PITFALLS OF TESTING PRODUCTS IN DESIGN DEFECT ACTIONS

Product testing may seem important and easy, but if the results are adverse, look out for discovery and many other unfortunate consequences

BY BRUCE R. PARKER

A DESIGN defect claim can present the most serious consequences of any product liability claim against manufacturers. If successful, serial design defect claims can force manufacturers to re-design, re-market and even recall products, results that can be both expensive and damaging to their reputations in the marketplace. Because of this, counsel retained to defend the design of a product, particularly one still in production, often are instructed to defend the claim "vigorously."

Many design defect claims are resolved at trial with opposing experts presenting opinions on the safety and efficacy of the design based on ambiguous data. Faced with the task of aggressively defending the design of a product, counsel may feel that the most convincing way to refute a plaintiff's design defect theory is to subject the product to testing in order to develop unequivocal data demonstrating the quality of the design.

Although the lure of developing demonstrative evidence through product testing is attractive, the potential benefits of testing often are outweighed by the risk of developing adverse test data. Unfavorable test results may seriously erode the defense because the results may not be protected from disclosure under the attorney-client and work product privileges. Generating adverse test data also may adversely impact important interests of the manufacturer that are unrelated or ancillary to the litigation. They could discredit the manufacturer's reputation with state or federal regulatory agencies, which would be of particular concern if the manufacturer has multiple products subject to agency approval. Generating adverse test data may also require the manufacturer to overhaul its procedures for designing products and for quality assurance.

This article identifies and analyzes issues that counsel should consider before deciding to have a product tested. Although all risks in testing a product cannot be eliminated, thoroughly reviewing the issues with the client can reduce the chances of being trapped with damaging test data.

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IMPACT OF PRODUCT TESTING ON LITIGATION ISSUES

A. Discoverability of Test Data

Before deciding whether to test a product, counsel must evaluate the risks of generating adverse test data. If the data properly can be withheld from discovery, then counsel may conclude that the potential benefits of the testing outweigh the risks of testing. If the conclusion is that the data will be discoverable, then, the probability of developing significant beneficial data must be sufficiently high to offset the danger of developing discoverable adverse data.

In determining discoverability, counsel will have to consider a number of procedural rules and privileges.[1] Unfortunately, these often conflict and are silent on the specific scenario presented. As a result, counsel will often be unable to determine conclusively whether adverse results will be discoverable.

1. This article analyzes several litigation issues under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Counsel should be alert to significant differences between them and some state rules.

1. Work Product Rule

The work product rule was first introduced 45 years ago by the U.S. Supreme Court in *Hickman v. Taylor*,[2] in which it attempted to balance the equities of full disclosure of information against the protection of the privacy, labor and impressions of attorneys. The issue was whether the defendant was required to divulge information its attorney had received in interviews with survivors of a tugboat accident. The Court explained that "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation" and "to that end, either party may compel the other to disgorge whatever *facts* he has in his possession." (Emphasis supplied.)

But the Court also recognized that the proper preparation of a case demands that attorneys assemble information, sift the relevant from the irrelevant facts, prepare their legal theories and plan their strategy without undue and needless interference. The Court concluded that requiring counsel to provide the text of statements taken from witnesses would reflect the attorney's theories of the case and therefore was not discoverable as work product.

The *Hickman* holding is largely codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which additionally recognizes that work product is discoverable if a party can establish a showing of substantial need for the materials. In allowing the discovery of these documents, however, the rule requires that courts protect from disclosure the mental impressions, conclusions, opinions or legal theories of an attorney.[3]

Consistent with *Hickman*, the almost universal interpretation of Rule 26(b)(3) is that the work product privilege does not permit a party to protect against the discovery of facts. In *Bio-Rad Laboratories Inc. v. Pharmacia* the district court stated that "one of the realities of litigation is that the work-product doctrine furnishes no shield against discovery by interrogatories or by deposition of facts that the adverse party's lawyer has learned."[4]

Bio-Rad, a patent holder, sought relief for alleged patent infringement by Pharmacia. The defendant deposed a member of the law firm that represented Bio-Rad in the product's patent approval process. Bio-Rad claimed that its attorney's opinions were precluded from discovery under the work product privilege. The court held that the work product doctrine furnished no shield against discovery by interrogatories or by deposition of facts that Bio-Rad's lawyer had learned.

Facts learned by an investigator hired by attorneys were held to be discoverable in *Laxalt v. McClatchy*,[5] a libel case stemming from a series of articles in the defendant's newspaper connecting the plaintiff's casino hotel with organized crime. The defendant retained a former Federal Bureau of Investigation officer and a former staff member of the Nevada Gaming Control Board to assist in its defense. Both had knowledge of the facts and allegations in the article both before and after they were retained to assist in the defense. The court found that both investigators had to answer questions aimed at discovering the relevant facts, including facts discovered after the investigators were hired for the purpose of assisting in the defense. The court stated that the plaintiff should tailor his questions carefully to elicit specific factual material and avoid broad-based inquiries that could lead to the disclosure of trial strategies.

Language in at least one federal circuit decision supports the argument that documents containing facts ascertained by counsel are not fully discoverable. In *In re Doe*[6] an attorney was under investigation by the United States for allegedly suborning perjury and conspiring to obstruct justice. The government sought the production of the attorney's files. He refused to produce them, asserting that they contained his work product.

The district court differentiated between

2. 329 U.S. 495 (1947).

3. Recently proposed changes in the Federal Rules of Civil Procedure may significantly alter several of the rules discussed in this article, including the procedure for asserting the work product rule or other privileges. Proposed Rule 26(b)(5), as transmitted by the Judicial Conference in September to the U.S. Supreme Court, would require a party seeking protection to "describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

4. 130 F.R.D. 116, 121 (N.D. Cal. 1990), *citing* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2023, at 194 (1970) [hereinafter WRIGHT & MILLER].

5. 116 F.R.D. 438 (D. Nev. 1987).

6. 662 F.2d 1073 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

"fact" work product and "opinion" work product—"fact" work product being documents the attorney prepared but did not reflect his mental impressions. It ordered the "fact" work product discoverable on the government's showing that the information was not otherwise available to it without undue hardship. The "opinion" work product was held to be discoverable only after the government demonstrated a prima facia case of fraud.

Affirming, the Fourth Circuit explained that the attorney "is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of a case or opinions he has formed about any phase of the litigation, even if they had been reduced to writing." The opinion does not address whether the attorney would have been compelled to reveal the facts in response to a deposition question or an interrogatory regardless of whether the document containing the fact was discoverable.

If counsel elects to test a product and unfavorable test data result, there is scant authority on which to argue that the "factual" data is privileged work product and not discoverable. This conclusion presupposes that counsel can easily differentiate a "fact" directly generated by the test from a "fact" indirectly derived by means of an expert's analysis of data. The more the "fact" approaches an opinion, the easier it will be for counsel to argue it is work product.

Most testing produces results that, depending on the sophistication of the testing equipment and the thoroughness of the testing, can be interpreted with varying degrees of certainty. The more specific and detailed the testing protocol, the less margin there is for divergent interpretation of the data and the more closely the data resemble "fact." For example, whether a tumor exists based on an x-ray is probably more opinion than fact, but the tumor's existence may be an undisputable "fact" when based on a CAT scan. The fatigue strength of a metal may be a fact or an opinion depending on the degree of sophistication of the test apparatus. The more variables or assumptions that an expert must make in testing a product, the less likely the testing will produce discoverable "facts."

Even if counsel concludes that testing will produce only opinions, opposing counsel may still be able to discover the data/opinions on a showing of "substantial need," to use the words of Rule 26(b)(3). The Supreme Court addressed the "substantial need" test in *Upjohn Co. v. United States*,[7] in which the government sought discovery of notes and memoranda Upjohn had accumulated in the course of an investigation conducted by its general counsel. Stressing the difficulty of deposing employees that are scattered across the globe and that Upjohn had forbidden employees to answer questions Upjohn considered irrelevant, the government asserted that it had met the substantial need test.

The Court held that the notes and memoranda were privileged from discovery because they revealed the attorney's mental process in evaluating the communication. It concluded that such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship, stating that a stronger showing of necessity and unavailability would be necessary.

Thus, in applying the work product privilege to test data, counsel must evaluate whether the data are "fact" or "opinion." If the data are "opinion," then the plaintiff must demonstrate a substantial need by showing unavailability and necessity.

2. *Discovery from Non-testifying Experts*

Although counsel may not be able to prevent disclosure of test data under Rule 26(b)(3), a line of cases under Rule 26(b)(4)(B) supports the argument that the data are not discoverable if developed by a non-testifying consultant or expert.[8] Rule 26(b)(4)(B) provides that a party generally cannot discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial if that expert is not expected to be called as a witness. Facts and opinions from a non-testifying witness are discoverable only in situations where the party seeking discovery can make a showing of "exceptional circumstances," to use the rule's words.

Rule 26(b)(4)(B) has been criticized for allowing parties in effect to "capture" witnesses by making them unavailable to the opposing party.[9] The rule was justified in *Eliasen v.*

7. 449 U.S. 383 (1981).
8. Doe, 662 F.2d at 1077.
9. Note, *Discovery of Expert Information*, 47 N.C. L. Rev. 401, 406 (1969).

Hamilton,[10] however, in that it "promote[s] fairness by precluding unreasonable access to an opposing party's diligent trial preparation, prevent[s] a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation, and more specifically, prevent[s] one party from utilizing the services of the opponent's experts by means of deposition."

A majority of cases interprets the barrier of Rule 26(b)(4)(B) to be an imposing one. For instance, in *Eliasen* the court quoted from Wright & Miller: "It is quite clear that [it will rarely be possible to make the required showing of exceptional circumstances] and equally clear that [this] was deliberately intended by the draftsmen of the [rule]." After noting that a party can "capture" experts by retaining but not using them as witnesses, the court added, "This is undoubtedly a harsh rule. It may be a bad rule. . . . But . . . it is the rule, and we must apply it as written.."[11]

While most courts clearly bar discovery directly from a non-testifying consultant, these decisions do not generally address whether the party retaining the consultant must disclose the "facts" produced by the testing in response to a properly framed discovery request. However, contrary to the rationale of Rule 26(b)(3), which renders facts discoverable, a few cases interpreting Rule 26(b)(4)(B) have held facts to be non-discoverable.

