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"Dirty" Experts: Ethical Challenges Concerning, and a Comparative Perspective on, the Use of Consulting Experts

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ARTICLE

David S. Caudill

“Dirty” Experts: Ethical Challenges Concerning, and a Comparative Perspective on, the Use of Consulting Experts*

Abstract. U.S. attorneys often hire consulting experts who potentially never get named as testifying experts. The same practice is evident in Australia, where the colloquial distinction is between a “clean” and a “dirty” expert, the latter being in the role of a consultant who is considered a member of the client’s “legal team.” A “clean” expert named as a witness is then called “independent,” signaling that he or she is not an advocate. In contrast to the U.S. discourse concerning consulting and testifying experts, focused on discovery issues, the conversation in Australia betrays immediate ethical concerns that both (i) explain why the term “dirty” is used to describe an advocacy-oriented expert, and (ii) likely arise from the fact that in the United Kingdom and in some Australian states, a testifying expert is bound by a code of conduct providing that his or her primary duty is to the court. In the U.S. context, there is seemingly nothing troubling about a consulting expert later becoming a testifying expert; in Australia, that situation raises red flags, because an expert-advocate-on-the-team during settlement negotiations would then be required to be independent—a potentially difficult transition.

Should U.S. attorneys be concerned with the rules that allow an attorney to keep all interactions with a consulting expert (who is not selected to testify) hidden from opposing counsel—and even from a later-retained expert who will

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testify? The purpose of this Article is to explore potential ethical issues raised by the use of consulting experts—for example, are the risks of an attorney influencing or manipulating a testifying expert’s opinion increased by the use of consulting experts who are neither disclosed nor subject to discovery? Are we worried that, after working with a dirty expert to identify all the weaknesses of a case, a clean expert may be manipulated by limiting the information that is known by the attorney and given to the clean expert who will testify? And finally, did the 2010 amendments to Federal Rule of Civil Procedure 26, limiting discovery of expert draft reports and communications with testifying experts, actually reduce the perceived need to use, strategically, consulting experts?

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I. INTRODUCTION

Often an attorney who is searching for an expert to testify at trial initially retains the expert as a consultant, if the court’s deadline for the disclosure of the 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. . . . 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.¹

1. Stephen D. Easton, “*Red Rover, Red Rover, Send That Expert Right Over*”: *Clearing the Way for Parties to Introduce the Testimony of Their Opponents’ Expert Witnesses*, 55 SMU L. REV. 1427, 1431–32 (2002) (footnotes omitted). The applicable Federal Rule of Civil Procedure provides that:

If there is sufficient time before the disclosure of witnesses is required, and sufficient funding from a client, it is not unusual for U.S. attorneys to hire consulting experts who potentially never get named as testifying experts; the same practice is evident in Australia. Among Australian attorneys and their retained experts, the colloquial, terminological distinction is between a “clean” and a “dirty” expert—the latter being in the role of a consultant who is considered a member of the client’s legal team.²

Tellingly, a “clean” expert is also referred to as an “independent” expert, signaling that a testifying expert should avoid the role of an advocate (or

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in Rule 35(b) [involving physical and mental examinations]; or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

FED. R. CIV. P. 26(b)(4)(D). The title of this Rule is “Expert Employed Only for Trial Preparation.” *Id.* The clear implication is that discovery concerning a consulting expert is rarely allowed. “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.” Easton, *Red Rover*, *supra*, at 1433 (footnote omitted).

2. See Donald Charrett & Andrew Potts, *What Corporate Counsel Need to Know About Engaging Forensic Engineers*, 5 INT’L IN-HOUSE COUNS. J., no. 19, Spring 2012, at 1, 2 (highlighting the difference between legal experts based on their participation in the legal team). It has been said that it is

usually better to engage a “dirty expert” up front to review the lay of the land, and to advise on the likely technical lines of attack that may eventuate and the soundest lines of defen[s]e that could be relied upon. This may in turn identify the required independent expert(s) and briefs they should embark upon.

Id. at 9. Interestingly, a financial consulting firm offering litigation support in Sydney, Westworth Kemp Consultants, states in an online ad that their consultants act as “clean” and “dirty” experts. See *Litigation Support*, WESTWORTH KEMP CONSULTANTS, <https://www.wentworthkemp.com.au/litigation-support.html> [https://perma.cc/PDC5-2CBP] (advertising services acting “as consultants and experts (‘clean’ and ‘dirty’ experts) in the context of dispute resolution”). Likewise, with respect to U.S. terminology, Judge Kest—as part of the Orange County Bar brown bag lunch materials—defines a consulting expert as a “team member”:

The Consulting Witness: A witness retained purely as a consulting expert—whose purpose it is to advise counsel only—generally will not be required to submit to discovery or disclose any opinions to the non-retaining counsel. This witness is part of the defense or plaintiff’s “team” and their thoughts or opinions are not shared with opposing counsel or with the trier of fact.

John Marshall Kest, *Discovery from Expert Witnesses*, ORANGE COUNTY B. (June 2013), http://www.orangecountybar.org/content/uploads/PDFs/BrownBagLunches_Kest/June_2013_Discovery_of_Expert_Witness.pdf [https://perma.cc/HE82-CX6E].

“team member”), and thereby serve the court and not a party at trial.³ In one Australian formulation of the practice:

[A] party may engage one expert as [an] advisor and a separate expert to act as [an] independent expert. The advisor is providing expert *assistance* whereas the independent expert is providing expert *evidence*. . . . The “clean” expert is engaged to act as the independent expert. His paramount duty is to the Court, not to the party that retained him. He owes the duties set out in the [Uniform Civil Procedure Rules]. By contrast, the advisor is referred to as a dirty expert because he is not independent. He has no duty to the Court. He acts solely on behalf of the litigant. His role is to provide advice and formulate arguments in order to advance the case.⁴

In contrast to discussions of the distinction between consulting and testifying experts in the U.S. that focus on discovery, including the

3. See Charrett & Potts, *supra* note 2, at 2 (suggesting an independent expert will often be referred to as a “clean expert”).

4. Declan Kelly & Dan Butler, *Ethical Considerations in Dealing with Experts*, HEARSAY (Dec. 1, 2010), http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1009&Itemid=48 [<https://perma.cc/8EPL-4AJV>]. “[I]t is not uncommon in the United States for a third expert to be appointed just to keep an eye on the other two.” *Id.*

One advantage which we understand is sought to be gained by [an Australian lawyer’s] retainer of a dirty expert is that privilege arguably can be maintained in respect of the dealings with that expert who is in the nature of a consultant. For example, privilege arguably would not be lost in any material that you send to him for comment. Opinions from Counsel and other privileged material can be sent to the dirty expert without fear that privilege will be lost.

Id. Note that in U.S. federal courts, since the 2010 amendments to FED R. CIV. P. 26, and in those state courts that follow the most recent federal rules, communications between a testifying expert and the attorney retaining him or her are not discoverable, which reduces some of the strategic advantages to hiring a consulting expert. See FED R. CIV. P. 26(b)(4)(C) (limiting discoverable communication between counsel and a testifying expert to: (1) compensation for expert services; (2) facts or data provided to the expert that were considered in forming the expert’s opinion; and (3) “assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be express”). Indeed, one of the reasons for the 2010 amendments was the concern over the rising cost of hiring two experts:

Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses, often called “core” or “opinion” work product. The cost of retaining a second set of experts gives an advantage to those litigants who can afford this practice over those who cannot.

PAUL W. GRIMM ET AL., DISCOVERY PROBLEMS AND THEIR SOLUTIONS 256 (2d ed. 2009); see also *infra* notes 11–18 and accompanying text.

attorney-client privilege and work-product rules, the conversation in Australia betrays immediate ethical concerns that both (i) explain why the term “dirty” is used to describe an advocacy-oriented expert, and (ii) likely arise from the fact that in the United Kingdom, and in some Australian states, a testifying expert is bound by a statutory code of conduct providing that he:

[M]ust assist the Court impartially on matters relating to his expertise. That duty overrides any duty that the expert has to the party that appointed him. Further, it is a requirement . . . that the expert state in his report that he understands that the expert’s duty is to the Court and that he has complied with that duty.⁵

Thus, for example, in the context of U.S. conversations and publications about ethics, there is nothing particularly troubling about an expert, initially in the role of a consultant, becoming a testifying expert; but, the discussion of that situation in Australia raises red flags:

[T]he expert may have acted as an advocate and as part of the team trying to reach a [favorable] settlement[,] . . . formulating arguments that support his client’s case. . . . [W]hen the case does not settle and proceedings are commenced[,] . . . it is usually more cost effective for that same person to also act as independent expert. . . . [O]vernight the expert is transformed from a “hired gun” acting for the party into an independent expert whose duties are to the Court. . . . [A]ny ethical difficulties . . . ? [Not] “[a]s long as that person and the legal advisors understand and recogni[ze] the difference between the two tasks, and keep them separate.”⁶

That sounds like a relatively straightforward solution, but the authors of the above commentary go on to worry that such an understanding and recognition on the part of the transformed expert might “practically [be] difficult to achieve[,]” and moreover, that

the reality may be that the expert has become too immersed in the case, viewing matters from the client’s perspective [so] as to have lost any claim to

5. Kelly & Butler, *supra* note 4.

6. *Id.* (quoting *Evans Deakin Pty Ltd v Sebel Furniture Ltd*, [2003] FCA 171 (Austl.)). In a federal case in New South Wales, Australia, Justice Allsup saw no ethical problem with a consulting expert becoming an independent expert if he or she appreciated the differences between the two roles. *Evans Deakin Pty Ltd*, [2003] FCA 171.

independence. Practically, how such an expert is to understand and keep separate the task of acting as his client's adviser and acting as an independent expert is also likely to pose some difficulties.⁷

Returning to the U.S. context, should we be more concerned, in ethical terms, not only about a consulting expert who becomes a testifying expert, but also with the rules that allow an attorney to keep all interactions with a consulting expert, who is not selected to testify, hidden from opposing counsel, and even from a later-retained expert who will testify?

