COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. PROBATE & FAMILY COURT
NO. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR, et al.,

Plaintiffs,

v.

ATTORNEY GENERAL of the Commonwealth of Massachusetts, et al.;

Defendants

IPSWICH SCHOOL COMMITTEE'S CONSOLIDATED OPPOSITION TO REQUEST FOR PROTECTIVE ORDERS CONCERNING VALUATION EXPERTS

INTRODUCTION

The Ipswich School Committee and Richard Korb (collectively the "School Committee") hereby oppose the motions filed by the Feoffees and by the Littleneck Legal Action Committee for protective orders that would prevent the School Committee from subpoenaing documents from, and conducting depositions of, LandVest and Petersen LaChance, and their respective valuation professionals. These firms provided valuation services over the years to the Feoffees and to the Little Neck tenants, respectively. Both LandVest and Petersen LaChance generated documents and performed substantial work valuing Little Neck for non-litigation purposes. This renders Rule 26(b)(4), which applies only to expert opinions formed in anticipation of litigation or for trial, largely or wholly inapplicable. The discovery is allowed as a matter of right.

Furthermore, the issues of fair rental value and fair market value are central to the case, and much is at stake. To the extent that any of the experts' opinions are deemed to have been

formed "in anticipation of litigation or for trial," the Court should exercise its discretion under Rule 26(b)(4) to allow the expert depositions and document discovery to occur.

BACKGROUND

1. Facts Concerning LandVest and James Monahan.

As the Feoffees themselves affirmatively stated in numbered paragraph 63 of their unsuccessful motion for partial summary judgment, James Monahan of LandVest "has consulted with the Feoffees since 1997 concerning valuation of Little Neck and fair rental values of lots." This involvement in setting rents is reflected in various items of correspondence between LandVest or Monahan and the Feoffees, in which proposed rental amounts to charge the tenants are discussed, including a February 21, 2006 letter that was included in the Summary Judgment Appendix as Exhibit 76.

The February 21, 2006 letter setting rental amounts, and all previous items of correspondence concerning proposed rental rates, were prepared long before there was any litigation between the Feoffees and the tenants. Thus, it is clear that the documents generated and opinions formed by LandVest in connection with the fair rental value of the premises were not generated or formed in anticipation of litigation or for trial.

According to Exhibit 54 in the Summary Judgment Appendix, in addition to its work regarding appropriate rents, LandVest provided the Feoffees with valuations of Little Neck as of April 15, 1997, December 1, 2000, February 13, 2004, and December 16, 2005. None of these earlier reports could have been prepared in anticipation of litigation or for use in trial. Even after the tenants filed their action against the Feoffees, the fair market value of Little Neck was not an issue directly in dispute.

While the lawsuit between the tenants and Feoffees was pending, the Feoffees entered into negotiations with the tenants regarding a potential sale of the property as a means of settling the parties' dispute. The Feoffees obtained a real estate advisory letter from LandVest dated November 10, 2008, which they relied upon in determining a price at which they would be willing to sell Little Neck. (Ex. A hereto) The Feoffees, through counsel, shared the results of this Advisory Letter with the School Committee. This real estate advisory letter states that it was prepared "in the context of ongoing rental and possible purchase and sale negotiations with the Little Neck Legal Action Committee." It was not prepared in anticipation of litigation or for use in litigation. Finally, on October 28, 2010, LandVest issued the appraisal that has been submitted to Probate Court in connection with the motion for partial summary judgment. This appraisal, which was shared with the School Committee and others, states that it was prepared for "financing purposes," as well as for possible submission to this Court in connection with the Feoffees' complaint for equitable deviation.

2. Facts Concerning Petersen LaChance and William LaChance.

Petersen LaChance has provided valuation services over the years to the tenants' association, the Little Neck Legal Action Committee ("LNLAC"). As noted above, the value of Little Neck was not directly in dispute in the litigation between the tenants and the Feoffees. The tenants and their association have never been parties to the present Probate Court litigation. Petersen LaChance was acting as an adviser with respect to the tenants' potential purchase of the real estate, rather than for purposes of testifying in any litigation.

During the time that the School Committee was considering what position to take as to the sale, LNLAC's attorney engaged Petersen LaChance to perform an updated valuation of

Little Neck. The Petersen LaChance report is Exhibit 75 to the Summary Judgment Appendix. The valuation report states at page 8,

> The intended use of this report is for use in investment decision by the client, Little Neck Legal Action Committee, and for possible consideration by the Feoffees and representatives of the Trust's beneficiaries.

The Petersen LaChance report was thus on its face prepared not for use in litigation, but as a means of providing the client, LNLAC, with investment advice, and with the possibility that the report would be provided to the Feoffees and the School Committee (the Trust's beneficiary), presumably to persuade them of the merits of the proposed sale.

Petersen LaChance also has prepared various other reports and documents over the years concerning the value of Little Neck. The motion to quash the subpoena would prevent these documents from being provided to the School Committee, even though there has not been any pretense of a showing that any of these other documents were prepared in anticipation of litigation or for trial.

After the School Committee noticed the depositions of James Monahan of LandVest and William LaChance of Petersen LaChance, the Feoffees designated both of them as expected trial witnesses. No claim has been made by the Feoffees that they ever engaged Petersen LaChance as an expert before LaChance completed his valuation. LaChance performed that valuation for LNLAC, a non-party.

ARGUMENT

I. The Discovery Requested As to LandVest and Monahan Is Not Barred By Rule 26(b)(4) Because the Documents and Testimony Sought Were Not Prepared In Anticipation of Litigation or For Trial

Rule 26(b)(4) provides that court approval is needed to conduct discovery of experts, beyond interrogatory answers, only if the expert's opinions were "acquired or developed in

anticipation of litigation or for trial." In the cases relied upon by the Feoffees, the experts in question had been specifically retained for the purposes of testifying in litigation. In such cases, the Court has discretion, based on the circumstances of the case, as to whether expert depositions should occur. But when, as here, the expert rendered services for primarily non-litigation purposes, Rule 26(b)(4) does not apply, and no court permission is required to conduct the depositions or document discovery.

Judge Agnes, the author of the *Lozoraitis* case on which the Feoffees rely, himself made this point in *Burgess v. Medical Center of Greater Lowell*, 14 Mass.L.Rptr. 310 (2002) (Ex. B hereto), where the Court stated as follows:

> When a party retains an expert to render services to that party rather than primarily to assist with litigation, and the expert thereby acquires or develops knowledge and/or opinions about issues that are relevant to subsequent litigation, there is no unfairness in requiring such an expert to submit to a deposition in the same manner as any other fact witness.

In the present case, the evidence establishes that LandVest was the consultant that the Feoffees utilized over the years for assistance in setting rental values. A culmination of this work was the February 21, 2006 letter included in the Summary Judgment record as Exhibit 76. No argument has even been made that any of this work in determining rental values was performed "in anticipation of litigation or for trial." The School Committee is entitled to full discovery of these documents, and to take deposition testimony on these issues.

Similarly, over the years when the Feoffees were contemplating a potential sale of Little Neck, they needed professional advice as to the fairness of any price. It was in this context that Monahan and LandVest provided valuation services to the Feoffees from 1997 through at least 2008. It is pure sophistry to contend, as the Feoffees now argue, that these valuation services were rendered in anticipation of litigation because court approval would someday be required to

conduct a sale. The Feoffees were not obtaining the services for use in litigation, but to determine whether they should sell, and if so, at what price.

Because LandVest's rental consulting services and valuation services through at least 2008 were not rendered in anticipation of litigation or for trial, the School Committee can proceed with its discovery as to those matters as of right and without limitation. The 2010 valuation report should not be treated any differently. This was a report prepared primarily for financing purposes, with only possible use in litigation anticipated.

II. The Discovery Requested As to Petersen LaChance and William LaChance Is Not Barred By Rule 26(b)(4) Because the Documents and Testimony Sought Were Not Prepared In Anticipation of Litigation or For Trial

LNLAC's motion for a protective order as to William LaChance must be denied for substantially the same reason. LNLAC has never been a party to any litigation where the sale value of Little Neck was at issue. As shown in the body of his report, LaChance did not prepare his most recent valuation report in anticipation of litigation or for trial. Rather, his report specifically states that he prepared it as a means of furnishing his client, LNLAC, with investment advice concerning the proposed purchase, and for possibly circulation to the School Committee and the Feoffees – presumably to help gain their support for a sale.

LNLAC cites two cases in support of its position that the discovery should not be allowed, but neither of them arose under the Rules of Civil Procedure. The first, *Commonwealth v. Vitello, 367 Mass. 224, 235* (1975), is a criminal case that refers to the general rule against summonsing to trial an expert who knows nothing about the case to force him to give an opinion. It has no relevance here, as LaChance has been intimately involved in matters pertaining to Little Neck and is not simply an expert summonsed to give an opinion based on his general expertise. The second case the tenants cite, *Ramacorti v. Boston Redevelopment Authority*, 341 Mass. 377

(1960), was decided some fourteen years before the Massachusetts Rules of Civil Procedure were adopted. It is therefore equally inapplicable in construing the provisions of Rule 26(b)(4).

Contrary to the argument that LNLAC is making based on inapposite and dated cases, the applicable rules of civil procedure permit full discovery from experts who were not retained specifically for purposes of litigation. Such discovery happens routinely, for example, in the case of treating physicians and mental health providers.