Perry v. Jeep Eagle[12] demonstrates the use of Rule 26(b)(4)(B) to protect the results of testing performed by a non-testifying consultant. The plaintiffs sought to depose the general counsel of the defendant automobile manufacturer with respect to testing that the defendant had commissioned in preparation of pending and anticipated litigation. Noting that the expert who prepared the report was not going to be called as a witness and that the defendant was prepared to stipulate that no portion of the testing report would be used in the litigation, the district court applied Rule 26(b)(4)(B) to prohibit the deposition, stating:

> Rule 26(b)(4)(B) *protects information, whether facts or opinions*, that a party obtains from its non-testifying expert retained in litigation. Therefore, if a party's expert will not testify, and thus is not subject to being deposed, then the information that the expert had obtained and passed along to the party cannot be acquired directly from a deposition of the party absent a showing of exceptional circumstances.[13]

Because the plaintiffs could obtain the facts and opinions on the same subject by other means, the court found they had not made the requisite showing of exceptional circumstances. The plaintiffs had access to other expert studies that had been prepared for other suits against the same defendant. The court also noted that another court had ordered the defendant to give the plaintiffs the underlying documents, earlier drafts and correspondence relating to the testing.

In a related case against the same manufacturer, *Grindell v. American Motors Corp.*,[14] another plaintiff sought to depose the consultant who had done the testing. The plaintiff attempted to justify the deposition of the non-testifying consultant on the ground that he was seeking information not as to his opinion as an expert, but rather "regarding factual matters surrounding" the expert's relationship with the manufacturer. The court did not allow the deposition, holding that Rule 26(b)(4)(B) protects both facts and opinions held by non-testifying witnesses. The court also concluded that the expert's dual role—being retained both in anticipation of litigation and to consult on product development—did not remove him from the protection of the rule.

As demonstrated by *Perry* and *Grindell*, neither Rule 26(b)(4)(B) nor the cases under the rule make a distinction between "facts known" or "opinions held" by the non-testifying expert. Both are equally protected. As such, this protection is significantly broader than the work product privilege in Rule 26(b)(3).

Counsel also must closely examine their state's discovery rule regarding non-testifying experts because in some states the rules are not as broad as Rule 26(b)(4)(B). For example, in

10. 111 F.R.D. 396, 401 (N.D. Ill, 1986). *See also* FED. R. CIV. P. Rule 26(b)(4)(B) advisory committee's note, 43 F.R.D. at 235 (1967) (rule "reflect[s] the fear that one side will benefit unduly from the other's better preparation").

11. 111 F.R.D. at 401-02. *See also* Barkwell v. Sturm, Ruger Co., 79 F.R.D. 444, 446 (D. Alaska 1978) (burden to establish exceptional circumstances is great); Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 990 (D.C. Cir. 1979) (rule imposes "carefully circumscribed opportunity for discovery").

12. 126 F.R.D. 542 (S.D. Ind. 1989).

13. *Id.* at 545 (emphasis added).

14. 108 F.R.D. 94 (W.D. N.Y. 1985).

Axelson Inc. v. McIlarey[15] the Texas Supreme Court held that the disclosure of facts known by a non-testifying expert is not protected since Rule 166b(3)(b) of the Texas Rules of Civil Procedure did not include specific language protecting "facts" from disclosure. *Axelson* involved the blow-out of a gas well in which several of the parties to the litigation sought to depose engineers hired to examine the wellhead equipment after the explosion. The court held that while opinions or impressions of the engineers formed during their investigation were protected, facts they acquired were freely discoverable under the Texas rule.

In jurisdictions that interpret Rule 26(b)(4)(B) or its state counterpart as broadly as *Perry* and *Grindell*, counsel can more comfortably predict that test data will not be discoverable. Even assuming a court were to read Rule 26(b)(4)(B) broadly, however, the protection is not absolute. A party can still obtain discovery of facts from the party or the consultant if "exceptional circumstances" can be shown.

The definition of "exceptional circumstances" is not completely clear. Rule 26(b)(4)(B) defines "exceptional circumstances" as situations in which "it is impracticable for the other party seeking discovery to obtain facts or opinions on the *same subject* by other means." (Emphasis supplied.) This has been construed to require showing an inability "to discover the equivalent information on the part of party moving for discovery."[16]

The determination of "exceptional circumstances," then, requires a determination of what constitutes the "same subject" or "equivalent information." If the terms "same subject" and "equivalent information" are construed narrowly—that is, the results a particular expert discovered or produced—then the expert information almost always will be discoverable. If the terms are defined broadly—that is, pertaining to the general subject matter of the product—then the party seeking discovery generally will be denied access to the results produced by the non-testifying expert and will be required to conduct its own testing.

Supporting the underlying purpose of the rule to prevent a party from building its case on the services of the opponent's expert, the court in *Eliasen* interpreted the terms broadly, concluding that the defendants could depose the plaintiff's expert only "under the unusual circumstance that there are no other experts in the same field or subject area."[17]

Support for this broad interpretation also is found in *Marine Petroleum Co. v. Champlin Petroleum Co.*,[18] an action for alleged price fixing in which a gasoline marketer sought to depose a petroleum refiner's independent consultant. After the District of Columbia Circuit held that the non-testifying consultant could not be deposed as to facts or opinions acquired after he began preparation for the litigation, the marketer sought to get the same information by deposing employees of the refiner about their conversations with the consultant. When those depositions were blocked on other grounds, the marketer came back to the D.C. Circuit, arguing that the exceptional circumstance requirement of Rule 26(b)(4)(B) had been satisfied.

Denying a petition for rehearing, the court again refused to find that exceptional circumstances existed. It observed that the "same subject" referred to in the rule is not the consultant's testimony but rather the group of topics on which the refiner would have the expert testify. The court concluded that it is not necessary "that the party seeking discovery know what facts the other party's experts have discovered and what opinions they have formed. His burden is to show circumstances such that he cannot get any facts or opinions on the subject in which he is interested."

In a few cases, the party seeking discovery of a non-testifying consultant has met the burden of demonstrating exceptional circumstances. In *Roesberg v. Johns-Manville Corp.*[19] the plaintiff sought to discover the extent of the defendant's knowledge of asbestos and asbestos-related diseases from the defendant's non-testifying consultants. After observing that this information was central to the plaintiffs' case and that the defendant had failed to offer an alternative method for the plaintiff to obtain the information, the district court abruptly concluded that the circumstances "must be considered exceptional." *Roesberg's* apparent shift-

15. 798 S.W.2d 550 (Tex. 1990).
16. Delcaster v. Vail Assoc., 108 F.R.D. 405, 409 (D. Colo. 1985), *quoting* Parker v. Carroll, 20 F.R. Serv.2d 698, 700 (D. D.C. 1974).
17. 111 F.R.D. at 402.
18. 641 F.2d 984 (D.C. Cir. 1980).
19. 85 F.R.D. 292 (E.D. Pa. 1980).

ing of the burden to the party opposing discovery to offer an alternative method of discovery is a departure from the majority rule and has not been followed.[20]

One court has defined "exceptional circumstances" in such a way as to render the protection of Rule 26(b)(4)(B) almost illusory. In *Locite v. Fel-Pro Inc.*[21] the plaintiff brought a patent infringement claim based on tests the plaintiff's laboratory supervisor had conducted. After the suit was filed, the supervisor re-evaluated his tests and concluded that it was almost certain that the infringing agent was not present in the defendant's product. The plaintiff did not reveal this re-evaluation of the data and repeatedly blocked the defendant's discovery efforts regarding the original tests. On motion, the district court ordered the laboratory supervisor to answer deposition questions regarding his analysis. When he acknowledged that he no longer believed the facts existed to support the infringement claim, the court dismissed the case and imposed sanctions of more than $140,000 for withholding and concealing critical facts during discovery.

Determining the actual holding in *Locite* is difficult because the court offered numerous reasons for its conclusion that the data were discoverable. Since the lab technician was not proffered as a non-testifying consultant, it is unclear why the court focused on Rule 26(b)(4)(B). Nevertheless, the court stated that "exceptional circumstances" exist when facts raise the suspicion that a party "may be proceeding with litigation without an adequate basis in fact to maintain it." Alternatively, the court stated that a regularly employed chemist could not be considered a Rule 26(b)(4)(B) consultant so as to render data generated by the consultant non-discoverable. Unfortunately, the court did not discuss to what degree the data and the analysis of data must contradict a litigant's claims or defenses before it can be said that the party lacks an "adequate basis" so as to entitle a party to obtain discovery of the consultant's analysis.

In *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*[22] a district court held that the inordinate amount of time, money or resources that would have to be expended by the party seeking discovery to duplicate the work of the non-testifying expert could be a significant factor in determining whether exceptional circumstances exist.[23] Showing that duplicating the test would involve excessive cost, however, is not always sufficient. In *In re Shell Oil Refinery*[24] a district court held that costs in the range of $230,000 to $315,000 to duplicate the defendant's tests did not satisfy the exceptional circumstances requirement.

(a) Can Testing be Done In-house and Still be Protected under Rule 26(b)(4)(B)?

In ascertaining the scope of the protection under Rule 26(b)(4)(B), counsel must determine if the consultant performing the test is within the class protected by that rule. Clients often insist that product testing be done by their own employees to preserve the confidentiality of its secrets. Because Rule 26(b)(4)(B) is not clear, courts have split over whether a regular employee of a corporate litigant falls within the rule.[25]

The leading case holding that an employee cannot be a non-testifying consultant under Rule 26(b)(4)(B) is *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*,[26] in which the district court based its holding largely on the assumption that an "expert" must be impartial. Since an employee presumably cannot be impartial, the court concluded he cannot be an expert protected by the rule. The assumption that retained consultants are not biased is subject to question since it is a central argument in any counsel's cross-examination of an adverse expert.