The concern over attorneys hiding communications with consulting experts was especially justifiable prior to the 2010 amendments to Rule 26 of the Federal Rules of Civil Procedure (Rule 26), when the interactions with one's testifying expert, including draft reports and communications, were discoverable.⁸ Actually,

7. Kelly & Butler, *supra* note 4; *see also Wood v The Queen* [2012] NSWCCA 21, ¶ 715 (Austl.) (addressing the concern that experts become biased towards a particular adversarial side when they are engaged to work on a particular case). The authors of the commentary also take into account that counsel will play a role in assisting an expert in comprehending "that he has 'crossed the Rubicon' and understands the new role he is assuming in the case." Kelly & Butler, *supra* note 4.

Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of "the team" which has a single objective of solving the problem or problems facing the party who engaged them to "win" the adversarial contest. It is almost an inevitable result of the adversarial system.

Wood, [2012] NSWCCA at ¶ 715.

8. *See* DAVID M. GREENWALD & MICHELE L. SLACHETKA, PROTECTING CONFIDENTIAL LEGAL INFORMATION: A HANDBOOK FOR ANALYZING ISSUES UNDER THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 153 (2015), https://jenner.com/system/assets/assets/8948/original/2015Jenner_26BlockAttorney-ClientPrivilegeHandbook.pdf [<https://perma.cc/U5U5-JXZS>] (quoting *People v. Ledesma*, 140 P.3d 657, 699 (Cal. 2006)) (discussing practical information for attorneys regarding attorney-client privilege and the work-product doctrine).

In an appeal from a death penalty sentence, the defendant-appellant asserted that the lower court's admission of the testimony of a psychiatrist regarding statements made to him by defendant violated the attorney-client and psychotherapist-patient privileges. The court commented: "An expert witness may be cross-examined as to 'the matter upon which his or her opinion is based and the reasons for his or her opinion.' The scope of cross-examination permitted under section 721 is broad . . . 'Once the defendant calls an expert to the stand, the expert loses his status as a consulting agent of the attorney, and neither the attorney-client privilege nor the work-product doctrine applies to matters relied on or considered in the formation of his opinion.'"

Id. (citation omitted) (quoting *Ledesma*, 140 P.3d at 699).

[b]ecause of their fear that any communications with experts might be discoverable, lawyers [prior to 2010] were hesitant to use a testifying expert to help them understand an adverse expert’s report or evaluate a case for settlement. In some cases, the 1993 [a]mendments forced counsel to hire a second consulting-only expert with whom they could have those conversations.⁹

In the view of some attorneys, however, as will be discussed below, it now “seems that the [2010] amendments were less of a ‘sea change[,]’ [leaving] [t]he scope of expert discovery . . . basically the same with a couple of exceptions.”¹⁰ Hence their advice: “Continue to consider using consulting experts if cost is not an issue. The protections afforded consulting experts remain stronger than those for testifying experts.”¹¹

9. Bradley R. Kutrow, *Expert Discovery Issues in State and Federal Court: Where’s the Ballpark and What are the Ground Rules?*, ANTI TRUST & COMPLEX BUS. NEWS, Jan. 2016, at 5, 5, <https://www.mcguirewoods.com/news-resources/publications/BRK-Article-Kutrow.pdf> [<https://perma.cc/EX8Z-DTL5>]; see also GREENWALD & SLACHETKA, *supra* note 8, at 299 (discussing the debate over the 2010 amendments).

Academics who opposed the amendments expressed concern that the amendments “would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers.” Further, they argued that . . . relevant information contained in draft reports and communications with experts will . . . now be concealed. Practitioners stated that lawyers today avoid communications with their testifying experts and discourage drafting reports, often employing two experts, one to testify and another to assess candidly. . . . [The committee thought that the amended Rule would therefore] “help to reduce the costs of discovery without sacrificing any information that litigants truly need.”

GREENWALD & SLACHETKA, *supra* note 8, at 306 (citations omitted).

10. Kevin C. Mayer et al., *Expert Discovery Since December 2010: Have the Amendments To Federal Rule of Civil Procedure 26 Made Anything Easier?*, BLOOMBERG BNA EXPERT EVIDENCE REP. 1 (Nov. 19, 2012), <https://www.crowell.com/files/Expert-Discovery-Since-December-2010-Have-the-Amendments-To-Federal-Rule-of-Civil-Procedure-26-Made-Anything-Easier.pdf> [<https://perma.cc/H9EB-DPKK>]. The authors point out that consulting experts were used frequently prior to the 2010 amendments. See *id.* at 2 (noting the frequent use of consulting experts who would not be called to testify at trial).

11. *Id.* at 4–5. Note that it is possible for an expert to wear “two hats,” and serve

as both a non-testifying consultant and a testifying expert. Most courts [hold] that . . . the broader discovery [standard] for testifying experts applies to everything except “materials generated or considered *uniquely* in the expert’s role as consultant.” . . . “[A]ny ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery.”

Sara Lee Corp. v. Kraft Foods, Inc., 273 F.R.D. 416, 419–20 (N.D. Ill. 2011) (citations omitted) (first quoting *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 538 (N.D. Ohio 2008); and then quoting *B.C.F. Oil Refining, Inc. v. Consol. Edison Co. of N.Y.*, 171 F.R.D. 57, 62

The purpose of this Article is to explore potential ethical issues raised by the use of consulting experts; for example, are the risks of an attorney influencing or manipulating a testifying expert's opinion increased by the use of consulting experts who are neither disclosed nor subject to discovery? In Part II below, this Article raises the question whether such perceived problems have been solved by the 2010 amendments to Rule 26, and argues that potential problems persist. In Part III, this Article catalogues some concerns about attorney influences on expert witnesses that relate to or parallel the issue of whether we should be concerned about the use of consulting experts, including the status of draft reports, de-disclosed experts, ethical regulation of experts, and proposals for neutral experts. In Part IV, this Article discusses (i) the development of consensus science in any field, and (ii) the issue of illegitimate influences on science, as it relates to expertise in legal contexts. Finally, this Article concludes in Part V that, in light of the current crisis in forensic science, the arguments of those who want to return to pre-2010 discovery Rules become more compelling. However, under either pre-2010 Rules or the current regime, the practice of using consulting experts strategically to hide adverse scientific information remains as an ethical concern—worthy of more discussion, as in Australia—but without an obvious solution.

II. HISTORICAL SHIFTS BEARING ON THE PERCEIVED PROBLEM

Consider this formulation of the problem:

“Dirty” experts are retained as non-witnesses, thereby reducing or eliminating their amenability to discovery. Once the attorney learns, with the [dirty] expert's help, the strongest version of the case's technical facts, a “clean” expert is hired to serve as the trial witness. The clean expert is informed only of the best features of the case, told only what is necessary to produce the most favorable expert reading of the case.¹²

(S.D.N.Y. 1997)); accord GREENWALD & SLACHETKA, *supra* note 8, at 308 (pointing to cases which evidence the change in ruling as a result of amendments to the discovery of attorney-expert communications). In this case, “the communications that Plaintiff request[ed] [were] subject to the protections for non-testifying consultants None of the communications contain[ed] facts, data, or assumptions that [the expert] could have considered in assembling his expert report.” *Sara Lee Corp.*, 273 F.R.D. at 420; accord GREENWALD & SLACHETKA, *supra* note 8, at 308 (discussing amendments to attorney-expert communication rules).

12. 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: STATISTICS & RESEARCH METHODS § 2:25 (2017–2018 ed.).

Now that testifying expert witnesses (like consulting experts) are no longer amenable to discovery (whether with respect to communications with counsel or draft expert reports), do the problems associated with “dirty experts” go away? It is clear that the 2010 changes to Rule 26(a)(2)(B)(ii)—from requiring that an expert report contain “the data *or other information* considered by the witness in forming” his or her opinion, to “the facts *or data* considered by the witness in forming” that opinion—were intended to “alter the outcome in cases” that required “disclosure of all attorney-expert communications and draft reports.”¹³ In short, “[t]he purpose of limiting the disclosure to ‘facts or data’ and not ‘other information’ was to protect counsel’s theories and mental impressions” that might have appeared in discussions with a testifying expert and in drafts of the expert’s report.¹⁴ However, the advisory committee immediately qualified that purpose—“[a]t the same time, the intention is that ‘facts or data’ be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients”¹⁵—leading some commentators to conclude that “the change from ‘other information’ to ‘facts’ was essentially no change at all!”¹⁶

Note as well that the qualified limitations on discovery with respect to *testifying* experts are not the same as the near-complete limitation on discovery with respect to *consulting* experts.¹⁷ Even after protecting theories and mental impressions, “to allow for unguarded and free communication between counsel and experts[,]” there remains “a broad area beyond the [expert] report itself open for inquiry.”¹⁸ For example, “the retention of the word ‘considered’ rather than just ‘relied upon’ was intentional. Any factual matter that the expert considered—even if derived from

13. FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment (emphasis added).

14. Jason J. Rawnsley et al., *The 2010 Amendments to the Expert Discovery Provisions of Rule 26 of the Federal Rules of Civil Procedure: A Brief Reminder*, 2012 A.B.A. SEC. LITIG. ANN. CONF. 2.

15. FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment.

16. See Mayer et al., *supra* note 10, at 2.

17. See FED. R. CIV. P. 26(b)(4)(D) (limiting discovery with respect to consulting experts). *But see* David R. Erickson & Lindsay R. Gris  et al., *Best Practices: Working with Experts*, 2013 A.B.A. SEC. LITIG. ANN. CONF. 9 (“While [a] consultant’s materials are not typically discoverable, a consultant’s work cannot be protected from disclosure if it is the complete basis of a testifying expert’s opinion.”).

18. See Rawnsley et al., *supra* note 14, at 5 (confirming that the purpose of the 2010 amendments was to encourage attorney-expert communication); *see also* FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment (“At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication[.]”).

communications with counsel . . . —is fair game.”¹⁹ Moreover, “opposing counsel are not forbidden to inquire into an expert’s opinions, including the ‘development, foundation, or basis of those opinions[,]’” and “[s]uch matters as the testing of materials and notes from such tests . . . are discoverable.”²⁰ Consequently, there is sufficient latitude for discovery from experts.²¹

[A] wealth of material about an expert’s work remains open to inquiry. . . . [Y]ou are entitled to know *any* facts or data considered by the witness, whatever the source may be The deposition of the expert may be your last chance to see whether discoverable communications with opposing counsel exist. . . . And . . . always remember to ask whether the expert was

19. Rawnley et al., *supra* note 14, at 2. The advisory committee’s note to the 2010 amendment reads: “The disclosure obligation extends to any facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those relied upon by the expert.” FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment.

20. Rawnley et al., *supra* note 14, at 5. Rawnley was referring to the advisory committee’s notes on the 2010 amendment of Rule 26, which state:

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert’s testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party’s counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in forming the opinions expressed.

FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment.

21. See John M. Barkett, *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications*, 2015 A.B.A. SEC. LITIG. ANN. CONF. 5 (highlighting the attorneys options to obtain discovery from expert witnesses). Barkett nevertheless sees the 2010 amendments (limiting discovery of draft expert reports) as an improvement over the prior rules, under which

lawyers and experts engaged in the legal equivalent of the floor game, “Twister,” contorting the expert report drafting process so that, in the most disciplined form of the game, there are discussions, perhaps a single drafting session, and only one version—the final one—of the expert’s report. This process has resulted in yet another well-known game, Hide and Seek, where opposing lawyers probe experts in lengthy depositions attempting to learn about who said what to whom in the formation of the expert’s report. This costly process has prompted lawyers in symmetric cases, where both sides have the same concerns about discovery of experts, routinely to stipulate that they will not seek discovery of their opponent’s draft reports or lawyer-expert communications. When the exception makes the rule, it is time to change the rule.

Id. at 3.

instructed to rely on certain assumptions that may not be evident from the report itself.²²

Apart from the warning that all communications between an attorney and her expert will *not* be protected as work product,²³ there are even more reasons that the 2010 revisions to Rule 26 do not eliminate all of the strategic advantages in hiring a consulting expert. For example, with respect to the work product protection given to draft expert reports,

[t]here is no clear consensus among the courts as to what constitutes a non-discoverable “draft” expert report. Some courts have found that draft notes, memoranda, lists, and outlines created by the expert are discoverable because they are not technically “draft” expert reports. These cases rely on the strict language of Rule 26(b)(4)(B) referring to “drafts of any report.”

In contrast, other courts have found that these same types of materials can nonetheless be protected from disclosure.²⁴

22. Rawnsley et al., *supra* note 14, at 6. Rawnsley was referring to FED R. CIV. P. 26(b)(4)(C)(ii) and (iii):

(C) *Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B) regardless of the form of the communications, except to the extent that the communications:

....

(ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.

FED R. CIV. P. 26(b)(4)(C)(ii)–(iii).

23. See FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment (“The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).”).

24. Mayer et al., *supra* note 10, at 3 (footnote omitted) (citing, *inter alia*, as an example of the strict language approach: *In re Application of the Republic of Ecuador*, 280 F.R.D. 506, 512–14 (N.D. Cal. 2012)). Courts that are not so strict and protect draft notes and memoranda from disclosure, have depended on two theories:

One, the materials could be part of the “draft” expert report and Rule 26(b)(4)(B) says the “draft” can be in *any* form. Or, two, and in line with the policy of the 2010 amendments to protect work product from disclosure, discoverable “facts or data” does not encompass everything that the opposing expert would need to replicate the analysis.

Id. (footnote omitted).

The latter approach appears to be “the more reasonable approach[.]” both in terms of the “plain text” of the 2010 amendments and the intent thereby to “protect work product and counsel mental impressions and theories. It would be inconsistent with this design to require the expert to turn over everything that allowed his adversary to recreate an analysis in every detail.”²⁵ However, if some courts follow the first approach, there is a risk of returning to the pre-2010 practices, when communications with an expert and draft reports “were fair game in discovery[.]” leading lawyers and experts to take “elaborate steps to avoid creating drafts of the expert’s report and to minimize communications between attorneys and experts.”²⁶ Those steps often included the use of consulting experts.

For all of the foregoing reasons, the potential problems identified with respect to the strategic use of consulting experts remain concerns even after the 2010 amendments to Rule 26.

III. RELATED ISSUES CONCERNING ATTORNEY INFLUENCES ON EXPERTS

Those who opposed [the 2010] changes [to Rule 26], including yours truly, argued that jurors need full information regarding the extent of a retaining attorney’s influence over an expert and that allowing retaining attorneys to hide this information behind work product protection would lead to hidden work product claims that will have to be flushed out via often unproductive discovery efforts.²⁷

There are several areas of concern regarding expert witnesses that relate to the potential for manipulation of a testifying expert by first working with a consulting expert who remains hidden. First, do the rules protecting drafts of expert reports, or other communications between an attorney and a testifying expert, from discovery somehow hide potential weaknesses of an expert report from opposing counsel, including potentially damaging

25. *Id.* “If, instead, the former line of cases were followed, experts could theoretically bury all otherwise discoverable notes, memoranda, lists, etc. into a ‘draft’ report and shield that from disclosure, at least until an *in camera* review by a court.” *Id.*

26. Matthew C. Hurley, *Changes to Federal Rules Regarding Expert Witness Discovery*, MINTZ LEVIN LITIG. ADVISORY (Dec. 21, 2010), <https://www.mintz.com/newsletter/2010/Advisories/0827-1210-NAT-LIT/web.html> [<https://perma.cc/6623-LAUJ>].

27. Stephen D. Easton, *2010 Changes in Disclosure and Discovery Regarding Expert Witnesses*, WYO. LAW., June 2010, at 26, 28 (footnote omitted). At least one person who opposed the 2010 amendments to Rule 26 has admitted they are biased “regarding the appropriate extent of disclosure and discovery regarding attorney-expert communications.” *Id.* at 29.

influences on the final report by an attorney?²⁸ Second, should an expert disclosed by an opponent, but then not used by that opponent (i.e., de-disclosed), be available as a testifying expert for the party opposed to the party who retained the expert, *and* should the jury be told that the expert has changed sides?²⁹ Third, does the scholarly discourse concerning existing or needed ethical demands on courtroom experts already confirm that testifying experts are regularly manipulated by attorneys?³⁰ And finally, would adoption of the perennial suggestion that courts ought to have a single, neutral expert likely result in each party retaining a dirty, “shadow” expert to maintain an orientation to advocacy with respect to each party’s view of the jointly proffered expertise?³¹

A. *Drafts of Expert Reports, and Other Communications Between Attorneys and Experts*

I believe that attorneys, rather than the expert witnesses themselves, are to a great extent responsible for crafting expert testimony in most instances. . . . Within reason, I do not believe this practice is unethical. . . . However, I believe that the civil justice’s system for the processing of expert witnesses, including disclosure and discovery, should reflect this reality. . . . [Many believe in] a paradigm of an expert independently reaching her conclusions, which just happen to be in concert with the position pushed in the case by the attorney who hired and pays her. . . . [But] a system based on these unrealistic presumptions is ill-equipped to deal with the reality of attorney-driven expert testimony.³²

At the outset of his article proposing full disclosure of all communications between an attorney and an expert who will testify at trial, Professor Stephen Easton, conceding that the “relationships between attorneys and their experts are, to a significant extent, hidden from public view[.]” nevertheless believes (on the basis of fifteen years as a trial attorney) “that attorneys often have tremendous influence over expert testimony, that this influence is potentially dangerous[,] . . . and that attorney work product concerns are adequately accommodated by” his proposal for less secrecy

28. See, e.g., *infra* Part III.A.

29. See, e.g., *infra* Part III.B.

30. See, e.g., *infra* Part III.C.

31. See, e.g., *infra* Part III.D.

32. 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, 468 n.1 (2000).

