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* J.D. Candidate, Washington & Lee University School of Law, May 2018. I would first like to thank Professor Joan Shaughnessy for her invaluable guidance during the writing process of this Note and the Editorial Board for their patience and perpetual edits. Further, a special thank you to my family and friends for their constant love and support over the years. Last but foremost, I dedicate this Note to my father—Mark Caldwell Lawrence—to whom I owe everything.

I. Introduction

Ponder the plight of William and Patricia Eastman (The Eastmans)—homeowners who unfortunately suffered fire damage to their home on August 30, 2009.[1] The Eastmans found a silver lining in this bleak happenstance and decided to build an addition and remodel their home.[2] There was just one problem—their insurance provider, Allstate Insurance Company (Allstate), refused to comply with the homeowner's fire insurance policy due to a disagreement over the damages calculation.[3] The Eastmans subsequently filed suit on January 9, 2013, claiming breach of contract.[4]

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1. Defendant Allstate's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment at 6, Eastman v. Allstate Ins. Co., No. 14-cv-00703-WQH-WVG (S.D. Cal. Feb. 29, 2016), 2016 WL 1576165.

2. *Id.*

3. *See id.* ("[T]he Eastmans submitted a cost of repair estimate for $1,103,774.00. Allstate's cost of repair estimate was $349,315.19. After considering the dueling estimates, the Neutral Contractor determined that the cost of repair was $718,613.25, a little less than the halfway point between the Eastmans' estimate and Allstate's estimate.").

4. Defendant Allstate Insurance Co.'s Notice of Removal of Civil Action Under 28 U.S.C. § 1441 (Diversity Jurisdiction), Eastman v. Allstate Ins. Co., No.

The Eastmans retained two experts to help with their insurance claim: Mario Zanelli, a contractor, to produce a construction estimate for repairs to their home, and Seb Ficcadenti, an engineer, to produce an engineering report.[5] Allstate issued subpoenas to both, seeking to depose them.[6] Initially, the depositions ran smoothly—Mr. Zanelli recorded six hours and forty minutes of testimony, and Mr. Ficcadenti recorded four hours and forty-five minutes of testimony.[7] Struggles soon materialized, however.[8] After the court granted a joint motion to extend the expert-discovery-cut-off period, Allstate issued two more subpoenas to depose Mr. Zanelli and Mr. Ficcadenti on December 23, 2015; this time, the Eastmans refused.[9] A meet-and-confer failed to resolve the dispute, and the two parties filed joint motions for "Determination of a Discovery Dispute."[10]

In the Eastmans' motion, they contended that Allstate should pay for the experts' time at the deposition *and* time spent in preparing for those depositions,[11] pursuant to Federal Rule of Civil Procedure 26(b)(4)(E)(i).[12] The district court concluded that, due to the ambiguity of the Rule's language, fee-shifting for expert deposition preparation time is required only in extenuating circumstances.[13] As a result, Allstate did not have to pay for Mr. Zanelli and Mr. Ficcadenti's preparation time, putting that billable time on the Eastmans.[14]

3:14CV00703 (S.D. Cal. Feb. 29, 2016), 2014 WL 1373758.

5. Eastman v. Allstate Ins. Co., No.: 14-cv-00703-WQH (WVG), 2016 WL 795881, at *1 (S.D. Cal. Feb. 29, 2016).

6. *Id.* at *2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* FED. R. CIV. P. 26(b)(4)(E)(i) ("Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D).").

13. *See* Eastman v. Allstate Ins. Co., No.: 14-cv-00703-WQH (WVG), 2016 WL 795881, at *6 (S.D. Cal. Feb. 29, 2016) (saying that it is the "exception, not the rule").

14. *See id.* (saying that there was "no evidence . . . as would justify an order" obligating Allstate to reimburse the Eastmans for their experts' preparation

In an interesting turn of events, a generic breach of contract case morphed into an issue that federal district courts have been struggling to tackle for decades[15]—whether Rule 26(b)(4)(E)(i) obligates the party seeking discovery to compensate an expert for his deposition preparation time as "time spent in responding to discovery."[16] Though district courts have been cognizant of the split as far back as the 1990s,[17] federal appellate courts have not fully addressed the issue.[18] This has led to increased confusion and uncertainty in the Rule's application, and many situations similar to the Eastman dispute.

Historically, district courts across the United States have approached Rule 26(b)(4)(E)(i) four different ways. First, there is the approach that preparation time is a natural component of depositions, and that Rule 26(b)(4)(E)(i) intrinsically subsumes preparation time into its language.[19] Second, some district courts have said that Rule 26(b)(4)(E)(i) wholly excludes preparation time.[20] Third, a selection of courts argue that preparation time specifically excludes any time spent with the expert's retaining party, or attorney; but includes the rest of the time as long as it is "reasonable."[21] Finally, a number of courts will shift expert deposition preparation time to the inquiring party only in extenuating circumstances.[22]

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times due to the lack of complexity and lapse in time).

15. *See* Hose v. Chi. & N.W. Transp. Co., 154 F.R.D. 222, 227–28 (S.D. Iowa 1994) (discussing other district courts' interpretations of Rule 26(b)(4)(E)(i)).

16. *Id.* at 224.

17. *See* Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 277 (E.D. La. 2010) ("Federal courts . . . are split on whether the rule allows parties to recoup fees from opposing parties for time spent in preparing for the opposition's depositions.").

18. *See infra* Part IV (describing the district courts approaches to Rule 26(b)(4)(E)(i)).

19. *See* Collins v. Vill. of Woodridge, 197 F.R.D. 354, 357 (N.D. Ill. 1999) ("Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery . . . .").

20. *See* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 637 (C.D. Cal. 2011) ("[I]t seems best to leave the retaining party free to have its expert prepare . . . at its own expense.").

21. *See* Packer v. SN Servicing Corp., 243 F.R.D. 39, 42 (D. Conn. 2007) (avoiding reimbursement for time spent with retained attorney).

22. *See* Brew v. Ferraro, No. CIV.95–615–JD, 1998 WL 34058048, at *2 (D.N.H. Sept. 1, 1998) ("While there may be an exception to the general rule for

To complicate matters even more, district courts are split not only across the circuits, but intra-district as well.[23] As an example, consider two cases that came out of the Eastern District of Missouri in 2005.[24] In May of that year, Judge E. Richard Webber declared that an expert's "preparation time is beyond the purview" of Rule 26(b)(4)(E)(i), reflecting the second approach discussed above.[25] Conversely, just two months later, Judge Stephen N. Limbaugh, Sr. declared—without reference to the previous case—that Rule 26(b)(4)(E)(i) allows a judge to determine, ad hoc, whether preparation time is reasonable or not on a case-by-case basis.[26]

Unfortunately, the difference in decisions and approaches recognized above are not uncommon, and this pattern has created a discernable fracture in the district courts' application of Rule 26(b)(4)(E)(i).[27] Parties who find themselves entangled in this issue are often vulnerable to differing conclusions of law depending upon where the case is pending—be that in the same federal circuit, state, or district.[28]

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complex cases . . . the circumstances here do not warrant a shifting of the costs.").

23. *See* United States v. Cap. Sand Co., No. 4:03CV6623NL, 2005 WL 1668141, at *1 (E.D. Mo. July 18, 2005) (discussing an admiralty case involving a collision of a boat and a dam); Litecubes, LLC v. N. Light Prods., Inc., No. 4:04CV00485 ERW, 2005 WL 6749422, at *1 (E.D. Mo. May 19, 2005) (discussing a damages expert and the plaintiff's motion to depose him).

24. *Cap. Sand Co.*, 2005 WL 1668141, at *1; *Litecubes, LLC*, 2005 WL 6749422, at *1.

25. *See Litecubes, LLC*, 2005 WL 6749422, at *1 (saying that "it is unfair to place the financial burdens of preparing an expert for trial on the shoulders of the opposing party").

26. *See Cap. Sand Co.*, 2005 WL 1668141, at *9 (saying that "pursuant to [Rule 26(b)(4)(E)(i)]" an expert "is entitled to a reasonable fee" from the inquiring party for his deposition preparation time).

27. *Compare* Collins v. Vill. of Woodridge, 197 F.R.D. 354, 357 (N.D. Ill. 1999) ("Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery . . . ."), *with* M.T. McBrian, Inc. v. Liebert Corp., 173 F.R.D. 491, 493 (N.D. Ill. 1997) ("[A]s a general rule, [Rule 26(b)(4)(E)(i)] . . . does not require the party deposing an expert witness to bear the expense . . . unless it involves a complex case . . . .").

28. *Compare* Lent v. Fashion Mall Partners, L.P., 223 F.R.D. 317, 318 (S.D.N.Y. 2004) (stating that Rule 26(b)(4)(E)(i) "clearly contemplates remuneration for time spent responding to discovery requests, which would include reasonable preparation for a deposition"), *with* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 647 (E.D.N.Y. 1997) (stating that a reasonable fee will be included for time spent preparing for deposition by the expert, "but not for the

This Note provides a comprehensive discussion pertaining to Rule 26(b)(4)(E)(i)'s interpretation and application. Part II discusses the Federal Rules of Civil Procedure (Federal Rules), their promulgation and purpose, with emphasis on the history of Rule 26 and subdivision (b)(4).[29] Part III discusses the lack of precedential value of legal decisions rendered by district courts, in contrast to federal appellate court opinions, and how that adversely affects parties in litigation.[30] Part IV discusses the historical approaches federal courts have used in interpreting Rule 26(b)(4)(E)(i).[31] Finally, Part V argues that Rule 26(b)(4)(E)(i) should not be understood, or interpreted, to include deposition preparation time.[32] The Rule's language, its legislative history, and practical concerns warrant a narrow reading of the statute to include only time spent in depositions.[33]

II. The Federal Rules of Civil Procedure

A. History and the Formal Rulemaking Process

In 1934, Congress passed The Rules Enabling Act (Act),[34] which gives the Supreme Court the power to "prescribe general rules of practice and procedure."[35] When the Supreme Court does prescribe such rules, they must not "abridge, enlarge or modify any substantive right."[36] The rules "set forth the procedures for the conduct of court proceedings and serve as a pattern for the procedural rules adopted by many state court systems."[37] As a

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time the expert spent preparing with the attorney who retained him").

29. *See infra* Part II (showing how Rule 26(b)(4) came into existence).

30. *See infra* Part III (outlining the way district courts adhere to stare decisis).

31. *See infra* Part IV (providing the different approaches).

32. *See infra* Part V (highlighting that Rule 26(b)(4)(E)(i) was meant to include only depositions themselves).

33. *See infra* Parts V.A–C (discussing why Rule 26(b)(4)(E)(i) mandates only deposition time).

34. The Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–77 (2000)).

35. 28 U.S.C. § 2072(a) (2012).

36. *Id.* § 2072(b).

37. *Overview for the Bench, Bar, and Public*, U.S. CTS., http://www.

limiting factor, Congress has final authority to either reject, modify, or accept proposed rules, and acceptance can be in the form of acquiescence.[38] The Act is the lynchpin for all the rules of procedure existing today, with scholars noting that it impacts every litigant who passes through the federal litigation system.[39]

Though the Supreme Court has the express power to propose rules, it invariably relies on advisory committees[40] through the Judicial Conference,[41] which is the "principal policy-making body of the U.S. Courts."[42] There are five advisory committees; most relevant to this Note, however, is the Civil Rules Advisory Committee (Advisory Committee).[43] The Judicial Conference appoints the Committee on Rules of Practice and Procedure, commonly referred to as the Standing Committee, which reviews each recommendation by the Advisory Committee.[44]

The formal rulemaking process proceeds as follows: (1) the Advisory Committee considers a proposed rule; (2) the Advisory Committee then issues the proposed rule publicly to garner public

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uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Nov. 26, 2017) [hereinafter *Overview*] (on file with the Washington and Lee Law Review).

38. *See* 28 U.S.C. § 2074(b) (emphasizing that Congress has seven months to make a decision).

39. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 26–27 (2008) (discussing history of the Act); *see also* A. Benjamin Spencer, *"The Importance of Civil Procedure for Access to Justice," with Professor A. Benjamin Spencer*, YOUTUBE (May 13, 2015), https://www.youtube.com/watch?v=Q6RRIlGrk6s (highlighting the vital importance of the Federal Rules).

40. *See* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1061 (1993) (describing the role of the judicial branch in the proposal of such rules).

41. *See* 28 U.S.C. § 2073(a) (2012) (providing the grant of power for the Judicial Conference to appoint such committees); *see id.* § 331 (prescribing the duties of the Judicial Conference).

42. *How the Rulemaking Process Works,* U.S. CTS., http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Nov. 26, 2017) [hereinafter *Rulemaking Process*] (on file with the Washington and Lee Law Review).

43. *See id.* (stating that there are committees for civil and bankruptcy matters, appellate procedure, evidence, and criminal proceedings).

44. *See* 28 U.S.C. § 2073(b) ("Such standing committee shall . . . recommend to the Judicial Conference . . . rules proposed . . . as may be necessary to maintain consistency and otherwise promote interests of justice.").

comment[45] and takes account of those comments; (3) the Advisory Committee then sends the proposed rule to the Standing Committee for review; (4) if the proposed rule is approved by the Standing Committee, the Standing Committee will send it to the Judicial Conference with a recommendation for approval; (5) if approved, the Judicial Conference will send the proposed rule to the Supreme Court, which promulgates the rule; (6) Congress then has seven months to review the rule and intervene at its discretion; and (7) if Congress does not act, the rule becomes effective.[46]

1. The Creation of the Federal Rules of Civil Procedure

In 1935, following the enactment of the Act, the Supreme Court created the Advisory Committee and tasked it with formulating a set of uniform procedural rules.[47] The Advisory Committee consisted of private attorneys, professors, and judges.[48] The Federal Rules it created were subsequently adopted in 1938.[49] The Federal Rules' express purpose is "to secure the just, speedy, and inexpensive determination of every action."[50]

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45. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. § 2073 (2006)) (requiring that proposed rules be issued for public comment); *see also* Nathan R. Sellers, Note, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 337–41 (2011) (discussing the reasoning behind why the law was created to inform the public of proposed rules).

