have already retained its own expert and absorbed the cost of preparing the expert to testify at trial. In others, that party may not be prepared to risk going to trial with only the Red Rover expert's testimony on a critical issue, if it can find a more qualified expert or one who will make a more persuasive witness at trial. For example, if the Red Rover testimony can only be presented through the reading of a deposition transcript, the party may also wish to call a live witness at trial.
Because attorneys ultimately will react to applicable rules, adoption of a Red Rover admission policy will likely result in other modifications of attorney behavior regarding experts. For example, attorneys who retain experts with the ultimate goal of finding experts who can testify at trial will be even more likely to initially retain them as consultants. Although many attorneys already follow this practice, some attorneys or, perhaps more correctly, attorneys on some occasions retain experts and immediately disclose them as possible trial witnesses, before the experts have had the chance to review the available evidence and reach opinions. Attorneys are often forced into this practice because they have not located an expert until just before the expiration of the court's deadline for the disclosure of expert witnesses. If courts made it clear that all disclosed experts can be called by any party, attorneys would have even more motivation to hire experts as consultants, and to do so early enough that they will have time to find and retain new experts if necessary. By expediting the retention of experts, this change will also expedite the receipt by attorneys of information about their chances of success on the merits because discussions between consulted experts and retaining attorneys will take place earlier in the pretrial period. Early acquisition of information about the merits of the case will lead to speedier and more efficient resolution of some cases because well-informed parties are more able to reach settlement agreements. When settlement occurs early in the pretrial process, parties are spared unnecessary attorneys' fees, expert

396. A clear policy of allowing depositions and trial testimony from all disclosed experts could lead to reduced expert witness expenses in one other way. Under such a system, attorneys might be a bit less enthusiastic about hiring numerous experts in a given case, because one or more of the experts might be ultimately used against the attorney by opposing counsel. Therefore, attorneys might be more careful about limiting their list of experts to those that are truly needed.


398. See supra notes 21-25 and accompanying text.

399. See supra note 25.

400. See supra note 343-45 and accompanying text.

401. If attorneys knew that all disclosed experts could be deposed by their opponents, some attorneys might also disclose their experts well in advance of the court's deadline for disclosure, to give themselves time to find a new expert if the deposition of their initial expert revealed that she would be a more helpful witness to their opponent than to her. Cf. House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 242 (N.D. Iowa 1996) (“The decision in In re Shell Oil suggests that a party may change anticipated witnesses to non-witnesses up until the court-imposed deadline for exchange of witness lists . . . .”). To some extent, however, this pressure exists even if the attorney believes that the court will let her render an expert ineligible to testify by de-disclosing her, because an attorney who de-discloses an expert will presumably still have to find and disclose a new expert before the court's deadline. A clear policy of allowing depositions of all disclosed experts may simply sharpen the attorney's concern about the need to have an expert review the available evidence and reach opinions in advance of the disclosure deadline, so that the attorney will not face the prospect of not being allowed to name an expert in a particular field due to passage of the deadline.

402. See supra notes 247-49 and accompanying text.
witness fees, discovery expenses, and other costs that would be incurred through later settlement.

The proposed system of regular admission of Red Rover evidence might also affect attorney behavior in a negative direction, however. Once such a system is adopted, some attorneys might be even more prone to hire experts who are likely to reach the opinions desired by these attorneys because an expert who reaches opinions that are helpful only to the attorney retaining her ordinarily will not become a Red Rover expert.

While clear rules allowing Red Rover evidence might move some attorneys to be more motivated to retain “dependable” experts who are very likely to reach opinions they prefer, this effect should not be overstated. Because Red Rover testimony, though usually not Red Rover bias evidence, is currently admissible under some circumstances in some courts, attorneys already have some reason to fear that their opponents will benefit from their expert’s opinions. Even without this fear in either the current or proposed system, there are several factors that can lead attorneys to try to retain “dependable” experts, including the costs of multiple experts and the recognition of the need for certain expert opinions to avoid summary judgment and reach the jury in weak cases. At the same time, there are offsetting considerations that lead some attorneys to avoid experts whose opinions are overly subject to the molding of their employers, including the belief among many trial attorneys that such experts do not make credible witnesses and the desire of attorneys to learn about problems with their cases from their own experts, rather than from juries returning adverse verdicts. Therefore, in both the current and the proposed system, some attorneys will search for and hire “dependable” experts and other attorneys will look for straight-shooting experts who are more likely to reach opinions that are contrary to those desired by their employers.