concerning potential influences.³³ He also suggests, only slightly tongue-in-cheek, that:

[If one wanted] to create a judicial system that wants its most important witnesses to be as biased as possible[,] . . . why not let attorneys select, hire, and pay the important witnesses . . . under “at will” employment contracts that allow the attorneys to fire the witnesses as soon as they do or say anything that is not completely consistent with the position the attorney wants them to take[?] ³⁴

Professor Easton goes on to ask, “But why stop there? How about letting the hiring attorney communicate freely with the witness, with little or no fear that an opposing attorney will ever find out about the secrets that they tell each other?”³⁵

Furthermore, let the attorney and his or her expert decide what to disclose, and let any threats made by the attorney (e.g., to fire the expert if he or she is not “willing to take a certain position”) remain hidden from opposing counsel and therefore from the jury “during cross-examination of the expert” so that the jury may never know “which of the two[, attorney or expert,] is devising the testimony.”³⁶ The joke, of course, is that the foregoing is a description of our system of acquiring courtroom expertise!³⁷

Easton argues that attorneys “craft” their expert’s opinion by controlling the information the expert receives, suggesting:

[An expert] is not likely to investigate case-specific matters without the attorney’s permission and review. If she does, she risks not being paid for

33. See *id.* at 469 n.1 (citation omitted) (emphasizing his belief that experts are easily influenced by attorneys); accord DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: STANDARDS, STATISTICS, AND RESEARCH METHODS § 3:14 (student ed. 2006) [hereinafter MODERN SCIENTIFIC EVIDENCE 2006] (“[T]he nature of [expert] opinion and interpretation is that they are more moldable than the observations of a fact witness[.]”).

34. See Easton, *Ammunition*, *supra* note 32, at 468–69 (footnote omitted); see also Easton, *Red Rover*, *supra* note 1, at 1432 (noting as an alternative to firing an expert, “[i]f 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”).

35. Easton, *Ammunition*, *supra* note 32, at 469.

36. See *id.* at 469. Easton calls particularly attention to the power attorneys have over hired expert witnesses, including the ability to fire the witness for failure to support a certain position. *Id.*

37. See *id.* at 470 (equating his satirical, biased, expert description to the system currently in place in the majority of American jurisdictions).

this work. Therefore, the attorney becomes both the primary source and the censurer of information for the expert.³⁸

Add to that the attorney's control over "the flow of money" to the expert, the pressures on the expert to be a "team player," and the attorney's "guidance" toward a particular opinion, and the result is a level of potential bias about which the jury should know.³⁹ Because (i) jurors "ought to at least be provided with full information about the formation of each expert's opinion, including, the retaining attorneys' roles in that process[,]"⁴⁰ and (ii) cross-examination is the way to deliver that information to "the jurors in their search for the truth,"⁴¹ Easton proposes a rule wherein "all information relevant to the development of expert opinions, including attorney-expert communications in all forms, [would be] within the scope of required disclosures and discovery."⁴²

Even though the pre-2010 Rules (revised in 1993) and the 1993 advisory committee's comments implied that information considered but not relied upon by an expert must be disclosed, including work product, Easton remained critical of the Rules because some courts allowed experts to hide information simply because it was not "relied upon," while at the same time allowing attorneys to hide behind the work product doctrine and attorney-client privilege.⁴³ Concerned about attorney influence on experts, and recognizing that the retaining attorney is the "primary source of

38. *Id.* at 495.

39. *See, e.g., id.* at 496–504. "Our adversary system relies primarily, if not exclusively, upon the cross-examining attorney to reveal the extent to which the retaining attorney formed the expert's testimony." *Id.* at 504.

40. *See id.* at 526 (proclaiming "jurors facing the difficult task of identifying which expert's testimony to discredit" should be given complete information about how the expert formed their opinions).

41. *See id.* at 527.

42. *See id.* at 527–28 (footnote omitted).

43. *See id.* at 537–43, 541 n.233, 543 n.243 (citing, *inter alia*: *Nexus Prods. Co. v. CVS N.Y., Inc.*, 188 F.R.D. 7, 11 (D. Mass. 1999); then *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 643 (E.D.N.Y. 1997); then *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 289 (W.D. Mich. 1995); and then *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634, 638 (D. Kan. 1993)); *see also* Christa L. Klopfenstein, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 IND. L. REV. 481, 497 (1999) ("[M]any post-1993 cases have adopted a protection-oriented approach."); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85 (S.D. W. Va. 1995) (demonstrating some courts refuse to require disclosure of information relied upon by the expert); *cf. Ambrose v. Southworth Prods. Corp.*, 38 Fed. R. Serv. 3d 813, 813 (W.D. Va. 1997) (warning parties that opinion work product may not be discoverable).

information considered by the expert[,]" Easton recommended a *clarifying* amendment stating:

[D]isclosure of all information considered by expert witnesses, including all communications between experts and the attorneys who hire them [is required,] . . . [and providing] for follow-up discovery regarding this information about the formation of expert testimony. . . . Instead of relying upon the expert report . . . to list information provided . . . to the expert, . . . a party [would be required] to provide the other party with copies of all items provided to the expert, including cover letters and other written communications, . . . [and] attorneys would be required to provide copies of written communications received from expert witnesses.⁴⁴

As to work product proponents who want attorney brainstorming with a testifying expert to be protected as "thoughts" of the attorney, Easton replies that "the brainstorming will affect not only the attorney's thinking, but the expert's thinking as well[,]" therefore it should be disclosed as a potential effect on the expert and a potential subject for cross-examination.⁴⁵ And as to attorney-client privilege, he states:

[T]he waiver of privilege occurs when the attorney reveals the previously confidential communication to the expert, regardless of whether the expert . . . [relies] upon it. . . . Therefore, given the general principle that privilege law must be narrowly construed due to a privilege's potential to keep relevant information from the jury, non-disclosure of . . . [such] information cannot be justified.⁴⁶

The attorney-client privilege, like the work product doctrine and judicial limitations on discovery, should, in Easton's view, give way to our "system's interest in determining the truth."⁴⁷ Notably, Easton confirms that "brainstorming" with a non-testifying consulting expert would not be discoverable.⁴⁸

44. Easton, *Ammunition*, *supra* note 32, at 544–45 (footnotes omitted).

45. *See id.* at 582. Essentially, Easton argues that communication between attorney's and expert's must be disclosed if cross-examination and the subsequent jury evaluation of expert testimony are to be effective. *Id.*

46. *Id.* at 603 (footnote omitted).

47. *See id.* at 605.

48. *See id.* at 581 (clarifying that neither the proposed rule nor the current version of Rule 26(a)(2)(B) would require the disclosure of information discussed in a brainstorming session between a non-testifying consultant and attorney).

Three years after his article proposing these broader discovery requirements, Easton betrayed his pre-occupation (the urgent need for more information to aid in the effective cross-examination of experts) with a co-authored article on the need to disclose draft expert reports.⁴⁹ Reflecting a concern with attorneys who influence their respective experts' reports perhaps by requesting revisions or even drafting it and asking the expert to retype on her stationary and sign, both practices which "are generally acknowledged to be acceptable under current discovery and procedural law," the co-authored article recommended "that courts provide for full and automatic production of all drafts of expert witness reports, as well as electronic and other substitutes for drafts. Automatic production will allow cross-examiners to inform jurors of the influence of the attorney on the expert's testimony"⁵⁰

The co-authors felt that attacking an expert whose original opinion developed over time in her interaction with an attorney "does not necessarily imply that the attorney impermissibly shaped expert testimony. Instead it reflects the reality that the expert's more independent, *original* opinion might present something closer to unvarnished reality (permeated with both favorable and unfavorable aspects) than an opinion developed over the course of preparation for trial"⁵¹ Notably, the co-authors believed their proposal was already required under the pre-2010 Rule 26 in effect when their article appeared, and they acknowledged that while there

If the attorney wishes to make an expert a part of the attorney-client relationship so that she can reveal and discuss attorney-client communications with her, she simply needs to retain her as a non-testifying consultant who will therefore be considered a "subordinate" for purposes of attorney-client privilege. In this capacity, the consultant is only assisting the attorney, not the jurors, and there is no need for disclosure of attorney-client communications that are shared only with her. In contrast, when the expert is hired to provide testimony, she is expected to inform not only the attorney, but also the jurors.

Id. at 600–01 (footnotes omitted) (citing, *inter alia*: *Capalbo v. Balf Co.*, No. CV-90-0377507S, 1994 WL 65214, at *2 (Conn. Super. Ct. Feb. 23, 1994); *In re Witham Mem'l Hosp.*, 706 N.E.2d 1087, 1090 (Ind. Ct. App. 1999)).

49. Stephen D. Easton & Franklin Don Romines II, *Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*, 22 REV. LITIG. 355 (2003).