46. *See Overview*, *supra* note 37 (noting that anyone can issue a proposed rule, or change, and suggest it to the Advisory Committee).

47. *See* Sellers, *supra* note 45, at 340 (discussing the intent of the drafters of the original Federal Rules).

48. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961–82 (1987) [hereinafter Subrin, *Historical Perspective*] (providing background on the members of the original Advisory Committee); *see also* Judith Resnik, *Failing Faith: Adjudication Procedure in Decline*, 53 U. CHI. L. REV. 494, 499 n.24 (1986) (stating that the Advisory Committee "was composed of leading lawyers (active in the bar and in politics)").

49. *See* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80 (2006) ("The [Federal Rules] have attracted much general analysis and comment since their adoption in 1938.").

50. FED. R. CIV. P. 1 advisory committee's note to 1938 amendment. The above quote is from the original language of Rule 1 from the 1938 version of the Federal Rules. Since then, Rule 1 has been amended frequently, with its latest

There is extensive scholarship within the legal community on the intent of the original Advisory Committee, with many scholars disclaiming what individual members wanted and what the group agreed upon.[51] It is undisputed, however, that the "core tenets of the Federal Rules" were notice pleading, liberal amendments, and liberal discovery.[52]

B. Discovery, Rule 26(b)(4), and Subdivision (E) and its Amendments

1. The Fallacies Discovery Sought to Ameliorate

Professor Edson Sunderland was the chief architect of the original discovery procedures in the Federal Rules.[53] A strong proponent of liberal discovery, Professor Sunderland believed that, if you alleviate surprise at trial, there will be more efficiency within litigation.[54] His view was that, the more information that

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revision occurring in 2015. *See* FED. R. CIV. P. 1 ("They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

51. *See* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure,* 74 CORNELL L. REV. 270, 274–77 (1989) ("[T]he Advisory Committee apparently had certain objectives . . . . The objectives are complex, subtle, and potentially inconsistent—and each procedural field and Rule had its own discrete history."); *see also* Robert M. Covert, *For James WM. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (calling the Federal Rules a "trans-substantive code of procedure"); Resnik, *supra* note 48, at 508–15 (discussing that the drafters "held a series of assumptions about the kinds of cases litigated in federal court," as well as what might have been the central goals for the Federal Rules); Subrin, *Historical Perspective*, *supra* note 48, at 922 ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.").

52. Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 257 (2008).

53. *See* Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959) ("The reason we so much desired Sunderland's help in this particular field was that it seemed an obvious place where a truly striking advance over existing procedures was indicated, and he by his writings and study had made himself the acknowledged master of this subject."). Charles E. Clark was the Reporter for the original Advisory Committee and advocate of Professor Sunderland's thinking on discovery. *Id.*

54. *See* Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. SOC. SCI. 60, 74 (1933) ("[A] trial which follows an

comes to light, the more "the true nature of the controversy [can] be satisfactorily ascertained"—especially to see where each party stands in relation to one another.[55]

Professor Sunderland looked at the abundance of jurisdictions within the United States and noticed that there were "extraordinarily divergent" discovery procedures.[56] There was the general, pervasive thought that "discovery [was] a dangerous practice which encourage[d] the production of framed-up cases and of fictitious evidence to meet the facts."[57] Additionally, some asserted that, if there were more lenient discovery, "fishing expeditions" would be a natural corollary—quite the opposite of the efficiency Professor Sunderland so strongly advocated.[58] In drafting the original discovery rules, Professor Sunderland rejected that line of thinking.[59] When the Advisory Committee finished fine-tuning the contours of its discovery rules, "virtually every known discovery method" was implemented: "interrogatories, oral depositions, written depositions, document requests, physical and mental examinations, inspection of property, and requests for admissions."[60]

Ultimately, the Supreme Court endorsed liberal discovery in the landmark case of *Hickman v. Taylor*.[61] Justice Murphy, writing

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effective preliminary discovery gains much in efficiency.").

55. Sunderland, *supra* note 54, at 74–75.

56. *See id.* at 75–76 (noting the different types of discovery practices).

57. *Id.* at 76.

58. Edson R. Sunderland, *Foreword* to GEORGE RAGLAND JR., DISCOVERY BEFORE TRIAL, at iii (Callaghan & Co. 1932) ("Hostility to 'fishing expeditions' before trial is a traditional and powerful taboo.").

59. *See* Sunderland, *supra* note 54, at 74 ("Only by a preliminary proceeding in which each party may call upon the other to submit himself and his witnesses to interrogation under oath, can the true nature of the controversy be satisfactorily ascertained.").

60. *See* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 300 (2002) (drafting the discovery rules took place from 1935–37).

61. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (stating that the discovery "rules are to be accorded a broad and liberal treatment"). In *Hickman*, the Court considered whether the then relatively-new discovery rules permitted a party to access oral and written statements of witnesses taken by an adverse party in preparing for possible litigation. *Id.* at 497. On February 7, 1943, the tugboat "J.M. Taylor" sank while it helped tow a "car float" that belonged to the Baltimore & Ohio Railroad across the Delaware River of Philadelphia. *Id.* at 498. Unfortunately, five of the crew members drowned, and J.M. Taylor's owners

for the majority, wrote that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation"[62]—a statement that was strikingly similar to what Professor Sunderland advocated.[63] No longer would the defense of "fishing expeditions" be an impediment to discovery requests.[64] As the *Hickman* case observed: "[Discovery] simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."[65]

2. The 1970 Amendments, Rule 26(b)(4)'s Promulgation, and Pre-Adoption Practices

Despite the advances made in the initial creation of the Federal Rules, it was not until the 1970 Amendments that the Advisory Committee created Rule 26(b)(4).[66] Prior to 1970, it was

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promptly hired attorneys to prepare to defend potential suits. *Id.* One of the attorneys, Fortenbaugh, interviewed the survivors and others about the accident "with an eye towards the anticipated litigation." *Id.* Eventually, claims were made and thirty-nine interrogatories were filed. *Id.* One interrogatory asked to disclose statements taken from the remaining surviving crew members. *Id.* Fortenbaugh answered all interrogatories except that one, claiming privilege in preparation for litigation. *Id.* at 499. The Court reasoned that discovery is to be construed broadly, but it still has its limits, such as bad faith or mere annoyance. *Id.* at 508. The Court stated that it is essential for a lawyer to work with the expectation of privacy from intrusions by opposing parties. *Id.* at 510–11. Only where the lawyer's files contain "relevant and non-privileged facts" that are hidden and are essential to the preparation of one's case will discovery of their files be allowed. *Id.* at 511. In *Hickman*, there was not a strong enough reason for Fortenbaugh's information to be disclosed—the interrogatory was "only a naked, general demand." *Id.*

62. *See id.* at 508 (limiting the discovery to conduct not in bad faith "or in such a manner as to annoy, embarrass, or oppress the person subject to the inquiry").

63. *See supra* notes 53–55 and accompanying text (noting the benefits of both parties having as much knowledge about the nature of the controversy as possible).

64. *See Hickman*, 329 U.S. at 507 (saying that there are, indeed, boundaries to such discovery, but still lenient nonetheless).

65. *Id.*; *see also* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 38 B.C. L. REV. 691, 692 (1998) (discussing "why and how" the change in view of discovery occurred).

66. *See* FED. R. CIV. P. 26 advisory committee's note to 1970 amendment (dealing with discovery of information from an expert retained by the adversarial party). There is a multitude of scholarship on Rule 26(b)(4) and its initial

common practice to deny discovery of the information provided by the adversarial party's retained expert. Early cases submitted three reasons for the non-disclosure: (1) the work-product doctrine,[67] (2) the attorney-client privilege,[68] and (3) its overall inherent unfairness.[69] The 1970 Advisory Committee repudiated the first two justifications and adopted the research of Professors Jack Friedenthal and Jeremiah Long.[70]

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promulgation. The 1970 Advisory Committee notes expressly reference Jack H. Friedenthal and Jeremiah M. Long as the main sources for their reasoning and decisions. *See generally* Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962) (discussing jurisdictions' reluctance to allow discovery of expert information); Jeremiah M. Long, *Discovery and Experts*, 38 F.R.D. 111 (1965/1966) (same). Throughout this section, points of reference can be made to Professors James Hayes and Paul Ryder, Jr. for their background work on Rule 26(b)(4) as well. *See generally* James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. MIAMI L. REV. 1101 (1988) (formulating a comprehensive tabulation of Rule 26(b)(4)).

67. *See* United States v. McKay, 372 F.2d 174, 176–77 (5th Cir. 1967) (discussing that the appraisal report prepared by the expert witness in anticipation of tax litigation constitutes work product); *see also* Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257, 262 (D. Neb. 1959) ("[R]eports which an expert has submitted to counsel in preparation of the case for trial is a request for the attorney's work product."); Colden v. R.J. Schofield Motors, 14 F.R.D. 521, 522 (N.D. Ohio 1952) (using the precedent set out in *Hickman* to analyze whether the expert's report should be discoverable).

68. *See* Am. Oil Co. v. Pa. Petroleum Prods. Co., 23 F.R.D. 680, 685–86 (D.R.I. 1959) (stating that an expert's conclusions are held under the attorney-client privilege); *see also* Schuyler v. United Air Lines, Inc., 10 F.R.D. 111, 113 (M.D. Pa. 1950) (denying a request for productions of documents prepared by the Massachusetts Institute of Technology); Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 684, 687 (D. Mass. 1947) ("To permit parties to examine the expert witnesses of the other party . . . where the evidence nearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 1 . . . .").

69. *See* United States v. 23.76 Acres of Land, 32 F.R.D. 593, 597 (D. Md. 1963) ("By the more modern and better-reasoned cases, discovery in this area, if denied, is denied on the ground of unfairness . . . ."); *see also* Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940) ("To permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor."); Roberson v. Graham Corp., 14 F.R.D. 83, 84 (D. Mass. 1952) (seeking to interrogate an expert witness concerning his opinions is "impossible" in the absence of "special circumstances" because it would be "unfair" to the retaining party (citing Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593, 594 (D. Mass. 1941))).

70. *See* FED. R. CIV. P. 26(b)(4) advisory committee's note to 1970 amendment

Under the work-product doctrine[71] and the attorney-client privilege,[72] the early rationale was that disclosing expert information was akin to "making use of an adversary's trial preparation."[73] The policy was that, "retaining, advising and conferring" with one's expert makes them the agent of the attorney, "or in effect co-counsel to whom protection should extend."[74] Friedenthal and Long, however, argued that an expert's opinions and conclusions were analogous to evidence, rather than communication.[75] Thus, pre-trial discovery should not automatically bar experts from disclosure because parties have a legitimate need to conduct a thorough cross-examination of witnesses.[76] The Advisory Committee notes added that expert cross-examination "requires advance preparation."[77] The idea that cross-examination preparation would occur for the first time during trial would "produce[] in acute form the very evils that discovery [was] created to prevent."[78]

From a perspective of fairness, courts were wary that parties would take advantage of the other party without having incurred

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("For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, . . . Long . . . ."); Friedenthal, *supra* note 66, at 455 (discussing expert restrictions in discovery); Long, *supra* note 66, at 112 (same).

71. First described in *Hickman* and codified in 1970, the work-product doctrine, Rule 26(b)(3), generally restricts discovery of documents or other tangible things prepared in anticipation of litigation. *See* FED. R. CIV. P. 26(b)(3) (granting discovery only if inquiring party substantially needs such information and has no other way, or will undergo undue hardship, to obtain the same or similar information).

72. The attorney-client privilege protects communication between an attorney and his client, if the communication was intended to be kept confidential and made to provide or receive legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976).

73. Long, *supra* note 66, at 117.

74. *Id.* at 140.

75. *See* Friedenthal, *supra* note 66, at 473 ("The conclusions of an expert are as much a part of the evidence as are his observations. Indeed his observations are controlled by his expertise which dictates the nature and direction of his inquiry."); Long, *supra* note 66, at 141 ("Unlike an attorney's, client's or investigator's recollection of potentional [sic] witnesses' conversations or even the statements obtained from potential witnesses, expert information in the form of opinions and conclusions and the support therefor constitute evidence.").

76. Friedenthal, *supra* note 66, at 465–66.

77. FED. R. CIV. P. 26(b)(4) advisory committee's note to 1970 amendment.

78. *Id.*

the same expense.[79] Friedenthal and Long argued that this was a legitimate reason to restrict discovery of expert information. They advanced two theories: (1) such information "constitute[d] property" of the expert and subsequently of the party who bought it,[80] and (2) pre-trial disclosure would promote an atmosphere of laziness.[81]

Pursuant to the property concept, courts went in two directions.[82] The majority view was that a party could subpoena any expert to testify like ordinary witnesses concerning their general knowledge.[83] The expert could not, however, be required to prepare himself beyond his current knowledge without just compensation.[84] The minority view, on the other hand, declared that a party could not require an expert to testify, like any layperson, as to his expert opinions and conclusions unless he received payment.[85] Professor Friedenthal analogized expert

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79. *See supra* note 69 (providing case law with parentheticals briefly highlighting the unfairness rationale).

80. Friedenthal, *supra* note 66, at 479; *accord* Long, *supra* note 66, at 130–31 ("Implicit in this view is the assumption that a property interest in favor of the party or the expert exists in the expert's opinions.").