403. See supra note 320 and accompanying text.
404. See supra notes 74-75, 77-80 and accompanying text.
405. See Andrade v. Parsons Corp., No. CV85-3344-RJK, 90 WL 757367, at *7-8 (C.D. Cal. June 21, 1990) (“[Plaintiffs’ expert] portrayed himself as an advocate rather than an expert hired to render an opinion, and thus the Court finds that [he] was not a credible witness. . . . At the trial, [his] testimony did the plaintiffs more harm than good.”).
407. Under the proposed system, an attorney might be even more interested in retaining an honest expert, because such a person might be less likely to be tempted by the fees that could be generated by reaching opinions that could be helpful to her original employer’s opponent. See County of L.A. v. Super. Ct., 271 Cal. Rptr. 698, 705 (Cal. Ct. App. 1990) (discussing the possibility that an expert “could ‘sell’ his or her opinions to the highest bidder”). A less than forthright expert could be a substantial problem for an attorney who initially retains her in a system that regularly allows Red Rover evidence.
D. Routine Admission of Red Rover Evidence Will Decrease the Comfort Level of Expert-Attorney Relationships

One final way in which attorneys are likely to react to the habitual admission of Red Rover evidence deserves special attention. If courts conclusively establish that Red Rover opinions and evidence about the original retention of Red Rover experts is ordinarily admissible, attorneys may become somewhat more circumspect in their relationships with the experts they retain.\footnote{408} If there is a possibility that a person who is now working with an attorney may appear, either through the unavoidable power of a subpoena or voluntarily, as a witness for that attorney’s opponent, the attorney is likely to be a bit more careful in her efforts to shape the witness’s opinions. The certainty of a deposition of the expert alone\footnote{409} should make the attorney think twice about taking overly direct steps to influence the expert’s analysis and opinions.

While the development of schisms between experts and their employers may be a disquieting prospect for some,\footnote{410} including many trial attorneys who have become accustomed to very cozy relationships with retained experts,\footnote{411} it is actually a rather promising prospect for a system that views litigation as a search for truth. As discussed previously, a system that relies on attorneys to select, employ, socialize, instruct, guide, compensate, and empower\footnote{412} some of its most important\footnote{413} witnesses runs the substantial risk that these influences will, at least on occasion, overcome those witnesses’ judgment.\footnote{414} Therefore, reasonable steps that

\footnote{408. Cf. Easton, supra note 21, at 607-608 (arguing that full disclosure of expert-attorney communications leads to less direct control by retaining attorneys over experts).}
\footnote{409. See supra note 39 and accompanying text.}
\footnote{411. See Easton, supra note 21, at 606 n.469 (noting the trial bar’s negative reaction to proposals that limit unfettered exchanges between experts and retaining attorneys).}
\footnote{412. See supra notes 318-33 and accompanying text.}
\footnote{413. See Karn, 168 F.R.D. at 639 (“The impact of expert witnesses on modern-day litigation cannot be overstated . . . .”); Lunghi v. Clark Equip. Co., 200 Cal. Rptr. 387, 388 (Cal. Ct. App. 1984) (“In the instant [product liability] case, the primary focus of the jury must have been on the expert testimony. . . . In this sort of analysis, the jury necessarily relies heavily on the testimony of experts.”); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 315 (Miss. 1992) (“In the trial of this case, the search for truth focused on a battle of the experts . . . .”); White v. Vanderbilt Univ., 21 S.W.3d 215, 230 (Tenn. Ct. App. 1999) (reversing due to trial court’s improper exclusion of Red Rover testimony because “the trial court’s error, more probably than not, affected the outcome of the case”).}
\footnote{414. See Burn v. United States, No. 95 C 6552, 1997 WL 417847, at *2 (N.D. Ill. July 23, 1997) (noting that “expert testimony may become another way in which counsel places his view of the case or the evidence in front of the jury”); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 396 (N.D. Cal. 1991) (observing that “some lawyers take professional
can be taken to lessen or counter these influences might increase the chances that experts will reach correct opinions in more cases.\textsuperscript{415} Although too much should not be made of the point, allowing depositions of de-disclosed experts and admitting both the opinion testimony of Red Rovers and related bias evidence are reasonable steps in the right direction.