50. *Id.* at 358, 360. The authors call attention to the misunderstanding of procedural rules regarding discovery of expert witness reports. *Id.*

51. *Id.* at 365 (emphasis added). "Nothing in the Federal Rules of Civil Procedure prohibits an attorney from assisting her expert in the development of her testimony. . . . At the same time, given the expert's status, the degree of the attorney's influence upon her testimony is relevant to the reliability of such testimony." *Id.* at 356–66.

was disagreement surrounding whether or not attorney-expert communications and notes are discoverable, courts have almost always “required production of an expert’s own drafts of reports and her notes and other memoranda.”⁵²

Some courts, however, albeit a minority, limited expert discovery to protect attorney work product (for example, an attorney’s: “first draft of her ‘expert’s’ report; . . . forwarding of her handwritten notes on an expert’s draft to the expert; . . . memorandum, letter, fax, e-mail or other written communication . . . to the expert discussing a draft of the report; or . . . oral suggestions about possible changes to the draft report”), on the basis that cross-examination would in any event uncover inappropriate influences.⁵³ In the co-authors’ view, however,

[t]hese analyses fail to appreciate the handicap placed on a cross-examiner who is not given access to information about a retaining attorney’s influence on an expert’s opinion [Because] the fact finder must decide between two experts with starkly different conclusions based upon the same underlying information, the influences on an expert’s thought processes are both relevant and essential to aid a fact finder in reaching a correct result.⁵⁴

52. *Id.* at 370, 372 (footnotes omitted).

53. *See id.* at 388–89 (footnotes omitted) (citing, *inter alia*, *Ladd Furniture, Inc. v. Ernst & Young*, 41 Fed. R. Serv. 3d 1633, 1638 (M.D.N.C. 1998), and explaining how “[t]he most common alleged justification for limiting expert discovery is protection of core attorney work product involved in attorney-expert communications”).

54. *Id.* at 390.

It is precisely because the rules have developed a structure in which attorney assistance is permitted in preparation of expert reports that such influence should be exposed to fact finders. An attorney who does not inappropriately influence her expert’s testimonial independence should not fear full disclosure of the development of the expert’s opinions.

Id. at 390–91 (footnotes omitted).

The *W.R. Grace & Co.* court properly recognized that “the exchange of documents between counsel and [the expert] raises an issue of the extent to which [the expert’s] final report represents [the expert’s] own product or that of [the non-disclosing attorney].” As the *W.R. Grace & Co.* court and other courts apparently recognize, the key event that should trigger the disclosure requirement is the transmission of information, not whether it is exchanged in paper, oral, or electronic form, and whether or not the transmission is from the expert to the attorney (or other person) or vice-versa. Courts should insist upon production of all materials, including those retained in electronic form, that reflect such communications.

Id. at 400–01 (footnotes omitted) (discussing *W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258, at *5 (W.D.N.Y. Nov. 2, 2000)).

Reminding readers, again, that communications with non-testifying, consulting experts need not be disclosed, the authors (i) adopted the view that “the truth finding process would be just as well served if lawyers played a lesser role in the formulation of other people’s opinions[,]”⁵⁵ and (ii) suggested that “full” disclosure would reduce inappropriate influences.⁵⁶

B. “De-Disclosed” Experts

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 . . . [this is] 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.⁵⁷

Professor Easton argues that courts should neither (i) restrict the acquisition, by the other side in a lawsuit, of an opposing expert whose testimony has become favorable to that other side, nor (ii) disallow the mention of the fact that the expert has changed sides.⁵⁸ And, even when these situations have been referred to as “instances of ‘side-switching experts,’” the terminology is deceptive because

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

55. *See id.* at 384, 382 (quoting *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 540 (N.D. Cal. 1987)) (suggesting hiding the influence attorneys have on expert reports would allow lawyers to “use the work product doctrine to hide the fact that they are secretly functioning as witnesses by writing declarations that purport to be from experts” (quoting *Hewlett-Packard Co.*, 116 F.R.D. at 540)).

56. *Cf. id.* at 385. “[A] lack of disclosure ‘impedes informed consideration of [a] case and proper evaluation of any expert’s report’” *Id.* at 379 (quoting *W.R. Grace & Co.-Conn.*, 2000 WL 1843258, at *5)).

57. Easton, *Red Rover*, *supra* note 1, at 1430 (footnotes omitted).

58. *See id.* at 1513 (noting “depositions of de-disclosed experts and admitting both the opinion of Red Rovers and related bias evidence are reasonable steps” to increase the chance that experts ultimately reach the correct opinion in a case).

common for the opposing counsel to initiate these efforts, often against the wishes of the expert.⁵⁹

If an attorney, for example, wants to depose an opposing, initially-disclosed expert who is no longer going to be called to testify, the attorney who initially retained that expert may resist that effort; and some courts 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.”⁶⁰ While there is a “significant split of authority on this issue . . . almost all of the reported decisions stop short of giving free rein to attorneys who seek to introduce” an expert previously named as a witness for the other side.⁶¹ As to those courts that allow testimony of an expert who switched sides, most courts prohibit the introduction of “evidence establishing that the expert was originally retained by the party who is now opposing the admission of her testimony”—that evidence is considered “unfairly prejudicial to the party who originally hired her.”⁶²

Easton’s critique of these restrictions is based on his perceived relevance of such evidence in the jury’s search for truth, “which after all is a fundamental purpose for conducting [a] trial and for allowing discovery.”⁶³ As to concerns over disclosure of confidential information or work product—“the thoughts, concerns, strategy, evidence, or other information

59. *Id.* at 1436–37 (footnotes omitted).

60. *See id.* at 1440 (explaining how the court determines what consequence will be imposed upon an attorney who attempts to de-disclose a hired expert by citing, *inter alia*, to: Callaway Golf Co. v. Dunlop Slazenger Grp. Ams., Inc., No. Civ.A. 01-669(MPT), 2002 WL 1906628, at *4 (D. Del. Aug. 14, 2002); FMC Corp. v. Vendo Co., 196 F. Supp. 2d 1023, 1048 (E.D. Cal. 2002); Dayton-Phoenix Grp., Inc. v. Gen. Motors Corp., No. C-3-95-480, 1997 WL 1764760, at *1 (S.D. Ohio Feb. 19, 1997); Ross v. Burlington N. R.R., 136 F.R.D. 638, 638 (N.D. Ill. 1991); County of L.A. v. Super. Ct., 271 Cal. Rptr. 689, 705 (Ct. App. 1990); Durlinger v. Artilles, 727 F.2d 888, 891 (10th Cir. 1984); Lehan v. Ambassador Programs, Inc., 190 F.R.D. 670, 672 (E.D. Wash. 2000); Campbell Indus. v. M/V Gemini, 619 F.2d 24, 26 (9th Cir. 1980); Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972); Reeves v. Boyd & Sons, Inc., 654 N.E.2d 864, 874–75 (Ind. Ct. App. 1996); Gen. Motors Corp. v. Jackson, 636 So. 2d 310, 313–14 (Miss. 1992); White v. Vanderbilt Univ., 21 S.W.3d 215, 224 n.9 (Tenn. Ct. App. 1999)).

61. *See id.* at 1443 (footnotes omitted).

62. *Id.* at 1445–46. “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.” *Id.* at 1446 (citing, *inter alia*, Peterson v. Willie, 81 F.3d 1033, 1038 n.5 (11th Cir. 1996); Granger v. Wisner, 656 P.2d 1238, 1243 n.2 (Ariz. 1982)).

63. *Id.* at 1447–48 (footnote omitted) (citing, *inter alia*, Lehan, 190 F.R.D. at 672, and Tom L. Scott, Inc. v. Mellhany, 798 S.W.2d 556, 559 (Tex. 1990)).

that the [original] retaining attorney has shared with the expert”—the 1993 amendments to Rule 26 (in contrast to the 2010 amendments) confirmed that “work product protection is waived when the retaining attorney reveals her work product to an expert who is disclosed as a possible trial witness.”⁶⁴

Moreover, Easton argues that when an expert is disclosed as a possible witness, the attorney is declaring that the expert is “not just a consultant” (i.e., is “no longer merely an aide” to a party), but rather is “a person who can help the jury determine the truth at trial”⁶⁵—hence:

[T]he 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. . . . [A] party’s de-disclosure does not place an expert outside the scope of discovery.⁶⁶

Indeed, the fact that an expert hired by the other side has reached conclusions in opposition to the attorney originally retaining her is arguably as important as the substance of the testimony, which, after all, could be

64. *Id.* at 1452–53.

These [1993] 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.” . . . [Several courts 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 by sharing them with the expert. 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. . . . 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.

Id. at 1455–58 (footnotes omitted) (quoting FED. R. CIV. P. 26(a)(2)(B)).

65. *Id.* at 1461–63.

66. *Id.* at 1463. The 1993 version of Rule 26(b)(4)(A) provided that:

A party may depose any person *who has been* identified as an expert whose opinions may be presented at trial.” . . . [The Rule does not provide a right] to negate that disclosure and return the expert to the status of a consultant who cannot be deposed by opposing counsel [E]ven after the retaining attorney attempts to de-disclose the expert, the expert is still a “person *who has been* identified as an expert whose opinions may be presented at trial.

Id. at 1463–64 (footnotes omitted) (quoting FED. R. CIV. P. 26(b)(4)(A)).

offered by any other expert!⁶⁷ Easton therefore proposes (i) that testimony of an expert who has, in terms of that testimony, changed sides should be admissible, *and* (ii) that “evidence establishing that the other party originally retained her” should likewise be admissible.⁶⁸

In terms of an attorney’s influence on an expert, Easton believes that the “relationship between an attorney who chooses, hires, befriends, informs, coaches, pays, and considers censoring an expert is inherently a coercive one.”⁶⁹ Therefore,

it is a rather remarkable event when a retained expert reaches an opinion that harms the retaining attorney’s case. It is even more amazing when the expert who reaches such a conclusion has not only been retained, but also disclosed, by that attorney. 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.⁷⁰

Moreover, Easton believes that the fear of this potential turn of events will make attorneys more wary of their relation with their experts.⁷¹

67. *See id.* at 1488–89 (opining “an expert hired by the opposing party” reaching the decisions before the jury can be just as probative as the expert opinion itself).