In what appears to be an effort to fit the facts to the applicable legal standard, LNLAC seems to claim in its motion for a protective order that LaChance did not really prepare his report for the reasons given in the body of the valuation. Rather, LNLAC asserts without factual support that Mr. LaChance "was retained by LNLAC to offer expert opinions in support of Plaintiffs' motion for summary judgment in this case." If this was indeed the secret reason for Mr. LaChance's retention, it is too late now to assert it as a reason for preventing his deposition. Mr. LaChance portrayed himself in the report as an impartial expert retained to provide investment advice to his clients, not as a hired gun who was acting in concert with the Feoffees in an attempt to gain summary judgment. Furthermore, it is not even true that the Feoffees used the LaChance report to support their Motion for Partial Summary Judgment. Rather, LNLAC voluntarily provided the report to the School Committee, and the report was submitted to this Court by the School Committee in opposition to Summary Judgment to demonstrate that the tenants were refusing to pay a level of rent that their own valuation expert opined to be fair.

III. To The Extent Any of the Requested Discovery is Governed by Rule 26(b)(4), This Court Should Exercise Its Discretion to Allow the Discovery to Proceed.

The preceding sections of this Memorandum establish that the opinions and documents of LandVest and Petersen LaChance were not prepared in anticipation of litigation or for use in trial as those terms are used in Rule 26(b)(4). The only possible exception is the most recent

LandVest report, and even that, by its terms, was primarily prepared for purposes of financing, with only a possibility that it would be used in this litigation.

Should this Court conclude that any portion of the requested discovery is governed by Rule 26(b)(4), so as to need the Court's permission to go forward, the Court should exercise its discretion under that rule to permit the discovery to occur. Rule 26(b)(4) provides that the Court may "order further discovery by other means, subject to such restrictions as to scope and such provisions pursuant to (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate."[1]

In the federal courts, under the same rule, expert depositions were routinely allowed to such an extent that the rule was ultimately amended to allow expert depositions as of right. Expert depositions are not routinely sought or needed in most state court cases. The Massachusetts rule continues to provide, where opinions have been formed for use at trial, that the scope of expert discovery beyond interrogatory answers is to be determined on a case-by-case and judge-by-judge basis, in the sole discretion of the presiding judge.

Rule 26(b)(4) does not provide any specific guidance as to how the Court's discretion is to be utilized. The Feoffees have submitted a case from Superior Court Judge Agnes in which he took a very limited view of circumstances warranting an expert deposition. But his decision was promptly criticized by a Law Review article (Ex. C), which called for a more nuanced approach to the issue.

The case at bar is a compelling one for allowing the expert depositions to occur. The proposed sale of Little Neck to the tenants raises extremely important issues from the standpoint

[1] Counsel for the Feoffees has agreed with counsel for the School Committee, in the interests of scheduling a prompt hearing, that it would be unnecessary for the School Committee to file a formal motion for leave to conduct expert discovery and that the issue would be considered properly before the court through the motions for protective orders and oppositions thereto.

of not only the parties, but also the public. All agree that the fair value of Little Neck is central to the issues in the case. The parties' respective valuation experts are tens of millions of dollars apart. Allowing the depositions of the valuation experts to go forward under these circumstances is likely to streamline the trial, allow for a more orderly and professional presentation of the evidence, and, most important of all, lead to a fairer outcome.

The Feoffees argue that the depositions will be costly. The cost of discovery is important in every case. Here, however, the marginal cost of the discovery that is sought is dwarfed by the amount in controversy, and by the discrepancy between the experts' respective opinions of value. Conducting the depositions will be cost-effective from the School Committee's perspective, and that is why the discovery is being sought.

Finally, while the experts in question did provide detailed reports with respect to their most recent valuations, these reports are not in and of themselves sufficient to reproduce what the experts did or to understand fully their methodology. For example, a reader of the LandVest report would be at a loss to understand exactly how the land values were extracted from Little Neck sales or how the valuation expert arrived at the most crucial values utilized in his appraisal. Furthermore, serious issues appear to exist as to whether the valuation experts on whom the Feoffees rely prepared their reports wholly in accordance with accepted valuation standards. Counsel for the School Committee intends to explore through these depositions the methodology that was employed and potential *Daubert* challenges based on faulty methodology. It will be far more efficient to explore these issues and determine whether they have merit through deposition testimony than it would be through time-consuming *voir dire* or cross-examination during trial.

Accordingly, in the event the Court determines that any part of the discovery sought by the School Committee is limited by Rule 26(b)(4), governing expert opinions formed in

anticipation of litigation or for trial, the School Committee requests that the Court exercise its discretion under Rule 26(b)(4) to permit such discovery to occur. Naturally, the School Committee in such event would not oppose reciprocal discovery on similar terms of its valuation expert.

CONCLUSION

For the foregoing reasons, the School Committee respectfully requests that the motions for protective orders be denied, and that the discovery sought from LandVest, Monahan, Petersen LaChance and LaChance be permitted to proceed.

Dated: June 14, 2011

Defendants and Counterclaim Plaintiffs,
IPSWICH SCHOOL COMMITTEE AND RICHARD KORB, SUPERINTENDENT
By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2011, I caused a copy of the foregoing document to be served upon all counsel of record by email delivery and by first class mail.

Stephen M. Perry

EXHIBIT A

LandVest®

Distinctive Properties - Real Estate Consulting & Appraisal - Forestry Consulting
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November 10, 2008

William H. Sheehan III
MacLean Halloway Doherty Ardiff & Morse P.C.
8 Essex Center Drive
Peabody, MA 01960

Re: ***Real Estate Advisory Letter***
Little Neck Estate – Ipswich

Dear Bill:

At your request, I have prepared the following Real Estate Advisory Letter regarding updated opinions of value for the 35± acre *Little Neck Estate Property* in Ipswich, Massachusetts. It is my understanding that this letter will be used by you and authorized representatives of the *Feoffees of the Grammar School in Ipswich* in the context of on-going rental and possible purchase and sales negotiations with the *Little Neck Action Committee*.

Specifically, this letter sets forth updated opinions of the market value of the property assuming both a sale to the current tenancy and, alternately, to a third party buyer. These opinions were requested as a means of facilitating an informed evaluation of a recently negotiated purchase of the *Little Neck* property by the current tenancy for a reported purchase price of $26,500,000. I understand that the purchase contract has not yet been drafted, but the following assumptions have been incorporated in this value update:

- The "subject property" consists of approximately 167 leasehold parcels and 39 additional parcels leasehold parcels held by the Feoffees. All but one of these 39 parcels is vacant;

- The assumed form of ownership following the proposed purchase is a legal condominium wherein the improved leasehold parcels will be owned by the various tenants and the remaining land and improvements comprising the balance of the property (including private roads) will be held as common property for use by the home owner's association, Hence, common elements are not assigned independent value;

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- It is specifically assumed that a tenancy or third party buyout of the property would lift the current seasonal use restrictions on the property but existing cottages would be subject to certain restrictions on footprint expansion and bedroom additions resulting in increased sewage flow.

This letter constitutes a re-appraisal of the subject property. LandVest's previous reports effective as of April 15, 1997, December 1, 2000, February 13, 2004 and January 6, 2006 are included herein by reference. Additional documents incorporated in this analysis include an opinion of market rental rates (both seasonal and year-round) outlined in an *Advisory Letter* dated February 21, 2006 and a *Memorandum* dated October 7, 2008 which provided clarification of several questions regarding previous valuations.

As a note of background, the valuation methodology employed in the previous appraisal of the property's fee simple value under an assumed condominium declaration included a two-part process whereby the individual and aggregate value of the condominium lots or "occupancy envelopes" were valued based on a review of comparable sales and an allocation of land/building value from recent sales within the *Little Neck* sub-market. We then employed what's known as a "cost of development" appraisal methodology whereby all costs to be incurred by the current tenancy or third party buyer are accounted for and a lot takedown schedule then projected individual sales over a projected absorption period. Assuming an "as is " sale of the property, basic costs include legal fees for preparation of the condominium declaration and closings, survey and preparation of a master plat plan (including metes and bounds of each envelope and building footprints), minor road/utility improvements, real estate taxes for unsold lots over the absorption period and some provision for project profit (third party buyer assumption only). Finally, lots sales revenue over a projected 3-4 year absorption period was discounted to present value using a safe rate of return. The resulting value represented the "as is" value of the property under an assumed post-closing condominium conversion.

In all of our previous appraisals of a condominium conversion, lot values were assigned based on the 6-tier value system devised and employed in our original appraisal in 1997. In our 2006 appraisal, lot values ranged from $80,000 for an inland, non-view, road-impacted lot to $255,000 for an exceptional view, front row lot. It should be noted that higher quality lots, ranging from top tier waterfront to interior/excellent view totaled 43 – or approximately 26% of the total leasehold property. By our estimation, nearly 75% of the leasehold property consists of lesser quality, interior lots with average views which are generally obstructed by adjoining cottages in the dense development pattern of 3,000± s.f. lots.

The aggregate lot value per our 2006 report totaled just under $20M prior to accounting for the aforementioned legal and resale expenses. This value as of January 2006 provides a useful benchmark or departure point in the current valuation of the subject property.