VI. CONCLUSION

In many cases, attorneys retain expert witnesses who reach the opinions that the attorneys desired when they retained them. In fact, the expert who reaches the opinions that the attorney sought is so commonplace that attorneys and judges who earn their livings litigating civil cases subconsciously expect almost every expert to say what the attorney hired her to say.\textsuperscript{416}

If these attorneys and judges could step back from this system and scrutinize it from afar, they might be a bit uncomfortable with it. In many cases, at least one expert testifies to an opinion that is directly contradicted by an opinion testified to by another expert, even when the question at hand can only have one correct answer.\textsuperscript{417} In other words, in countless cases litigated in our civil justice system, expert witnesses testify to opinions that are, quite simply, wrong. Perhaps it should be at least a bit distressing that it is so easy to retain experts who are willing to swear to opinions that are incorrect.\textsuperscript{418}

The trick, of course, is that it is not easy to identify which experts are wrong in a given case, even when it is clear that at least some of the experts are indeed wrong. We assign this task to jurors. If our system is indeed a search for truth, it is the jurors who must find it. This is not an easy task, particularly when the jurors are faced with directly conflicting
expert testimony. How are they to decide which of two impressively qualified experts is wrong?

If we are going to require jurors to decide this rather staggering question, the least we can do is give them every reasonably relevant piece of information that they might use in their search for the correct answer, absent some legal doctrine prohibiting such information. Information, which we lawyers and judges refer to as “evidence,” is in the final analysis the only thing that the jurors will receive to resolve this and other factual issues. In fairness to the jurors, they should be entitled to hear from a witness who was once declared by the party who now objects to her testimony to be an expert in her field who is capable of reaching opinions that will help the jurors decide the case. If we want the jurors to fully evaluate this witness’s testimony, we should also provide them with information about the expert’s relationships with the parties, just as we provide jurors with information about the relationships between fact witnesses and the parties.

With this information, along with all other admissible relevant evidence, jurors have a decent chance of finding the truth. If we did not believe that, we could not support a system that calls upon them to do just that. If we do believe it, we should zealously guard against anything that decreases those prospects, including the unnecessary exclusion of Red Rover evidence.

419. The Florida pattern jury instructions set out the task the jury faces:

The jury, and only the jury, has the duty to consider the evidence, weigh it, and decide what it means. It is also the jury, and only the jury who has the duty to consider the appearance and testimony of the witnesses, and to decide whether to believe a witness.

1 Florida Forms of Jury Instruction § 2.01 (optional) (2000).

420. See, e.g., 1 Modern Federal Jury Instructions § 2.01, Form Jury Instruction 2-4 cmt. n.2 (2000); John M. Dinse et al., supra note 287, § 1.00 (California) (“You must decide all questions of fact in this case from the evidence received in this trial and not from any other source.”); 1 Florida Forms of Jury Instruction § 2.40 (2000) (“Your verdict must be based on the evidence that has been received and the law on which I have instructed you.”); Mo. Sup. Ct. Comm. on Civil Jury Instructions, Missouri Approved Jury Instructions § 3.01 (5th ed. 1996) (“In determining whether you believe any . . . proposition, you must consider only the evidence and the reasonable inferences derived from the evidence.”); Virginia Model Jury Instructions, Civil § 2.000 (1998).

421. See supra notes 33-34 and accompanying text.

422. See supra notes 257-65 and accompanying text.