LEGAL ETHICS

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VI. LEGAL ETHICS

Introduction

As the Preamble to the Arkansas Rule of Professional Conduct notes, "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."

In this section, we will highlight some ethical trouble spots you may encounter with respect to your own expert witnesses or those of your adversary. Being familiar with the applicable rules can help ensure that you do not commit an ethical breach.

A. Attorney Fees and Engagement Agreements

It is good business practice to put all contracts down in writing. Written contingency agreements are required by the Rules of Professional Conduct. "A contingent fee shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted for or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client shall be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." **Arkansas Rules of Professional Conduct** Rule 1.5(c).

Attorney fees must also be reasonable. "A lawyer's fee shall be reasonable." **Arkansas Rules of Professional Conduct** Rule 1.5 (a) There has been much litigation over the years regarding how to determine if a fee is "reasonable." The different factors to determine reasonableness are:

(a)

(b) the results obtained,

(c) the subject of the litigation,

(d) the ability and reputation of counsel,

(e) customary charges,

(f) merits of case; and,

(g) the amount of time spent on the case.

Preventing Conflicts of Interest

The rules for determining if one has a conflict of interest are found at Rule 1.7 of the **Arkansas Rules of Professional Conduct** which state:

(a) Except as provided in paragraph (B), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer,

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law:

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and,

(4) Each affected client gives informed consent, **confirmed in writing.**

The following comments accompany Rule 1.7. "Loyalty and independent judgment are essential elements in a lawyer's relationship to a client. Even when there is no direct adverse conflict, a conflict of in interest may exist if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be material only limited as a result of the lawyer's other responsibilities or interests. For example, an attorney who is asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventually and if it does, whether it will materially interfere with the lawyer's independent professional judgment considering alternatives for close courses of action that reasonably should be pursued on behalf of the client."

E. Avoiding Conflicts of Interest

Another scenario the attorney may encounter is that in which an expert he has retained or would like to retain has had some kind of prior relationship with the adverse party. Under what circumstances will the prior relationship mean that the expert cannot be retained?

Ex parte contact. On an initial note, an attorney should not attempt to make any contact with an expert witness already retained by opposing counsel. In federal cases, such ex parte contact is generally considered improper and in violation of Fed. R. Civ. P. 26. *See e.g., Olson v. Snap Products, Inc.*, 183 F.R.D. 539, 542 (D.Minn. 1998). Ex parte contact with opposing expert would probably also be considered improper in Arkansas state cases and in violation of Ark. R. Civ. P. 26. (Contact with a patient's physician or psychotherapist is expressly barred under Ark. R. Evid. (d)(3)(B).)

Bias/Personal Interest. Another situation that can arise is that in which there is an allegation that the expert should not be permitted to testify because he has a bias or other personal interest in the matter on which he is called to testify. Generally, bias will only go to the weight to be given the expert's testimony and is not enough to disqualify the expert. *See e.g., Skokos v. Skokos,* 332 Ark. 520, 534, 968 S.W.2d 26, 33 (1998); *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 468 (8th Cir. 2000).

"Switching sides." The most clear cut case of a situation in which the court would likely bar an expert witness from testifying due to a conflict is when the expert has already served as an expert for one side and received confidential information but then for whatever reasons switches to the other side in the same matter. Federal courts, and most likely Arkansas state courts as well, would not permit the expert to serve for the other side in that situation. *See e.g., Koch Refining Co. v. Jennifer L. Boudreau M/V,* 85 F.3d 1178 (5th Cir. 1996).

Other Prior Relationship Situations. If the case is not one in which the expert witness has changed sides during the same case, then in federal court (there do not appear to be any Arkansas state decisions on this), there is not a bright line rule. Rather courts generally consider the following factors in assessing whether to disqualify an expert on the basis of the expert's relationship with the party seeking disqualification:

> First, was it objectively reasonable for the first party who claims to have retained the [expert] to conclude that a confidential relationship existed?
>
> Second, was any confidential or privileged information disclosed by the first party to the [expert]?
>
> Many courts have also considered a third element: the public interest in allowing or not allowing an expert to testify.
>
> The burden is on the party seeking disqualification to establish these elements.

Mays v. Reassure America Life Ins. Co. 293 F.Supp.2d 954, 957 (E.D.Ark. 2003) (citing *Koch Refining Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178 (5th Cir. 1996).

So generally the court will not disqualify an expert witness due to a prior relationship with the adverse party unless it is established that the expert had been clearly retained as an expert by the adverse side in the same case/matter and has already received confidential information.