The proposition that in-house experts are not protected by Rule 26(b)(4)(B) also was cited in *Kansas-Nebraska Natural Gas v. Marathon Oil Co.*[27] The facts of the case, however, re-

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20. *See* Kelly McDonald, *Gimme Shelter? Not If You Are a Non-Witness Expert under Rule 26(b)(4)(B)*, 56 CINN. L. REV. 1027, 1045 (1988).
21. 94 F.R.D. 1 (N.D. Ill. 1980).
22. 415 F.Supp. 1122 (S.D. Tex. 1976).
23. *See also* In re Agent Orange Product Liability Litigation, 105 F.R.D. 577, 581 (E.D. N.Y. 1985) (exceptional circumstances included: some of "information is not readily available from any other source" and "plaintiffs would have to devote such enormous time and resources to duplicating the experts' efforts that obtaining the information by other means is impracticable," thus counter to purpose of multidistrict litigation process).
24. 132 F.R.D. 437 (E.D. La. 1990).
25. *See* James R. Pielemeier, *Discovery of Non-Testifying "In-house" Experts under Federal Rule of Civil Procedure 26*, 58 IND. L.J. 597 (1983) (noting uncertainty in rule, advisory committee notes, commentators and case law).
26. 68 F.R.D. 397 (E.D. Va. 1975).
27. 109 F.R.D. 12 (D. Neb. 1985).

veal that the court was not announcing a universal rule barring an employee's designation as an in-house expert. The court noted that the employees in question did not indicate they were working "for" their employer's attorneys, only that some of their responsibilities included assisting the attorneys. The court concluded that the use of the terms "retained or specially employed" in Rule 26(b)(4)(B) "implies something more than simply the assignment of a current employee to a particular problem raised by current litigation." The court also was concerned that the plaintiff's claim for injunctive relief might involve the same employees.

Most courts have not adopted *Virginia Electric*'s per se rule barring "in-house experts" from the protection of Rule 26(b)(4)(B). The court in *Shell Oil* provided a thorough review of the case law in this area.[28] That litigation involved claims for personal injuries and deaths caused by an explosion at an oil refinery. Shortly after the explosion, Shell conducted metallurgical and chemical tests on material removed from the explosion site. The plaintiffs sought to depose two Shell employees who were present at the tests and drafted preliminary reports.

After concluding that in some circumstances protection of an in-house expert's opinion "supports improved public safety and other social benefits of self-analysis," the court provided some guidance as to when employees of a party should be considered "retained or specially employed in anticipation of litigation or preparation for trial" and thus fall under the protection of Rule 26(b)(4)(B). In determining that the employees in this case were non-testifying consultants under the rule, the court found the following factors significant: the employees were engaged by the defendant's attorneys to "perform specific tasks to help them defend the lawsuit," the employees acted "at the direction of those attorneys," and they sent their reports only to the defendant's outside counsel. The employees were not disqualified from the rule's protection, the court said, because (1) they might have conducted the studies regardless of the litigation, (2) they were not paid additional compensation for the studies, and (3) they were not assigned exclusively to the litigation.[29]

Decisions such as *Shell Oil* demonstrate that although facts and opinions gained in preparation of litigation may be protected, facts and opinions acquired prior to that special retention or employment are not. For example, in the second *Shell Oil* case,[30] the court distinguished information that a person might have gained as part of the investigation team from information gained in the course of regular employment. The former is protected under Rule 26(b)(4)(B); the latter is subject to discovery just as it would be from an ordinary witness. The Advisory Committee's note to Rule 26(b)(4)(B) makes clear that "the expert whose information was . . . acquired . . . because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit . . . should be treated as an ordinary witness." The ordinary witness status will not change merely by retaining the individual as an expert.

While acknowledging that segregating the pre- and post-retention knowledge could be difficult, the court decided that not only could it be done, it must be done to implement Rule 26(b)(4)(B) fully. Other courts also have deemed it necessary to segregate the pre- and post-retention knowledge of an expert.[31]

These "segregation" decisions suggest that the fact that an attorney has identified a particular expert to testify on certain issues should not preclude the expert from also serving as a non-testifying consultant for purposes of the product testing. The expert's pre-retention (as a Rule 26(b)(4)(B) consultant) knowledge and experience is still discoverable, while knowledge acquired as a non-testifying consultant regarding the testing should be protected.

Although the case law would permit counsel to have an expert serve in these dual capacities, it is probably unwise to do so. Once the expert becomes aware of the test data, it may be impossible for reasons discussed below to

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28. 132 F.R.D. 437 (E.D. La. 1990).

29. Other cases indicating that Rule 26(b)(4)(B) protection could be applied to regular employees include Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984 (D.C. Cir. 1979); In re Sinking of Barge "Ranger I," 92 F.R.D. 486, 489 n.5 (S.D. Tex. 1981); and Seiffer v. Topsy's Int'l Inc., 69 F.R.D. 69 (D. Kan. 1975).

30. 134 F.R.D. 148 (E.D. La. 1990). The court also extended the protection of Rule 26(b)(4)(B) to eight additional Shell employees who were part of the post-accident investigation team.

31. Marine Petroleum, 641 F.2d at 992 ("one may simultaneously be a litigation expert with Rule 26(b)(4) protection as to some matters and simply an unprotected actor or witness as to others").

preclude discovery of the data. If counsel elects to use a testifying expert to perform the tests and the results are unfavorable, the safer course is to withdraw the expert as a witness and continue his retention as a non-testifying consultant. There are some cases suggesting that, depending on how it is done, this approach can preclude all discovery from the consultant.

In *Mantolete v. Bolger*[32] the defendant withdrew its expert just four days before that expert's scheduled deposition and still was able to take advantage of the protection of Rule 26(b)(4)(B) by redesignating that expert as a non-witness consultant. The plaintiff contended that the defendant's re-characterization of the expert as a non-witness consultant was "solely to avoid discovery" and was "a gross abuse of the federal rules." But the court dismissed the plaintiff's contention, stating that the defendant was free to execute the trial strategy it thought appropriate and that "this extends to the changing the status of an expert, which thereby narrows the scope of discovery."

Similarly, in *In re Oracle Securities*[33] a plaintiff was able to protect a witness from deposition by redesignating the formally testifying witness as a consulting expert only. The court held that the plaintiff had the prerogative of changing his mind, and since the redesignation occurred before any expert testimony was given, the witness never acted as a testifying expert witness. The defendant argued that by identifying the witness and indicating the subject matter of his anticipated testimony, the plaintiff had waived the protection of Rule 26(b)(4)(B). But the court held there was no waiver, since none of the actual facts or opinions of the expert were revealed.[34]

In *County of Los Angeles v. Superior Court*[35] the defendant in a medical malpractice suit designated a pathologist to testify at trial. Before the expert was deposed, the defendant withdrew the expert as a witness but continued to retain him as a non-testifying consultant. When the plaintiff tried to employ the pathologist as his expert, the defendant sought a protective order.

Applying the California rule analogous to Rule 26(b)(4)(B),[36] the California Court of Appeal held, "If that expert continues his or her relationship with the party as a consultant, the opposing party is barred from communicating with the expert and from retaining him or her as the opposing party's expert."

Counsel should be aware that a decision to redesignate a testifying expert as a non-testifying expert may not have the desired effect if it is made as the result of an agreement between co-defendants. In opposing the motion in County of Los Angeles, the plaintiff argued that the defendant was attempting to suppress relevant evidence and cited a California Supreme Court decision, *Williamson v. Superior Court*,[37] in which a defense expert produced a report concluding that the negligent design of a co-defendant's product had caused the plaintiff's injury. The two defendants entered an agreement which provided that the first defendant would withdraw his expert and not make his report available to the plaintiff. In return, the second defendant would indemnify the first defendant against any liability it might incur.

The California Supreme Court found that such an agreement between two parties with adverse interests was an agreement to suppress evidence and void as against public policy. The *County of Los Angeles* court distinguished its case from *Williamson* on the ground that there was but one party who, for tactical reasons and in its own interest, had chosen not to call one of its witnesses. Therefore, there was no policy preventing the defendant from changing the status of the expert from testifying to non-testifying.[38]

(b) Disclosure of Identity of Non-testifying Expert

In most cases, counsel will not want to disclose the identity of the consultant conducting the testing. There is a split in authority whether Rule 26(b)(4)(B) protects against that. One line of cases holds that the identity of non-testify-

32. 96 F.R.D. 179 (D. Ariz. 1982).
33. 136 F.R.D. 639 (N.D. Cal. 1991).
34. *See also* Durflinger v. Artiles, 727 F.2d 888, 891 (10th Cir. 1984) (special showing needed to obtain testimony of consulting witness formerly listed as probable testifying witness); Bailey v. Meister Brau Inc., 57 F.R.D. 11, 13-14 (N.D. Ill. 1972) (prohibited deposition of expert originally designated as testifying witness on issue once party decided expert would not testify on that issue).
35. 271 Cal.Rptr. 698 (Cal.App. 1990).
36. CAL. CIV. PROC. CODE § 2018.
37. 582 P.2d 126 (Cal. 1978).
38. *See also* Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984) (agreements to silence testifying experts pursuant to settlement violate purpose and policy underlying rules of discovery).

ing consultants is discoverable under Rule 26(b)(1), which provides for the discovery of the identity and location of all persons having relevant knowledge.[39] Another line holds that the protection of Rule 26(b)(4)(B) is an exception to Rule 26(b)(1) and renders undiscoverable even the identity of non-testifying witnesses.[40]

For example, in *In re Sinking of Barge "Ranger I"*[41] one party sought to discover the identity of experts hired by another party to assist it in an internal investigation of the sinking of a barge. After a review of the conflicting case law, the court denied a motion to compel discovery of the expert's identity, reasoning that once the identities of retained or specially employed experts are disclosed, the protective provisions of the rule concerning facts known and opinions held by those experts are subverted. "The expert may be contacted or his records obtained and information normally non-discoverable under Rule 26(b)(4)(B) revealed," the court stated.