81. *See* Friedenthal, *supra* note 66, at 480–81 ("[U]nlimited discovery would promote laziness and would permit parties to jockey for position by outwaiting each other before hiring experts."); Long, *supra* note 66, at 123 (making use of opponent's trial preparation).

82. *See* Friedenthal, *supra* note 66, at 479–81 (discussing the expert property concept); Long, *supra* note 66, at 130–39 (same). Professors Friedenthal and Long both discussed this extensively; case law will proceed with this discussion.

83. *See* San Francisco v. Superior Court of S.F., 37 Cal. 2d 227, 233–34 (1951) (saying that a doctor who tried to assert privilege personal to himself is denied because he is like any other witness); *see also In re* James' Estate, 10 Ill. App. 2d 232, 238 (1956) (discerning no difference between ordinary and expert witnesses).

84. *See* Early v. Shelter Ice Cream Co., 150 S.E. 539, 541–42 (W. Va. 1929) (discussing that a physician can demand extra compensation if the services are of the kind "not falling within the role . . . of an ordinary witness"); *see also* Gordon v. Conley, 78 A. 365, 366–67 (Me. 1910) (discussing whether an expert should receive additional compensation).

85. *See* Walsh v. Reynolds Metal Co., 15 F.R.D. 376, 378–79 (D.N.J. 1954) (saying that fairness dictates that the property interest in the expert's knowledge can be dispensed only if the inquiring party pays for it); *see also* People v. Kraushaar Bros., 296 N.Y. 223, 225 (1947) ("We think the better rule is not to compel a witness to give his opinion as an expert against his will."); Pa. Co. for Insurances on Lives & Granting Annuities v. Philadelphia, 105 A. 630, 630 (Pa. 1918) ("The process of the courts may always be invoked to require witnesses to appear and testify to any facts within their knowledge; but no private litigant has a right to ask them to go beyond that.").

knowledge as "like any other merchant's stock in trade."[86] This minority viewpoint was grounded on three points. First, equating an expert to an ordinary witness can lead certain experts to be empaneled more often than less desirable experts.[87] Second, as a practical matter, experts are more often than not forced to prepare to answer all the necessary questions.[88] Third, though witnesses can be individuals who happen to be experts, Professor Friedenthal pointed out that, in certain circumstances, an expert's "testimony as to the 'facts' in such cases often will indicate his expert opinions and conclusions"—leading to the inevitable homogenization of his expertise and mere factual experiences.[89]

Under the laziness critique, Professors Friedenthal and Long saw that, if expert discovery was readily available, parties could take advantage of the adversarial party's trial preparation.[90] Particularly less-active litigants could use that expert information to help receive favorable testimony at trial, promulgate trial strategies, and "lay the foundation for cross-examination in case the expert was called to testify."[91] The argument in favor of discovery was that the benefits of cross-examination outweighed any unfairness that would come about "in terms of time, effort, and money."[92] Professor Friedenthal noted that the natural consequence of cross-examination, however, is that it may lead to direct support of the inquiring party's case.[93] But, Friedenthal

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86. Friedenthal, *supra* note 66, at 480.

87. *See* Buchman v. State, 59 Ind. 1, 13–14 (1877) (providing an argument that "physicians or surgeons" may be compelled to give their opinions in "any part of the State, at any and all times").

88. *See Kraushaar Bros.*, 296 N.Y. at 225 (putting emphasis on "callings where highly specialized knowledge is essential," which require preparation so as to avoid the optics of ignorance).

89. Professor Friedenthal spoke of a "doctor" called to testify for treatment of a litigant for injuries. Friedenthal, *supra* note 66, at 481. Though the doctor is treated as an ordinary witness, certain observed facts can arise only because of his training and expertise. *Id.* In this scenario, the doctor's testimony would run the risk of eliding ordinary facts and expert opinion.

90. *Id.* at 479; Long, *supra* note 66, at 123.

91. Friedenthal, *supra* note 66, at 483.

92. *See id.* at 487 ("The ultimate requirement that judicial decisions be based on the true facts overcomes any detriment which might be suffered by the adversary system.").

93. *See id.* ("[T]he obvious objection to permitting unlimited discovery for cross-examination is that it is impossible to divorce information for purposes of

opined, a court can control only "the introduction of evidence at trial," not its utilization.[94] In the end, as Friedenthal explains, the benefits of cross-examination of expert witnesses cannot be downplayed: "The ultimate requirement that judicial decisions be based on the true facts overcomes any detriment which might be suffered by the adversary system."[95]

Using Friedenthal and Long's research as a foundation, the 1970 Advisory Committee modeled the initial version of subdivision 26(b)(4) on a procedure used by Chief Judge Thomsen in *Knighton v. Villiam & Fassio*.[96] Judge Thomsen's order reads as follows:

> A party, by means of interrogatories served under Rule 33, . . . a reasonable time prior to trial, may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert will testify. The party who served the interrogatories may proceed by any appropriate method to discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter and not privileged. It is so ordered in this case.[97]

Additionally, the court mandated the inquiring party to pay the expert's reasonable fees for "time spent in responding to

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impeachment from information to be used in direct support of the discoverer's own case.").

94. *See id.* ("A court . . . cannot prevent the use of information, ostensibly obtained for cross-examination only, to provide new approaches or to collect data which can be utilized by the discoverer's experts but which information was obtained only after considerable calculation and expense to the adverse party.").

95. *Id.*

96. *See* Knighton v. Villiam & Fassio, 39 F.R.D. 11, 13–14 (D. Md. 1965) (discussing the rule in the case). In *Knighton*, the court considered whether certain interrogatories asking about a defendant's experts could go unanswered. *Id.* at 13. A longshoreman was struck by a "draft" while on the ship owner's vessel. *Id.* at 12–13. The longshoreman brought suit claiming negligence and the unseaworthiness of the vessel. *Id.* at 13. The longshoreman submitted various interrogatories, with the ones in question pertaining to, *inter alia*, the defendants' expert medical authority, whether or not said expert would testify, and the expert's findings, opinions, and conclusions. *Id.* at 14. The court promulgated a new procedure to better handle expert discovery discrepancies. *Id.* at 13. The court then sustained the unanswered interrogatories using the new procedure. *Id.* at 14.

97. *Knighton*, 39 F.R.D. at 13.

discovery,"[98] including depositions.[99] The court made clear, however, that inquiring parties could not use the depositions to "conduct a preliminary cross-examination" to develop impeachment material or to obtain facts other than what the expert has been retained for.[100]

The 1970 version of Rule 26(b)(4) had three components.[101] First, subdivision (b)(4)(A) gave a party the right to issue interrogatories to ascertain "each person whom the other party expect[ed] to call as an expert witness at trial."[102] Additional discovery requests concerning expert information needed court approval.[103] Second, subdivision (b)(4)(B)—disclosure of facts and opinions of a non-testifying expert who is "retained or specially employed" in "anticipation of litigation, or preparation for trial"—was held to a stricter standard.[104] Only upon a showing of "exceptional circumstances," or as provided in Rule 35(b), could the party seeking discovery get that expert information.[105] Third, subdivision (b)(4)(C) obligated the court to require the inquiring party to pay the expert a reasonable fee for "time spent in

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98. *Id.* at 14.

99. *See id.* at 13 n.2 ("Depositions upon Oral Examination . . . [and] Depositions of Witnesses upon Written Interrogatories . . . .").

100. *Id.* at 13–14. There has been much discussion regarding the *Knighton* approach and the approaches suggested by Professors Friedenthal and Long; because the 1970 Advisory Committee notes acknowledge all three, for the purposes of this Note, it is not necessary to delve into the differences. *See* 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, 907–08 (discussing *Knighton* in relation to Professors Friedenthal and Long); *see also* Hayes & Ryder, Jr., *supra* note 66, at 1114–15 (same).

101. *See* Hayes & Ryder, Jr., *supra* note 66, at 1116 (providing the 1970 version of Rule 26(b)(4)).

102. *See id.* (mandating that it must "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").

103. *See id.* (furthering discovery under subdivision (b)(4)(A)(i) was limited to the judge's discretion "subject to such restrictions as to scope and such provisions, pursuant to" the fee-shift rule).

104. *Id.*

105. *See id.* (showing that exceptional circumstances required that the effort to be taken would be "impracticable for the party . . . to obtain facts or opinions on the same subject or by other means"). Rule 35(b) governs examiner's reports and when they can be requested. FED. R. CIV. P. 35(b).

responding" to further discovery that was outside the scope of interrogatories.[106]

The new provision embodied what Professors Friedenthal and Long suggested, and what the *Knighton* court ordered in 1965.[107] Subdivision (b)(4) was crafted to counteract the "fear that one side will benefit unduly from the other's better preparation."[108] Specifically, subdivision (b)(4)(C)[109] was the first federally codified rule concerning fee-shifting for expert discovery in the Federal Rules. The 1970 Advisory Committee notes justified the fee-shifting provision by saying that it is "unfair to permit one side to obtain without the cost the benefit of an expert for which the other side has paid, often a substantial sum."[110]

3. The 1993 Amendments

After the 1970 amendments, although expert information became somewhat easier to garner, access to expert information was still limited.[111] The 1993 amendments substantially changed the discovery procedures for expert information.[112] The 1993

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106. *See* Hayes & Ryder, Jr., *supra* note 66, at 1116 ("[T]he court shall require that the party seeking discovery pay the expert a reasonable fee from spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule . . . ." (citation omitted)).

107. *See supra* notes 66–95 and accompanying text (discussing pre-subdivision (b)(4) expert discovery procedures); Knighton v. Villiam & Fassio, 39 F.R.D. 11, 13 (D. Md. 1965) (stating that the initial rule subdivision (b)(4) was eventually based on).

108. FED. R. CIV. P. 26(b)(4) advisory committee's note to 1970 amendment.

109. *See infra* Part II.B.5 (discussing the 2010 amendments and how subdivision (b)(4)(C) became the contemporary (b)(4)(E)).

110. *See* FED. R. CIV. P. 26(b)(4)(C) advisory committee's note to 1970 amendment (citing Lewis v. United Air Lines Trans. Corp., 32 F. Supp. 21 (W.D. Pa. 1940); Walsh v. Reynolds Metal Co., 15 F.R.D. 376 (D.N.J. 1954)).

111. *See* CIVIL RULES ADVISORY COMM., SEPT. 7-8 MINUTES, at 15 (2006), http://www.uscourts.gov/sites/default/files/fr_import/CV09-2006-min.pdf [hereinafter COMMITTEE MINUTES] (discussing the rationale behind expanding expert discovery).

112. *See* Katherine A. Rocco, Note, *Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure: In the Interest of Full Disclosure?*, 76 FORDHAM L. REV. 2227, 2232 (2008) ("While the 1970 amendments made the Rules more uniform, it was not until after 1993 that Rule 26 took on its current significance."); *see also* Mathew Diller, *The Impact of the 1993 Amendments to the Federal Rules of Civil Procedure*, 28 CLEARINGHOUSE REV. 134, 134 (1994) ("The revisions contain the

amendments acknowledged that interrogatories were "frequently so sketchy and vague that [they] rarely dispensed with the need to depose the expert."[113] The Advisory Committee was concerned that the expert information procedures put in place in 1970 were not achieving the level of efficiency and fairness for which they were created.[114] Thus, the Advisory Committee added new provisions to Rule 26 and subdivision (b)(4).[115] Two of the major changes, for the purposes of this Note, were the provisions for expert-written reports and the availability of depositions.[116]

The first major change was Rule 26(a)(2)(B), requiring expert written reports.[117] Prior to 1993, only interrogatories could be used, without court permission, to get the subject matter of the expert's testimony under Rule 26(b)(4).[118] After the 1993 amendments, certain disclosures were to be made automatically in advance of trial; the disclosures concerned only those experts "retained or specially employed to provide expert testimony."[119] The purpose of the report requirement was to provide a "reasonable opportunity to prepare for effective

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most seeping alterations of the discovery process since the initials promulgation of the rules in 1938."); Sundeep Patel, *The New Rule 26: Must Attorneys Disclose Opinion Work Product?*, 3 BUS. L. BRIEF. (AM. U.) 53, 53 (2007) (addressing the changes in expert disclosure after and prior to the 1993 amendments).

113. *See* FED. R. CIV. P. 26 advisory committee's note to 1993 amendment (going so far as to say that the interrogatories did not help even the preparation for deposition).

114. *See id.* (noting that the "information explosion of recent decades" substantially increased the cost of discovery and could be used for "delay or oppression").

115. *See id.* (discussing the new expert written report requirement, and the availability of depositions for subdivision (b)(4)).

116. *See id.* (stating the amendments were meant to "accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information").

117. *See id.* (stating the reports were "intended to set forth the substance of the direct examination," reflecting the potential testimony to be given).

118. *See* Hayes & Ryder, Jr., *supra* note 66, at 1116 (providing the 1970 version of Rule 26(b)(4)); *see also* Patel, *supra* note 112, at 53 ("Before the 1993 amendments, parties were limited to traditional discovery methods such as interrogatories in obtaining information from . . . testifying experts.").

119. *See* Patel, *supra* note 112, at 54 ("The material that is provided by each expert is known as the expert's report, and it must be disclosed without the need for any discovery requests.").

cross[-]examination,"[120] eliminate surprise to the opposing party, and conserve expenditures.[121] The Advisory Committee hoped that the reports would "at least focus and expedite the deposition, and even avoid any need" for them in some cases.[122]

The second major change was the newly revised Rule 26(b)(4) and its inclusion of a right to depose the adverse party's testifying expert without the need for a court order.[123] As a caveat, parties could not depose the expert until the expert provided the written report.[124] The Advisory Committee noted that the change was because, in most courts, "depositions of experts [had] become standard."[125]

The Advisory Committee updated Rule 26(b)(4)(C),[126] but kept the same language "to take account of the changes" of subdivision (b)(4)(A).[127] The Advisory Committee tried to dispel any concerns about the right to depositions by stating that deposition costs "should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition."[128]

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120. FED. R. CIV. P. 26(a)(2)(B) advisory committee's note to 1993 amendment.