The median residential sale price in Ipswich (source: *The Warren Group*) for 2005 was $487,500 and the median value for 2008 (January through September) was $399,500. This indicates a total Town-wide value decline of approximately 18.1%. As outlined in my Memo of October 7, 2008, there have been three sales in the past 12 months on *Little Neck* and there are currently 10 active listings indicating an average list price of $398,370. The average value indicated by the

three closed sales is $358,000. The average land/building ratio from the three sales is roughly 56%, indicating an average underlying lot/land value of approximately $200,000. All three sales are classified as front-Ipswich River/Plum island Sound lots with average-prime view per LandVest's tiered valuation system. We had valued that lot type at approximately $190,000 at the end of 2005 so the ensuing market decline of 18% cited above does not appear to be warranted in the current valuation. In fact, the average value from this somewhat limited sale sample is just over 5% higher than LandVest's end-of-2005 estimate for that lot type.

The application of a 5% value increase to our previous aggregate lot value of $19,870,000 results in a current aggregate lot value of approximately $20,863,000 ($124,928/leasehold lot) prior to cost accounting. This total is $5,637,000 *lower than* the proposed purchase price of $26,500,000 negotiated by the Feoffees. Assuming an "as is" sale where the tenancy is responsible for all related legal and engineering costs and subsequent coordination of intra-tenancy lot sales, the $26,500,000 ($158,682/leasehold lot) purchase price is *well above* the supportable value indicated by time-adjusted prior appraisals and the application of accepted appraisal methodology to recent sales data.

In LandVest's 2006 appraisal, hard and soft costs to be borne by the existing tenancy in affecting a successful purchase and resale of the 167 lots to willing and capable tenant buyers over a 4-year sellout period totaled roughly 30% of projected lot sales revenue. As a basic test of "reasonableness", if one were to impute an average (though highly aggressive, in my opinion) lot value of $200,000, the resulting aggregate lot value totals $33,400,000. The application of even a 20% cost margin (highly conservative, in my opinion) results in an "as is" value of $26,720,000 – essentially in line with the proposed purchase price. Again, this equation is neither accurate nor technically appropriate as the assumed revenue and costs figures are faulty, but it does add credence to the assertion that the $26,500,000 buyout price is above appraisable value to a single buyer.

As an additional check from the viewpoint of the tenant/buyer, the average proposed purchase price of $158,682 implies annual debt service of roughly $10,274 (assuming 10% down, 30-year fixed mortgage at 6%). When coupled with taxes, insurance, sewer betterments and association fees, the annual debt load will readily exceed $15,000. This total debt load (again amortized over 30 years) implies a present value of approximately $208,500 – again, notably above an aggressive $200,000 average lot value.

The property's current market value to a third party buyer, due in part to the current credit crisis and the scarcity of viable financing, would range between $10M-$15M depending upon equity yield (all cash) assumptions. It is clear that the existing tenancy is the most motivated and self interested buyer for the subject property.

Based on this analysis, it is my opinion that the proposed purchase price of $26,500,000 for the Little Neck leasehold exceeds the property's appraised value under a condominium conversion by the current tenancy.

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Please do not hesitate to call with any questions regarding this value update or if we can be of additional assistance.

Respectfully submitted,

James E. Monahan
Senior Advisor
LandVest, Inc. – Real Estate Consulting Group
(Massachusetts Gen. Cert. #3481)

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Appendix

Appraiser Certification
Survey Plan
4-Lot Schematic Division Plan
Exhibit A – Lot Sales Overview

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CERTIFICATION OF VALUE

I hereby certify that:

1. I have made a personal inspection of the property that is the subject of this report.

2. To the best of my knowledge and belief, the statements of fact and the opinions contained in this report are true and correct.

3. The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and my personal, unbiased professional analyses, opinions, and conclusions.

4. I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest or bias with respect to the parties involved.

5. My compensation is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.

6. This appraisal was not based on a requested minimum valuation, specific valuation or approval of a loan.

7. My analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Practice of The Appraisal Institute, as well as the Uniform Standards of Professional Appraisal Practice of the Appraisal Institute. I am currently licensed as a Certified General Appraiser in Massachusetts (CG #3481), Vermont (C.G.#0000212), New Hampshire (C.G.#669), and Virginia (C.G.#008676).

8. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives.

9. No one provided significant professional assistance to the person(s) signing this report.

Appraiser: _____ Date: November 11, 2008

James E. Monahan

EXHIBIT B

14 Mass.L.Rptr. 310
Superior Court of Massachusetts.

David W. BURGESS & Andrea Burgess, Plaintiffs,
v.
MEDICAL CENTER OF GREATER LOWELL, P.C., Lowell Walk-In Medical Center, Sybil Lynn Brown, R.N., & Gary Asher, M.D., Defendants.

No. CIV.A. 99-03458.Jan. 30, 2002.

Opinion

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION TO QUASH SUBPOENA OR FOR A PROTECTIVE ORDER

PETER W. AGNES, JR., Justice.

BACKGROUND

*1 This is a medical malpractice case in which the plaintiff, David W. Burgess, alleges that he suffered an ear injury on July 26, 1996, and then suffered further permanent injury as a result of the defendants' negligence in failing to properly treat him at the Lowell Walk-In Medical Center following his accident. In answers to interrogatories filed by the defendants, the plaintiffs have identified Dr. Bjorn Bie, a physician who treated Mr. Burgess following his allegedly negligent treatment by the defendants, as an expert witness who will testify about the nature of the injuries suffered by the plaintiff and the present and likely future impact these injuries will have on the plaintiff's life. The plaintiffs also have supplied the defendants with an affidavit by Dr. Bie which they maintain sets forth the subject matter of his testimony, the substance of the facts and opinions on which he is expected to testify, and the basis for his opinion testimony. Plaintiff's Memorandum at 2.1 *See* Mass. R. Civ. P. 26(b)(4)(A)(i).

The plaintiff seeks relief on grounds that Dr. Bie, as an expert witness, cannot be noticed for a deposition in the absence of prior judicial approval and subject to appropriate arrangements for the payment of the witness' fees and expenses. *See* Mass. R. Civ. P. 26(b)(4)(A)(ii). The defendants, on the other hand, maintain that Dr. Bie, who the plaintiff saw on a number of occasions between July, 1996 and 1998, not only diagnosed his condition, but rendered treatment and made referrals for second opinions to the plaintiff, and thus is a treating physician who is subject to deposition like any other "fact" witness. The defendants indicate that they wish to inquire of Dr. Bie because they have evidence that Dr. Bie began to treat the plaintiff within days of the allegedly negligent conduct by the defendants. The defendants indicate that they wish to ask Dr. Bie about the plaintiff's visits with him, about his diagnosis and treatment of the plaintiff "as well as any other opinions that he reached contemporaneously with his care and treatment of Mr. Burgess.... The defendants do not seek to ask Dr. Bie questions about opinions that he has formed in connection with this litigation in his role as a paid expert witness." Opposition of Defendant Asher at 2. The other defendants take essentially the same position.

DISCUSSION

Under Mass. R. Civ. P. 26(a), a party may obtain discovery of relevant information by means of deposition "[u]nless the court orders otherwise, or unless otherwise provided in these rules." One of the limitations on the use of a deposition is for the "[d]iscovery of facts known and opinions held by experts ... and acquired or developed *in anticipation of litigation or for trial.*" Mass. R. Civ. P. 26(b)(4) (emphasis added). In that case, the rules require the party seeking discovery to employ an expert interrogatory, but authorize the court, upon motion to "order further discovery by other means [presumably including by deposition] subject to such restrictions as to scope and such provisions ... concerning fees and expenses as the court may deem appropriate." Mass. R. Civ. P. 26(b)(4)(A)(i). Thus, unless the circumstances call for an exercise of judicial discretion to fashion a protective order of some sort, see Mass. R. Civ. P. 26(a), the Massachusetts Rules of Civil Procedure permit a defendant in a medical malpractice case to depose the plaintiff's treating physician about any facts or opinions he or she may have that are relevant to the case with the exception of facts and opinions "acquired or developed in anticipation of litigation or for trial." *See* Mass. R. Civ. P. 26(b)(4). See Lauriat, McChesney, Gordon & Rainer, Discovery § 2.9, at 95 (49 Mass. Prac.2001).2

*2 Based on the representation by the defendants that the plaintiffs did not file suit in this case until July 12, 1999, nearly three years after Mr. Burgess began to treat with Dr. Bie, there is no reason to presume that all of his knowledge of the plaintiff and all of his opinions about the plaintiff's injury, treatment and prognosis were acquired or developed in anticipation of litigation. "[A]n important consideration is whether in the circumstances it

is fair for one party to acquire the expert opinion of one who has already been engaged by his adversary." *Ramacorti v. Boston Redevelopment Authority,* 341 Mass. 377, 379 (1960). When a party retains an expert to render services to that party rather than primarily to assist with litigation, and the expert thereby acquires or develops knowledge and/or opinions about issues that are relevant to subsequent litigation, there is no unfairness in requiring such an expert to submit to a deposition in the same manner as any other fact witness.3 The critical inquiry, therefore, is whether the witness' knowledge and opinions about the case were acquired or developed in anticipation of litigation, not whether the witness happens to be an expert, nor whether the discovery seeks only facts as opposed to opinions.4 Thus, as plaintiffs point out in their memorandum, inquiry of Dr. Bie by the defendants at a deposition about his diagnosis and his treatment of the plaintiff may call for Dr. Bie to express an expert opinion.5 Plaintiffs' Memorandum of Law at 3. However, Mass. R. Civ. P. 26 does not, for this reason alone, restrict the defendants from taking the deposition of Dr. Bie. Accord *Chakales v. Hertz Corp.,* 152 F.R.D. 240 (N.D.Ga.1993); *Lee v. Knutson,* 112 F.R.D. 105 (N.D.Miss.1986); *Quarantillo v. Consolidated Rail Corp.,* 106 F.R.D. 435 (N.D.Ill.E.D.1985); *Nelco Corp. v. Slater Elec. Inc.,* 80 F.R.D. 411 (E.D.N.Y.1978). Therefore, it is not appropriate to quash the subpoena.