(c) The Effect of Future Lawsuits on Rule 26(b)(4)(B) Protection

Even if counsel concludes that the facts and identity of a non-testifying consultant will not be discoverable, the decision to proceed with testing should not be made until counsel also considers the likelihood of future lawsuits brought under the same theory. Surprisingly, some courts have held that the protection of Rule 26(b)(4)(B) does not extend beyond the case for which the material is prepared, so the potential exists for the test data to be non-discoverable in the case for which the testing was done but discoverable in a subsequent case. Since a defective design claim is likely to generate multiple lawsuits, this potential exposure in future litigation should be a significant consideration in the decision to test.

In *American Buildings Co. v. Kokomo Grain Co.*[42] the Indiana Court of Appeals, interpreting an Indiana rule similar to the federal rule, held that the privilege created by Rule 26(b)(4)(B) does not extend to subsequent litigation. That case involved the collapse of a grain storage building. In the course of discovery, the purchaser of the building requested that the seller produce the studies and reports prepared for the seller regarding six similar failures of its buildings, particularly the report of an expert hired to analyze the collapse of a building very similar to that in the present case.

The court noted that the discovery of work product and the discovery of materials from experts are governed by separate provisions of Rule 26. After examining the distinct purposes of the various sections of the rule, the court concluded that while Rule 26(b)(3) applies to materials prepared in anticipation of prior litigation, Rule 26(b)(4) does not. Since the expert did not prepare his report in anticipation of the pending litigation, it was discoverable.[43]

A federal district court in *Sullivan v. Sturm, Ruger & Co.*[44] reached a similar conclusion. The plaintiff sought to depose an expert retained by the defendant gun manufacturer. Prior to his employment by the defendant, the expert had been employed by another plaintiff with a similar claim against the same gun. The plaintiff in the subsequent action agreed to limit the deposition solely to work done by the expert while under the employ of the prior plaintiff. The court held that the expert was not protected by Rule 26(b)(4)(B) because, "While [the expert's] knowledge and opinions that plaintiff seeks to discover were developed for litigation, they were not developed for this lawsuit, and more importantly, were not devel-

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39. *See, e.g.*, Baki v. B.F. Diamond Constr. Co., 71 F.R.D. 179, 23 F.R. Serv. 2d 188, 190 (D. Md. 1976); Sea Colony Inc. v. Continental Ins. Co., 63 F.R.D. 113, 114 (D. Del. 1974); Roesberg, 85 F.R.D. at 303; In re Folding Carton Antitrust Litig., 83 F.R.D. 256, 259 (N.D. Ill. 1979); Arco Pipeline Co. v. S/S Trade Star, 81 F.R.D. 416, 417 (E.D. Pa. 1978); Weiner v. Bache Halsey Stuart Inc., 76 F.R.D. 624, 628 (S.D. Fla. 1977).

40. *See, e.g.*, Ager v. Jane C. Stormont Hosp. & Training School for Nurses, 622 F.2d 496, 503 (10th Cir. 1980); In re Pizza Time Theatre Sec. Litig., 113 F.R.D. 94, 97-98 (N.D. Cal. 1986); Kuster v. Harner, 109 F.R.D. 372, 375 (D. Minn. 1986); Barge "Ranger I," 92 F.R.D. 486 (S.D. Tex. 1981); Detwiler v. Gall, Landau & Young Constr. Co., 712 P.2d 316, 318 (Wash.App. 1986); Ruiz v. Brea, 489 So.2d 1136, 1138 (Fla.App. 1986).

41. 92 F.R.D. 486 (S.D. Tex. 1981).

42. 506 N.E.2d 56 (Ind.App. 1987).

43. *See also* National Steel Prod. Co. v. Superior Court, 210 Cal.Rptr. 535 (Cal.App. 1985) (expert's engineering report prepared for prior litigation but never disclosed was discoverable when expert was called in subsequent litigation); Grinnell Corp. v. Hackett, 70 F.R.D. 326, 333 (D. R.I. 1976) (Rule 26(b)(4) applies when "information sought was obtained for the very purpose of preparing *for the litigation in question*") (emphasis supplied).

44. 80 F.R.D. 489 (D. Mont. 1978).

oped for the use of the defendant."

There are situations in which courts have extended the protection of non-testifying experts to subsequent litigation. In the *Agent Orange Product Liability Litigation*[45] the plaintiff sought to depose several medical experts who had been retained by the defendant in anticipation of a similar action that had settled before trial. The court held that Rule 26(b)(4) still controlled discovery of these experts, although their information was obtained in preparation of a different case. As noted by the court in *American Buildings*,[46] however, this extension of the protection of Rule 26(b)(4) by the court in *Agent Orange* was conditioned on the fact that the two cases were part of the same multidistrict litigation:

> Given the legal and factual similarities, the involvement of many of the same parties, and the procedural realities of the [multidistrict litigation] process, it is reasonable to interpret Rule 26(b)(4) to reach experts retained by a party for trial preparation in a closely related case that is before the court as part of the same multidistrict litigation.[47]

The district court in *Hermsdorfer v. American Motors Corp.*[48] expanded the protection of Rule 26(b)(4)(B) to "information obtained for the purpose of preparing for numerous lawsuits, some perhaps already filed and others yet anticipated merely as a matter of statistical or logical probability."

Hermsdorfer involved an attempt by the plaintiffs to depose three experts hired by American Motors to study the propensity for some of its vehicles to roll over when taking curves at slow speeds. To avoid the barrier of Rule 26(b)(4)(B), the plaintiffs argued that the experts were not retained in anticipation of litigation or preparation for trial but, more generally, to evaluate the safety of the defendant's product. The court held that for information to be protected, it need not be developed for a particular case. Information obtained for the purpose of preparing for "all other similar litigations against the defendants" was protected.

Following the reasoning of *Hermsdorfer*, the degree of protection Rule 26(b)(4)(B) provides in subsequent litigation will depend on how related the subject matter of that litigation is to the subject matter of the litigation for which the expert prepared or obtained the information. To give full effect to the purpose of the rule, courts ought to extend the protection to factually related cases regardless of whether they have been formally joined in a multidistrict litigation or a similar proceeding. Defense counsel should be aware, however, that not all courts have interpreted the rule so broadly, and therefore they cannot be certain that adverse test data generated by a non-testifying consultant will not be discoverable in future litigation.

3. Privilege of Critical Self-Examination

The privilege of critical self-analysis is relatively modern and may be applicable when the work product or attorney-client privileges are not available. It is based on the precept that it is in the best interests of society to have active analysis and evaluation of a company's policies, products and problems. As stated by the federal district court in *Ashley v. Uniden Corp. of America*,[49] a case concerning the disclosure of required governmental filings in a personal injury lawsuit, "the need to encourage full and frank disclosure of information to the government regarding defective products is of crucial importance to the consuming public. The success of a reporting scheme would be severely undercut if manufacturers fear that their frank disclosures may be used against them in lawsuits."

Reflective of that policy, information protected under the privilege of critical analysis generally should fit the following criteria:

1. The information must result from a critical self-analysis undertaken by the party seeking protection.
2. The public must have a strong interest in preserving the free flow of the type of information sought.
3. The information must be of the type whose flow would be curtailed if discovery were allowed.[50]

In a recent scholarly analysis of the self-examination privilege in this *Journal*, Stuart Rickerson recommended several steps to en-

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45. 105 F.R.D. 577 (E.D. N.Y. 1985).
46. 506 N.E. 2d at 61, n.1.
47. Agent Orange, 105 F.R.D. at 580. The court actually permitted the discovery after determining that the information sought fell within the "exceptional circumstances" of Rule 26(b)(4)(B).
48. 96 F.R.D. 13 (W.D. N.Y. 1982).
49. Civil No. SA-84-CA-2383 (W.D. Tex. 1986).
50. Note, *The Privilege of Critical Self-analysis*, 96 HARV. L. REV. 1083, 1086 (1983) [hereinafter *Critical Self-analysis*].

hance the probability of the privilege being recognized. These included designing a protocol to protect the investigations by making the self-critical analysis confidential, designating it as a special assignment requiring immediate attention and requiring that the report and analysis be shared only with the person supervising the evaluation.[51]

A review of a product that is allegedly defectively designed is a prime candidate for the assertion of the privilege of critical self-evaluation. In *Lloyd v. Cessna Aircraft Co.*[52] Cessna sought protection of a "top ten" list that contained information compiled at staff meetings that reviewed, analyzed and evaluated operations for the continued improvement of the quality of products. The district court found that while it was in general agreement with the principles enunciated in *Brendice v. Doctors Hospital Inc.*,[53] application of the privilege was not warranted in the case before it since the plaintiff sought only to have general questions answered and not the production of the actual reports and minutes of the meetings.

As with the work product doctrine, the privilege of critical self-examination raises questions as to whether the factual portions of the investigations are privileged. Although the issue is rarely discussed, courts appear to assume that the facts learned in such investigations do not fall within the privilege.[54] This assumption, however, is not an absolute rule, since the rationale for the self-evaluation privilege also can encompass facts revealed in the investigation. One of the factors cited for determining whether facts turned up in a self-analysis investigation are discoverable is whether the factual portions are independently replicable—for example, raw statistics. It is reasoned that being able to replicate something reduces the chance that a secret independent investigation is necessary, since the opponent could easily use the same statistics to reconstruct the analysis.[55]

4. *Duty to Supplement Discovery Responses under Rules 26(e) and 37(c)*

Courts holding that facts known by a nontestifying expert or information learned through a critical self-examination are not discoverable often do not attempt to reconcile their holdings with the general duty to supplement discovery responses under Rule 26(e)(2). An argument can be made that if testing produces facts inconsistent with facts previously asserted in discovery responses, counsel must reveal those facts notwithstanding any privilege.