Before sharing confidential information with a potential expert witness, a prudent attorney will check that the expert does not already have a conflict on that case. When retaining a potential expert witness, one should also do a written engagement letter for the expert so there is no misunderstanding as to the fact of the engagement.

Confidentiality and Privileged Communications with Experts

1. Attorney-Client Privilege

The purpose of the attorney-client privilege is to promote full and frank communication between attorneys and clients, and that, in turn, promotes the observance of law and administration of justice. *Holt v. McCastlain,* 357 Ark. 455, 464, 182 S.W.3d 112, 118 (2004).

The parameters of the attorney-client privilege are contained in Arkansas Rule of Evidence 502. Rule 502 protects confidential communications made for the purpose of rendering professional legal services between the client (or his representatives) and his lawyers (or his lawyers' representatives). The Rule also protects communications between the client or his lawyer and a lawyer (or his representative) of "another party in a pending action and concerning a matter of common interest therein." *See also* Trial Handbook for Arkansas Lawyers § 43:1. (2006 ed.).

2. Work-Product Doctrine

The work product doctrine is a procedural rule which protects from disclosure materials prepared by an attorney during or in anticipation of litigation. Subparagraph (b)(3) of Ark. R. Civ. P. 26 provides that materials prepared by or for a party or that person's representative are only discoverable upon a showing (1) of a "substantial need" for the materials and (2) that the substantial equivalent of the materials cannot be obtained without "undue hardship." If the court does order production of such materials, the court must protect against the disclosure of "mental impressions, conclusions, opinions, or legal theories" of an attorney or other representative. Ark. R. Civ. P. 26(b)(3). (*See also* Ark. R. Crim. P. 17.5(a))

The work product privilege "functions not merely and (perhaps) not mainly to assist the client in obtaining complete legal advice but in addition to establish a protected area in which the lawyer can prepare his case free from adversarial scrutiny." *In re Green Grand Jury Proceedings*, 492 F.3d 976, 980 (8th Cir. 2007).

As it is necessary for an attorney to rely on the assistance of investigators and other agents in preparation for trial, the work product doctrine also protects material prepared by agents for the attorney as well as those prepared by the attorney himself. *U.S. v. Nobles*, 422 U.S. 225, 237-238, 95 S.Ct. 2160, 2170 (1975) (citing *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947)).

3. Consulting Expert v. Testifying Expert

When a consulting expert is retained by counsel in connection with existing or anticipated litigation, communications between the attorney and the expert are protected by attorney-client privilege. *See* Ark. R. Evid. 502. A consulting expert falls within the "representative of the lawyer" definition of Ark. R. Evid 502 since he is "employed by the lawyer to assist the lawyer in the rendition of professional legal

services." *See Holt v. McCastlain,* 357 Ark. 455, 462, 182 S.W.3d 112, 116-117 (2004).

Subparagraph (b)(4) of Ark. R. Civ. P. 26 describes the scope of permissible discovery of "facts known" and "opinions held by" a party's experts. Subparagraph (b)(4)(A) provides that the only discovery that may be had concerning such information acquired or developed in anticipation of litigation consists of the following: (a) interrogatories seeking the identity of any expected testifying experts and a summary of the facts and opinions to which she is expected to testify; and (b) taking the deposition of identified testifying experts. *See also* David Newbern & John J. Watkins, Arkansas Civil Practice and Procedure § 21:8. Generally, the party taking the expert's deposition is required to pay a reasonable fee to the expert being deposed. Ark.R.Civ.P. 26(b)(4)(C).

On the other hand, the opinions of a consulting (i.e., not testifying) experts are not discoverable absent "exceptional circumstances." Ark.R.Civ.P. 26(b)(4)(B).

Under most interpretations of the federal counterpart to Ark.R.Civ.P. 26, whenever otherwise protected materials are provided to a testifying expert who considers them in forming her opinions, they are no longer protected by the work product doctrine or attorney-client privilege. *See e.g., Monsanto Co. v. Aventis Cropscience, N.V.*, 214 F.R.D. 545, 546 (E.D.Mo. 2002); *Douglas v. University Hosp.* 150 F.R.D. 165, 168 (E.D.Mo. 1993). Even materials that were provided to the expert while she was still a consulting expert are generally no longer protected if they are on the same subject as the matter on which the expert will now be testifying. *See Monsanto Co. v. Aventis Cropscience, N.V.*, 214 F.R.D. 545, 547 -548 (E.D.Mo. 2002).