In the alternative, the plaintiffs ask this court to issue a protective order and "limit the scope of the deposition and the scope of the subpoena duces tecum and require the Defendants to pay Dr. Bie for his time as an expert witness." Plaintiffs' Memorandum of Law at 3. In particular, the plaintiffs ask that any inquiry of Dr. Bie by defendants at a deposition should be limited to questions about the medical history he took of the plaintiff, his observations of the plaintiff, any complaints made by the plaintiff, and the treatment he rendered. Plaintiffs argue further that the defendants should not be permitted to inquire of Dr. Bie about his diagnosis of the plaintiff, the reasons for the course of treatment he ordered, and his prognosis because such questions call for Dr. Bie to render an expert opinion. *Id.* at 4. As noted above, the rules permit a treating physician to be deposed about his knowledge and opinions about the case that were not acquired or developed in anticipation of litigation. Furthermore, as noted above, the defendants concede that they "do not seek to ask Dr. Bie questions about opinions that he has formed in connection with this litigation in his role as a paid expert witness." Based on the information before the court, it is not possible to fashion an appropriate protective order that enforces that limitation. The parties in this case are in the best position to know where the boundary line lies between knowledge and related opinion acquired by Dr. Bie in his capacity as a treating physician and opinions formed by Dr. Bie in his capacity as an expert witness engaged by plaintiffs in anticipation of litigation. Therefore, the parties are encouraged to enter into a stipulation to govern the scope of the inquiry. If that is not possible, either party may apply to the court for a protective order based on a more detailed showing of what opinions Dr. Bie has been engaged by plaintiffs to render as an expert witness at trial.

**3* The final question relates to whether Dr. Bie, as Mr. Burgess' treating physician, is entitled to compensation beyond the statutory fee for attending and giving testimony at a deposition. Because Dr. Bie is subject to a deposition like any other witness under Mass. R. Civ. P. 26(a) and 30, I deny plaintiffs' motion for payment of expert witness fees beyond what is required by statute. While I agree with the parties that Dr. Bie may be considered an expert as to some matters in this action for which the plaintiffs may have specially retained him and paid accordingly, that does not change his status so as to entitle him to an expert fee. Both parties appear to be aware of the unfairness of a defendant obtaining expert opinion testimony from a witness, paid by a plaintiff to develop it, without having to pay for that opinion. This is one of the reasons why I encourage the parties here to come to some agreement prior to examining Dr. Bie. Such an agreement could include permitting the defendants to inquire of Dr. Bie about opinions he formed as an expert witness retained by the plaintiffs in anticipation of litigation provided that the defendants pay him accordingly. Should a disagreement arise during the examination, the correct procedure is to suspend the deposition and seek a protective order at that time. See *Long v. Roy,* 10 Mass. L. Rptr. 140, 1999 WL 355801 (Mass.Super.1999) (Gants, J.).

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the plaintiffs David W. Burgess and Andrea Burgess' motion to quash subpoena and notice of taking deposition and, in the alternative, for a protective order and for expert fees is *DENIED.*

Parallel Citations

2002 WL 192411 (Mass.Super.)

Footnotes

1 The affidavit itself was not submitted with the parties' filings on this motion.

2 This view is consistent with Massachusetts practice which recognizes that an expert witness who has personal knowledge of the fact issues in a case may be compelled to give testimony by either party. See *Commonwealth v. Vitello,* 367 Mass. 224, 235 (1975). The appellate courts also recognize that there is "discretionary power in the court to require, without payment of expert fees, that an expert witness testify as to an opinion already formed ... when necessary for the purposes of justice." *Bagley v. Illyrian Gardens, Inc.,* 401 Mass. 822, 827 (1988)(quotations omitted).

3 While Mass. R. Civ. P. 26 does not address this question with the precision it addresses the distinction between so-called testifying experts and educating experts, see James W. Smith & Hiller B. Zobel, Rules Practice § 26.6 (1975), the result I reach is nonetheless an outcome that is contemplated by the rule. See *id.* at 214-15 n. 53 ("Whether and to what extent one's 'own' physician's opinions are discoverable depends on his status with respect to the litigation, determined by the principles of Mass. R. Civ. P. 26(b)(4).").
The result reached is also consistent with federal decisions addressing the scope of discovery of expert opinions under Fed.R.Civ.P. 26(b)(4), as amended in 1970, a rule at that time that was substantially the same as the Massachusetts rule presented here. See *Quarantillo v. Consolidated Rail Corp.,* 106 F.R.D. 435 (N.D .Ill.E.D.1985), quoting *Nelco Corp. v. Slater Elec. Inc.,* 80 F.R.D. 411, 414 (E.D.N.Y.1978) (" '[T]he mere designation by a party of a trial witness as an 'expert' does not thereby transmute the experience that the expert witness acquired as an actor into experience that he acquired in anticipation of litigation or for trial.' "). In *Quarantillo,* an action under the Federal Employers Liability Act, the court held that the plaintiff was not entitled to a protective order under Fed.R.Civ.P. 26(c) that would either preclude the defendant from deposing his treating neurologist or would place limits on the scope of the examination pursuant to Fed.R.Civ.P. 26(b)(4)(A). In that case, as here, the plaintiff failed to demonstrate that the treating physician "should be deemed an 'expert' rather than a 'viewer' or an 'actor' with respect to facts obtained and opinions formed during treatments ... subsequent to the ... alleged injury." *Quarantillo, supra* at 437. See also Advisory Committee Notes to Fed.R.Civ.P. 26(b)(4) (1970) ("It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.").

4 This view does not conflict with Mass. R. Civ. P. 30A(m), which was added in 1989 and which deals with audio-visual depositions of "treating physicians and expert witnesses for use at trial." Rule 30A(m) authorizes a party who intends to call its own treating physician or expert witness at trial to take the witness' oral deposition for use at trial in lieu of oral testimony. The Reporter's Notes suggest that the purpose of the 1989 amendment was to avoid the need for a continuance on the day of trial due to the unavailability of these witnesses. Both Rule 30A(m)(1) and the 1989 Reporter's Notes state that it has no application to "another party's treating physician or expert, discovery from whom is subject to the provisions of Rule 26(b)(4)(A) or 26(b)(4)(B)." The fact that Rule 30A(m)(1) also contains separate definitions of "treating physician" and "expert witness" was not intended to suggest that a witness must be assigned to one category or the other for purposes of applying the rules relating to discovery. Indeed, the 1989 Reporter's Notes to Rule 30A acknowledge that a witness may be both a treating physician and an expert, and suggest that the definitions were simply designed to avoid artificial limits being placed on the scope of Rule 30A(m).

5 For this reason, in medical malpractice cases plaintiffs are not relieved of the obligation to identify such treating physicians as expert witnesses in reply to an interrogatory submitted by a defendant pursuant to Mass. R. Civ. P. 26(b)(4)(A)(i). See *Lee v. Knutson,* 112 F.R.D. 105 (N.D.Miss.1986). The *Knutson* court ruled that Rule 26(b)(4) does not protect plaintiffs in a medical malpractice action from disclosing the identity of six medical witnesses they intend to call at trial who obtained their knowledge solely through providing professional services to one of the plaintiffs. *Id.* at 108 n. 1, 109. I merely rule that to the extent that Dr. Brie was not retained to form any opinions in anticipation of litigation or for trial, the Burgesses are not entitled to the special protections under Mass. R. Civ. P. 26(b)(4). See *Chakales v. Hertz Corp.,* 152 F.R.D. 240, 242 (N.D.Ga.1993).

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18 Mass.L.Rptr. 709
Superior Court of Massachusetts.

Michael K. DENZER and Judith A. Denzer,
Plaintiffs
v.
Paul BARCK, Defendant/Third-Party Plaintiff
v.
Gerald Celli, Third-Party Defendant.

No. 2000-2066A.Feb. 9, 2005.

Opinion

MEMORANDUM AND ORDER

PETER W. AGNES, JR., Justice.

*1 1. This is a civil action that arises from a boating accident. The plaintiffs, Michael and Judith Denzer, allege that the Defendant/Third Party plaintiff, Paul Barck (Barck) negligently operated a boat on Brandy Pond in Naples, Maine, and, as a result, struck another boat operated by Third-Party defendant Gerald Celli (Celli). The plaintiff Michael Denzer was a passenger in the Celli boat and he alleges that he suffered severe injuries. The plaintiffs also allege that Third-Party defendant Celli was negligent in the operation of his boat. Barck has filed a motion seeking the approval of the court pursuant to Mass. R. Civ. P. 26(b)(4)(A)(ii) to compel an expert witness for Celli to submit to a deposition.