121. *See* Reed v. Binder, 165 F.R.D. 424 (D.N.J. 1996) ("The test of a report is whether it was sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.").

122. COMMITTEE MINUTES, *supra* note 111, at 15; *accord* Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 MINN. L. REV. 1345, 1371 (1994) ("The amendments to the Rules [were] designed to provide litigants with enough information through the reports so that a subsequent deposition can focus economically and efficiently on points that need elaboration.").

123. *See* Patel, *supra* note 112, at 54 ("[A]llows a party to depose the opposition's expert . . . .").

124. *See* FED. R. CIV. P. 26(b)(4)(A) advisory committee's note to 1993 amendment ("[T]he deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.").

125. *Id.*

126. *See infra* Part II.B.5 (discussing the 2010 amendments and subdivision (b)(4)(E)'s appearance).

127. FED. R. CIV. P. 26(b)(4)(C) advisory committee's note to 1993 amendment.

128. *Id.*

4. The 2007 Amendments

In 2007, the Federal Rules went through a "general restyling."[129] The restyling was an attempt by the Advisory Committee to make the Federal Rules easier to understand.[130] Rule 26 was not the only rule impacted; as a whole, the Federal Rules' language changed in some shape or form, or were displaced altogether.[131] No substantive changes or effects were "intended," but merely meant as aesthetic adjustments.[132]

Subdivision (b)(4)(C)'s structure was modified, and some of the language was changed. Thus, restructured subdivision (b)(4)(C) became:

> (C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:
>
> (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
>
> (ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonable incurred in obtaining the expert's facts and opinions.[133]

Besides subdivision (b)(4)(C)'s general restructuring, the changes from 1993 to 2007 do not stand out, but they do provide more clarity. One change, among others, was that the language was altered from "the court *shall* require" to "the court *must* require," in regard to the inquiring party paying the expert a reasonable fee.[134]

Perhaps the most substantial of the changes was when a party could act upon subdivision (b)(4)(C)'s fee-shift requirement. In 1993, subdivision (b)(4)(C) stated that the expert would receive a reasonable fee for time spent responding to discovery "under this subdivision."[135] After the 2007 amendments, that phrase changed

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129. FED. R. CIV. P. 26 advisory committee's note to 2007 amendment.

130. *See id.* ("[T]o make them more easily understood and to make style and terminology consistent throughout the rules.").

131. *Id.*

132. *See id.* ("[S]tylistic only.").

133. FED. R. CIV. P. 26(b)(4)(C) advisory committee's note to 2007 amendment.

134. *Id.* (emphasis added).

135. Hayes & Ryder, Jr., *supra* note 66, at 1116.

to "under Rule 26(b)(4)(A) or (B)."[136] Even though the Advisory Committee did not intend substantive changes to the Federal Rules, a small number of recent court cases have said that this alteration narrows an expert's reasonable fee to depositions only, rather than to other "compensable expert activities."[137]

5. The 2010 Amendments

In the 2010 amendments, some additions were made to subdivision (b)(4).[138] Subdivision (b)(4)(B), "Protection for Draft Reports or Disclosures," provides work product protection for drafts of expert reports.[139] Subdivision (b)(4)(C), "Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses," protects as work-product communications between counsel and expert, save for three exceptions.[140]

The Advisory Committee noted that, after the 1993 amendments, "courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports."[141] This led to a rise in costs and a "guarded attitude" by counsel toward their interactions with their experts, stymieing effective communication.[142]

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136. FED. R. CIV. P. 26 advisory committee's note to 2007 amendment.

137. *See* Young v. Liberty Mut. Grp., Inc., No. CV-12-02302-PHX-JAT, 2015 WL 12669890, at *1 (D. Ariz. Jan. 8, 2015) ("Rule 26(b)(4)[(C)] limits mandatory compensation of expert witnesses to the limit spent in relation to depositions."); *accord* Nester v. Textron, Inc., 1:13–CV–920 RP, 2016 WL 6537991, at *2 (W.D. Tex. Nov. 3, 2016) ("Amendments . . . in 2007 narrowed the rule, changing it from requiring payment for any time a testifying expert spent responding to any discovery under Rule 26(b), to only requiring payment for time a testifying expert spent responding to discovery under Rule 26(b)(4)(A), which covers depositions.").

138. *See* FED. R. CIV. P. 26 advisory committee's note to 2010 amendment (addressing concerns regarding excessive expert discovery of privileged information).

139. FED. R. CIV. P. 26(b)(4)(B).

140. The three exceptions are discussions (1) relating to "compensation for the expert's study or testimony;" (2) identifying facts or data that the retaining attorney provided and the expert considered in formulating the opinions to be expressed; or (3) involving assumptions that the retaining attorney provided and that the expert considered in formulating the opinions to be expressed. *Id.* 26(b)(4)(C).

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

142. *See* FED. R. CIV. P. 26 advisory committee's note to 2010 amendment

Subsequently, former subdivision (b)(4)(C) became (b)(4)(E).[143] The Advisory Committee said virtually nothing of substantive value pertaining to new subdivision (b)(4)(E)—only that a "slight revision has been made in (E) to take account of the renumbering of former (B)," which became (D).[144]

III. District Courts and Their Own Precedent

As briefly mentioned above, conflicting intra-district court decisions pertaining to deposition preparation time under Rule 26(b)(4)(E)(i) are not uncommon.[145] Parties can be vulnerable to differing conclusions of law that depend upon which district judge is presiding over their case in that particular district.[146] In highlighting those discrepancies, this section will examine the doctrine of stare decisis and discuss the federal district courts' attitude towards district court legal precedent.[147]

A. The Doctrine of Stare Decisis

The relationship between federal district courts, appellate courts, and the Supreme Court can be described as a system of vertical precedent—the rule that lower courts must abide by higher courts' rulings.[148] But, what happens when there are conflicting decisions within the same circuit court, or the same district court? What about differing interpretations of a statute

("[L]eading to undesirable effects.").

143. *Id.*

144. *Id.*

145. *See supra* notes 23–26 and accompanying text (discussing an Eastern District of Missouri intra-district split that was created over a two-month span).

146. *See supra* notes 23–26 and accompanying text (stating that Judge Webber had one interpretation, then two months later Judge Limbaugh had a differing interpretation, within the same district).

147. *See infra* Parts III.A–B (discussing federal courts and their obligations to precedent).

148. *See* Joseph W. Mead, *Stare Decisis in the Inferior Court of the United States*, 12 NEV. L.J. 787, 790 (2012) ("[T]he practice of a lower court adhering to the decisions of courts with supervisory jurisdiction, or courts 'with the power to reverse' the judgment." (quoting Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179 (2006))).

between district court judges within the same district? How do disagreements among judges in a federal court affect the parties within those courts? The answer to these inquiries are governed by what is known as the doctrine of stare decisis.

Stare decisis emerged from the development of English common law.[149] Short for "*stare decisis et non quieta movere*"[150]—stand by the thing decided and do not disturb the calm—stare decisis is ubiquitous throughout the U.S. federal judicial system.[151] The Supreme Court has said that stare decisis is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."[152] It can also be described as a "doctrine through which courts use opinions not merely to resolve cases, but also to make law in the form of . . . presumptively binding precedents."[153] To put it generally, stare decisis "refers simply to a court's practice of following precedent, whether its own or that of a superior court."[154] There are two types of stare decisis: vertical and horizontal.[155]

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149. *See* James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986) (discussing the history of stare decisis and its creation through English common law).

150. *Id.* (emphasis added).

151. *See* Honorable Edward D. Re, Chief Judge, U.S. Customs Ct., Speech at a Seminar for Federal Appellate Judges (May 13–14, 1975) (discussing the function of stare decisis in attaining "two seemingly contradictory goals" of the judicial process: stability and change).

152. Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

153. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 956 (2005). There have been numerous ways in which stare decisis has been defined. *See* Mead, *supra* note 148, at 788 ("[W]here the decisions of the past control of the future."); *see also* Or. Nat. Desert Assoc. v. U.S. Forest Serv., 550 F.3d 778, 782 (9th Cir. 2008) (being "bound by earlier published decisions of our court"); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 411 (2010) (stating that stare decisis is an "analytical system used to guide the rules of decision for resolving concrete disputes that come before the courts").

154. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003).

155. *See* Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 649 (2000) (discussing the difference between vertical and horizontal stare decisis and the Supreme Court's use of horizontal stare decisis in the issuance of its own decisions).

Vertical stare decisis is the practice of lower courts adhering to the decisions of higher courts.[156] Vertical stare decisis applies when the Supreme Court or appellate courts make decisions and mandates that lower courts follow such decisions.[157] Circuit court decisions bind district courts within that circuit,[158] and Supreme Court decisions bind all lower courts.[159]

Horizontal stare decisis, on the other hand, is the action of a court following its own precedent, rather than a decision of a higher court.[160] Horizontal stare decisis can be thought of in terms of policy.[161] Federal appellate courts are technically not "inexorably command[ed]"[162] by their prior decisions; however, they normally abide by horizontal stare decisis for policy and functional reasons.[163] Some of the rationales include uniformity, stability and certainty in the law;[164] historical and pragmatic considerations;[165]

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156. *See* Barrett, *supra* note 154, at 1015 (following "the precedent of a superior court").

157. *See* Thurston Motor Line, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) ("[O]nly this Court may overrule one of its precedents.").

158. *See* Mead, *supra* note 148, at 807 n.149 ("If there is a federal district court standard, it must come from the Court of Appeals . . . each of whom sits alone and renders decisions not binding on the others." (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430 n.10 (1996))); *see also* Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179 (2006) ("[D]istrict courts in a given circuit are bound by the decision of the circuit in which they sit . . . .").

159. *See* Hutto v. Davis, 454 U.S. 370, 374–75 (1982) ("[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress.").

160. *See* Mead, *supra* note 148, at 794 ("Most circuits have gone further than the Supreme Court and adopted very strong rules of *intra-court* stare decisis for panel decisions." (emphasis added)).

161. *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[P]olicy judgment that in 'most matters it is more important that the applicable rule of law be settled than that it be settled right.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

162. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932).

163. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1361 (1988) (stating that judges will not overturn precedent "unless clearly convinced that the rule was originally erroneous or is no longer sound").

164. *See id.* (refusing to follow precedent "because of changed conditions and that more good than harm would come by departing from precedent").

165. *See* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Case,* Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 57–81 (discussing the Supreme Court's considerations in binding itself to its prior decisions).

cost-saving functions;[166] and the overall "presumption that [a court's] prior judicial articulations of the law are correct."[167]

Though horizontal stare decisis is usually viewed in reference to the Supreme Court,[168] federal appellate courts have developed a doctrine of horizontal stare decisis as well—called the "law of the circuit."[169] The law of the circuit declares that a decision by a three-judge panel is binding on subsequent panels of that court.[170] The only way to overrule a three-judge panel's decision is to have the circuit court sit en banc, or have a contravening opinion by the Supreme Court.[171]

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166. *See* Lee, *supra* note 155, at 648 (conserving "public and private litigation expenses" by preventing the "constant reconsideration of settled questions").

167. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 65 (1993).

168. *See* Consovoy, *supra* note 165, at 57 (discussing stare decisis in relation to the Supreme Court).

169. *See* Walter V. Schaefer, *Reliance on the Law of the Circuit—A Requiem*, 1985 DUKE L.J. 690, 691 (1985) (discussing the law of the circuit and its consequences); *see also* Mead, *supra* note 148, at 789 (providing background on the "law of the circuit"). Circuit court horizontal stare decisis has also been termed "inter-panel accord." *See* Sullivan, *supra* note 158, at 1180 (discussing its conceptual questions raised by the creation of horizontal stare decisis). It is also important to note the difference between horizontal stare decisis and comity. Comity is the relationship between courts of "equal jurisdiction," where they give deference to a decision of one of its other *sister* circuits. *See* Mead, *supra* note 148, at 790 (providing more detail in the distinction between stare decisis and comity).

170. *See* Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767, 771 (2003/2004) (discussing that the "norm of horizontal stare decisis is more strict" at the appellate level than the Supreme Court).

171. *See* Barrett, *supra* note 154, at 1018 ("A panel possesses the authority to overrule precedent only when there has been an intervening, contrary decision by the Supreme Court or by the relevant court of appeals sitting en banc."). The Sixth Circuit, and others, have gone so far as to codify its horizontal stare decisis obligations. *See* 6th CIR. R. 206(c) ("Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel."). Only published opinions get precedential effect, not unpublished opinions; although there has been vibrant discussion within the legal community as to whether that juxtaposition should even exist. *See* Bell v. Johnson, 308 F.3d 594, 611 (6th Cir. 2002) ("It is well-established law in this circuit that unpublished cases are not binding precedent."); *see also* Mead, *supra* note 148, at 798 n.84 (comparing both sides of the argument). The rule on published opinions also applies to district courts who are heeding its circuit court's precedents and decisions. *See id.* at 799 ("As a result, lower district courts in the circuit need not follow unpublished decisions, but are fully bound by any published pronouncement.").