There do not appear to be any Arkansas state cases on this issue, but it is reasonable to assume that Arkansas courts would likely follow a similar approach. An attorney should thus be very careful about what communications are made with a

retained expert witness. If your expert may be called to testify, you should not share any litigation strategies with her as any such conversations may have to be disclosed during her deposition.

4. False Testimony and Illegal Inducements

Suppose your named expert has prepared a preliminary report which contains conclusions that are harmful for your case, but those opinions did not end up in the final prepared report. Can you ask the your expert to throw out the preliminary report draft? No. Under paragraph(a) of Rule 3.4 of the Arkansas Rules of Professional Conduct, an attorney is prohibited from counseling any person to unlawfully alter, destroy, or conceal any item of evidence. In this scenario, the earlier draft is a writing of your expert which could be admissible as a prior inconsistent statement to impeach your expert witness. Destroying it or asking your expert to destroy it would be sanctionable conduct.

Suppose your expert witness tells you the opinions she has arrived at and they are harmful for your case. Can you try to talk her into giving a more favorable opinion? It depends. If an attorney honestly believes that the expert may have overlooked some facts in her analysis or based her conclusions on a mistaken assumption, the attorney can certainly point that out. However, the attorney may not suggest that the expert should state anything other than her honest beliefs as to the facts and his opinions concerning the matter at issue. Under Rule 3.4(b), a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." Rule 3.4(b) also would not permit a lawyer to imply that he is seeking a particular conclusion from an expert witness in exchange for payment.

Likewise, it is generally not permissible to pay an expert a contingency fee. Comment 3 to Ark. R. Prof. Conduct 3.4 states:

> With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

In Arkansas medical malpractice cases, expert witness contingency fees are barred by statute. A.C.A. § 16-114-207.

It is, however, permissible to pay an expert a reasonable fee for his services and to provide reimbursement for expenses.

5. Protecting Confidentiality of Information

Attorneys owe a duty of confidentiality to their clients. Arkansas Rule of Professional Conduct 1.6 ("Confidentiality of information") states that (absent certain exceptions) an attorney is not to reveal information relating to the represenation of the client without the client's permission.

Moreover, as Comment 16 to Rule 1.6 indicates, an attorney has a duty to safeguard confidential information against inadvertent or unauthorized disclosure either by himself or by "other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."

Accordingly, if an attorney shares confidential information with a potential expert without taking any steps to ensure confidentiality, she may have breached her duty of confidentiality to her client.

6. Ethics Recommendations Regarding Experts

Here are seven things a prudent attorney should do regarding expert witnesses to avoid a breach of ethics:

1. **Inquire as to potential conflicts before retaining expert.**
2. **Confirm retention in writing.**

3. **Protect confidential information.**
4. **No expert contingency fee.**
5. **Don’t attempt to improperly persuade expert to opine favorably.**
6. **Don’t destroy a testifying expert’s writings.**
7. **Don’t discuss strategy with a (potential) testifying expert.**

G. Some Arkansas Ethics, Evidence, and Civil Procedure Rules

Ark. R. Prof. Conduct 1.6
Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the commission of a criminal act;
(2) to prevent the client from committing a fraud that is reasonably certain to result in injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client or,
(6) to comply with other law or a court order.
(c) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

Ark. R. Prof. Conduct 3.3
Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or had engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Ark. R. Prof. Conduct 3.4
Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Ark. R. Evid. 502
Lawyer-client privilege.

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A ["] representative of the client ["] is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications [communications] made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime of fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two [2] or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

(e) Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.

(f) Selective waiver. Disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

Ark. R. Evid. 503 (Excerpts)
Physician and psychotherapist-patient privilege.

…

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or

treatment under the direction of the physician or psychotherapist, including members of the patient's family. …

(d) Exceptions: …

(3) Condition and element of claim or defense.

A. There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense, or, after the patients death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense.

B. Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with the physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures.

Ark. R. Evid. 510

Waiver of privilege by voluntary disclosure.

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Ark. R. Evid. 702

Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Ark. R. Evid. 703

Basis of opinion testimony by experts.

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

Ark. R. Civ. P. 26 (Excerpts)

General provisions governing discovery.

…

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. …

(3) Trial preparation; materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Subject to subdivision (b)(4)(C) of this rule, a party may depose any person who has been identified as an expert expected to testify at trial.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at the trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.