Rule 26(e)(2) states:

> A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Before this duty arises, however, "it must be shown that the failure to disclose the new facts would amount to a knowing concealment."[56] The duty to supplement does not arise until the party, or its attorney, has "actual knowledge of the new information and actual knowledge that is inconsistent with a response previously made."[57]

In *Locite v. Fel-Pro Inc.*[58] the court found that after the plaintiff filed its patent infringement claim, its laboratory supervisor re-evaluated his data and concluded the defendant had probably not infringed the plaintiff's patent. Under such circumstances, the court held the plaintiff had a duty to convey the new "facts"

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51. Stuart E. Rickerson, *The Privilege of Critical Self-examination: How To Raise and Use It*, 58 DEF. COUNS. J. 504 (1991).

52. 74 F.R.D. 518 (E.D. Tenn. 1977).

53. 51 F.R.D. 187 (D. D.C. 1970).

54. *See, e.g.*, Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978). This was a class action employment discrimination case in which the plaintiffs sought Westinghouse's employment policies and affirmative action programs. The court found that materials prepared for government reports, especially the objective data in those reports, were not privileged.

55. *See* Dickerson v. United States Steel Corp., 14 Fair Empl. Proc. Cas. (BNA) 1448, 1449 (E.D. Pa. 1976). *See also Critical Self-Analysis, supra* note 50, at 1094.

56. Havenfield Corp. v H & R Block Inc., 509 F.2d 1263, 1272 (8th Cir. 1975).

57. WRIGHT & MILLER, *supra* note 4, § 2049. The new proposed Rule 26(e) replaces the two-part test of the current rule with one requiring a party to supplement any response that the party learns "is incomplete or incorrect." The new rule also clarifies that the duty to supplement applies to responses to interrogatories, requests for production of documents, and requests for admissions. Proposed Rule 37(c)(1) provides that if a party unjustifiably fails to disclose information required by Rules 26(a) or 26(e)(1), then the party shall not, unless the failure is harmless, be permitted to use as evidence at a trial, at a hearing or on a motion any witness or information not so disclosed.

58. 94 F.R.D. 1 (N.D. Ill. 1980).

to the defendant. The plaintiff's failure to supplement its discovery responses was one of the bases for the court's decision to award sanctions under Rule 37.

In *Board of Directors v. Anden Group*[59] the district court held that even supplementing prior responses might not be a sufficient remedy when a party is faced with adverse test results; the party also may be required to admit a previously disputed fact. The case involved a dispute between the seller and the purchaser of treated plywood. After being sued by the purchaser, the seller impleaded its supplier. This put the seller in the awkward position of having to deny the defectiveness of the product to the purchaser yet claim the product was defective with respect to the claims against the supplier.

The court held that the defendant may prepare and defend two inconsistent positions until certain facts become "unequivocally established." This point was reached when the plywood roof deteriorated to the extent that it was an "objectively observable fact" that it needed to be replaced. Then the seller was required to admit that fact, "even if doing so would undermine or scuttle one of its positions."

During the discovery process, the seller hired experts to sample the roof plywood and determine the safety of the roof. The test data suggested that the roof had deteriorated to the point that it was unsafe. The seller, on receiving the report, supplemented its answers regarding anticipated expert testimony to reflect the test data. The seller, however, failed to admit that the roof needed to be replaced.

Imposing sanctions under Rule 37, the court rejected the seller's contention that its supplemental answer was the equivalent of an admission:

> [The buyer] could not rely at trial on this answer to the same extent and in the same manner as it could on an admission. . . . For example, [the seller's] expert might not testify at trial, thus depriving [the buyer] of this evidence of deterioration. Moreover, testimony by [the seller's] expert might be subjected to attack and undermined at trial by the third-party defendants. An interrogatory answer describing anticipated expert testimony is not the equivalent of [the seller's] admitting the objective factual results of its investigation, namely that the plywood had deteriorated and needed replacement. [The seller]. . . had clear evidence of this. It should have amended its previous outright denials to [the buyer's] second set of requests for admissions.[60]

The court reached a different conclusion as to the seller's duty to admit the cause of the product's deterioration. Since the seller was able to proffer an expert witness who could testify that defects in the lumber were related to its manufacture and not its installation, the seller was not required to admit causation. The court employed an objective reasonableness test whereby the inquiry focused only on whether a "reasonable attorney in like circumstances" could believe his actions to be factually and legally justified.[61]

A similar result was reached in *Chemical Engineering v. Essef Industries*,[62] in which the plaintiff alleged that the defendant had infringed its patent. The central issue regarding infringement was whether the defendant's water purifier, like the plaintiff's device, raised the pH of treated water. The plaintiff failed to supplement its discovery responses after its own tests demonstrated that the defendant's device did not raise the pH. The Court of Appeals for the Federal Circuit held the plaintiff's failure to file an supplemental answer warranted an award of fees and expenses.

The plaintiff unsuccessfully attempted to justify its failure to supplement its responses on several grounds. First, the plaintiff asserted that the admission would have conceded the essence of its case. Citing Rule 3.3 of the American Bar Association Model Rules of Professional Conduct, the court commented that the "notion that the plaintiff was free to refuse to admit the truth because the truth might have defeated its lawsuit is contrary to the duty of candor to the court." Next, the plaintiff asserted that it was a legal issue for the court to decide "whether the raising of the pH was a claim of the patent in suit or an element necessary to a claim in the patent in suit." In response, the court stated that "the presence of a legal dispute does not obviate a party's responsibility to admit the truth of a matter which the party knows to be true in order to avoid forcing the other party to prove the truth of the matter." Finally, the plaintiff argued that the

59. 136 F.R.D. 100 (E.D. Va. 1991).
60. *Id.* at 109.
61. *Citing* Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987)).
62. 795 F.2d 1565 (Fed.Cir. 1986).

request for admission was not sufficiently specific, noting the "unpredictability" and "complexity" of water treatment technology. The court, however, concluded that the request did not require admission of unpredictable or complex events, but only a summary of definite test results.

As briefly discussed above, what constitutes a "definite test result" is a difficult question. To state that there is a duty to supplement only raises the question of when something has become so undisputable that its existence is no longer a matter of opinion or subjective analysis—but a "fact." An opinion is not the type of information that gives rise to a duty to supplement under Rule 26(e)(2). In the words of one court, "It is the facts that the rule seeks to bring out in the open, not new contentions which may be based upon allegedly new facts."[63]

Presumably, there are tests that, when properly performed, produce data over which there is no legitimate dispute. The pH test conducted in *Chemical Engineering* is an example. Rule 26(e)(2) seemingly imposes the responsibility on counsel to differentiate between facts whose existence are not subject to "legitimate" dispute and those that are the product of an analysis of data. The differentiation between "pure" and "quasi" facts developed by an expert based on interpretation of data is often very difficult. Unfortunately, the determination of whether counsel failed to disclose an arguably "objectively" proved fact generally will be made with the benefit of perfect hindsight.

5. *Can Counsel "Forget" One Expert and "Shop" for Another?*

Even if counsel concludes that if adverse test data is generated it will not be discoverable, counsel still will need an expert to defend the design. May counsel retain and use a new expert while not divulging adverse data to him? May counsel maintain a defense inconsistent with the data?

While counsel is always free to elicit opinions and analyses from several experts, it is not clear that counsel always can offer opinions into evidence that are inconsistent with undisclosed adverse test data. The more the test data approach being "true" facts, the more counsel must be sure that he is not offering, as the court found in *Locite*, "false" evidence by using an expert who is unaware of the test data.

Rule 3.3 of the ABA Model Rules of Professional Conduct, "Candor Toward the Tribunal," states that a lawyer shall not "offer evidence that the lawyer knows to be false" and must take "reasonable remedial measures" when coming to know of the falsity. The comment to Rule 3.3 states that a lawyer must refuse to offer evidence the lawyer knows to be false regardless of the client's wishes. If a client is offering the "false evidence," the lawyer, on learning that the evidence is false, "should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures."

The critical phrase "false evidence" is not defined. Some commentators argue that the drafters of Rule 3.3 intended it to require that a witness's testimony be corrected when it can be shown to be "objectively false," even if the witness is sincere in his belief of the truth of his testimony.[64] These commentators presumably would contend that if an expert's opinion is "objectively false" because he is ignorant of contradictory test data, then counsel cannot use the expert.

The scope of Rule 3.3 is unclear. Depending on the degree to which the test data are unequivocal, the new expert may have to be advised about the data. Once the expert learns about the data, however, they inevitably will become discovered. Therefore, a major concern for counsel considering whether to test a product is whether the type of adverse test data that might be produced is of the type that could render a defense of the design "objectively false."

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63. Havenfield Corp, 509 F.2d at 1272. *See also* Chubb Integrated Sys. v. Nat'l Bank of Washington, 103 F.R.D. 52, 61 (D. D.C. 1984) (duty to supplement answers if "in retrospect there exists other information relevant" to issue raised in interrogatories).

64. GEOFFREY C. HAZARD, THE LAW OF LAWYERING § 3.3:208. Professor Hazard discusses Rule 3.3(a)(4) in the situation in which a lawyer presents a witness the lawyer knows is mistaken about a material fact. The lawyer offers the witness with the knowledge the witness likely will testify as to the witness's misconception. He concludes that under these circumstances the lawyer will be offering false testimony, although the witness believes he is telling the truth.

6. Can Test Results Be Revealed to Expert Expected To Testify?

Before having a product tested, counsel should consider whether it will be reasonably necessary for the data to be shared with an expert who is expected to testify. These situations may result in the otherwise non-discoverable test data becoming discoverable as pursuant to Rule 26(b)(4)(B) and Rule 612 of the Federal Rules of Evidence. The same complication arises when the person doing the testing is also a witness on other issues.

Rule 26(b)(4)(A) allows a party to discover through interrogatories the identity, subject matter, substance of the expert's testimony and the grounds for the opinions. Federal Rule of Evidence 612 provides in pertinent part:

> . . . if a witness uses a writing to refresh memory for the purpose of testifying, either—
> (1) while testifying, or
> (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . .

Together, Rule 26 and Evidence Rule 612 support broad discovery of any material reviewed by testifying experts. Some courts have extended this discovery mandate to render discoverable material otherwise within the work product rule if it was disclosed to a testifying witness. Therefore, even if test results are classified as attorney work product or protected under Rule 26(b)(4)(B), those results may still be discoverable if they have been disclosed to a testifying expert witness or employee in order to prepare them to testify.[65]

The leading decision suggesting that this rule could be applied to compel the production of work product is *Berkey Photo Inc. v. Eastman Kodak Co.*[66] Defense counsel had supplied one of his witnesses with several notebooks containing background information on some of the economic issues involved in the litigation. The attorney took the position that the notebooks represented the compilation of his "legal analysis, mental impressions and . . . legal judgment as to what facts were needed to be understood, mastered and possibly presented" in the litigation. As such, he claimed, they were work product and therefore protected from discovery.

Referring to the purpose of Evidence Rule 612, the district court noted:

> [Given the] modern views favoring broad access to materials useful for effective cross-examination, embodied in rules like Rule 612 . . . it is disquieting to posit that a party's lawyer may "aid" a witness with items of work product and then prevent and counteract the effect of such assistance.[67]

Recognizing that the attorney would not have anticipated that providing the notebooks to a witness would waive the work product privilege, the court did not compel disclosure, but it did conclude that "there will be hereafter, powerful reason to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties."

Cases diverge on whether disclosure of material to a witness to prepare for testimony automatically waives the work product privilege.[68] Some courts have adopted a rule that it is always "necessary in the interests of justice" to require disclosure of all documents and materials reviewed by a witness in preparation for offering testimony.[69] This view has been criticized.[70] The majority of courts has held that the determination of whether providing privileged material to a witness waives the privi-

65. Proposed Rule 26(a)(2)(B) requires a party to disclose a detailed and complete report of the expected testimony of each expert. That report must contain a description of "the data or other information" relied on in forming the expert's opinion. The Advisory Committee's notes state explicitly that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions . . . are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

66. 74 F.R.D. 613 (S.D. N.Y. 1977).

67. *Id.* at 616.

68. JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE para. 612 [04], at 612-49 (1988).

69. *See, e.g.*, Marshall v. United States Postal Service, 88 F.R.D. 348, 350 (D. D.C. 1980) (stating, without qualification, that once a document is used to refresh the recollection of a witness, privileges as to that document have been waived); Barrier v. Women's Nat'l Bank, 96 F.R.D. 202 (D. D.C. 1982) (noting "judicial trend towards requiring disclosure under Rule 612 of materials used to refresh recollection preliminary to the taking of a deposition, notwithstanding claims of attorney-client privilege or work product privilege"). *See also* Wheeling Pittsburgh Steel Corp. v. Underwriters Laboratories Inc., 81 F.R.D. 8 (N.D. Ill. 1978).

70. *See, e.g.*, Note, ***Interactions Between Memory Refreshment and Work Product Protection under the Federal Rules***, 88 YALE L.J. 390, 404-06 (1978).

lege involves a balancing of competing interests—the need for full disclosure versus the need to preserve the integrity of the adversary system as protected by the work product rule.[71]

Even under the balancing test, it is likely that showing adverse test data to a witness will waive the work product rule. First, the material does not involve opinion work product, which would be afforded greater protection.[72] Second, the witness's knowledge of adverse test results would be highly relevant "to test the credibility and memory of the witness and to determine what effect the document review had upon the witnesse's testimony."[73] Third, the party seeking production of the result may have less access to the means of conducting similar testing.

Unequal access was a determining factor in *In Re Comair Air Disaster Litigation*,[74] which was a design defect suit brought against an aircraft manufacturer by the owner of an aircraft that crashed. An employee of the defendant manufacturer investigated the accident and compiled a report of his findings. That report was then turned over to another of the defendant's employees for review in preparation for deposition. At the deposition, the plaintiff requested a copy of the report. The defendant refused, and a motion to compel production was filed.

The district court found that it was necessary in the "interest of justice" to compel production of the report. Using the balancing test, the court noted that the party seeking production did not have "as complete access to the wreckage as the manufacturer," and it concluded that "it would be unfair and unduly prejudicial to permit the deponent . . . to review the accident report, give a deposition with it fresh in his mind, yet keep it unavailable to opposing counsel." The court also gave great weight to the fact that no attorneys were involved in the preparation of the report.

From the above discussion, it is reasonably clear that if counsel wishes to minimize the chances of adverse test data becoming discoverable, it should not be shown to a testifying expert.

B. Ramifications of Having Client Review Test Data

Another issue counsel must consider before testing a product is whether the test data can be reviewed by the client without waiving the attorney-client and work product privileges.

The attorney-client privilege protects discovery of communications between an attorney and client. The purpose of the privilege is to encourage full and frank communications between attorney and client. The scope of the privilege has been subject to repeated challenges as the definitions of "attorney" and "client" become more sophisticated and complex. For example, the defense of a design defect case often can involve both the manufacturer's general counsel's office and outside counsel. Each of these "firms" has its own support staff of paralegals, law clerks, computer personnel, etc. The attorneys also may hire a variety of consultants to test the product, statisticians to quantify risks of the product, economists to quantify damages, demographers to speculate on jury compositions, etc.

Generally, in order for the attorney-client privilege to apply, the following elements must be present:

1. The asserted holder of the privilege is or sought to become a client.
2. The person to whom the communication is made is a member of the bar or his subordinate.
3. The attorney is acting as a lawyer in connection with the communication.
4. The communication relates to a fact of which the attorney was informed by his client.
5. No strangers were present when the communication was made.
6. The communication was made primarily for the purpose of securing an opinion on law, or legal services, or assistance in a legal proceeding.
7. The communication was not made for the purpose of committing a crime or tort.
8. The privilege has not been waived by the client.[75]

Prior to *Upjohn Co. v. United States*[76] there

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71. In re Joint Eastern & Southern Asbestos Litig., 119 F.R.D. 4, 5 (E.D. & S.D. N.Y. 1988). *See also* James Julian Inc. v. Raytheon Co., 93 F.R.D. 138, 146 (D. Del. 1982) ("Each case must, of course, be evaluated on its own facts.").
72. *See, e.g.*, Bogosian v. Gulf Oil Corp., 738 F.2d 587, 592-93 (3d Cir. 1984).
73. Joint Eastern & Southern Asbestos Litig., 119 F.R.D. at 6.
74. 100 F.R.D. 350 (E.D. Ky. 1983).
75. United States v. United Shoe Mach. Corp., 89 F.Supp. 357 (D. Mass. 1950).
76. 449 U.S. 383 (1981).

were two competing tests adopted by various jurisdictions to determine whether a corporate employee qualified for the privilege. Under the subject matter test, any communication to a corporation's lawyer by a person associated with the corporation about matters relating to his or her employment was privileged if made for the purpose of assisting the lawyer to render legal services or to advise corporate counsel.[77] The competing test—the control group test—limited the attorney-client privilege to those communications made for the purpose of obtaining legal advice or assisting the lawyer in rendering legal services to the corporation only if the person making or receiving the communication was within the "control group." The control group was limited to the group of individuals within the corporation that had the managerial responsibility for taking action in response to the lawyer's recommendation.[78] Under either test, both in-house and outside counsel qualified as attorneys for the purpose of the privilege.

In *Upjohn* the Court expressly rejected the more restrictive control group test and held that communications between an attorney and corporate employees will be privileged provided (1) the matters are within the scope of the employee's corporate duties, (2) the employee is aware that he is being questioned so to assist counsel in rendering legal advise to the corporation, and (3) the communication is considered highly confidential when made and is kept confidential by the company. In addition, the Court held that communications between a client and non-attorneys who are hired by the attorney to assist the attorney in furnishing legal services also may be protected.[79]

Although the control group test was rejected by the Supreme Court in *Upjohn*, some jurisdictions have retained it.[80] Counsel's communications with in-house technicians may not be protected by the attorney-client privilege in those jurisdictions. For example, in *Archer Daniels Midland Co. v. Koppers Co.*[81] the Illinois Appellate Court held that a technical report submitted to a corporation's in-house counsel by the corporation's senior project product engineer was not protected from disclosure by the attorney-client privilege. The court reasoned that although the data substantially influenced management's decision, the engineer did not have personal influence in the decision-making. The court focused on the specific people who substantially influenced decisions, not who provided the facts that substantially influenced the decisions.

Sharing the information with the client also might jeopardize the protection provided by Rule 26(b)(4)(B). While most courts have held that the facts and opinions of a non-testifying witness remain protected even when passed to the party, at least two courts have reached a different conclusion.

After holding that a plaintiff could not depose the defendant's non-testifying expert, the D.C. Circuit in *Marine Petroleum* noted that the plaintiff was free to seek that same information through other means. The court remarked, in dicta, that Rule 26(b)(4)(B) protected facts known to non-testifying experts, "only if discovery is attempted *from the expert*, and not at all if the effort is to obtain it from a party or another sharing it."[82] Therefore, if the information has been passed from the expert to the party, the information is freely discoverable from that party. The *Marine Petroleum* court made clear, however, that the same result would not follow if the consultant passed the information only to the party's counsel.

The holding in *Marine Petroleum* has been followed by only one court,[83] and a 1989 federal district court decision, *Roberts v. Heim*,[84] criticized the *Marine Petroleum* conclusion. *Roberts* held that allowing discovery of information merely because it had been passed from a non-testifying expert to the party would contradict the clear language of Rule 26(b)(4): "Discovery of *facts known* and opinions held *by experts. . . may be obtained only* as follows:

77. *See* Harper and Row Publishers Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd*, 400 U.S. 348 (1971).

78. *See* City of Philadelphia v. Westinghouse Elec. Corp., 210 F.Supp. 483 (E.D. Pa. 1962).

79. *See also* Brown v. Trig, 791 F.2d 598 (7th Cir. 1986) (polygraph expert); United States v. Kovel, 296 F.2d 918 (7th Cir. 1961) (accountant).

