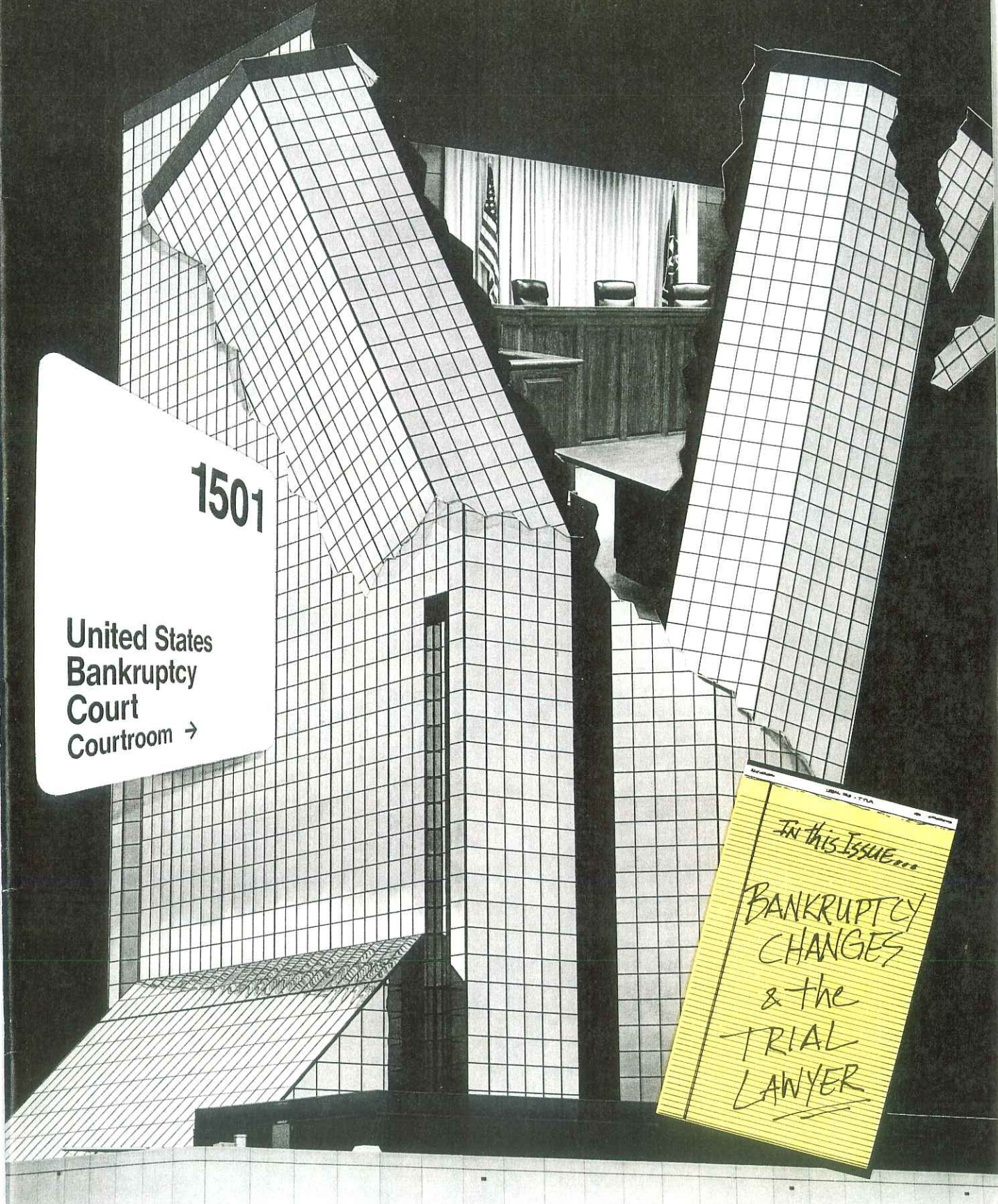


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Discovery of Expert Opinions

By

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Contrary to popular notion, a party does not have the absolute right to discover his opponent's expert opinions by the means of a "discovery" deposition. A careful reading of Rule 26.02(4) T.R.C.P. reveals that absent court order, the identity of the expert, the subject matter to which he will testify, the substance of the facts and opinions about which the expert will testify and a summary of grounds for each opinion are discoverable only through interrogatories. Rule 26.02(4)(A)(i) T.R.C.P. In the absence of an agreement, further discovery can only be obtained through a court order pursuant to subdivision (4)(A)(ii) of Rule 26.02(4) T.R.C.P., which says:

Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

Initially in discovery of an opponent's case, the discovering party must serve interrogatories asking for the information allowed by Rule 26.02(4)(A)(i). Once adequate answers are served, if the discovering party wants more, he will have to go to court and be ready to pay for the privilege of obtaining more.

Obviously nothing would prohibit the parties from agreement in respect to discovery, but the attorney should recognize that a deposition cannot be taken for "discovery" purposes only. There is no such thing as a "discovery" deposition in Tennessee. See "From the Bench, Make it Easy on Yourself," *The Tennessee Trial Lawyer*, Vol 2, No. 1, p. 26, by Chancellor Robert S. Brandt.