Overall, horizontal stare decisis at the Supreme Court and appellate level, even though technically only policy, is accepted "without major objection."[172] In contrast, district courts, pursuant to their own legal precedents, act differently; precedent and uniformity are harder to come by.[173]

B. Intra-District Judges' Obligations to Each Other

Congress has established a total of ninety-four federal district courts encompassing the United States, as well the territories of Puerto Rico, Guam, the Northern Marianna Islands, and the U.S. Virgin Islands.[174] Most states have only one district court, but, depending upon the size of the state, there can be more.[175] Some districts are divided into divisions, but the divisions themselves "are of no real importance."[176] District courts are held to the authority of the regional circuit in which they preside,[177] and within those districts sit district court judges.[178] Currently, there

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172. *See* Mead, *supra* note 148, at 799–800 (stating, however, that it was not always inevitable that the law of the circuit would be universally accepted).

173. *See supra* Part II.C (discussing district courts, their judges, and those judges' duties to follow their fellow intra-district judges).

174. *See* 28 U.S.C. § 132(a) (2012) (stating that there will be a district court in each district); U.S. DIST. COURTS, ADDITIONAL AUTHORIZED JUDGESHIPS 5 (2016), http://www.uscourts.gov/sites/default/files/districtauth_0.pdf [hereinafter DISTRICT COURT GRAPH] (providing a tabulation of the number of districts and where they are located in each state); *see also* Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction and Related Matters*, 13 FED. PRAC. & PROC. JURISDICTION § 3505 (2016) (discussing district courts); JUDICIAL SERV.'S OFFICE, ADMIN. OFFICE OF THE U.S. CTS., THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATION IN OTHER COUNTRIES 8–9 (4th ed. 2016), http://www.uscourts.gov/sites/default/files/federalcourtssystemintheus.pdf [hereinafter INTRODUCTION FOR JUDGES] (providing an overview of district courts).

175. *See* DISTRICT COURT GRAPH, *supra* note 174, at 1–6 (providing the number of districts in each state within each regional circuit).

176. *See* Wright et al., *supra* note 174, at § 3505 ("Since 1988 there has been no statutory requirement that an action be commenced in a particular division within a district.").

177. *See* Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIR. REV. 1, 1 (2006) (stating that it is the district courts within that federal circuit that must abide by the decisions of the circuit court).

178. *See* 28 U.S.C. § 132(b) ("Each district shall consist of the district judge or

are 667 permanent district judgeships in the United States,[179] with Congress periodically increasing the number of district court judges.[180] Although there used to be a plethora of districts with only one judge, Congress has seen to it that all but one district has at least two judges.[181] Normally, only one judge will sit on a case pending in the district court; however, sometimes district courts hear certain matters en banc, via a three-judge panel, because they deem them highly important.[182]

In contrast to the federal courts of appeals' "law of the circuit" deference, there does not exist an equivalent "law of the district" at the federal trial level.[183] Though sometimes expressly rejected,[184] and other times dismissed without mention,[185] "[i]t is [nonetheless] unclear whether district courts actually follow a rule of horizontal stare decisis" at all.[186]

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judges for the district in regular active service.").

179. *See id.* § 133(a) (showing the number of district court judgeships in each state's districts).

180. *See* DISTRICT COURT GRAPH, *supra* note 174, at 1–6 (showing that from 1960 to 2016, there have been 426 additional district court judges appointed).

181. *See id.* at 6 (displaying that it is the Eastern District of Oklahoma that carries only one district court judge).

182. *See* Wright et al., *supra* note 174, at § 3505 (stating that statutes do not forbid *en banc* procedures); *see also* Ainsworth v. Vasquez, 759 F. Supp. 1467, 1469 (E.D. Cal. 1991) ("Because this procedure will be at issue in many death penalty habeas corpus petitions pending in this court, the court has elected to determine the matter en banc.").

183. *See* Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) (rebuking the plaintiff's assertion that "it was entitled to rely" on the previous district court's ruling). Throughout this section points of reference can be made to Professor Joseph Mead's Article on stare decisis' presence in the lower federal court system. *See* Mead, *supra* note 148, at 790 (focusing on horizontal stare decisis).

184. *See Threadgill*, 928 F.2d at 1371 ("[T]here is no such thing as 'the law of the district.'"); *see also* State Farm Mut. Auto. Ins. Co. v. Bates, 542 F. Supp. 807, 816 (N.D. Ga. 1982) ("The doctrine of stare decisis does not compel one district court judge to follow the decision of another."); Cactus Corner, LLC v. U.S. Dep't of Agric., 346 F. Supp. 2d 1075, 1106 (E.D. Cal. 2004) (stating that there is no law of the district and providing other cases where those other courts expressly say the same).

185. *See supra* notes 23–26 and accompanying text (highlighting the district judge of the Eastern District of Missouri's adoption of differing interpretations of Rule 26(b)(4)(E)(i), pertaining to expert deposition preparation time, without reference to the earlier intra-district judge's decision).

186. Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 773 (1993).

As far back as the 19th century, district judges gave a great amount of deference to their intra-district judges' decisions.[187] It was rare for intra-district judges to contravene one another when drafting their opinions.[188] Disagreements and departures from precedent were the exception, rather than the rule, for cases that concerned "unusual and exceptional circumstances."[189] Thus, intra-district court precedent had a strong presumption of validity. One court went so far as to say that in "the absence of palpable mistake of error," prior district court rulings "should be respected as law."[190]

More contemporary cases, however, show a pattern that district judges no longer consistently adhere to the "exceptional circumstances" line of deference.[191] District judges tend to "view the precedential effect of the other judges' decisions as persuasive, but not binding authority."[192] The standard recital by a court is to

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187. *See* Shreve v. Cheesman, 69 F. 785, 791 (8th Cir. 1895) (providing a multitude of cases where the court has respected the decision of a district court).

188. *See* Mead, *supra* note 148, at 800 ("Historically, district judges extended great deference to the prior decisions within their district."); *see also* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1095 (1994) (discussing district courts as courts of review in relation to bankruptcy court decisions and how their little expertise in the subject disincentivizes conflict).

189. *See* Mead, *supra* note 148, at 800–01 (discussing the early history of district courts' adherence to their own precedent); *accord* Buna v. Pac. Far E. Line, Inc., 441 F. Supp. 1360, 1365 (N.D. Cal. 1977) ("Judges of the same district court customarily follow a previous decision of a brother judge upon the same question except in unusual or exceptional circumstances."); Rojas-Gutierrez v. Hoy, 161 F. Supp. 448, 450 (S.D. Cal. 1958) ("[V]arious judges who sit in the same court should not attempt to overrule the decisions of each other . . . except for the most cogent reasons." (quoting Carnegie Nat'l Bank v. Wolf Point, 110 F.2d 569, 573 (9th Cir. 1940))).

190. Sears Roebuck & Co. v. Stockwell, 143 F. Supp. 928, 932 (D. Minn. 1956).

191. *See* Mead, *supra* note 148, at 801–02 (providing case law showing the district courts' pattern of behavior in putting less weight on intra-district precedent); *see also* O'Hara, *supra* note 186, at 773–74 (providing reasons as to why the shift in opinion has come about). Some circuit courts have even opined that district judges are not required to adhere to horizontal stare decisis. *See* Starbuck v. San Francisco, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (stating that a district court is not compelled "to follow the decision of another").

192. Charles H. Nalls & Paul R. Bardos, *Stare Decisis and the U.S. Court of International Trade: Two Case Studies of a Perennial Issue*, 14 FORDHAM INT'L L.J. 139, 146 (1990/1991); *see also* State Farm Mut. Auto. Ins. Co. v. Bates, 542 F. Supp. 807, (N.D. Ga. 1982) (stating that there is no compelled decision to follow another district court judge, however, judges may still defer to prior decisions for

issue its own opinion and state that there is no "law of the district," rather than first ponder whether precedent should be followed.[193] The rationale, suggested by some scholars, is that, due to the right to an appeal to a federal appellate court, the likelihood of a long-lasting conflict within that region is small.[194]

Although there are occasional instances of district court judges extending deference to fellow judges in their district,[195] such decisions do not erase the "considerable ambiguity regarding horizontal stare decisis in district courts."[196] While an argument could be made that horizontal stare decisis exists at the district court level—albeit not a strong argument—there is not enough case law to elucidate a clear district court doctrine. Therefore, horizontal stare decisis, if recognized at all, is merely persuasive authority that a district court judge can lean on for assistance—no different from an appellate court looking at its sister courts' decisions.

Not being bound by a prior district court decision enhances "great diversity in the approaches that district courts have taken, are taking, and could take in the future."[197] This is evident in the nation-wide district court fracture regarding the application of Rule 26(b)(4)(E)(i)'s regulation of expert deposition preparation time.[198]

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comity reasons).

193. *See* E.E.O.C. v. Pan Am. World Airways, 576 F. Supp. 1530, 1535 (S.D.N.Y. 1984) ("We concede at the outset of our discussion that the decision in Allstate is not binding precedent upon this Court. Indeed it would not be binding were its author appointed for this district.").

194. *See* Nalls & Bardos, *supra* note 192, at 146–47 ("[M]akes it unlikely that conflicts of this nature will long survive."). *But see* O'Hara, *supra* note 186, at 774 ("Some litigants may forgo their right to appeal, notwithstanding conflicting precedents. Moreover, many appeals are disposed of summarily or with a nonprecedential memorandum opinion.").

195. *See* Peterson v. BASF Corp., 12 F. Supp. 2d 964, 970 (D. Minn. 1998) ("We add that the doctrine of *stare decisis,* when applied to a prior ruling, on an identical question of law, by a coordinate Court in the same District, serves the considerable interests of consistency, and predictability of result.").

196. Mead, *supra* note 148, at 801.

197. *Id.* at 800.

198. *See infra* Part IV (discussing the different district court approaches to Rule 26(b)(4)(E)(i)).

IV. Approaches to Interpreting Rule 26(b)(4)(E)(i) with Expert Deposition Preparation

A nation-wide district court fracture regarding the interpretation of Rule 26(b)(4)(E)(i) has been plaguing the courts as far back as the early 1990s.[199] Rule 26(b)(4)(E)(i) states: "Unless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D)."[200] The crux of the disagreement focuses on the phrase "time spent in responding to discovery," and whether that includes expert deposition preparation time.[201] Historically, there have been four main approaches tackling this question. The first is that deposition preparation time is included in Rule 26(b)(4)(E)(i) (reasonableness standard)—courts abide by the traditional rule of judges calculating a reasonable fee.[202] The second approach is that preparation time is wholly excluded from Rule 26(b)(4)(E)(i).[203] Third, preparation time is reimbursable but not for time the experts spend with their retaining attorneys (retained-attorney time standard).[204] Lastly, only in extenuating circumstances will expert deposition time be shifted to the inquiring party (extenuating circumstances standard).[205] Though some federal

199. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 154 F.R.D. 212, 213 (E.D. Wis. 1994) ("The court has found no published decisions . . . . [W]hether a party seeking to depose an expert witness must pay the deposition preparation time of that witness.").

200. FED. R. CIV. P. 26(b)(4)(E)(i).

201. *See* Paz v. Our Lady of Lourdes Reg'l Med. Ctr., Inc., No. 01–2693, 2009 WL 1401696, at *2 (W.D. La. May 19, 2009) ("[F]ederal courts interpreting the rule are split on the issue . . . .").

202. *See* Fleming v. United States, 205 F.R.D. 188, 190 (W.D. Va. 2000) ("[T]ime spent by an expert preparing for his or her deposition by opposing counsel is part of a reasonable fee under Rule [26(b)(4)(E)(i)].").

203. *See* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 637 (C.D. Cal. 2011) ("[I]t seems best to leave the retaining party free to have its expert prepare as thoroughly, and review his or her deposition transcript as meticulously, as it wish, albeit at its own expense.").

204. *See* Mock v. Johnson, 218 F.R.D. 680, 683 (D. Haw. 2003) (stating that Rule 26(b)(4)(E)(i) encompasses preparation time, "but not for the time the expert spent preparing the attorney who retained him").

205. *See* Brew v. Ferraro, No. CIV.95–615–JD, 1998 WL 34058048, at *2 (D.N.H. Sept. 1, 1998) ("While there may be an exception to the general rule for complex cases . . . the circumstances here do not warrant a shifting of the costs.").

circuits have had ample opportunity to clarify this issue,[206] there has not been a thorough discussion of expert deposition preparation time other than at the district court level.

A. The Reasonableness Standard

In a typical scenario under Rule 26(b)(4)(E)(i), a reasonable fee is found through an analysis of a multitude of factors that help the district judge come to an equitable conclusion.[207] Factors considered are:

> (1) The expert's area of expertise; (2) the education and training that is required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; (6) the fee being charged to the retaining party; (7) fees traditionally charged by the expert on related matters; [and] (8) any other factor likely to be of assistance to the court in balancing the interests implicated by Rue 26.[208]

These factors are used on a case-by-case basis, with each factor bearing different weight according to "the circumstances before the court."[209] The judge is to apply the facts to the judicially created rule and issue a determination using his discretion as to whether

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206. *See* Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 356 (5th Cir. 2007) (saying that the district court's changes in "limiting the billed preparation time of appellant's two expert witnesses" were "reasonable deductions"); Halasa v. ITT Educ. Servs., Inc., 690 F.3d 844, 849 (7th Cir. 2012) ("The costs ITT would like to have reimbursed are for Lynch's deposition preparation . . . .").

207. *See* Goldwater v. Postmaster Gen. of U.S., 136 F.R.D. 337, 339 (D. Conn. 1991) ("[T]here is very little authority as to what is meant by the term 'a reasonable fee' . . . ."). *Goldwater* was the first case to issue a set of factors to guide district judges in determining whether a fee request was reasonable. *See id.* at 340 (listing the factors considered by the district court).