80. *See, e.g.*, Archer Daniels Midland Co. v. Koppers Co., 485 N.E.2d 1301 (Ill.App. 185). *See also* Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473 (1987).

81. 485 N.E.2d 1301 (Ill.App. 1985).

82. 641 F.2d at 994 (emphasis added).

83. Puerto Rico Aqueduct and Sewer Auth. v. Clow Corp., 108 F.R.D. 304 (D. P.R. 1985).

84. 130 F.R.D. 424 (N.D. Cal. 1989).

. . ." (Emphasis supplied.) The court continued, "If facts which are obtained by the expert from sources other than the party who retained him may be reached by [discovery] once they are conveyed to the party by the expert, it will have an unwarranted chilling effect on communications between that party and his expert." The *Roberts* court noted that *Marine Petroleum*'s indication to the contrary (1) was dictum without any critical analysis, (2) that regardless of this dictum, the *Marine Petroleum* court denied the request for discovery, and (3) the decision has been cited only once for that proposition.

If counsel concludes that adverse test data will have to be reviewed by the client, the next issue to consider is when the data should be shared with the client. This can become a thorny ethical issue if the data are generated before the client's corporate representative's deposition is taken under Rule 30(b)(6). May, or should, counsel wait until after the depositions are concluded before revealing the test data to the client?

Revealing the data to the client prior to a Rule 30(b)(6) deposition virtually guarantees the data will be disclosed. Counsel may be exposing the client and himself to greater risks, however, by not promptly revealing the data. If someone is injured by the product while the attorney "sits" on the data, the injured party in the later suit probably will argue that the attorney's knowledge is imputed to the client and therefore the manufacturer had constructive knowledge of the defect before the subsequent injury.[85] The subsequent plaintiff also may seek punitive damages by attempting to show that the manufacturer acted recklessly (through its attorney) by failing to take appropriate remedial steps to prevent the injury.[86]

Even if not named as a defendant in the subsequent suit, counsel still might be liable. If the client were held liable for an injury that occurred after its counsel was aware of test data verifying the existence of a design defect but before counsel had provided the data to the client, the client could seek recovery of its expenses from the attorney on a theory of malpractice. The client would have to show that the failure to disclose the data to it promptly breached the standard of care and that had the information been provided, it could and would have acted to avoid the injury. It should be noted that Rule 1.4(a) of the Model Rules states, "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

C. Evidentiary Effects of Product Testing

If testing is critical to the successful defense of a design defect claim but counsel concludes that adverse test data probably will be discoverable, counsel may nevertheless elect to proceed with the testing if the data will be inadmissible at trial. To sustain an argument for inadmissibility, counsel will have to demonstrate that the test program constitutes a "subsequent remedial measure" under Evidence Rule 407:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measure is not admissible to prove negligence or culpable conduct in connection with the event. . . .

Two rationales are offered for Rule 407 in the Advisory Committee Notes. First, the conduct should not be considered an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Second, the exclusion promotes the social policy of encouraging people to take, or at least does not discourage them from taking, steps in furtherance of added safety. In most situations, testing will be the first step in any remedial re-design of a product. Therefore, testing would appear to be encompassed by the rationale of Rule 407.

The above argument was unsuccessfully asserted in *Rocky Mountain Helicopters v. Bell Helicopters*,[87] in which the owner of a helicopter brought suit against the helicopter's manu-

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85. *See, e.g.*, Mass Transit Admin. v. Granite Constr. Co., 471 A.2d 1121 (Md. 1984) (notice to agent who had apparent authority to receive notice binding on principal); RESTATEMENT (SECOND) OF AGENCY § 272 (1958).

86. In the malpractice suit, the client would seek production of counsel's file. To refute claims of privilege and the work product rule, the client would rely on case law developed in insurance bad faith litigation to the effect that the attorney's knowledge is relevant and discoverable. *See, e.g.*, Charlotte Motor Speedway Inc. v. Int'l Ins. Co., 125 F.R.D. 127 (M.D. N.C. 1989); Brown v. Superior Court, 670 P.2d 725, 734 (Ariz. 1983).

87. 805 F.2d 907 (10th Cir. 1986).

facturer for damages arising from a crash. The owner alleged that the crash was caused by the failure of a critical component of the helicopter. After the accident, the manufacturer conducted a test of that component and re-designed it. While evidence of the re-design was excluded as a subsequent remedial measure, the test report was admitted.

The manufacturer argued that the test, if conducted before the accident, would have made the accident less likely to have occurred and therefore the test should be considered a remedial measure. The 10th Circuit rejected the argument, holding that "it would strain the spirit of the remedial measure prohibition of Rule 407" to use it to shield post-event tests or reports. The court distinguished "tests" conducted to discover what might have gone wrong from "remedial measures" taken to remedy flaws or failures indicated by those tests.

The *Rocky Mountain* court relied heavily on *Westmoreland v. CBS Inc.*,[88] the case in which General Westmoreland sued CBS for libel alleged to have been committed in one of its broadcasts. After the broadcast was criticized, CBS had one of its executive producers undertake a study of the preparation of the broadcast in light of the criticisms. Westmoreland sought to introduce a copy of the report into evidence, and CBS countered by arguing (1) that honest self-examination and self-policing should be encouraged, (2) that a rule permitting discovery and use as evidence of reports of self-investigations would discourage potential defendants from doing so, and (3) therefore the rule of law should exclude such evidence.

The district court rejected CBS's argument, noting that its rationale failed to take into account the social value of making available for trial what is often "one of the best and most accurate sources of evidence and information." The court also drew an analogy to the use of internal investigative reports and industrial and railroad accident litigation.

While the majority of federal courts appears to be following the rationale of *Rocky Mountain*,[89] a few courts have held that post-accident investigations constitute a remedial measure and, as such, are inadmissible. In *Martel v. Massachusetts Bay Transport Authority*[90] a plaintiff who was injured when struck by the defendant's bus sought to introduce into evidence an investigation ordered by the defendant following the accident. The defendant successfully argued that, although the investigation did not repair a dangerous condition, it was a prerequisite to any remedial safety measure.

Without first discovering the cause of the accident, the authority argued, it could not prevent a future occurrence of a similar accident. The court agreed, stating, "The investigation is inextricably bound up with the subsequent remedial measures to which it may lead, and questions of admissibility of evidence as to each should be analyzed in conjunction and answered consistently."

Even in a jurisdiction that accepts these contentions, there are limited situations in which the argument can be used. To assert the claim, the test data must be communicated to the client. The client must then re-design or withdraw the product as a result of the information. "Acts which do nothing to make the harm less likely to occur should not be excluded under Rule 407," the 10th Circuit declared in *Dow Chemical Corp. v. Weevil-Cide Inc.*[91]

It also should be noted that Evidence Rule 407 contains a number of exceptions under which evidence may be admitted if offered for a reason other than proof of negligence or culpability. The rule itself states that it "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or disability of cautionary measures, if controverted, or impeachment." For example, in *Rozier v. Ford Motor Co.*,[92] after assuming arguendo that a cost report on the re-design of an automobile was a remedial measure, the Fifth Circuit held that it would be admissible as proof of the knowledge of the dangerous condition or feasibility of precautionary measures.

88. 601 F.Supp. 66 (S.D. N.Y. 1984).

89. *See, e.g.*, Afanaro v. Mooney Aircraft Corp., 687 F.Supp. 482 (N.D. Cal. 1988) (admitting evidence of post accident testing by aircraft manufacturer); Benitez-Allende v. Alcan Aluminio do Brazil S.A., 857 F.2d 26 (1st Cir. 1988) (admitting internal investigatory report of potential defects of pressure cooker). *But see* Alimenta (U.S.A.) Inc. v. Stauffer, 598 F.Supp. 934 (N.D. Ga. 1984), cert. denied, 489 U.S. 1018 (1989) (excluding post-event accounting report as within the scope of Rule 407).

90. 525 N.E.2d 662 (Mass. 1988).

91. 897 F.2d 481 (10th Cir. 1990).

92. 573 F.2d 1332 (5th Cir. 1978).

D. Problems That May Arise If Expert Refuses to Honor Confidentiality Agreement

If a decision is reached to have a consultant test a product, counsel should have the consultant execute a confidentiality agreement for the purpose of protecting the information provided to the expert in order to facilitate the testing as well as the information generated by the testing. These agreements typically prohibit disclosure without prior authorization by the client and contain provisions for prompt notice to counsel of any attempt by litigants to compel the consultant to disclose the test data.

It is questionable how much protection actually is provided by confidentiality agreements. An expert or his employees, or both, may breach the agreement because of a sincerely held belief that public health risks should not be kept confidential. In that case, the expert will argue that the confidentiality agreement is void as against public policy because it seeks to suppress the disclosure of a public health risk.

While no reported cases have directly addressed this issue, it is a general principle of contract law that a court can declare a contract unenforceable if its enforcement would contravene public policy.[93] The public policy encouraging the disclosure of risks associated with consumer products, medical devices or drugs is clearly enunciated in the relevant regulatory schemes, which tend to support arguments that contracts to suppress adverse test results are contrary to the prevailing public interest.[94]

In some cases, consultants may be driven by economic incentives to reveal their test data to opposing counsel. A good example of this is the gun safety expert in the Sturm, Ruger cases.[95] The expert, while employed by the defendant gun manufacturer, heard of a substantial verdict that a plaintiff had received in a suit against the manufacturer. The expert wrote a letter to the plaintiff's attorney offering his assistance in other cases against the manufacturer. He was employed by that plaintiff's attorney in several cases until the gun manufacturer was able to re-employ him.

Even if a confidentiality contract is legally enforceable, particularly as to a consultant who breaches the agreement for financial benefit, its practical enforceability is dubious. If the disclosure is made without any prior warning to the client, the benefits of obtaining an injunction to prevent further disclosure are marginal. Bringing an action against the expert for damages for breach undoubtedly will publicize the information the client is attempting to keep confidential. Once the non-testifying expert has publicly revealed the test data, most likely the only recourse for the manufacturer is to prevent the expert from being retained by plaintiffs who were injured by the alleged defect.[96]

EFFECT OF PRODUCT TESTING ON CLIENT'S ANCILLARY INTERESTS

As mentioned earlier, testing a product involved in litigation creates risks for the client's interests that, although collateral to the litigation, may be more significant to the client.