"There is no such thing as a 'discovery' deposition in Tennessee."

If an agreement is reached in respect to taking a deposition of an opponent's expert, the opponent's attorney should acknowledge upon the record that it is for discovery only and no other purpose. If he does not, a risk is assumed in taking the deposition. An unwary plaintiff's attorney could find the defense attorney at the trial reading the "discovery" deposition as evidence to the jury.

If answers to interrogatories concerning expert witnesses give insufficient information to prepare for trial, resort can be made to a motion to com-

pel more complete answers under the "evasive or incomplete answer" section of the rules. Rule 37.01(3) T.R.C.P. An even better tactic (if the damages warrant the expense) is to apply to the court for an order to be allowed to take the deposition of the opponent's expert under Rule 26.02(4)(A)(i) T.R.C.P. If you rely on this rule, insure that the order reflects that the deposition will be taken for "discovery purposes only", or it will be taken for all purposes.

Discovery of Non-Trial Experts

There should be very few instances where a party can discover anything (by any method) concerning facts known or opinions held by an expert who was retained in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial. Rule 26.03(4)(B) T.R.C.P. To discover such information, the moving party would have to convince the court that there are such exceptional circumstances in the case that make it impractical for the moving party to obtain the same facts or opinions from someone else. *Id.* This rule obviously is designed to protect a party from being forced to reveal his attorney's and non-trial expert's thoughts, conclusions and work product. Under this rule an attorney who retains an expert but does not plan to have him testify at trial can safely use the valuable information provided by the expert to plan his case and develop his legal theories without concern over invasion of his work product.

Tennessee Case Law

The Tennessee court decisions that discuss the issue of expert opinions revolve around the notion of fairness and balancing, as does Rule 26.02(4). The leading case is *Lutz v. John Bouchard and Sons Co., Inc.*, 575 S.W. 2nd 7 (Tenn. App. 1974), which provides an extensive analysis of the discoverability of expert opinions. Although the *Lutz* case was decided before Rule 26.02 T.R.C.P. was amended in 1979, the court presents an opinion that corresponds with much of what the revised rule says today.

The *Lutz* case involved a suit for personal injuries sustained during an explosion of a device used by defendants while making repairs. The defendants sent the remains of the device to a metalurgist to render his expert opinion. Afterwards, the device was given to plaintiff. Plaintiff was unsuccessful in obtaining a local metalurgist to render an opinion and moved to compel defendant's

expert to give his deposition. The Court of Appeals vacated the trial judge's order compelling discovery, holding that the plaintiff should pursue his investigation by obtaining his own expert.

The Court of Appeals in *Lutz* starts out its analysis of expert discovery by reviewing Tennessee decisions covering the issue. The Tennessee Supreme Court in *Medic Ambulance Service, Inc. v. McAdams*, 392 S.W. 2d 103 (Tenn. 1965), is cited as stating:

It is our opinion the Act requires a party seeking to discover the investigatory file or any of its parts which are the work product of the adversary party or his attorney must show good cause for the discovery; and that the party has used diligence to discover for himself those things which he seeks to have the adversary party produce for inspection and copying. We are of the further opinion a mere allegation that good cause exists is not enough. We think there must be a factual statement, not merely conclusions, as to the need for the data or material for the purposes of the trial and the motion should be supported by proper affidavit.

Lutz v. John Bouchard and Sons Co., Inc., 575 S.W. 2d 7, at 11 (Tenn. App. 1974).

The court in *Lutz* quotes Professor Moore on Federal Practice as stating: "The court should not ordinarily permit one party to examine an expert engaged by the adverse party, or to inspect reports prepared by such expert, in the absence of a showing that the facts or the information sought are necessary for the moving party's preparation for trial and cannot be obtained by the moving party's independent investigation or research." *Lutz v. John Bouchard and Sons, Inc.*, 575 S.W. 2d 7, at 14. Thus, the discovering party must overcome the "good cause" and "diligence" requirements as set out in *Lutz* when attempting to obtain the information for himself before discovery will be granted.

"The court establishes nine 'principles of fairness' that should govern the allowance of expert testimony."

It should be noted that the *Lutz* requirements appear to be comparable to the "exceptional circumstances" requirement as set out in T.R.C.P. 26.02(4) (B). They may even be used as precedent for a motion under subdivision (4) (A) (ii). Either way, the rules inherently suggest, as does *Lutz*, that the court may consider many factors in using its discretion to grant or deny a motion for

further discovery. One such common factor appears to be fairness.

The court establishes nine "principles of fairness" that should govern the allowance of expert testimony. The principles stated are:

1. Initially, each party should be required to pursue his investigation independently and with due diligence, including the employment and use of experts.
2. Initially, neither party should be permitted to obtain by discovery the factual information accumulated by the investigation of adversary's experts nor to obtain the benefit of any skill or expertise of such experts.
3. If the factual information is no longer available for presentation to other experts for their opinion, then the discovery of factual information in the hands of adversary's experts should be allowed in order to enable other experts to form their opinions upon the same facts.
4. If one party has employed the only available expert, this should not deprive the court of the benefit of his testimony. In such event, such an expert should be declared the witness of the court, and his compensation should be borne equally by the parties or taxed as part of the costs.