2. Barck served Celli with interrogatories that included a question about the identity of any expert witness he intended to call at trial and "the substance of the facts and opinions to which each such expert is to testify," and "a summary of the grounds for each opinion." On or about June 15, 2004, Celli served Barck with a Supplemental Answer in which he reported that one Jonathan Klopman (Klopman), a marine surveyor from Marblehead, Massachusetts would testify as an expert. In his Supplemental Answer, Celli added, that Klopman "is expected to testify concerning liability and causation ... that the accident between the boats driven by Paul Barck and Gerald Celli presented a crossing situation." Further, the Supplemental Answer states that the expert will testify that "the boats approached each other in a crossing situation and collided at a substantially perpendicular angle." Further, the Supplemental Answer states that the expert will testify "at the time of the accident, Mr. Celli's boat was the stand-on (privileged) vessel and that Mr. Barck's boat was the give-way (burdened) vessel," and that "Mr. Barck's failure to give way to Mr. Celli was a violation of Maine boating law and was negligent. Mr. Barck also negligently failed to keep a proper lookout, determine the risk of collision, and avoid the colission when the two boats became in extremia." Further, the Supplemental Answer states that the expert will testify that Mr. Barack's failure to properly know and understand applicable boating rules an regulations caused or contributed to cause the accident." Further, the Supplemental Answer states that the expert will testify "to the relative speeds of the Celli and Barck vessel." Barck's Motion, Appendix B. Barck made several efforts to obtain a copy of Klopman's report and was rebuffed in his effort to secure consent for a deposition of Klopman. The case proceeded to mediation, but has not settled.

3. In *Lozoraitis v. Lachman,* 16 Mass.L.Rptr. 809, 2003 WL 22461978 (Mass.Super. Oct 30, 2003) (NO. CIV.A.98-1792-B), this court examined Massachusetts law with respect to a party's request to take the deposition of another party's expert witness. After reviewing federal law which follows a liberal practice and permits deposition of expert witnesses as a matter of routine, see Fed.R.Civ.P. 26(b)(4), and the Massachusetts rule which is silent on the point, see Mass. R. Civ. P. 26(b)(A)(ii)1, this court concluded that Massachusetts practice was more restrictive.

> *2 "Under Mass.R.Civ.P. 26(b), expert witness's answers to interrogatories are limited to four subjects: (1) the identity of each expert witness expected to be called at trial, (2) the subject matter on which the expert is expected to testify, (3) the substance of the facts and opinions to which the expert is expected to testify, and (4) a summary of the grounds for each opinion expected to be offered by the expert. Mass.R.Civ.P. 26(b)(4)(A)(i). It is only when the answers to these questions are inadequate, incomplete, inconsistent, or when the discovering party is unable to obtain equivalent information through other means, that a court should permit a deposition of an expert witness to be taken." *Lozoraitis, supra.*

4. The decision in *Lozoraitis, supra,* has been criticized in a law review article in which the author questions whether existing Massachusetts practice is so restrictive, and advocates for a more liberal exercise of judicial discretion to permit the deposition of expert witnesses.

> "Answers to expert interrogatories are only a starting point, however, in preparing for the cross-examination of an expert and are typically unsatisfactory alone to complete such preparation. The elimination of the required hypothetical question and the increased role of

the trial court in acting as a gatekeeper in regard to expert testimony weigh in favor of liberally allowing further discovery of experts, including by way of deposition. Once the court is satisfied that the moving party is seeking further discovery for the purpose of preparing for cross-examination, and not to build his own case, such discovery should typically be allowed. With that protection, there is no reason to treat an expert differently from a fact witness or party for the purpose of allowing depositions or document discovery."

N.G. Apjohn, *"Further Discovery of Expert Witnesses Under Massachusetts Rule of Civil Procedure 26,"* 88 Mass. L.Rev. 197, 203 (2004)("Further Discovery"). In fact, the author argues that a more liberal practice might actually produce savings of time and money for the parties and the courts.

"Notwithstanding the expert fee-shifting provisions of Rule 26(b)(4), the concerns of expense and delay, raised in *Lozoraitis,* possibly flowing from routinely taking expert depositions should not be overlooked. Indeed, as the court noted, further discovery of experts may lead to even more discovery requests. Nevertheless, finding out in the midst of trial that an expert has insufficient evidentiary support or methodology for a necessary expert opinion also creates needless expense and delays for the parties and the court. Full pretrial disclosure of expert testimony in such circumstances can lead to a more efficient resolution by way of settlement or summary judgment. Moreover, when expert depositions lead to additional discovery, it is often for the same reason that motions for additional discovery, continuances and mistrials are filed during trial: the lack of prior disclosure of an expert opinion or a ground for the opinion. In sum, the absence of adequate expert discovery can also impose costs, both monetary and in terms of reaching a fair and just result."

**3* Apjohn, *Further Discovery,* at 203 (footnotes omitted).

5. In the present case, there is an opposition from Celli who maintains that the Barck's motion is untimely and unwarranted coming as it does nearly eight months after the Supplemental Answer and that the opinions expressed by Klopman are "largely consistent" with those expressed by the expert for the plaintiffs whose report has been disclosed. Celli's Opposition at 2. In a "limited opposition," counsel for the plaintiffs maintains that this is not a case in which an expert deposition should be ordered because the factual disputes are not complex, that the Supplemental Answers supplied by the plaintiffs and Celli are sufficient,2 and that if the motion is granted it will trigger a request for leave to depose the other experts. "The plaintiffs submit that conducting three expert depositions in this relatively straightforward case is wasteful, inefficient and prohibitively expensive. Indeed, the plaintiffs' expert will have to travel from out of state to attend any deposition ordered by the court." Plaintiffs' Limited Opposition at 2. Furthermore, as plaintiffs point out, it is telling that the stated reason why the case did not settle is that defendants are unable to agree on the appropriate apportionment of liability." Id at 2-3, quoting Barck's Motion.

6. In *Lozoraitis, supra,* this court made the following observation:

"However, if taking depositions of an adverse party's experts became a matter of routine practice, it could lead to problems that could produce additional delays and costs in an already slow and expensive civil litigation system including the potential need for parties to return to court for protective orders, and the potential for further discovery requests as a result of issues that arise during the deposition. Before the Massachusetts practice is abandoned, there should be a careful review of the experience in the federal system. This may be an appropriate subject for a bench-bar forum to consider, or an appropriate subject of rule-making."

I continue to believe that a discovery practice in which leave to take the deposition of an expert witness would be granted on the request of a party in all but the most unusual circumstances would impose substantial and unnecessary burdens on the court and on litigants. This case illustrates the point. On the other hand, the thoughtful observations and useful suggestions made by attorney Nelson Apjohn in *Furthering Discovery, supra* should be considered by judges faced with such questions and those charged with making recommendations for changes in the Massachusetts Rules of Civil Procedure.

ORDER

For the above reasons, Barck's Motion to Compel the Deposition of Celli's expert witness is *DENIED.*

Parallel Citations

2005 WL 425261 (Mass.Super.)

Footnotes

1 "Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem proper." Mass. R. Civ. P. 26(b)(4)(A)(ii).

2 Counsel for the plaintiffs has included the Supplemental Answer provided by plaintiffs' expert, Henry Woods III a retired naval officer and experienced seaman. Essentially, Mr. Woods opines that it was a crossing accident in which the boats collided in a perpendicular fashion, that Celli's boat was the stand-on (privileged) boat, while Barck's boat was the give-way (burdened) boat. He also states that the collision was due to the negligence of Barck based on his consumption of alcohol, excessive speed and failure to keep a proper lookout, and the negligence of Celli in failing to keep a proper lookout. Plaintiffs' Limited Opposition, Supplemental Answer to Interrogatory 28.

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EXHIBIT C

Further Discovery of Expert Witnesses Under Massachusetts Rule of Civil Procedure 26

By Nelson G. Apjohn*

Nelson G. Apjohn is a partner in the Litigation Department of Nutter, McClennen & Fish, LLP.

I. Introduction

Rule 26(b)(4)(A) of the Massachusetts Rules of Civil Procedure provides a two-step process for obtaining discovery in regard to experts expected to testify at trial.[1] First, a party may obtain, through what are commonly called expert interrogatories, the following information: the identity of a party's expert witness; the subject matter of the expected testimony; and the substance of the facts and opinions to which the expert is expected to testify, with a summary of the grounds for each opinion.[2] Second, upon motion, a party may seek leave to obtain "further discovery" from the adverse expert.[3] Such further discovery is typically by deposition, but it could also be simply by production of documents, such as expert reports. Rule 26(b)(4)(A) does not provide, however, any standard by which the court is to determine whether to grant leave for such further discovery.

In the recent decision *Lozoraitis v. Lachman*, the superior court attempted to define a standard for further expert discovery. The court denied leave to depose an adverse party's expert, holding that such depositions should be permitted only when answers to expert interrogatories "are inadequate, incomplete, inconsistent, or when the discovering party is unable to obtain equivalent information through other means."[4] The court observed that the discretion allowed for depositions of an adverse party's trial experts "should only be exercised in certain narrowly defined circumstances."[5]

This article looks more closely at the *Lozoraitis* decision and the authority cited by the court in that case. It then turns to the origins of Massachusetts Rule of Civil Procedure 26(b)(4) and the interpretation of the cognate federal rule. After examining the current need for further discovery of experts, the article suggests that, contrary to the holding in *Lozoraitis*, such discovery should be liberally granted, once the court is satisfied that certain protections have been met.

II. The *Lozoraitis* Decision

In *Lozoraitis*, the plaintiff moved in a personal injury case to depose two medical experts identified by the defense as expected to testify at trial.[6] The superior court noted that neither Rule 26(b)(4) nor the

* The author gratefully acknowledges the assistance of Jeffrey M. Ernst in the preparation of this article. Jeffrey Ernst is a former associate in the Litigation Department of Nutter, McClennen & Fish, LLP, and is now serving as a clerk for The Honorable Bruce W. Kauffman, United States District Court, Eastern District of Pennsylvania.