68. *See id.* at 1492–96 (arguing for admitting opposing expert opinions at trial).

69. *Id.* at 1500 (footnote omitted).

70. *Id.* at 1501 (footnotes omitted). Additionally,

[i]f we are going to require jurors to decide [which of two experts is wrong,] . . . 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 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.

Id. at 1514 (footnotes omitted). Significantly, Easton believes that this situation (an expert switching sides) indicates that the case is one in which one of the experts is correct and the other is wrong (i.e., there is one clear answer to the question the experts are asked to answer), rather than a case in which qualified experts could reach different conclusions. *See id.* at 1503 (“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.”). *But see infra* note 78 and accompanying text.

71. Easton, *Red Rover*, *supra* note 1, at 1512 (arguing a system relying “on attorneys to select, employ, socialize, instruct, guide, compensate, and empower,” witnesses runs a risk of influencing the

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.⁷²

That is, the influence of an attorney over a witness could be subject to embarrassing disclosure;⁷³ but in Easton’s view, that

is actually a rather promising prospect for a system that views litigation as a search for truth. . . . [A] system that relies on attorneys to select, employ, socialize, instruct, guide, compensate, and empower some of its most important witnesses runs the substantial risk that these influences will, at least on occasion, overcome those witnesses’ judgment. Therefore, reasonable steps that can be taken to lessen or counter these influences might increase the chances that experts will reach correct opinions in more cases.⁷⁴

In short, reducing influence on experts increases the value—the validity—of their expertise.⁷⁵ This concern—that attorney influence over experts “shapes” their expertise—is the same concern that arises in the discourse concerning the rules allowing consulting, or “dirty,” experts (*and* their interactions with counsel) to remain hidden.⁷⁶

C. *On the Ethics of Experts*

The open-ended nature of scientific investigation does not mean that there is no desire on the part of scientists to reach closure on important questions. But in science, closure ideally is achieved through a process of consensus building based on the merits. This type of closure, what one might call resolution, means that timeliness is relatively unimportant. . . . Moreover, nothing is ever finally and irrevocably settled. If new evidence arises, we may

witness’ judgment, and proposing the allowance of de-disclosed experts to lessen or counter these influences).

72. *Id.* “The certainty of a deposition of the expert alone should make the attorney think twice about taking overly direct steps to influence the expert’s analysis and opinions.” *Id.* (footnote omitted).

73. See Easton & Romines, *Draft Dodgers*, *supra* note 49, at 366 (“[Attorney] influences [on expert testimony] are open for exploration on cross-examination.”).

74. Easton, *Red Rover*, *supra* note 1, at 1512–13 (footnotes omitted).

75. See Easton & Romines, *Draft Dodgers*, *supra* note 49, at 366 (“Nothing causes greater prejudice than to have to guess how and why an adversarial expert reached his or her conclusion.” (quoting *Reed v. Binder*, 165 F.R.D. 424, 430 (D.N.J. 1996))).

76. *Cf. id.* at 402 (“For any given disclosure or discovery requirement, it is always possible for attorneys to cheat, and some attorneys presumably will succumb to the temptation to cheat.”).

revise our views. Closure is a more immediate legal objective. . . . Statutes of limitations and speedy trial acts are designed to limit the length of time the threat of litigation may hang over someone.⁷⁷

In discussions concerning the ethical obligations of courtroom experts, most commentators believe that experts should apply the same standards of justification for their conclusions as they would in their field of practice—this is the same “intellectual rigor” test referred to in *Kumho Tire Co. v. Carmichael*.⁷⁸ We expect independence and objectivity, and those ideals can be formulated as follows:

An objective expert views the facts and data dispassionately, without regard to the consequences for the client. An independent expert is not affected by the goals of the party for which she was retained, and is not reticent to arrive at an opinion that fails to support the client’s legal position.⁷⁹

But we know the risks of bias and distortion in an adversarial system, which leads to a certain “tension . . . felt by many experts.”⁸⁰ For example:

The conflict is between whether I am testifying for the people who hired me or whether I am a servant of the court, and am simply supposed to answer questions and however the questions come up, the answers fall where they will.⁸¹

Another expert conceded the pejorative effect of adversarialism, commenting:

77. Joseph Sanders, *Expert Witness Ethics*, 76 *FORDHAM L. REV.* 1539, 1550 (2007).

78. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). This view contrasts with that of Neil B. Cohen. See Neil B. Cohen, *The Gatekeeping Role in Civil Litigation and the Abdication of Legal Values in Favor of Scientific Values*, 33 *SETON HALL L. REV.* 943, 949 (2003) (stating the legal context requires that we lower the standard of justification, as preponderance of the evidence is a lower burden than consensus in the scientific community). But see DAVID S. CAUDILL & LEWIS H. LARUE, *NO MAGIC WAND: THE IDEALIZATION OF SCIENCE IN LAW* 60–61 (2006) (critiquing Cohen, *supra*, and asserting that Cohen has wrongly presumed that “more probable than not” means “statistically greater than 50%,” leading him to falsely believe “that the burden of proof in science is much higher than the preponderance of evidence standard in the courtroom”).

79. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 *GEO. J. LEGAL ETHICS* 465, 467–68 (1999).

80. See Sanders, *supra* note 77, at 1559.

81. *Id.* (quoting CHESLER ET AL., *supra* note 80, at 112).

I would say things on the witness stand that in my real life I was not quite sure of. But I was not engaged in a professorial dialogue. I was in the role of an expert and an expert is just not unsure You omit all the qualifications one would give in the classroom or with colleagues. This is a different arena, you don't do that here.⁸²

This flexibility on the part of adversarial experts leads judges to doubt the independence of experts.⁸³ In a survey of judges in three jurisdictions,

[s]eventy-nine percent of the judges did not think expert witnesses could be depended upon to be impartial Sixty-three percent thought that expert witnesses were usually noticeably biased in favor of the side paying them, and 68% thought that the most distressing characteristic of expert witnesses was that they could not be depended upon to be impartial. Fifty-seven percent reported that they thought of expert witnesses as "hired guns" who gave biased testimony.⁸⁴

Some jurors distrust experts as well; a survey showed that jurors in Massachusetts found expert witnesses less competent and less honest the higher their educational level.⁸⁵

And finally, in a survey of experts, "seventy-seven percent agreed with the statement that '[l]awyers manipulate their experts to weaken unfavorable testimony and strengthen favorable testimony,' and fifty-seven percent agreed that '[l]awyers urge their experts to be less tentative.'"⁸⁶ If

82. *Id.* at 1559–60 (quoting CHESLER ET AL., *supra* note 80, at 115). Another expert stated:

I understood the partisan nature of the courtroom and I realized that I would be on the stand arguing for a position without also presenting evidence that might be contrary to my [side of the case]. But you see, that didn't bother me, because I knew that the other side was also doing that.

Id. at 1560 (quoting CHESLER ET AL., *supra* note 80, at 127).

83. *Cf. id.* at 1560–61 ("[I]n situations that are less emotionally and morally laden, an expert who joins a side might better be viewed as a 'hired gun,' someone who is not personally invested in the outcome of the litigation but who, nevertheless, is committed to the party that hired him.").

84. *Id.* at 1576 (quoting Daniel W. Shuman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193, 201 (1994)).

85. *See* MODERN SCIENTIFIC EVIDENCE 2006, *supra* note 33, § 3:11 ("[T]he higher the educational level of a juror, the less competent and the less honest expert witnesses were thought to be."). If judges and "the better educated jurors" tend to "steeply discount what the expert has to say[,] then "[t]he end result may be courts that overprotect themselves from being fooled, by undervaluing expert testimony, thereby depriving themselves of some knowledge they might have used to improve their decisions." *Id.*; *see also supra* note 84 and accompanying text.

86. Sanders, *supra* note 77, at 1577 (alteration in original) (quoting Shuman et al., *supra* note 84, at 201). One expert said that his attorney told him:

manipulation of experts is a fact of life, then Easton's arguments concerning the need for more disclosure (to aid in cross-examination) is strengthened—moreover, “a full disclosure system might encourage attorneys to do less to influence expert testimony.”⁸⁷

D. *Shadow Experts If There Is One Joint Expert*

[Appointing a single joint expert for all parties] has been shown in practice to potentially *increase* costs for the parties due to the use of “shadow” experts, otherwise known as “dirty” experts. This is done for a myriad of reasons including . . . aiding in understanding the single expert's opinion or providing firepower for cross-examination.⁸⁸

It bears mention that in the Australian legal context, consulting experts are sometimes used even in cases where a single, joint expert is either retained by the attorneys (i.e., appointment by consent of the parties) or is appointed by a court order.⁸⁹ The Supreme Court of Queensland requires that a joint expert be used by the parties (unless ordered otherwise by the Court).⁹⁰ This is an obvious effort to escape the bias associated with the adversarial or “hired gun” practice of each party retaining its own expert. However, “the adversarial system exists for a reason. Often experts have different opinions for *genuine* reasons, and are not just ‘hired guns.’ By

You're my expert in this case, and you say it “could be” or “couldn't be”? Look, I'm going to tell you. The other side doesn't waffle. They pick one view. And they will push that view. And they will make their case in front of a jury. And there will be no misunderstanding. There will be no gray area. They will take a position one way or the other and make it stick You better start thinking like they do.