"... trial attorneys should remember that expert opinions are generally discoverable through interrogatories only."

5. After both parties have completed their investigations through experts, then each party is entitled to reasonable notice of the nature and tenor of the testimony to be expected from the experts of his adversary whether such notice would be best given by exchanging copies of experts' reports or by discovery deposition, or otherwise, is to be determined by the parties and the discretion of the trial judge under proper limitations and safeguards.
6. The facts observed by an expert do, indeed, constitute factual evidence which should be discoverable under the foregoing principles.
7. The conclusions which such an expert has reached and expects to announce in his testimony should be discoverable under the foregoing principles, if said expert will testify. If not, there would be no reason for discovery of

his opinion.

8. Discovery should not be allowed of the scientific theories and mental processes employed by an expert in reaching his conclusions unless there is a joint disclosure of such information by both parties and such advance disclosure appears necessary to the proper cross-examination and rebuttal of the witness.
9. Discovery should not be made an instrument for "picking the brain" of an expert, deriving from him information as to skills, processes and theories which might be transmitted to another expert for his edification and use in his investigation."

Lutz v. John Bouchard and Sons Co., Inc., 575 S.W. 2d 7, 14-15.

A comparison of the above principles with Rule 26.02(4) T.R.C.P. now in effect shows a marked similarity in substance. The *Lutz* principles, however, appear to go further and fill in some gaps where the rule remains silent.

Although the Court of Appeals in *Lutz* felt it necessary to mention that Federal Rules Decisions should not hold much precedent for Tennessee cases due to the difference in rule construction at that time, the 1979 revisions of the Tennessee rule alter that premise. Presently Rule 26.02(4) T.R.C.P. is fashioned after the Federal Rules of Civil Procedure 26(b) (4). For that reason, two federal cases leading on the issue will be discussed.

Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (D.C. Miss. 1972), provides an analysis of expert discovery under the Federal Rules. *Breedlove* is often cited for the proposition that an expert's report is generally not discoverable. The case involved a product liability action where plaintiff moved to compel production of expert reports rendered on the alleged defective equipment. The District Court, in considering Rule 26(b) (4) F.R.C.P., held that the rule did not encompass the production of written documents or reports on which expert opinions rely. The court also stated that in the absence of an order for further discovery, oral depositions should not be any greater in scope than interrogatories. In considering Rule 26(b) (3) F.R.C.P. on materials prepared for trial, the court held that the discovering party must show substantial need of the materials and that he is unable without undue hardship to obtain the substantial equivalent before discovery can be granted. The court implies that substantial need may be evidenced when the materials are needed to make out a case "in chief." *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, at 205.

Wilson v. Resnick, 51 F.R.D. 510 (D.C. Pa. 1970) is often cited with *Breedlove* concerning

the discovery of expert reports. The *Wilson* case involved a medical malpractice action where the defendant employed an expert witness. In denying plaintiff's motion to produce the report, the court held that the only method by which a party may discover the facts and opinions held by an expert witness is through interrogatories as provided by Federal Rule 26(b) (4). Although the court recognized its discretionary power to order further discovery under 26(b) (4) F.R.C.P., the court refused to compel production of the documents on the mere allegation that the answers to the interrogatories were insufficient. The court explained that "inasmuch as these reports are materials prepared in anticipation of litigation, any production of them would be subject to a showing that the party seeking discovery has substantial need of the materials in the preparation of his case." *Wilson v. Resnick*, 51 F.R.D. 510, at 511, 512.

"Where the expert is not expected to testify and is not an examining physician, the discovering party must show exceptional circumstances before the motion will be granted."

The *Breedlove* and *Wilson* interpretations provide the expert-retaining attorney with a Rule 26.02(3) T.R.C.P. argument that a substantial need must be shown before a Rule 26.02(4) (a) (ii) T.R.C.P. motion requesting further discovery can be granted. For further discussion of limited discovery under F.R.C.P. 26(b) (3), trial preparation materials, see *Baise v. Alewel's, Inc.*, 99 F.R.D. 95 (W.D. Mo. 1983); *Virginia Electric & Power Co., v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975).

In conclusion, trial attorneys should remember that expert opinions are generally discoverable through interrogatories only. The scope of the interrogatories should be limited to the identity of the expert, the subject matter of his opinions, the substance of the facts and opinions to which he will testify, and a summary of the grounds for each opinion. Any further discovery must be made through motion pursuant to Rule 26.02(4) (A) (ii) T.R.C.P. Where the expert is not expected to testify, the judge in using his discretion to grant the motion should still consider factors similar to the *Lutz* principles of fairness, including the good cause and diligence requirements. Furthermore, if the needed information falls within the purview of Rule 26.02(3) as trial preparation materials, the discovering party shall have no show substantial need before obtaining discovery. Finally, the request for further discovery must be considered in light of 26.02(4) (c)

T.R.C.P., where the cost burdens of such discovery should fall on the moving party.



**ABOUT
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