1. Mass. R. Civ. P. 26(b)(4)(A) provides that:

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

2. MASS. R. CIV. P. 26(b)(4)(A)(i).
3. MASS. R. CIV. P. 26(b)(4)(A)(ii).
4. 16 Mass. L. Rptr. No. 32, 809 (Nov. 17, 2003).
5. *Id.*
6. *Id.*

corresponding reporter's notes provide any guidance for the court in determining whether to exercise its discretion to allow an expert deposition.[7] With support from a Massachusetts treatise on discovery,[8] however, the court observed that there appeared to be a "settled Massachusetts practice" that such depositions generally are not permitted.[9] The *Lozoraitis* court also turned to another reported superior court decision in which the court had observed that "[g]enerally, the court should not allow examination of experts engaged by [an] adverse party."[10] Notwithstanding the plaintiff's arguments that leave should be granted to depose the experts because he had learned only recently they would testify and that the expert testimony would be crucial in deciding the case, the *Lozoraitis* court saw no reason to move from the "default position" under Rule 26(b)(4) and, thus, denied the motion.[11] The plaintiff's offer to pay the expenses of the depositions was unavailing.[12]

Recognizing that there was nothing in the language of Rule 26(b)(4) to prevent a more liberal exercise of discretion to grant expert depositions, the court pointed to practical problems that may arise from routinely allowing such depositions.[13] In particular, the court was concerned with the potential for increased delays and expense, including even further discovery arising out of expert depositions.[14] Before abandoning Massachusetts practice, the court suggested a careful review of the more liberal practice of allowing expert depositions in the federal courts.[15] The court further noted that the subject of expert depositions may be appropriate for a bench-bar forum and further rule making.[16]

III. The Origins of Massachusetts Rule of Civil Procedure 26(b)(4) and the Federal Background of Expert Depositions

The text of Massachusetts Rule of Civil Procedure 26(b)(4) is taken from Federal Rule of Civil Procedure 26(b)(4),[17] as it existed prior to the 1993 amendments of Federal Rule of Civil Procedure 26. As early as 1975, the Supreme Judicial Court ruled that the construction given to the Federal Rules of Civil Procedure is to be given to the Massachusetts Rules of Civil Procedure, "absent compelling reasons to the contrary or significant differences in content."[18] In determining how Massachusetts Rule 26(b)(4) should be construed, therefore, it is worth looking at the origins and application of its federal counterpart.[19]

It soon became apparent after Federal Rule of Civil Procedure 26(b)(4) was adopted in 1970 that the lack of guidance for a court in exercising its discretion to allow expert depositions was creating remarkable lack of uniformity in applying the rule. As one leading author observed:

> As the reported cases clearly demonstrate, the absence of a standard in both Rule 26(b)(4) and in the Advisory Committee Note, leaves each judge free to decide motions consistent with his personal predilections (called his discretion), as to the proper scope, timing, and manner of further discovery under Rule 26(b)(4)(A)(ii). The rule also leaves each judge free to impose on a moving party whatever prerequisites he desires to further discovery, including a burden of establishing "insuffi-

7. *Id.*

8. HON. PETER M. LAURIAT, ET AL., DISCOVERY § 6.14 (49 Mass. Prac. 2001), states that "[g]enerally speaking, in Massachusetts state court, expert depositions of the adverse party's experts are *not* permitted." *Id.* In the absence of any cited survey data, there is some question whether the practice of the various Massachusetts judges is quite as uniform and definitive as this passage seems to suggest. THE GUIDE TO JUDICIAL PRACTICE IN THE SUPERIOR COURT OF MASSACHUSETTS (Douglas H. Wilkens ed., 2d ed. 1999) contains responses from 57 superior court judges to questions on various areas of judicial practice. The questions on pre-trial procedure include the questions: "Do you generally permit expert depositions?" and "If so, under what circumstances?" In response to these questions, 50 judges indicated a general practice in regard to contested motions seeking expert depositions. Of these judges, 14 responded that they generally permit expert depositions, essentially without qualifications unique to expert discovery (e.g., "When seasonably requested"). In addition, 23 judges responded that they generally permit such depositions, but with various qualifications, such as "adequate showing of need," "not any extreme burden," "depends on the complexity of the case and reasons advanced" and for "good cause." The remaining 13 judges responded that they generally did not allow such depositions, with 11 of those judges indicating exceptions to their general practice, for example, when answers to expert interrogatories were inadequate. *See also* MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL § 8.8.7 (Hon. Paul E. Chernoff & Bruce T. Eisenhut eds. Supp. 2002) ("[A] court is unlikely to deny a party's request for leave to take expert depositions, as long as the moving party agrees to pay a reasonable fee for the expert's time.")

9. *Lozoraitis*, 16 Mass. L. Rptr. No. 32 at 809.

10. *Miller v. Lou's Serv. Station*, 3 Mass. L. Rptr. No. 15, 339 (April 10, 1995).

11. *Lozoraitis*, 16 Mass. L. Rptr. No. 32 at 809-10.

12. *Id.* at 809.

13. *Id.* at 810.

14. *Id.*

15. *Id.*

16. *Id.*

17. MASS. R. CIV. P. 26 (1973) reporter's notes.

18. Rollins Envtl. Services, Inc. v. Superior Court, 368 Mass. 174, 179-80 (1975).

19. Unless otherwise noted, all references to FED. R. CIV. P. 26(b)(4) are to the rule before the 1993 amendments.

ciency," "exceptional circumstances," or "substantial need," and whatever restrictions he desires on the scope, timing, and manner of such discovery.[20]

A view that further discovery of experts should not be unduly hampered by standards not found in the text of the federal rule was set forth in *In re IBM Peripheral EDP Devices Antitrust Litigation*.[21] In that case, the court recognized that the two-step process contained in Federal Rule of Civil Procedure 26(b)(4) "suggests that the court should impose some check on the exercise of its discretion."[22] In determining the nature of the check, the court examined the advisory committee note to the 1970 amendment of Rule 26, which states that:

> Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

In light of that note, the court found that "the purpose behind the requirement of a court order for further discovery in Rule 26(b)(4)(A)(ii) is to insure that the movant's only interest is obtaining information for cross-examination."[23] The court rejected decisions seeking to impose a "substantial need" test for further expert discovery, instead holding that "[t]he court's task in ruling on a motion for further discovery of an expert is . . . to satisfy itself that the procedure is not being abused."[24] In other words, a court should allow a motion for further discovery under Rule 26(b)(4) if it is satisfied that the moving party's interest is limited to obtaining the information needed for cross-examination and not designed to build her own case on the work of an opposing party's expert.

Regardless of what level of protection the various courts imposed under Federal Rule of Civil Procedure 26(b)(4)(A)(ii), the two-step process "did not sit well with a significant portion of the litigating bar."[25] A 1976 survey showed that:

> the actual practice of discovery of expert witnesses expected to be called at trial varies widely from the two-step procedure of Rule 26(b)(4)(A). The interrogatory overwhelmingly is recognized as a totally unsatisfactory method of providing adequate preparation for cross-examination and rebuttal. In practice, full discovery is the rule, and practitioners use all available means of disclosure including both the discovery of expert reports and depositions.[26]

The developments in actual practice under Federal Rule of Civil Procedure 26(b)(4) eventually led to the 1993 amendments to Federal Rule 26,[27] which include provisions for expert reports with mandatory disclosures beyond those required for expert interrogatory answers, as well as the right to depose trial experts.[28]

IV. The Need for Further Discovery of Experts

The evolution of federal practice and eventually rule making to expand the nature and extent of discovery of experts is hardly surprising given the expanded role and use of experts in modern litigation.[29] There are at least three significant considerations that support allowing further discovery of expert witnesses more liberally. First, interrogatory answers typically provide an insufficient basis for preparing to cross-examine an expert. Second, the elimination of the hypothetical question requirement necessitates full exploration of the bases for expert testimony.

20. Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L. F. 895, 930 [hereinafter Graham I]. A similar statement could be made concerning Massachusetts practice based on the 1999 survey of superior court judges. *See supra* note 8.

21. 77 F.R.D. 39 (N. D. Cal. 1977).

22. *Id.* at 41.

23. *Id.*

24. *Id.*

25. CHARLES ALAN WRIGHT, ET AL., 8 FEDERAL PRACTICE AND PROCEDURE 435 (2d ed. 1994) [hereinafter FEDERAL PRACTICE].

26. Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, an Empirical Study and a Proposal*, 1977 U. Ill. L. F. 169, 172 (footnote omitted). The survey was comprised of responses from 48 United States district court judges, 23 United States magistrates, 12 governmental agencies and 139 practitioners. *Id.*

27. FEDERAL PRACTICE, *supra* note 25, at 435.

28. FED. R. CIV. P. 26(a)(2)(B), 26(b)(4)(A).

29. One referral source of experts for litigation, TASA, claims to offer more than 9,500 categories of expertise from Astroturf to zero gravity environments, *at* http://www.tasanet.com/expertis.cfm.

Third, the increased responsibility of the trial court in examining the reliability of expert testimony requires the full disclosure and review of expert theories, preferably before trial. The last two of these considerations arose after Massachusetts Rule of Civil Procedure 26 was adopted in 1973.[30] Each of these considerations is discussed sequentially next.