FRED PRICHARD, EXPERTS IN CIVIL CASES: AN INSIDE VIEW 30–31 (2005).

87. See Sanders, *supra* note 77, at 1580. “[T]he jury will find it easier to make an informed evaluation of the expert's testimony if each side is required to report all communications between hiring attorneys and expert witnesses” *Id.*

88. Richard Skurnik, *Single Joint Expert Appointments: All Alone with Two Dirty Shadows*, EXPERT BLOG (Aug. 26, 2013) (emphasis added), <http://www.expertsdirect.com.au/blog/all-alone-joint-expert-appointments/> [https://perma.cc/2C9F-WBUC].

89. *Id.* (defining a joint expert, generally, as an expert hired to opine on a specific subject who is instructed by the parties and the court). “[W]here parties fail to agree on such instructions, separate instructions may be given by each party and the areas of disagreement are documented.” *Id.* “In Australia, each court's specific rules for joint expert appointments differ. For example, in the Family Court, single experts can be appointed by consent of the parties or by Court order and in Queensland, the Supreme Court *requires* parties to use a joint expert unless the Court orders otherwise.” *Id.* (emphasis added) (footnotes omitted).

90. *Uniform Civil Procedure Rules 1999* (Qld) ch 11 pt 5 (Austl.).

allowing them to ventilate their differing views, the Court is getting a more wholesome picture.”⁹¹

Indeed, the notion that whenever experts disagree in litigation, one of them must be a charlatan, is a false assumption—it ignores the fact that good scientists often disagree.⁹² In any event, despite the perennial suggestion that litigants would be better off with a single, court-appointed expert, the adversarial conventions in the U.S. make it unlikely that we will follow Queensland’s example.⁹³

IV. ILLEGITIMATE INFLUENCES ON SCIENCE

Concerns over attorney influence on experts find a rough analogy in the literature concerning illegitimate, particularly political, influences on science. Some of this literature has arisen as a backlash to the encouragement of citizen involvement in governmental agencies’ scientific decisions in the European Union.⁹⁴ Collins and Evans, for example, argue that scientific decisions ought to be made by specialists in the relevant field, not by scientists in other fields, and not by ordinary citizens.⁹⁵ This is not a bias toward formal training or professional qualifications, because it is possible in many fields to have experience that leads to expertise even in the absence of formal training and university degrees, a point made in *Kumho Tire* (i.e., that expertise can arise from experience).⁹⁶ Therefore, a citizen, or a scientist from another specialty *may* be able to participate in scientific

91. Skurnik, *supra* note 88.

92. See CAUDILL & LARUE, *supra* note 78, at 15–16 (“[Arguing for a] pragmatic perspective on science as neither realist (facts = nature) nor relativist (facts as merely social constructs), but as oriented to local, practical problem solving.”).

93. See MODERN SCIENTIFIC EVIDENCE 2006, *supra* note 33, § 3:20 (“[F]or court-appointed experts . . . run counter to the adversary culture, [and] although they are on the books [i.e., judges are permitted to appoint them] they are rarely put to use.” (citing JOE CECIL & THOMAS WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS UNDER FEDERAL RULE OF EVIDENCE 706 (1993))).

94. See, e.g., SOCIENTIZE Consortium, *Green Paper on Citizen Science*, at 26 (Nov. 2013), http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=4122 [<https://perma.cc/N73X-JTN5>] (emphasizing the importance of engaging new citizens in scientific projects and motivating them to be actively involved).

95. H. M. Collins & Robert Evans, *The Third Wave of Science Studies: Studies of Expertise and Experience*, 32 SOC. STUD. SCI. 235, 270 (2002).

96. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) (“*Daubert* . . . can help to evaluate the reliability even of experience-based testimony. . . . [I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”).

decision-making, but only on the basis of his or her expertise.⁹⁷ Collins and Evans, therefore

resurrect the old distinction between the political sphere and the sphere of expertise, but in [their] model the boundary is found in a new place. This boundary is no longer between the class of professional accredited experts and the rest [i.e., “ordinary” citizens]; it is between groups of specialists [which might include “extraordinary” citizens] and the rest.⁹⁸

Moreover, in fields of research where there is not yet consensus, decision-making rights should not arise out of the political sphere. For example:

[I]n the debate over genetically modified organisms (GMOs), the argument about whether rats’ stomach linings are affected by certain kinds of genetically modified potatoes is science of this kind [i.e., no consensus]; in the BSE (“mad cow” [disease]) debate, the question of the strength of the causal link between BSE and Creutzfeld-Jacob disease is science of this kind. In neither of these cases is there any reason to think that the core-set [of specialist in the relevant field] will not reach a consensus eventually, nor is there any reason to want to say that the decision they reach should be influenced by anyone who does not work in a specialist scientific laboratory or medical school.⁹⁹

For Collins and Evans, such decisions should not be political decisions;¹⁰⁰ and the public wants closure of scientific debates to take place in science, *not* in the “political sphere[.]”¹⁰¹ Closure in the *political phase* should follow the closure in the *technical phase*, not precede it.¹⁰² The analogy with expertise in the courtroom is that experts should not be guided or manipulated by attorneys; if they were, it would be as if EU scientists were meeting with and deferring to influential citizens but not telling anyone, such that their scientific conclusions appeared to be scientific!

97. See *id.* at 152 (“The objective of [Daubert’s gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony.”).

98. Collins & Evans, *supra* note 95, at 270. “This follows from distinctions that scientists make themselves: in any specialism it is easy to distinguish between a core group of experts and scientists in general, yet the core holds no special professional qualifications.” *Id.*

99. *Id.* at 268.

100. *Id.*

101. See *id.* (“[T]he complaint from the public is that the science has been prematurely passed to politicians who . . . reassure the public about the safety of the new technologies when no closure had been reached by the scientists.”).

102. *Id.* at 269.

And there is another analogy, insofar as the work of scientists who have not yet reached consensus is generally hidden from the public, who consequently do not appreciate the uncertainties as much as the specialists in the field do.¹⁰³ Once there is consensus, the public generally accepts the results¹⁰⁴—but if they could see the research phase prior to the consensus, they would realize that there was significant disagreement and perhaps lose some of their confidence in the eventual consensus, when they (arguably) should not.¹⁰⁵

Professor Sanders has highlighted a parallel problem when there are two opposing witnesses, one of whom represents a consensus among scientists in the field, while the other represents a marginalized view—the jury may get the idea that there is a genuine controversy.¹⁰⁶ Professor Samuel Gross gives this example of “how the structure of legal proceedings can distort the jury’s view of”¹⁰⁷ expertise:

[P]sychiatrists today have overwhelmingly rejected the notion that they can predict future violence—let alone do so on the basis of hypothetical questions—but psychiatric testimony to the contrary is regularly heard in court, and is a basis of many death sentences. . . . The universe of psychiatrists may consist of a hundred experts, of whom one believes in predictions of dangerousness and ninety-nine do not, but the list of witnesses in a particular case will probably include one expert on each side of this fictitious divide.¹⁰⁸

103. See *id.* at 246 (“According to the sociology of scientific knowledge, ‘distance lends enchantment.’ Core-scientists are continually exposed, in case of dispute, to the counter-arguments of their fellows and, as a result, are slow to reach complete certainty about any conclusion. In general, it is . . . the non-specialists in the scientific community . . . who, in the short term, reach the greatest certainty about matters scientific. . . . [For core scientists], scientific disputes are seen to linger on long after the wider community takes matters to be settled. . . . The [public, the] consumers, as opposed to the producers, of scientific knowledge have no use for small uncertainties.” (footnote omitted)).

104. See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1179 (1991) (“A number of studies [h]ave found that expert testimony has some impact on jury decisionmaking . . .”).

105. See *id.* at 1179–80 (“The results of post-trial interviews with actual jurors in several cases are consistent with these sketchy data: the jurors do not seem to have accepted expert testimony uncritically.”).

106. See Sanders, *supra* note 77, at 1576–77 (providing statistical data on judges’ opinions regarding expert witnesses’ impartiality).

107. Gross, *supra* note 104, at 1185.

108. Sanders, *supra* note 77, at 1577 (quoting Gross, *supra* note 104, at 1184–85). “It is less commonly noted that the one expert who will testify to the discredited point of view is probably in greater demand as a witness, more experienced in court, and more effective.” *Id.*

One of the roles of an attorney, during direct and cross-examination of experts, is surely to highlight the difference between consensus science and scientific issues where substantial uncertainties persist; expert testimony should not be “shaped” to turn uncertainties into apparent consensus.¹⁰⁹

V. CONCLUSION

What goes on in the pretrial phase is controlled far less by rules than the trial is and more by informal practices. The pretrial phase may tell us something about the structure of the legal process and may reveal its underlying norms in ways that a look at the trial does not. . . . [I]n terms of the messages sent to experts about what is expected of them, the black-letter rules of trial and the informal processes of pre-trial are at war with each other¹¹⁰

The foregoing statement highlights the fact that, pre-trial, the parties select their own experts, after which the lawyers make certain that they have their respective expert's loyalty and cooperation;¹¹¹ each lawyer becomes, with respect to each's expert, a “teacher with a very particular agenda.”¹¹² Lawyers do not “reserve” their skills as “professional persuaders and negotiators . . . for the courtroom.”¹¹³

By the time the expert arrives in court the morning of trial, . . . the court has a limited opportunity to transform the witness from being an honorary member of the advocacy team to being a “witness” whose loyalty is to the factfinder, whom the witness promises to inform fully and honestly.¹¹⁴

This is the first concern of this study, mirroring the perception in Australia that there are practical “difficulties” when a consulting expert has become “too immersed” as an advocate, “viewing matters from the client's perspective[,]” and thereby losing “any claim to independence.”¹¹⁵ Hence the argument that deciding to change a consulting expert into a testifying

109. See Gross, *supra* note 104, at 1125 (“[A]ttorneys control the information and the issues on which their witnesses testify . . .”).