208. Ndubizu v. Drexel Univ., No. 07–3068, 2011 WL 6046816, at *2 (E.D. Pa. Nov. 16, 2011) (citing Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493, 496 (S.D. Iowa 1992)). It should be noted that the court in *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493 (S.D. Iowa 1992), disagreed with *Goldwater*'s inclusion of the cost of living in the geographical area factor; still, some district courts utilize it nonetheless. *See id.* at 496 (stating that the cost of living is "not directly relevant to a reasonable fee").

209. *Goldwater*, 136 F.R.D. at 340.

the fee request is reasonable or not.[210] The judge's obligation is to find both that the fee or hourly rate is reasonable, and that the number of hours charged is reasonable.[211] In the context of deposition preparation time, district courts that have adopted the reasonableness standard generally apply the factors discussed above.[212]

The rationale given has been that "[t]ime spent preparing for a deposition is, literally speaking, time spent responding to discovery,"[213] and thus Rule 26(b)(4)(E)(i) provides "explicit statutory authority."[214] Other courts have said that, because preparation "relates" to the deposition, it is therefore compensable.[215] Interestingly, in the vast majority of cases, district courts do not even analyze whether deposition preparation time is included in Rule 26(b)(4)(E)(i) at all.[216] The general practice is to apply the reasonableness standard without providing a rationalization;[217] equating preparation time to time spent in the deposition itself.

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210. *See* Gray v. Dage, No. 2:10–cv–1928–TLN–EFB P, 2014 WL 5019666, at *1 (E.D. Cal. Oct. 7, 2014) ("Determining what constitutes a 'reasonable fee' for an expert witness at deposition is within the court's discretion.").

211. *See* Barnes v. District of Columbia, 272 F.R.D. 135, 137 (D.D.C. 2011) ("Plaintiffs must . . . submit an invoice itemizing the charges for which they expect the District to pay. Once Dr. Kriegler has indicated in an invoice how many hours he spent on preparation for the deposition . . . then the Court can determine reasonableness.").

212. *See* Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 278 (E.D. La. 2010) (discussing the factors set out above); *see also* Snook v. County of Maryland, No. 07–14270, 2009 WL 928753, at *3–4 (E.D. Mich. Mar. 31, 2009) (same).

213. Collins v. Vill. of Woodridge, 197 F.R.D. 354, 357 (N.D. Ill. 1999).

214. Bone Shirt v. Hazeltine, No. CIV. 01-3032-KES, 2006 WL 1788307, at *8 (D.S.D. June 22, 2006).

215. Halasa v. ITT Educ. Servs., Inc., No. 1:10–cv–437–WTL–MJD, 2012 WL 639520, at *2 (S.D. Ind. Feb. 27, 2012). One court has stated that the preparation needs to relate to the deposition request, as a type of "but for" causation. El Camino Res., Ltd. v. Huntington Nat'l Bank, No. 1:07–cv–598, 2012 WL 4794589, at *4 (W.D. Mich. Sept. 18, 2012).

216. *See* Granjas Aquanova S.A. de C.V. v. House Mfg. Co., No. 3:07–CV–00168–BSM, 2010 WL 4809342, at *4 (E.D. Ark. Nov. 19, 2010) ("Aquanova requests reimbursement for the hourly fees charged by Lyman Scribner for preparing . . . the deposition . . . . [T]hese costs are reasonable and are hereby granted.").

217. *See* Horizon Hobby, Inc. v. Ripmax Ltd., No. 07-CV-2133, 2009 WL 3381163, at *8 (C.D. Ill Oct. 15, 2009) (saying that "$15,562.00 [was] an unreasonable amount to charge for deposition preparation"); *see also* El-Ad

B. Barring Fee-Shifting for Expert Deposition Preparation Time

As the antithesis to the reasonableness standard, other district courts bar fee-shifting for expert deposition preparation time.[218] With such a dearth of case law, there is little discussion of this approach. The two courts that have adopted this approach, however, have provided significant analysis as to why Rule 26(b)(4)(E)(i) does not include expert deposition preparation time.

The Eastern District of Missouri stated that fee-shifting for preparation time "goes beyond the purpose" of Rule 26(b)(4)(E)(i).[219] The court went on to explain that "each expert prepares for a deposition in a different way," and that "the amount of time spent in preparing for a deposition . . . varies by expert."[220] Additionally, experts "spend considerable time contemplating trial strategy as part of their preparation."[221] As a result, "it would be difficult, if not impossible, to distinguish the time spent in preparation for trial from the time spent preparing for a deposition."[222]

The Central District of California provided the same line of reasoning as the Eastern District of Missouri, and discussed other concerns as well.[223] The court said that the "deposing party has no control over how much time an expert spends preparing for a deposition."[224] As a result, shifting expert compensation would, the court said, create a negative externality: the inquiring party would pay for the preparation time determined by the retaining party,

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Residences at Miramar Condo. Assoc., Inc. v. Mt. Hawly Ins. Co., Nos. 09–60723–CIV, 09–60726–CIV, 2010 WL 4174711, at *2 (S.D. Fla. Oct. 12, 2010) ("Mr. LeBleu was therefore entitled to a reasonable hourly rate for the amount of time he spent preparing for and attending the deposition . . . .").

218. *See* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 637 (C.D. Cal. 2011) (saying that it would be best to leave the retaining party to pay the expense); Litecubes, LLC v. Northern Light Prods., Inc., No. 4:04CV00485 ERW, 2005 WL 6749422, at *1 (E.D. Mo. May 19, 2005) (stating that deposition preparation time is beyond the purpose of the rule).

219. *See Litecubes, LLC*, 2005 WL 6749422, at *1.

220. *Id.*

221. *Id.*

222. *Id.*

223. *See Rock River Commc'ns*, 276 F.R.D. at 636 (explaining that, because depositions usually occur shortly before trial, "deposition preparation and trial preparation often inevitably overlap").

224. *Id.*

which would result in substantial unfairness.[225] Another concern the court noted was that preparation may also encompass irrelevant, unrelated matters that contribute nothing to the deposition; leaving inquiring parties to pay for inconsequential trivialities.[226]

C. The Retained-Attorney Time Standard

The retained-attorney time standard comes to the same conclusion as to the reasonableness standard: deposition preparation time is included in Rule 26(b)(4)(E)(i).[227] The only difference between the two is that the retained-attorney time standard prohibits any time spent "preparing" with the expert's retained attorney.[228] Courts fear that it is in fact a "dress rehearsal" for the expert's eventual testimony at trial and not actual deposition preparation time.[229] There inevitably is "great risk" in compensating such preparation, thus it is necessary to proceed with "caution."[230] Such caution is deemed warranted because it is inequitable for the inquiring party to pay for the expert's time spent in helping the retaining party prepare for trial.[231] In the end, the deposition would be a mere formality, with

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225. *Id.*

226. *See id.* (stating that compensation would not enhance efficiency, and would be done for an "entirely partisan purpose").

227. *See* Heiser v. Collorafi, Civ. No. 1:14-CV-464, 2016 WL 1559592, at *3 (N.D.N.Y. Apr. 18, 2016) ("Ordinarily, hours that an expert spends on preparation in connection with the expert's deposition are compensable under Rule 26(b)(4)(E).").

228. *See* Mock v. Johnson, 218 F.R.D. 680, 683 (D. Haw. Nov. 10, 2013) ("Rule [26(b)(4)(E)] encompasses a reasonable fee for time spent by an expert preparing for deposition, but not for the time the expert spent preparing the attorney who retained him." (quoting Magee v. Paul Revere Life Ins., Co., 172 F.R.D. 627, 647 (E.D.N.Y. 1997))).

229. *See* Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47 (N.D. Ill. 1989) ("An expert's deposition is in part a dress rehearsal for his testimony at trial . . . .").

230. Am. Ref-Fuel Co. of Niagara, LP v. Caremeuse N.A., No. 02-CV-814C(F), 2007 WL 2283768, at *1 (W.D.N.Y. Aug. 6, 2007) (citing Constellation Power Source, Inc. v. Select Energy, Inc., No. 3:04cv983 (MRK), 2007 WL 188135, at *8 (D. Conn. Jan. 23, 2007)).

231. *See* Granite Rock Co. v. Int'l Broth. Of Teamsters, No. C 04-2767 JW (RS), 2008 WL 618897, at *2 (N.D. Ca. Mar. 3, 2008) ("Local 287 is not entitled to have Granite Rock pay for time Wollet spent in preparing to assist Local 287 at

the goal of the retaining party to protect its own interests as much as possible before trial[232]—hindering the deposition's efficiency and ability to run smoothly.[233]

In conjunction with using the factors from the reasonableness standard, courts adopting the retained-attorney time standard have additional factors they use.[234] Courts look to the amount of time the experts claim, and the preparation times' proximity to the deposition and the trial in order to determine whether the preparation by the expert was, in fact, trial preparation.[235]

D. The Extenuating Circumstances Standard

Courts adopting the extenuating circumstances standard disagree with the conclusion that the "plain language of [Rule 26(b)(4)(E)(i)] mandates fee-shifting for time that experts spend in deposition preparation."[236] But, instead of disposing of the issue and agreeing with the minority of those courts which prohibit the fee-shift entirely, they instead have developed a carve-out for cases under specific conditions.[237] Only in "extenuating circumstances" will fee-shifting for expert preparation time occur.[238] Extenuating circumstances can appear in a variety of ways, and the standard

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trial.").

232. *See* LK Nutrition v. Premier Research Labs, LP, 12 CV 7905, 2015 WL 4466632, at *2–3 (N.D. Ill. July 21, 2015) (calling depositions "strategy sessions").

233. *See* Hose v. Chi. and N.W. Trans. Co., 154 F.R.D. 222, 228 (S.D. Iowa 1994) ("[C]ompensating Dr. Golnick for his time spent reviewing Plaintiff's medical records speeds the deposition process along, thereby saving on costs."); *see also* Heiser v. Collorafi, Civ. No. 1:14-CV-464, 2016 WL 1559592, at *3 (N.D.N.Y. Apr. 18, 2016) (ensuring the fluidity of a deposition requires experts reasonably reviewing their work).

234. *See* Peterson v. Direct Coast to Coast, LLC, No. 3:14-cv-00284-MO, 2016 WL 756562, at *4 (D. Or. Feb. 24, 2016) (discussing additional factors used for the retained-attorney time standard).

235. *Id.*; *see Heiser*, 2016 WL 1559592, at *3 (looking at the deposition date in relation to the date the expert report was written).

236. Eastman v. Allstate Ins. Co., No.: 14-cv-00703-WQH (WVG), 2016 WL 795881, at *5 (S.D. Cal. Feb. 29, 2016).

237. *See* Brew v. Ferraro, No. CIV.95–615–JD, 1998 WL 34058048, at *2 (D.N.H. Sept. 1, 1998) (describing the set of circumstances that need to occur for the fee-shift to be implemented for deposition preparation time).

238. *See Eastman*, 2016 WL 795881, at *6 (stating it is the "exception, not the rule").

does not require a talismanic procedure as to what meets the standard and what does not.[239] Historically, there have been two scenarios that have met the extenuating circumstances standard: complex cases,[240] and cases involving significant lapses in time between the expert's work and the deposition date.[241]

The complex case exception applies when an expert has had to review a vast array of documents, seemingly complicated and dense in nature.[242] Cases involving multiple experts have been found to be enough to be considered complex,[243] in contrast to single defendant and plaintiff cases,[244] and "simple contract case[s],"[245] which have not been found to pass muster.

Courts deciding cases involving considerable lapses in time from the expert's work and the date of the deposition have also imposed fee-shifting.[246] The rationale is that, because the deposition date was so far divorced from the time of the expert's work, the expert "[could not] be expected to testify without [additional] preparation and review."[247] Further, repeated delays by the inquiring party can result in excessive preparation costs that the retaining party would be otherwise obligated to pay.[248]

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239. *See* Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47 (N.D. Ill. 1989) ("There may be some cases where compensation of an expert for time spent preparing for a deposition is appropriate . . . .").

240. *See* McClain v. Owens-Corning Fiberglas Corp., No. 89 C 6266, 1996 WL 650524, at *3 (N.D. Ill. Nov. 7, 1996) ("[I]n complex cases . . . compensation for deposition preparation is appropriate.").

241. *See* M.T. McBrian, Inc. v. Liebert Corp., 173 F.R.D. 491, 493 (N.D. Ill. 1997) ("[Rule 26(b)(4)(E)(i)] does not require the party deposing an expert witness to bear the expense of that expert's deposition preparation time, unless . . . there has been considerable lapse of time between an expert's work on the case and the date of his actual deposition.").

242. *See McClain*, 1996 WL 650524, at *3 (stating that reviewing "voluminous documents" can require the fee-shift).

243. *See* Equal Emp't Opportunity Comm'n v. Sears, Roebuck and Co., 138 F.R.D. 523, 526 (N.D. Ill. 1991) (describing that Sears had to "retain many experts" in its litigation with the E.E.O.C.).

244. *Rhee*, 126 F.R.D. at 47.

245. *M.T. McBrian, Inc.,* 173 F.R.D. at 493.

246. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 154 F.R.D. 212, 214 (E.D. Wis. 1994) (requiring a fee shift for "considerable" lapses in time).

247. *M.T. McBrian, Inc.,* 173 F.R.D. at 493.

248. *See* Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47 (N.D. Ill. 1989) (saying that "the expert's deposition [that] has been repeatedly postponed over long periods of time" by the inquiring party will warrant a fee-shift).