A. Interrogatory Answers Alone Are Typically Insufficient to Prepare an Effective Cross-Examination of Experts

As recognized in the 1970 advisory committee note to Federal Rule of Civil Procedure 26(b)(4):

> Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Once the need for expert discovery is recognized, the question becomes whether answers to expert interrogatories, drafted by opposing counsel, sufficiently satisfy that need. The answer is typically "no" in practice. As observed in the advisory committee note for the 1993 Amendment of Federal Rule of Civil Procedure 26, information disclosed in response to interrogatories under the former rule "was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert . . . ." That phenomenon would certainly not go unrecognized by most practitioners in the Massachusetts state courts.

Indeed, unless the expert acknowledges at trial that he reviewed and approved the expert interrogatory answers drafted by counsel, the answers are practically useless in cross-examining the expert because the expert is not tied to the answers.[31] As observed by one federal court, "[f]urther expert discovery will undoubtedly permit more effective and pointed cross-examination at trial. . . ."[32] Moreover, it would be naïve — to say the least — to think that expert interrogatory answers will provide any information that exposes areas of bias. As one federal court stated, Federal Rule of Civil Procedure 26(b)(4) should be construed liberally to allow further discovery of expert witnesses, "including information only relevant for impeachment."[33] As the court recognized, precluding expert witness depositions will not prevent cross-examining an expert at trial concerning biases, fees and related matters.[34] Instead, the lack of an expert deposition will more likely lead to a fishing expedition before the jury or a more prolonged, less effective series of questions attempting to show a known bias.

To be sure, one could argue that the *Lozoraitis* decision already allows for further discovery where answers to expert interrogatories "are inadequate, incomplete, inconsistent, or when the discovering party is unable to obtain equivalent information through other means."[35] Nevertheless, what passes as adequate for an interrogatory answer does not give the same insight that a deposition provides into the expert's reasoning or the foundation for the expert opinion. When seeking discovery as to one's reasoning, "a deposition is incomparably preferable to written interrogatories as a vehicle for seeking out useful evidence, not only because of the greater ease in shaping later questions based on earlier answers but also because the interrogatory answers are typically prepared by lawyers rather than through the uncounseled responses of the witnesses."[36]

For example, in regard to an expert testifying about a motor vehicle accident reconstruction, answers to expert interrogatories may simply disclose that the expert bases his testimony on photographs taken at the scene of the accident. Only through deposition, however, will the opposing party learn the specific items or conditions depicted in the photographs upon which the expert relies and the reasoning, based on the photographs, behind the expert opinion. Moreover, only through deposition will the adverse party learn if there are items or conditions

30. The Supreme Judicial Court adopted the Massachusetts Rules of Civil Procedure on July 13, 1973. Delf v. Comm'r of Pub. Welfare, 369 Mass. 345, 346 n.1 (1975). The rules became effective on July 1, 1974. *Id.*

31. This is not to say that the court cannot control the scope of expert testimony by precluding counsel and the expert from going beyond the subject matters, for example, disclosed in answers to expert interrogatories. Unless the expert adopts the interrogatory answers, however, they do not offer a means of impeaching the expert.

32. American Steel Products Corp. v. Penn Cent. Corp., 110 F.R.D. 151, 152 (S.D.N.Y. 1986). *See also* Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303 (E.D. Pa. 1983) (an expert deposition "further reduces the possibility that an expert witness may alter or amend his generalized opinion to fit the evidence presented at trial").

33. Bockweg v. Anderson, 117 F.R.D. 563, 565 (M.D.N.C. 1987).

34. *Id.* at 565-66.

35. *Lozoraitis*, 16 Mass. L. Rptr. No. 32 at 809.

36. Hendricks v. Coughlin, 114 F.3d 390, 394 (2d Cir. 1997).

depicted in the photographs that the expert cannot explain or reconcile with his opinion. Evidence ignored, or that is not known, by an expert can be as important as that relied upon.[37] Finally, because the underlying facts of an accident (or any claim for that matter) are often in dispute, only through deposition will the opposing party be able to determine to what extent the expert's opinion would change if certain contested facts are established at trial.[38]

B. *The Elimination of a Required Hypothetical Question*

In *Department of Youth Services v. A Juvenile*,[39] the Supreme Judicial Court adopted Proposed Massachusetts Rule of Evidence 705, which provides that, "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."[40] The rule eliminates the requirement, but not the availability, of the hypothetical question.[41] Significantly, as the advisory committee's note to Proposed Rule 705 observes, "[t]he thrust of the rule is to leave inquiry regarding the basis of expert testimony to cross-examination, which is considered an adequate safeguard. Expanded discovery techniques are viewed as affording advance knowledge for purposes of cross-examination. *See* Mass. R. Civ. P. 26-37; . . . ."[42] More specifically, as stated in the advisory committee notes to the cognate Federal Rule of Evidence 705, "Rule 26(b)(4) . . . provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of experts."[43] If cross-examination is to serve as an "adequate safeguard" concerning expert testimony and discovery is to provide the means of preparing such cross-examination, then expert discovery should be sufficient to explore fully the expert's opinions and grounds for the opinions. To paraphrase the federal advisory committee notes, the elimination of the hypothetical question requirement rests on the assumption that "substantial discovery" will be available for expert testimony.

C. *Ensuring the Reliability of Expert Testimony*

In *Commonwealth v. Lanigan*,[44] the Supreme Judicial Court accepted "the basic reasoning" of the Supreme Court's *Daubert* decision,[45] "because it was consistent with [the Supreme Judicial Court's] test of demonstrated reliability." The application of *Daubert* to expert testimony and various areas of expertise is beyond the scope of this article. For present purposes and in the simplest terms, *Daubert* is significant in recognizing the trial court's "gatekeeping role"[46] in ensuring the reliability of expert testimony. As explained in *Lanigan*:

> the judge must rule first on any challenge to the validity of any process or theory underlying a proffered opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.[47]

Thus, just as eliminating the required hypothetical question presupposes that the cross-examiner knows the bases for the expert testimony, so does recognizing the trial court's gatekeeping role presuppose that it will have available sufficient information to make the necessary "preliminary assessment" that the expert testimony is both evidentially reliable and relevant. That assessment calls for an analysis of the expert's reasoning and methodology, which interrogatory answers typically will not, by their very nature, disclose in sufficient detail. Expert depositions provide not only a means for counsel to frame

37. *See, e.g.*, Smith v. Bell Atlantic, 2003 WL 1962900, at *4 (Mass. Super. 2003) (expert opinion on the alleged causal relationship between a failure to accommodate and plaintiff's permanent disability should have been excluded because of what the expert did not know about the plaintiff's day-to-day activities).

38. *See* Graham I, *supra* note 20, at 897 n.12 ("the examining attorney clearly would prefer to have prior knowledge as to whether the expert's opinion would differ given variations in assumed facts.").

39. 398 Mass. 516, 532 (1986).

40. *Reprinted in* HON. WILLIAM G. YOUNG, ET AL., MASSACHUSETTS EVIDENTIARY STANDARDS 403 (2004).

41. Advisory committee's note to Proposed Rule 705; HON. PAUL J. LIACOS, ET AL., MASSACHUSETTS EVIDENCE § 7.7.3, at 410 (7th ed. 1999) [hereinafter MASS. EVIDENCE]. With a properly constructed hypothetical question, "alleged facts, evidence of which has previously been introduced or may fairly be expected to be introduced, are summed up by counsel and the expert is asked to state his opinion on the assumption that the alleged facts are true." MASS. EVIDENCE, *supra*, at 410. The hypothetical question necessarily requires counsel to disclose the facts and data on which the expert opinion is based, before the opinion is given.

42. Advisory committee's note to Proposed Rule 705.

43. 1972 advisory committee notes to FED. R. EVID. 705.

44. 419 Mass. 15, 26 (1994).

45. Daubert v. Merrel Dow Pharms., Inc., 509 U.S. 579 (1993).

46. *Id.* at 597.

47. *Lanigan*, 419 Mass. at 26 (internal quotation marks and citation omitted).

Daubert related issues before trial, but also allow the court to make an informed decision on the admissibility of expert testimony, often without the need of an evidentiary hearing or the urgency attendant with a waiting jury.[48]

V. A Proposal for Further Discovery under Massachusetts Rule of Civil Procedure 26(b)(4)(A)(ii)

As suggested in *Lozoraitis*, Massachusetts has probably reached the point where the procedure for discovery of expert testimony under Rule 26(b)(4)(A) would be appropriately reexamined. The Massachusetts rule became effective 30 years ago.[49] There is now a decade's worth of experience to look at in federal practice in regard to the 1993 amendments of Federal Rule of Civil Procedure 26, requiring signed expert reports[50] and the right to expert depositions. Until such a reexamination, however, the framework provided by the court in *In re IBM Peripheral EDP Devices Antitrust Litigation*,[51] discussed earlier,[52] provides a useful starting point for Massachusetts courts to use in determining when to grant further discovery of experts. When ruling on a motion for further discovery under Rule 26(b)(4)(A)(ii), if the court is satisfied that the moving party is not attempting to build his case on the work of the opposing party's expert, the further discovery should ordinarily be allowed. When the further discovery is directed to preparing for cross-examination, allowing such discovery by way of deposition and production of the expert's file helps to ensure that expert opinions and their underlying grounds can be fully explored and minimizes the risk that unreliable expert testimony will find its way to the jury, contrary to the intent of *Lanigan*.