110. MODERN SCIENTIFIC EVIDENCE 2006, *supra* note 33, § 3:13.

111. *Id.*

112. *Id.* (“Experts are introduced to the facts of the case and informed of what is at issue by the lawyer . . .”); see also *supra* note 33 and accompanying text.

113. MODERN SCIENTIFIC EVIDENCE 2006, *supra* note 33, § 3:13 (proclaiming that when the experts arrive in court, “who is allied with whom could not be more apparent”).

114. *Id.*

115. Kelly & Butler, *supra* note 4; see also *supra* note 7 and accompanying text.

expert is problematic—an argument that has little traction in the U.S. primarily because we acknowledge and yet spend little time or energy enforcing the expert’s “paramount duty” to the court, while that duty is more heavily emphasized in the Australian discourse concerning courtroom experts.¹¹⁶

116. See, e.g., Kelly & Butler, *supra* note 4 (discussing the implication of converting a consulting expert into a testifying expert). In Australian state courts, the Uniform Civil Procedure Rules require that expert witnesses

act independently and . . . [have an] overriding duty . . . to the Court. In particular, under rule 426 the independent expert must assist the Court impartially on matters relating to his expertise. That duty overrides any duty that the expert has to the party that appointed him. Further, it is a requirement under rule 428 that the expert state in his report that he understands that the expert’s duty is to the Court and that he has complied with that duty. In the Federal Court [of Australia] there is a practice direction on expert witnesses to similar effect.

Id. (discussing the *Uniform Civil Procedure Rules 1999* (Qld) pt 5 (Austl.)). Further:

For [an attorney] . . . to make suggestions [to an expert] is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt. I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting . . . so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions.

Id. (quoting *Boland v Yates Prop Corp Pty Ltd* [1999] HCA 64 (9 December 1999) 279 (Austl.)). For example, in the case of *Universal Music Australia*, involving a breach of copyright claim, Judge Wilcox said that his confidence in the expert, Professor Ross, was “shaken during the course of his cross-examination.” *Universal Music Austl Pty Ltd v Sharman Licence Holdings Ltd* [2005] 220 ALR 1, ¶ 227 (Austl.).

In particular, during cross-examination, Professor Ross was shown email exchanges between him and one of the instructing solicitors. In one of those emails the solicitor had deleted a sentence in the draft report and suggested a substitute sentence. . . .

. . . .

The report was then amended and put in final form with the solicitor’s suggestion. Wilcox J. said (at [231]):

“I am forced to conclude that Professor Ross was prepared seriously to compromise his independence and intellectual integrity. After this evidence, I formed the view it might be unsafe to rely upon Professor Ross in relation to any controversial matter.”

See Kelly & Butler, *supra* note 4 (quoting *Universal Music Austl Pty Ltd v Sharman Licence Holdings Ltd* [2005] 220 ALR 1, ¶ 231 (Austl.)); see also *Wood v The Queen* [2012] NSWCCA 21, ¶ 758 (Austl.) (discussing an expert for the prosecution in a murder trial, who “became an active participant in attempting to prove that the . . . [defendant] had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed his view from speaking with some police . . . and from his own assessment of the circumstances that . . . it was his task to assist in proving [the defendant’s] guilt. . . . [If the] extent of [his] partiality [had been] made apparent, his evidence would have been assessed by the jury to be of little if any evidentiary value”).

The second concern of this study is that working with a consulting expert before hiring a testifying expert potentially allows an attorney to both (i) protect from discovery all of the initial discussions with and analysis by an expert (perhaps involving weaknesses in the client's case, or alternative explanations), and (ii) manipulate the testifying expert by controlling the information that the testifying expert receives (that is, revealing only "the strongest version of the case's technical facts" in order to "produce the most favorable expert reading of the case").¹¹⁷ As to protecting discussions with an expert from discovery, because the 2010 amendments to Rule 26 protect attorney communications (including exchanges of draft reports) with any expert (even a testifying expert) from discovery, the strategic use of a consulting expert to hide discussions of weaknesses in a case is arguably no longer necessary.¹¹⁸ However, the protection offered to consulting experts is relatively absolute, while the broad exception for "facts or data" *considered* by the testifying expert in forming his or her opinion remains enough of a concern that some attorneys recommend continuing the strategic use of consulting experts.¹¹⁹

As to the potential for manipulation of an expert (to secure favorable testimony), it is significant that when the 2010 amendments to Rule 26 were being debated, it was the academics (like Professor Easton) who argued for more discovery and disclosure with respect to testifying experts, but the practitioners present (i) claimed that the current rules made them less likely to communicate with experts or ask for draft reports, and (ii) wanted to avoid both the expense of consulting experts and the advantages flowing to a party who could afford a consulting expert when the opposing party could not.¹²⁰ And, it is true that the pre-2010 discovery rules (which Easton supported) created or at least justified the strategic use of consulting experts to hide information¹²¹—that phenomenon betrays a weakness in Easton's otherwise compelling arguments.¹²²

There are advantages and disadvantages to either approach—pre-2010 discovery of communications and draft reports and post-2010 protections—such that it is difficult to tip the balance.¹²³ However, since

117. *See supra* note 12 and accompanying text.

118. *See supra* Part II.

119. *See supra* note 11 and accompanying text.

120. *See supra* note 9 and accompanying text.

121. *See supra* note 9 and accompanying text.

122. *See supra* note 9 and accompanying text.

123. *See supra* Part II.

2010, the legal profession has experienced the crisis in forensic science generated by research discrediting so many fields of apparent expertise (including bite mark analysis, microscopic hair comparisons, and arson evidence) and revealing “misleading presentations” of expertise in other fields (including fingerprint examination and firearms identification).¹²⁴ The optimism surrounding the capacity of the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²⁵ regime to eliminate junk science in the courtroom,¹²⁶ including the view on remand¹²⁷ that forensic science requires no particular scrutiny, has disappeared.¹²⁸ The most recent examples of experts exaggerating or over-testifying should lead us to question the limitations on discovery in the 2010 amendments to Rule 26.¹²⁹ Moreover, Professor Easton’s proposed solutions to these concerns¹³⁰ take into account the centrality of the adversary process in our legal system.¹³¹ Party control of case preparation, including party control of experts (instead of a court-appointed expert), is a feature of litigation with which “few would want to dispense.”¹³²

Under either regime (pre-2010 or post-2010), however, the strategic use of consulting experts remains an ethical concern. The only solution appears to be to allow discovery of attorney communications with a consulting expert (who is never named as a testifying expert), but no one—not even Easton—is calling for that reform. That leaves a concern without a solution,

124. See generally Paul C. Giannelli, *Forensic Science: Daubert’s Failure*, 68 CASE W. RES. L. REV. (forthcoming 2018), available at <https://ssrn.com/abstract=3031227> [<https://perma.cc/37JW-YSWZ>] (discussing in detail the discredited techniques).

125. *Daubert v. Merrell Dow Pharm., Inc.* (*Daubert*), 509 U.S. 579 (1993).

126. See generally CAUDILL & LARUE, *supra* note 78, at 1–12 (portraying *Daubert* and its purpose to eliminate junk science in the courtroom).

127. See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316–17 (9th Cir. 1995) (analyzing how to verify expert’s scientific opinions).

128. See *id.* at 1317 n.5 (explaining, after stating that expertise prepared for litigation should be especially scrutinized, Judge Kozinski seemed to have given a pass to prosecutorial forensic science by saying that “the fact that [such an] expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration”).

129. See *supra* Part III.A.

130. See *supra* Part III.A.

131. See generally David S. Caudill, *Lawyers Judging Experts: Oversimplifying Science and Undervaluing Advocacy to Construct an Ethical Duty?*, 38 PEPP. L. REV. 675, 703–08 (2011) (“Failure to carry out that duty [to act as a zealous advocate in the adversarial system] both impedes development of the case and undermines the adversary process.”).

132. MODERN SCIENTIFIC EVIDENCE 2006, *supra* note 33, § 3:20. “Any solutions proposed to relieve the role conflict of experts or the distortion of expert information must take care to preserve essential elements of procedural justice built into the adversary system.” *Id.*

other than the maintenance of a self-critical discourse among academics and trial attorneys regarding the ethics of expert evidence. Indeed, the concern analyzed in this study (influence or manipulation made easier by using a consulting expert) is just one aspect of the issue of attorney influence upon expert testimony generally—a problem that we cannot seem to solve, but we mention often.