V. The Recommended Approach: Deposition Preparation Time Does Not Mandate a Fee-Shift

This Note emphasizes the interpretation of the second of the four district court approaches: Rule 26(b)(4)(E)(i) never mandates the inclusion of expert deposition preparation time in a judge's reasonable fee calculus.[249] The purpose of Rule 26(b)(4)(E)(i) is to prevent unfairness stemming from the inquiring party's benefit at the expense of the retaining party's diligence.[250] The Advisory Committee's broad canon, however, is reined in through Rule 26(b)(4)(E)(i)'s limiting language and its amendment history. As such, there are three justifications that resolve this district court split. First, the term "discovery" shows that the Advisory Committee intended fee-shifting only during the course of the deposition; rather than during activities relating to the deposition.[251] Second, the extenuating circumstances standard, in its attempt to focus on the purpose of the Rule, misconstrues the language of Rule 26(b)(4)(E)(i) when it allows for a carve-out.[252] Third, it would nonetheless be infeasible, due to practical concerns, for Rule 26(b)(4)(E)(i) to include deposition preparation time.[253]

A. The Term "Discovery" Does Not Mean Matters Peripheral to the Deposition

The phrase "time spent in responding to discovery"[254] is ambiguous on its face. Viewed in isolation, it is not clear whether

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249. *See supra* Part IV.B (discussing cases in which courts have opted not to shift fees to the inquiring party for deposition preparation time and the reasons why).

250. *See* FED. R. CIV. P. 26 advisory committee's note to 1970 amendment ("[I]t is unfair to permit one side to obtain without the cost the benefit of an expert for which the other side has paid, often a substantial sum." (citing Lewis v. United Air Lines Trans. Corp., 32 F. Supp. 21 (W.D. Pa. 1940) and Walsh v. Reynolds Metal Co., 15 F.R.D. 376 (D.N.J. 1954))).

251. *See infra* Part V.A (explaining that the language and legislative history of Rule 26(b)(4)(E)(i) do not include deposition preparation time).

252. *See infra* Part V.B (arguing that the extenuating circumstances standard misconstrues the language of Rule 26(b)(4)(E)(i)'s fee-shift procedures).

253. *See infra* Part V.C (listing four practical concerns as to why Rule 26(b)(4)(E)(i) should not include deposition preparation time).

254. FED. R. CIV. P. 26(b)(4)(E)(i).

it includes "time spent" only in the deposition when the expert "responds" to the inquiring party's questions or if it includes actions relating to the deposition as well.[255] Arguably, "time spent" by the expert travelling, preparing, or setting aside his work schedule pursuant to the deposition request also falls within Rule 26(b)(4)(E)(i).[256] Looking at the Rule's language in reference to subdivision (b)(4) and its legislative history, however, shows that it is only during the deposition itself that expert fees can be transferred.[257]

The term "discovery" within Rule 26(b)(4)(E)(i) refers to Rules 26(b)(4)(A) and (D).[258] Rule 26(b)(4)(A) allows a party the opportunity "to *depose* any person who has been identified as an expert whose opinions may be presented at trial."[259] Rule 26(b)(4)(D) grants depositions of experts used only for trial preparation only in "exceptional circumstances."[260] As a result, the term "discovery" portrays the term "deposition" only as the deposition itself, rather than matters relating to it. There is no indication in the language of subdivision (b)(4) that fee-shifting for anything but depositions themselves is mandated.[261] If the Advisory Committee wanted to include preparation time, the

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255. *Id.*; *see* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning.").

256. Travel time has been found to be included in Rule 26(b)(4)(E)(i). *See* United States *ex rel.* Liotine v. CDW-Government, Inc., No. 3:05–cv–33–DRH–DGW, 2012 WL 1252982, at *3 (S.D. Ill. Apr. 13, 2012) ("Generally, the time an expert spends traveling to a deposition by the opposing party is compensable.").

257. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1123 (2002) (highlighting the "importance of adhering to the text and Notes of a Rule" in the Federal Rules); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Princeton University Press 1997) ("We look for . . . 'objectified' intent [from the legislature]—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the [body of the law].").

258. *See* FED. R. CIV. P. 26(b)(4)(E)(i) ("[T]ime spent in responding to discovery under Rule 26(b)(4)(A) or (D) . . . .").

259. *Id.* 26(b)(4)(A) (emphasis added).

260. *See id.* 26(b)(4)(D) (stating that a party cannot ordinarily "discover facts known or opinions held by an expert" unless by proving that it would be "impracticable" to try to obtain such facts or opinions).

261. *See* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 544 (1991) (discussing that the Court will not adopt a certain reading of a rule when there is "no indication that [it] is what the Advisory Committee intended").

language of Rule 26(b)(4)(E)(i) could have been: "time spent in responding to *the discovery request*," or "time spent in responding to discovery*, and matters relating to the discovery*."[262] Those additions would allow efforts taken by the expert to include actions peripheral to the deposition. Without the word "request," or the phrase "matters relating to the discovery," actions attributable to "discovery" under Rule 26(b)(4)(E)(i) encompass only time spent responding during the deposition.

The interpretation of Rule 26(b)(4)(E)(i) that fee-shifting is allowed only for time spent in the deposition is further bolstered through the Rule's Advisory Committee notes.[263] Though the 1970 amendments did not expressly provide for depositions at the time, the Advisory Committee did explain the purpose of Rule 26(b)(4)(E)(i): to put the onus on the benefitting party to pay for the expert's time and expertise.[264] Subsequently in 1993, the Advisory Committee provided more clarity as to its intent.[265] After 1970, the Advisory Committee noticed that interrogatories were not creating the efficiency it wanted through the Federal Rules.[266] It then suggested revisions granting the right to depose expert witnesses under Rule 26(b)(4)(A).[267] Additionally, the 1993 amendments included a requirement that experts provide written reports if they were retained to give expert testimony under Rule 26(a)(2)(B).[268] The report requirements were expected to alleviate

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262. The Supreme Court in *Business Guides, Inc.* fostered a similar counter-factual argument in the context of Rule 11. *See id.* at 545 ("Had the Advisory Committee intended to limit the application of the certification standard to parties proceeding *pro se,* it would surely have said so.").

263. *See supra* Parts II.B.2–5 (discussing subdivision (b)(4)'s initial promulgation and Rule 26(b)(4)(E)(i)'s 1970, 1993, 2007, and 2010 amendments); *see also* Struve, *supra* note 257, at 1156 ("[T]he most logical evidence of such intent can be found in the Rule's text and Advisory Committee Notes.").

264. *See supra* Part II.B.2 (describing subdivision (b)(4)(C)'s initial promulgation in 1970).

265. *See supra* Part II.B.3 (providing that the 1993 amendments mandated more disclosures and opportunities so as to reduce surprise at trial).

266. *See* FED. R. CIV. P. 26 advisory committee's note to 1993 amendment (saying that the interrogatories were "frequently so sketchy and vague that it rarely dispensed with the need to depose the expert").

267. *See supra* notes 123–125 and accompanying text (discussing subdivisions (b)(4)(A)'s purpose).

268. *See* Rocco, *supra* note 112, at 2236 (highlighting that the 1993 amendments sought to "ensure 'that opposing parties have a reasonable

the need for depositions altogether, or at the very least speed up depositions.[269] The Advisory Committee hoped that, with the innovation of the report requirement, depositions would seldom be needed.

Furthermore, the 1993 Advisory Committee stated: "[T]he expense . . . should be mitigated by the fact that the expert's fees for *the deposition* will ordinarily be borne by the party taking the deposition."[270] The phrase "the deposition" signifies that Rule 26(b)(4)(E)(i) is implicated only for the deposition itself.[271] Unfortunately, the Advisory Committee notes are devoid of any further explanation concerning the applicable scope of Rule 26(b)(4)(E)(i). Analyzing the Rule, and subdivisions (b)(4)(A) and (a)(2)(B) together, however, one can glean that preparation time was not contemplated to be within the Rule. In fact, the expert written report is the preparation itself—not only for the purpose of increasing the efficiency of litigation, but depositions as well. Because the expert report requirement under subdivision (a)(2)(B) is silent on the matter of fee-shifts, it can reasonably be understood that deposition preparation time is not the inquiring party's responsibility under Rule 26(b)(4)(E)(i).

B. The Extenuating Circumstances Standard Misconstrues Rule 26(b)(4)(E)(i)'s Mandated Fee-Shift Requirement

As discussed in Part IV.D, some courts permit fee-shifting for expert deposition preparation time only in extenuating circumstances.[272] Courts that have adopted the extenuating

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opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.'" (quoting FED. R. CIV. P. 26 advisory committee's note to 1993 amendment)).

269. *See supra* notes 117–122 and accompanying text (discussing that the expert written report mandates were enacted for pragmatic and fairness reasons); *see also* Patel, *supra* note 112, at 53 (enacting the 1993 amendments "to curb perceived abuses and delays in the civil justice system").

270. FED. R. CIV. P. 26(b)(4)(C) advisory committee's note to 1993 amendment.

271. *See* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 635 (C.D. Cal. 2011) ("The Advisory Committee Note's use of the phrase 'for the deposition' suggests that the shifting of expert fees is limited to the fees attributable to the deposition itself.").

272. *See supra* notes 236–248 and accompanying text (providing that extenuating circumstances have historically involved complex cases or large

circumstances standard have two different interpretations of Rule 26(b)(4)(E)(i). The majority view is that the Rule does not include deposition preparation time, but in instances of unfairness the fee-shift can occur.[273] On the other side, other courts have said that, although the plain language of the Rule does not include preparation time, the Rule's vague language allows the courts leverage to determine scenarios when "fee-shifting is justified."[274]

The majority view effectively goes beyond Rule 26(b)(4)(E)(i)'s enumerated powers given to the court. Rule 26(b)(4)(E)(i) says that a "court *must*" require the inquiring party to compensate an expert's "time spent in responding to discovery."[275] The courts that have adopted this interpretation implicitly concede that time spent preparing for the deposition does not fall within Rule 26(b)(4)(E)(i).[276] With that concession, a court no longer has the power to issue the fee-shifting mandate for preparation time under any circumstance because the Rule disallows such a result.[277] Only

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lapses in time between the expert's work and the deposition date).

273. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 154 F.R.D. 212, 214 (E.D. Wis. 1994) ("[A]s a general rule, [Rule 26(b)(4)(E)(i)] . . . does not require the party deposing an expert witness to bear the expense of that expert's deposition preparation time.").

274. Eastman v. Allstate Ins. Co., No.: 14-cv-00703-WQH (WVG), 2016 WL 795881, at *6 n.2 (S.D. Cal. Feb. 29, 2016).

275. FED. R. CIV. P. 26(b)(4)(E)(i) (emphasis added).

276. *See* Equal Emp't Opportunity Comm'n v. Sears, Roebuck & Co., 138 F.R.D. 523, 526 (N.D. Ill. 1991) (stating that the Rule "does not permit recovery for time spent 'preparing' for a deposition").

277. Parties who feel that fee-shifting is needed can always try and motion to the court for a protective order under Rule 26(c)(1). Rule (c)(1) states that a party can "move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken." FED. R. CIV. P. 26(c)(1). If good cause can be shown, a court can issue the order "to protect a party or person from annoyance, embarrassment, oppression, or under burden or expense." *Id.* Pertinent to this Note is subdivision (B). Subdivision (B) allows a court to issue a protective order for "the allocation of expenses." *Id.* 26(c)(1)(B). The Advisory Committee, however, has spoken on subdivision (B) and has warned that the express "authority does not imply that cost-shifting should become a common practice. *Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding*." FED. R. CIV. P. 26(c)(1)(B) advisory committee's note to 2015 amendment (emphasis added). Courts have heeded the Advisory Committee's warning and have usually issued such orders only "under limited circumstances." United States *ex rel.* Bibby v. Wells Fargo Bank, N.A., NO. 1:06-CV-0547-AT, 2016 WL 7365195, at *2 (N.D. Ga. May 26, 2016); *accord* Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., No. 11–cv–1049 (PLF/GMH), 2017 WL

in times of potential "manifest injustice" to the party seeking discovery can a court *refuse* to issue the fee-shift.[278] A court cannot take the inverse of that and *grant* a fee-shift in certain circumstances if a court declares from the outset that deposition preparation time does not fall within the purview of Rule 26(b)(4)(E)(i).

The minority view sees the vagueness of the language of the Rule as a gateway in order to determine whether "fee-shifting is justified" on a case-by-case basis.[279] That interpretation is a misconstruction of Rule 26(b)(4)(E)(i). Again, fee-shifting is always justified when an expert's actions fall within the Rule "[u]nless manifest injustice would result."[280] The courts adopting this carve-out provision effectively change the Rule's procedural language. Thus, according to the extenuating circumstances standard, the inquiring party is not mandated to pay an expert for deposition preparation time, unless the "time spent in responding" occurs within certain circumstances.[281] This construction of Rule 26(b)(4)(E)(i) lacks a sufficient foundation from the Rule's express language and the Advisory Committee.[282] The Rule requires only an action that is in response to "discovery," not a determination of the circumstances surrounding the response to "discovery." The extenuating circumstances standard puts policy above the

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4011136, at *7 (D.D.C. Sept. 11, 2017) (discussing that Rule 26(c)(1)(B) should only be invoked sparingly); McClurg v. Mallinckrodt, Inc., No. 4:12-CV-00361-AGF, 2016 WL 7178745, at *3 (E.D. Mo. Dec. 9, 2016) (same).

278. *See* United States v. Twin Falls, 806 F.2d 862, 879 (9th Cir. 1986) ("The language of the rule is mandatory . . . . [But] the court may decline to award expenses if it finds that manifest injustice would result.").

279. *Eastman*, 2016 WL 795881, at *6 n.2.

280. *See* FED. R. CIV. P. 26(b)(4)(E)(i) ("[T]he court must require . . . .").