To prevent the unfairness of profiting from the work of an opposing party's expert, the court can typically look to whether, at the time of the request for further discovery, all parties have provided answers to expert interrogatories, pursuant to Rule 26(b)(4)(A)(i).[53] If so, there is ordinarily little risk that the moving party is seeking to use the work of the opposing party's expert to build the moving party's case, especially if the moving party has already designated an expert for trial on the same subject. In practice, answers to expert interrogatories are typically provided by way of supplementation, under Rule 26(e)(1)(B), during the later stages, if not the end, of discovery.[54] The timing of such supplementation, subject to the court's review when ruling on a motion for further discovery, serves to minimize the risk that a party is sitting back and hoping to build his case on an opposing expert's work. The rules also address the cost of such further discovery.

The fee-shifting provision of Rule 26(b)(4)(C) requires the party seeking further discovery to pay the expert a reasonable fee for time spent in responding to the discovery, unless "manifest injustice would result."[55] This provision seeks to prevent the unfairness of a party incurring further expert witness fees for the benefit of the opposing party.[56] Although the court re-

48. *See, e.g.*, Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 154 (1999) ("the transcripts of [the expert's] depositions support both the trial court's initial uncertainty and its final conclusion" to exclude the expert testimony because it failed to meet the requirements of *Daubert*).

49. *See supra* note 30.

50. For most experts appearing at trial, FED. R. CIV. P. 26(a)(2)(B) requires a report prepared and signed by the expert that addresses, among other things, a summary of the expected opinion testimony and supporting grounds, exhibits to be used, qualifications, compensation and a list of cases in which prior testimony has been given. The advisory committee thought that such reports may shorten the length of expert depositions and, in some cases, eliminate the need altogether. 1993 advisory committee note to FED. R. CIV. P. 26(a)(2). Even under current Massachusetts practice, parties often forgo further discovery when expert answers to interrogatories incorporate an expert's report, such as an economist's report addressing lost wages in a personal injury case.

51. 77 F.R.D. 39 (N. D. Cal. 1977).

52. *See supra* text accompanying notes 21-24.

53. *See* 1970 advisory committee note to FED. R. CIV. P. 26(b)(4)(A) ("Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be.")

54. The superior court tracking order discovery deadline requires that all depositions be completed by the deadline, not distinguishing between depositions of fact witnesses and experts. Superior Court Second Amended Standing Order 1-88 (Time Standards) n.9. The duty to supplement under MASS. R. CIV. P. 26(e) continues, however, even after the deadline. *Id.* Where experts and expected testimony are disclosed by supplementation at or after the deadline under MASS. R. CIV. P. 26(e)(1)(B) and the supplementation is deemed by agreement or court order to be "seasonably" made, the tracking order deadline should not, as a matter of fairness and logic, be a basis for denying further discovery of the experts.

55. Certainly, that time includes the time spent testifying and, at least for in-state experts, may sometimes include travel time. Time beyond that, however, may pose certain allocation problems. It is certainly questionable, for example, when the party seeking further discovery is asked to pay for the time the expert spends meeting with opposing counsel or in conducting further research or work in support of his testimony. Such time may be more appropriately characterized as trial preparation time. It is one thing to be asked to pay for the time an expert spends in providing discovery, it is altogether something different to be asked to pay for the trial preparation of an opposing party's expert.

56. U.S. v. The City of Twin Falls, 806 F.2d 862, 879 (9th Cir. 1986); FEDERAL PRACTICE, *supra* note 25, at 467.

tains discretion to prevent such fee shifting to prevent manifest injustice, exceptions will be "rare."[57] In the context of a request to prevent fee shifting, courts have recognized that "manifest injustice" is a "stringent standard."[58] Applying this standard, the "court must exercise restraint while balancing the respective hardships" to the parties.[59] One instance where the court may prevent such fee shifting, for example, is where multiple defendants have identified multiple experts in a case involving an impoverished plaintiff. In such a situation, an order requiring each party to bear the costs for the deposition of that party's expert witnesses may be necessary to prevent manifest injustice.[60] By the terms of Rule 26(b)(4)(C), the amount of the fee shifted must be "reasonable."[61]

Notwithstanding the expert fee-shifting provisions of Rule 26(b)(4), the concerns of expense and delay, raised in *Lozoraitis*, possibly flowing from routinely taking expert depositions should not be overlooked. Indeed, as the court noted, further discovery of experts may lead to even more discovery requests.[62] Nevertheless, finding out in the midst of trial that an expert has insufficient evidentiary support or methodology for a necessary expert opinion also creates needless expense and delays for the parties and the court. Full pretrial disclosure of expert testimony in such circumstances can lead to a more efficient resolution by way of settlement[63] or summary judgment.[64] Moreover, when expert depositions lead to additional discovery, it is often for the same reason that motions for additional discovery, continuances and mistrials are filed during trial: the lack of prior disclosure of an expert opinion or a ground for the opinion. In sum, the absence of adequate expert discovery can also impose costs, both monetary and in terms of reaching a fair and just result.

VI. Conclusion

The absence of a standard to guide the court in allowing or denying requests for further discovery of experts under Rule 26(b)(4)(A)(ii) has resulted in a stated practice of allowing such discovery, if at all, only when answers to expert interrogatories are deemed insufficient in some respect. Answers to expert interrogatories are only a starting point, however, in preparing for the cross-examination of an expert and are typically unsatisfactory alone to complete such preparation. The elimination of the required hypothetical question and the increased role of the trial court in acting as a gatekeeper in regard to expert testimony weigh in favor of liberally allowing further discovery of experts, including by way of deposition. Once the court is satisfied that the moving party is seeking further discovery for the purpose of preparing for cross-examination, and not to build his own case, such discovery should typically be allowed. With that protection, there is no reason to treat an expert differently from a fact witness or party for the purpose of allowing depositions or document discovery.[65] After all, "[t]he pur-

57. *See* Reed v. Binder, 165 F.R.D. 424, 428 (D.N.J. 1996). Although Federal Rule 26(b)(4)(C) "was amended in 1993 to take account of the new provisions adopted regarding testifying experts, . . . [it] retains its basic orientation from the 1970 adoption of Rule 26(b)(4)." FEDERAL PRACTICE, *supra* note 25, at 468 (footnote omitted).

58. Delgado v. Sweeny, No. Civ.A.01-3092, 2004 WL 228962, at *2, (E.D. Pa. Jan 6, 2004); Fisher-Price, Inc. v. Safety 1st, Inc., 217 F.R.D. 329, 330 (D. Del. 2003).

59. *Reed*, 165 F.R.D. at 428.

60. *See, e.g., Reed*, 165 F.R.D. at 425-428. In *Reed*, the multiple defendants had designated six defense experts. *Id.* at 428.

61. Although reimbursement of the expert's fee is constrained by the requirement that it be "reasonable," "[t]he mere assertion that a fee is unreasonable or excessive is not sufficient in most circumstances to establish the point." Routhier v. Hamiltion, 2000 WL 33170794, at *2 (Mass. Super. 2000). Thus, when challenging the reasonableness of an expert fee, counsel should establish a record, for example, of what the expert routinely charges per hour for his or her services, including the hourly fee charged to opposing counsel. As recognized in *Anthony v. Abbott Laboratories*, 106 F.R.D. 461, 465 (D.R.I. 1985):

> In the final analysis, the mandate of Rule 26(b)(4)(C) is not that an adverse expert will be paid his heart's desire, but that he will be paid "a reasonable fee." The ultimate goal must be to calibrate the balance so that a [party] will not be unduly hampered in his/her efforts to attract competent experts, while at the same time, an inquiring [party] will not be unfairly burdened by excessive ransoms which produce windfalls for the [opposing party's] experts.

62. *Lozoraitis*, 16 Mass. L. Rptr. No. 32 at 810.

63. *See* Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303 (E.D. Pa. 1983) ("By deposing the expert witness, trial counsel can far better assess the value of the case. A deposition should improve the prospects of an amicable settlement . . . ."); Henlopen Hotel Corp. v. Aetna Ins. Co., 33. F.R.D. 306, 308 (D. Del. 1963) ("pretrial examination may reveal such major defects in the reasoning and conclusions of the experts of one side or the other as to lead to settlement . . . .") *Daubert* decisions, for example, are often not cut-and-dried. Both sides have to take into account marginal expert testimony in determining whether to try a case.

64. *See, e.g.*, Hicks v. Brox Indus., Inc., 47 Mass. App. Ct. 103 (1999) (upholding summary judgment because the required expert testimony failed to meet the reliability requirements of *Lanigan*).

65. As observed by the court in *Herbst v. International Telephone & Telegraph Corp.*, 65 F.R.D. 528, 530-31 (D. Conn. 1975):

> All but experts may be freely deposed before trial in keeping with the liberal spirit that pervades the federal rules. Once the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently from any other witness.

poses for which the discovery rules exist are to avoid surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify, and frame the issues involved, and to enable a party to obtain the information needed to prepare for trial."[66] Those purposes are no less relevant or important when dealing with expert testimony.[67]

66. GTE Products Corp. v. Stewart, 414 Mass. 721, 725 (1993) (internal quotation marks and citation omitted) (quoting FEDERAL PRACTICE, *supra* note 25, § 2001.

67. *See* Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303 (E.D. Pa. 1983) (Expert depositions result in "a greater likelihood of a fair trial with all the relevant facts presented to a jury for its ultimate decision. It avoids trial by surprise.").