A. Expanded Duty to Warn

One issue counsel must consider is how adverse test data will affect the client's duty to warn. In most jurisdictions, the scope of the duty to warn is commensurate with the manufacturer's knowledge. Testing that expands the client's knowledge will affect the adequacy of the existing warnings. So, even if the adverse test data were not discoverable, the client probably will have to disclose the newly discovered risk in a modified warning.

A good example of the expanded duty to warn after receiving adverse test results is found in the cases involving the use of intrauterine devices. In *Kociemba v. G. D. Searle & Co.*[97] a federal district court, applying Minnesota law, held that there is a continuing post-sale duty to warn the users of products. The plaintiff in *Kociemba* proved a claim for intentional misrepresentation by showing the manufacturer concealed a material fact involving a particular dangerous side effect of its product.

Although the manufacturer included a warning in the product's package insert that pelvic infection was a possible "adverse reaction," it did not disclose the relatively high frequency of the infection by its testing. The court held

93. St. Paul Mercury Ins. Co. v. Duke Univ., 849 F.2d 133 (4th Cir. 1988).
94. *See* RESTATEMENT OF CONTRACTS § 512.
95. Sullivan v. Sturm, Ruger & Co., 80 F.R.D. 489 (D. Mont. 1978); Barkwell v. Sturm, Ruger & Co., 79 F.R.D. 444 (D. Alaska 1978).
96. *See, e.g.*, Wang Lab. Inc. v. Toshiba Corp., 1991 U.S.Dist. Lexis 6323 (E.D. Va. 1991).
97. 707 F.Supp. 1517 (D. Minn. 1989).

> Every manufacturer of a consumer product . . . who obtains information which *reasonably supports* the conclusion that such product (1) fails to comply with an applicable product safety rule; or (2) contains a defect which would create a substantial product hazard . . . shall immediately inform the commission of such failure to comply or of such defect. [Emphasis supplied.]

Manufacturers that fail to make the required reports can be subject to civil fines up to $1.250 million and in some cases, criminal penalties. 15 U.S.C. §§ 2069, 2070.

The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 355(k), requires that any manufacturer of a drug approved by the Food and Drug Administration must maintain records and make reports to the FDA of any "data relating to clinical experience and other data or information, received or otherwise obtained by the [manufacturer] with respect to such drug."

In *Toole v. Richardson-Merrell Inc.*[103] a drug manufacturer failed to disclose to the FDA the results of numerous studies indicating serious side effects of one of its drugs. In an action to recover damages for injuries sustained by an individual who suffered the undisclosed side effects, the California Court of Appeal held that the manufacturer's failure to make the required reports created a presumption of negligence.

The court also held that the non-disclosure of facts that, if known to the FDA, would have enabled the FDA to make a more critical analysis of the drug rendered the drug not "properly prepared and marketed." As such, the drug could not be considered an "unavoidably unsafe product" under Section 401 of the Restatement (Second) of Torts. As a result, the manufacturer would fall outside the protection that section affords from strict liability for any adverse effects of the drug.[104]

Reporting adverse results to a regulatory agency also may have an impact beyond the immediate product in question. The notification of a design defect may impair the manufacturer's ability to obtain prompt approval of other products under consideration by the regulatory body. Since approval of a new product shifts the burden of proof to the regulatory agency to demonstrate the existence of defect sufficient to have the product withdrawn, the agency will be cautious in approving a new product from a manufacturer whose previous product is shown to be defectively designed. The cost of additional tests or studies to reassure the agency, and the cost of additional delay in the approval of a new product, can be very substantial.

Finally, the litigation implications of adverse test results may have to be disclosed to a company's auditors and accountants. The American Bar Association Statement of Policy regarding lawyers' responses to auditors' requests for information may require a disclosure of possible claims. A corporation required to make a disclosure on Securities and Exchange Commission filings also may have to include a statement of pending liabilities that adverse test results could greatly affect.

Recommendations

Before a decision is made to test a product, many issues have to be resolved under applicable state and federal law. Only then can counsel and the client make a reasonably informed decision whether the risk of testing a product is outweighed by the potential benefits.

If, after an analysis of the issues discussed in this article, the client wants to proceed with the testing, steps should be taken to minimize the risks inherent in the testing. First, counsel, client and consultant should jointly develop a protocol for the testing. The protocol should narrowly outline the test objectives and limit the consultant's discretion regarding tests to be performed. Second, an understanding must be reached between counsel and the client regarding whether and when any adverse data will be shared with the client. Third, a comprehensive confidentiality agreement should be executed with the consultant. It should clearly reflect the consultant's agreement that the test results are the client's property and are not to be discussed publicly until authorization is obtained from the client.

Although it is preferable to have the testing done by an independent laboratory, if the testing must be done in-house, counsel should obtain an agreement that the employee-expert will obtain a leave of absence from normal duties while performing the testing. The employee-expert should be further instructed, pursuant to a confidentiality agreement, not to discuss the

103. 60 Cal.Rptr. 398 (Cal.App. 1967).
104. *See* Restatement (Second) of Torts § 401 cmt. k.

test results with anyone other than counsel unless authorized by counsel.

Whether the investigator is an independent consultant or employee of the client, counsel should attempt to select someone who is not needed to testify on other issues. This will give counsel flexibility in the event that the test results preclude the consultant from serving as an expert witness.

Conclusion

Testing a product to develop data to refute a plaintiff's allegations of design defect is often a very attractive option. Unless the data are considered essential to the defense of the case, however, the potential adverse risks of testing generally will outweigh the anticipated benefits. Counsel cannot assume that adverse data will be immune from discovery. Even in jurisdictions in which the data are not discoverable, the client may be compelled to disclose the results of the testing by amending its warning or recalling the product.

Testing also may generate adverse data that will result in a product recall or that must be reported to a governmental agency. Disclosure of adverse data when an agency is in the process of evaluating a new product may lead to substantial delays in the approval process of the new product while the agency attempts to evaluate the significance of the test data.

Testing may be necessary in order to defend a product's design. Unless counsel wishes to invite disaster, however, a product should never be tested by counsel until the potential ramifications have been thoroughly studied and discussed with the client.

that "a person who has special knowledge of material facts to which other persons do not have access, has a duty to disclose those facts."[98]

The duty to warn becomes an even more momentous task in states that have imposed on manufacturers a duty to warn anyone who used or was exposed to the product in the past. For example, in *MCIC Inc. v Zenobia*[99] the Maryland intermediate appellate court held that in situations where a person's susceptibility to the dangers of a product continue beyond that person's direct exposure to the product, the manufacturer has a duty to "exercise reasonable care to warn the person of known dangers, if the warning could help to prevent or lessen the harm.[100]

Zenobia was a suit against several manufacturers for injuries allegedly caused by exposure to asbestos in insulation. Despite the fact that the plaintiff had not been exposed to the product for more than 35 years and the defendant-manufacturer had been out of the insulation industry for more than 30 years, the court held that the manufacturer continued to have a duty to warn those who had used the product once it obtained knowledge of increased risks associated with its use.

It should be noted that some of the IUD decisions not only recognize the continuing duty to warn but also a companion continuing duty to test. For instance, the court in *Kociemba* stated, "If a manufacturer [obtains] sufficient credible information that a product already in use is potentially dangerous, the manufacturer should test that product to determine the extent of any danger, and then issue an appropriate warning or product recall."[101] In some situations, the initial lawsuit may provide the "sufficiently credible information" that further testing is necessary. Consequently, a manufacturer involved in litigation that results in the realization that it had incomplete data regarding the safety and efficacy of the product is faced with a substantial dilemma.

Counsel may conclude that testing the product is not in the client's best litigation interests. By not testing, however, the client may be exposing itself to even greater liability in future lawsuits.

B. Regulatory Concerns

A second effect of developing adverse test data is that the client probably will be forced by a government agency or product liability law to withdraw or recall the product. Depending on the geographical distribution of the product, a recall can be tremendously expensive and potentially damaging to the manufacturer's reputation.

Generating adverse test results when none were disclosed by the manufacturer's research and development, manufacturing and quality control procedures also may call into question the soundness of those procedures. The manufacturer may have to re-evaluate each of its procedures to determine why the defect or latent risk was not revealed in the product's development. That re-evaluation also could affect other products in production and development.

For products that are regulated by federal agencies, the receipt of adverse test results may create a duty to disclose the data to the appropriate regulatory agency. Failure to do so can result in civil and in some cases criminal penalties. For instance, the National Traffic and Motor Vehicle Safety Act of 1966 includes a reporting provision applicable to all automobile manufacturers, 15 U.S.C. § 1411:

> If a manufacturer obtains knowledge that any motor vehicle or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety . . . he shall furnish notification to the [National Highway Traffic Safety Administration].

Manufacturers that fail to make the report are subject to civil penalties up to $800,000 under 15 U.S.C. § 1398(a).

One of the broadest reporting provisions is contained in the Consumer Product Safety Act.[102] Under 15 U.S.C. § 2064(b):

98. *Citing* Tetuan v. A. H. Robins Co., 738 P.2d 1210, 1228 (1987).

99. 587 A.2d 531 (Md.App. 1991), *remanded on other grounds*, Owens-Illinois Inc. v. Zenobia, 601 A.2d 633 (Md. 1992).

100. *Quoting* Lockwood v. AC&S Inc., 744 P.2d 605 (Wash. 1987).

101. 707 F.Supp. at 1529.

102. *See* Theresa M. Schwartz & Robert S. Adler, *Product Recall: A Remedy in Need of Repair*, 34 CASE WEST. RES. L. REV. 401 (1984) (comparing reporting requirements of National Traffic and Motor Vehicle Safety Act of 1966, Consumer Product Safety Act, and Medical Device Amendments to Food, Drug and Cosmetic Act).