281. *See* Eastman v. Allstate Ins. Co., No.: 14-cv-00703-WQH (WVG), 2016 WL 795881, at *6 (S.D. Cal. Feb. 29, 2016) (saying that it is the "exception, not the rule," and that it must decide "whether such circumstances [were] present" in the case); *see also* Stevens v. CoreLogic, Inc., No.: 14-cv-1158 BAS (JLB), 2016 WL 8729928, at *3 (S.D. Cal. May 6, 2016) ("This Court is in agreement with those that hold that reasonable expert deposition preparation fees are compensable only in complex cases or in extenuating circumstances.").

282. *See Eastman*, 2016 WL 795881, at *6 n.2 (declaring that the vague language of the rule indicates to the court the "drafters' intent"). This would seem to contradict what the *Eastman* court said in its previous note when it stated that the Advisory Committee notes "provide only the most limited guidance." *Id.* at *5 n.1.

language of Rule 26(b)(4)(E)(i) and the Advisory Committee's legislative discourse.[283]

C. Practical Concerns for Not Including Deposition Preparation Time

Ironically, the district court approaches, besides the reasonableness standard, highlight the same or similar justifications in reaching their different conclusions.[284] The Advisory Committee promulgated subdivision (b)(4) for the purpose of speeding up the litigation process, and reducing surprise at trial.[285] Most district courts have expressed caution about rewarding expert deposition preparation time when taking into account the Advisory Committee's goals;[286] they have expressed three main concerns that should be addressed. Additionally, as discussed above, the absence of strong horizontal stare decisis at the district court level further warrants a narrow reading of Rule 26(b)(4)(E)(i).[287]

First, deposition time reimbursement runs the risk that an expert and the retaining party will develop trial strategy at the expense of the inquiring party.[288] As a result, the deposition itself

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283. *See* Struve, *supra* note 257, at 1110 ("[S]ome lower courts have similarly felt free to strain the Rules' text, and ignore relevant Notes, in order to implement their own views of desirable policy. . . . [S]uch an approach enlarges the powers of the courts beyond their proper boundaries.").

284. *Compare* Granite Rock Co. v. Int'l Broth. of Teamsters, No. C 04-2767 JW (RS), 2008 WL 618897, at *2 (N.D. Ca. Mar. 3, 2008) ("Local 287 is not entitled to have Granite Rock pay for time Wollet spent in preparing to assist Local 287 at trial."), *with* Litecubes, LLC v. Northern Light Prods., Inc., No. 4:04CV00485 ERW, 2005 WL 6749422, at *1 (E.D. Mo. May 19, 2005) ("[E]xperts spen[d] considerable time contemplating trial strategy as part of their preparation for a deposition.").

285. *See supra* Parts II.B.2–3 (highlighting subdivision (b)(4)'s initial promulgation and subsequent amendments in order to show that its evolution was designed to assuage unfairness and abuse in a federal civil trial).

286. *See supra* Parts II.B–D (discussing a multitude of district courts that have adopted constraining standards attributable to Rule 26(b)(4)(E)(i) and the goals it was promulgated to achieve).

287. *See* Struve, *supra* note 257, at 1120 (stating that there is a trend that, for the sake of subjective policy, lower federal court judges tend expand the Federal Rules' text).

288. *See* Peterson v. Direct Coast to Coast, LLC, No. 3:14-cv-00284-MO, 2016 WL 756562, at *4 (D. Or. Feb. 24, 2016) (avoiding the risk of rewarding "time

would be an all-expenses-paid "dress rehearsal" for the retaining party for the eventual trial.[289] This is not to say, however, that a party cannot use the deposition as a way to practice for trial.[290] In other words, the practical concern is that, if the inquiring party *finances* such trial preparation, then there is little benefit the inquiring party is receiving; the retaining party would actually be the benefactor. Such an outcome is contrary to the underlying rationale of Rule 26(b)(4)(E)(i).[291]

Second, it has been held that, because no two cases are ever the same, each expert is thus going to prepare differently and spend different amounts of time preparing for the deposition.[292] Therefore, judges are ill-equipped to determine a reasonable fee under the circumstances in each case for preparation time.[293] Courts have acknowledged that it is difficult to quantifiably reduce an expert's philosophy on preparation to a reasonable number according to the circumstances.[294] Though various courts have implemented ratio standards[295]—i.e., for every *x* amount of time in

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spent in trial preparation" by looking at the expert's claim of time spent preparing in relation to the deposition date).

289. *See* Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47 (N.D. Ill. 1989) ("An expert's deposition is in part a dress rehearsal for his testimony at trial . . . .").

290. *See* HENRY L. HECHT, EFFECTIVE DEPOSITIONS 460 (2d ed. 2010) (allowing a party to depose an expert gives that party the chance to "see[] the expert's 'dress rehearsal' . . . and will [thus] have ammunition for cross-examination" later at trial).

291. *See* FED. R. CIV. P. 26 advisory committee's note to 1970 amendment (saying that it is "unfair" for the inquiring party to benefit at the retaining party's expense).

292. *See* Litecubes, LLC v. Northern Light Prods., Inc., No. 4:04CV00485 ERW, 2005 WL 6749422, at *1 (E.D. Mo. May 19, 2005) (stating that preparation for depositions varies by expert).

293. *See* Eastman v. Allstate Ins. Co., No.: 14-cv-00703-WQH (WVG), 2016 WL 795881, at *5 (S.D. Cal. Feb. 29, 2016) ("[J]udges are in an extremely poor position to determine whether a particular amount of preparation time is reasonable in any particular case.").

294. *See* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 636 (C.D. Cal. 2011) (emphasizing no control over how much time an expert spends preparing).

295. *See* Collins v. Vill. of Woodridge, 197 F.R.D. 354, 358 (N.D. Ill. 1999) (adopting a "ratio of one and one-half the length of the deposition"); *see also* Nordock Inc. v. Sys. Inc., 927 F. Supp. 2d 577, 583 (E.D. Wis. 2013) (approving a "3:1 ratio for preparation time"); Constellation Power Source, Inc. v. Select Energy, Inc., No. 3:04cv983 (MRK), 2007 WL 188135, at *8 (D. Conn. Jan. 23, 2007) (limiting preparation time reimbursement to the amount of hours in the

a deposition, the expert may claim *y* amount of preparation time—this actually has the potential for experts to over-prepare, and force the inquiring party to pay more in situations when it otherwise would not be necessary to do so.[296] Scrutinizing each party's "respective levels of preparation of their experts" would force a court to "second-guess" counsel's own choice in determining what, and how much, preparation is appropriate.[297]

Third, preparation time reimbursement incentivizes experts and parties to charge fees for time that is irrelevant to the deposition.[298] The concern is that the retaining attorney will use the reimbursement opportunity to spend time with the expert for activities unrelated to the efficiency of the deposition.[299] For instance, parties using preparation time as a tool to transfer payment for time otherwise billable to the retaining party.

Finally, the lack of horizontal stare decisis at the district court level warrants a narrow interpretation of Rule 26(b)(4)(E)(i). Some have said that horizontal stare decisis is not strong in the federal trial level because, among other reasons, it handles a multitude of tasks—such as analyzing both the law and the facts—while appellate courts mostly handle narrow legal issues.[300] As discussed in Part III.B, district courts will not likely accumulate an equivalent "law of the circuit."[301] This conclusion only buttresses the exigency for a consistent application of Rule 26(b)(4)(E)(i). Unlike normal federal circuit splits that arise frequently, district

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deposition).

296. *See Eastman*, 2016 WL 795881, at *5 (increasing overall costs from the implementation of ratio standards).

297. *Rock River Commc'ns*, 276 F.R.D. at 636–37.

298. *See* Heiser v. Collorafi, Civ. No. 1:14-CV-464, 2016 WL 1559592, at *3 (N.D.N.Y. Apr. 18, 2016) (reviewing the amount of time an expert spent changing his testimony in review of his report).

299. *See* Am. Ref-Fuel Co. of Niagara, LP v. Caremeuse N.A., No. 02-CV-814C(F), 2007 WL 2283768, at *1 (W.D.N.Y. Aug. 6, 2007) (suggesting that the possibility of trial preparation can lead to charging the opponent for unwarranted fees); *see also Rock River Commc'ns*, 276 F.R.D. at 636 ("[T]asks that contribute little or nothing to the efficiency of the deposition . . . .").

300. *See* Mead, *supra* note 148, at 822 (stating that there are "structural reasons why consistency should only exist at higher levels of judicial review," including the "scope and timing of discovery," and making "factual findings that depend on highly individualistic assessments of facts").

301. *See supra* Part III.B (discussing district courts and their lack of horizontal stare decisis).

court splits put parties in a special category of vulnerability because of a lack of an application of legal precedent.[302] This is because, at the appellate level, litigants are at least on notice regarding the application of a law—whether they think it wrong or correct.[303] An inter- and intra-district court split, on the other hand, leaves a law's application to the discretion of an individual judge, not the law of the court.[304] Unfortunately, Rule 26(b)(4)(E)(i) is placed in that unique latter category of court splits.[305] Because the Rule lacks discussion at the federal appellate level, it cannot be applied consistently in a region, let alone across the United States.[306] Thus, it is best to apply Rule 26(b)(4)(E)(i) down to its simplest form. It would give parties sufficient notice as to the Rule's application without wondering how it might be applied until

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302. *See supra* notes 191–198 and accompanying text (highlighting that district court judges apply what they think the law says in lieu of any other intra-district decisions concerning the same law).

303. *See* Mead, *supra* note 148, at 793 ("Concern for predictability reflects the recognition that change in the law disturbs the foundation for countless human interactions.").

304. As Alexander Hamilton poignantly stated in *Federalist* 78: "To avoid an arbitrary discretion in the courts . . . it is indispensable that they should be bound by . . . precedents which serve to define and point out their duty in every particular case that comes before them . . . ." THE FEDERALIST NO. 78, at 455 (Alexander Hamilton) (ABA ed., 2009); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (Legal Legends ed., 2010) ("'If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am a plaintiff' . . . . Adherence to precedent must then be the rule [not] the exception if litigants are to have faith in the . . . courts." (citation omitted)).

305. *See Irreparable Injury in Constitutional Cases*, 46 YALE L.J. 255, 264 (1936) ("[T]o the extent that the trial court's discretion is controlling, the principle of stare decisis has little effect." (emphasis omitted)). To make matters worse, the Supreme Court has historically emphasized that rules of procedure cases should be given far less stare decisis effect than other cases. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved, . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules." (emphasis omitted)); *see also* Mead, *supra* note 148, at 793 ("Procedural rulings (another area where variation is most tolerated) usually do not implicate reliance interests, making stare decisis considerations less important.").

306. *See supra* notes 156–172 and accompanying text (discussing the difference between vertical and horizontal stare decisis, and that, in lieu of a higher court ruling, the lower court is not bound by any precedent).

they know who their judge will be.[307] Furthermore, a repeated application may signify to the Advisory Committee that the Rule should be adjusted if it feels that the Rule is not being applied properly.[308]

VI. Conclusion

For over twenty years, district judges have differed in their application of Rule 26(b)(4)(E)(i) in relation to expert deposition preparation time. This is due, in part, to district judges having near unilateral deference given to them by their fellow judges through a substantial lack of horizontal stare decisis. In contrast to the federal circuit courts of appeals, a district judge is not obligated to follow his intra-district judge's decisions because there is no equivalent "law of the district." This lack of constraint, in conjunction with Rule 26(b)(4)(E)(i)'s relative obscurity, continues to place litigants in vulnerable positions depending upon the region in which their case is pending.

There have been four interpretational approaches to Rule 26(b)(4)(E)(i). First, expert deposition preparation time is naturally included into the language of the Rule. Second, Rule 26(b)(4)(E)(i) wholly excludes deposition preparation time. Third, only time spent by the expert with his retained attorney is excluded from Rule 26(b)(4)(E)(i)'s fee-shift mandate. Finally,

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307. *See* Barrett, *supra* note 154, at 1031 ("Stare decisis is regarded as a doctrine of judicial restraint." (citing Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (saying that stare decisis "restrain[s] the discretion that legal indeterminacy would otherwise give judges"))). Such an application of Rule 26(b)(4)(E)(i) would also be consistent with past Supreme Court rulings that the Federal Rules be given "their plain meaning." Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989).

308. *See* Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165, 1171 (2016) ("When a court makes a decision contrary to the intent of the legislature or contrary to values the legislature now cherishes, regardless of the intent of an earlier, enacting legislature, the legislature can override the court's decision and regain control of the statute's application."). Additionally, the Advisory Committee has a history of amending the Federal Rules in light of disliked federal court practices that contradicted the Federal Rules' purpose. *See supra* notes 138–142 and accompanying text (stating that the Advisory Committee added Rules 26(b)(4)(B) and (C) in 2010 to account for courts consistently granting discovery of all communication between an expert and his retaining attorney).

although deposition preparation time is not generally included in Rule 26(b)(4)(E)(i)'s language, the fee-shift can be initiated when extenuating circumstances are present. This Note proposes that the only feasible interpretation of Rule 26(b)(4)(E)(i) is to bar fee-shifting for expert deposition preparation time. For reasons such as the Rule's limiting language, its concurrent Advisory Committee notes, and practical concerns, Rule 26(b)(4)(E)(i) should be construed narrowly to allow fee-shifting for only depositions themselves. Any change in Rule 26(b)(4)(E)(i) should go through "the process specified in the Enabling Act, rather than tak[e] effect through judicial fiat in the course of litigation."[309]

309. Struve, *supra* note 257, at 1102; *accord* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (Amy Gutmann ed., 1997)

> But though I have no quarrel with the common law and its process, I do question whether the *attitude* of the common-law process judge—the mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law.