

United States Court of Appeals, Tenth Circuit.  
Emily **AGER**, an incompetent, by Law Lamar **Ager**,  
her father and duly appointed guardian, Plaintiff-  
Appellant,

v.

JANE C. STORMONT HOSPITAL AND  
TRAINING SCHOOL FOR NURSES, a/k/a  
Stormont-Vail Hospital, and Dan L. Tappen, M. D.,  
Defendants-Appellees.

No. 79-2228.

Argued and Submitted March 14, 1980.

Decided June 2, 1980.

BARRETT, Circuit Judge.

Lynn R. Johnson, counsel for plaintiff Emily **Ager**, appeals from an order of the \*498 District Court adjudging him guilty of civil contempt. Jurisdiction vests by reason of [28 U.S.C.A. s 1826\(b\)](#).

Emily was born April 4, 1955, at Stormont-Vail Hospital in Topeka, Kansas. During the second stage of labor, Emily's mother suffered a massive rupture of the uterine wall. The ensuing loss of blood led to Mrs. **Ager's** death. Premature separation of the placenta from the uterine wall also occurred, resulting in fetal asphyxia. Following Emily's delivery, it was discovered that she evidenced signs of severe neurological dysfunction. Today, she is mentally impaired and a permanently disabled quadriplegic with essentially no control over her body functions.

In March, 1977, Emily's father filed, on her behalf, a complaint for the damages sustained at her birth. The complaint alleges, in essence, that "the hemorrhaging and resultant death of her mother and the brain damage and other injuries which she sustained . . . while still in her mother's womb and/or during her delivery, were directly and proximately caused by the negligence and carelessness of the defendants (Stormont-Vail Hospital and Dr. Dan L. Tappen, the attending physician) which joined and concurred in causing plaintiff's mother's death and plaintiff's bodily injuries and damages and resultant disability." (R., Vol. I, p. 4). After joining the issues, Dr. Tappen propounded a series of interrogatories to the plaintiff. The specific interrogatories at issue here

are:

1. Have you contacted any person or persons, whether they are going to testify or not, in regard to the care and treatment rendered by Dr. Dan Tappen involved herein?

2. If the answer to the question immediately above is in the affirmative, please set forth the name of said person or persons and their present residential and/or business address.

3. If the answer to question # 1 is in the affirmative, do you have any statements or written reports from said person or persons?

(R., Vol. I, p. 1).

In response, plaintiff filed written objections, accompanied by a lengthy brief. Dr. Tappen answered the plaintiff's objections. The answer brief was treated by the United States Magistrate as a motion for an order compelling discovery pursuant to [Fed.Rules Civ.Proc., rule 37\(a\), 28 U.S.C.A.](#) Following his review, the Magistrate ordered the plaintiff to answer the interrogatories:

Interrogatories No. 1, 2 and 3 should be answered with the single exception, if the plaintiff has contacted an **expert** who was informally consulted in preparation for trial, but who was never retained or specifically employed and will not be called as a witness, it will not be necessary for the plaintiff to supply the name and address of such person or persons or to set forth any statement or report which such person or persons may have made.

(R., Vol. I, p. 15).

Plaintiff's counsel answered the interrogatories in part, but failed to provide any information concerning consultative **experts** not expected to testify at trial. Plaintiff apparently based the refusal to answer on her contention that an **expert** who advises a party that his opinion will not aid the party in the trial of the case falls within the definition of **experts** informally consulted but not retained or specially employed. At defendant's suggestion, the Magistrate ordered plaintiff to provide further answers to the interrogatories, specifically defining the terms retained or specially employed:

In the generally accepted meaning of the term in everyday usage, "retained" or "specially employed" ordinarily implies some consideration, a payment or

reward of some kind, as consideration for being “retained” or “specially employed.” It follows, therefore, that if a medical **expert** is consulted for the purpose of rendering advice or opinion on a hospital chart, or a physician's medical records pertaining to a case, and is paid or makes a charge for such service, he has been “retained” or “specially employed” within the meaning of the Rule. If (such an) **expert** is not to be called as a witness, he \*499 would be subject to the provisions of [Rule 26\(b\)\(4\)\(B\)](#) and, as shown by [Baki, supra, \(Baki v. B. F. Diamond Construction Co., 71 F.R.D. 179 \(D.Md.1976\)\)](#) there would be routine access to the names and addresses of such **experts**; but if they are not to be called as witnesses, facts known or opinions held by such **experts** would be subject to the requirements of [Rule 26\(b\)\(4\)\(B\)](#). However, if the consultation with the medical **expert** was strictly on an informal basis and such **expert** was not “retained” or “specially employed,” the identity of such **expert** need not be disclosed.

(R., Vol. I, pp. 24-25).

Rather than complying with the Magistrate's order, **Ager** sought review by the District Court pursuant to [28 U.S.C.A. s 636\(b\)\(1\)\(A\)](#). The District Court denied plaintiff's motion for review as untimely. On reconsideration, the Court affirmed the Magistrate's order:

In the context of this malpractice case the question is whether plaintiff must identify each and every doctor, physician or medical **expert** plaintiff's counsel retained or specially employed during pretrial investigation and preparation. The courts have been divided on the issue. Compare [Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 \(S.D.Fla.1977\)](#), [Baki v. B. F. Diamond Const. Co., 71 F.R.D. 179 \(D.Md.1976\)](#), [Sea Colony, Inc. v. Continental Ins. Co., 63 F.R.D. 113 \(D.Del.1974\)](#) and [Nemetz v. Aye, 63 F.R.D. 66 \(W.D.Penn.1974\)](#) with [Guilloz v. Falmouth Hospital Ass'n, Inc., 21 F.R.Serv.2d 1367 \(D.Mass.1976\)](#) and [Perry v. W. S. Darley & Co., 54 F.R.D. 278 \(E.D.Wis.1971\)](#). The Magistrate relied upon [Baki](#) and [Nemetz, supra](#), and held the identities of persons retained or specially employed for an opinion(i. e. to whom some consideration had been paid) to be discoverable. We have again read the Magistrate's Order and the suggestions of counsel. We find plaintiff's argument based upon the Advisory Committee Notes to be unpersuasive. After reviewing the cases and the suggestions of counsel we cannot find the

Magistrate's Order to be “contrary to law.” (Supp.R., Vol. I, pp. 4-5). (Parenthetical remark in original text).

Plaintiff's counsel filed a formal response to the Court's order and refused to comply. The Court thereafter entered a civil contempt order against Johnson.[\[FN1\]](#) Johnson was committed to the custody of the United States Marshal until his compliance with the Court's order. Execution of the custody order was stayed pending appeal, after Johnson posted a recognizance bond. The Court specifically found that the appeal was not frivolous or taken for purposes of delay.

[FN1.](#) At the contempt hearing, Johnson agreed to accept any sanctions on behalf of plaintiff for failing to disclose the identities of plaintiff's consultative witnesses.

The issues on appeal are whether: (1) the District Court erred in adjudging Johnson guilty of civil contempt; and (2) a party may routinely discover the names of retained or specially employed consultative non-witness **experts**, pursuant to [Fed.Rules Civ.Proc., rule 26\(b\)\(4\)\(B\), 28 U.S.C.A.](#), absent a showing of exceptional circumstances justifying disclosure.

#### *The Contempt Power*

(Discussion of whether the contempt order applies regardless of the validity of the underlying order is omitted)

#### *Validity of the Underlying Order*

Having held that the viability of the contempt citation depends upon the validity of the underlying order, we now turn to the issue of whether a party may routinely discover the identities of non-witness **expert** consultants absent a showing of exceptional circumstances justifying disclosure.

[Fed.Rules Civ.Proc., rule 26, 28 U.S.C.A.](#), governs the scope of discovery concerning **experts** or consultants. Subdivision (b)(4) separates these **experts** into four categories, applying different discovery limitations to each:

(1) **Experts** a party expects to use at trial. The opponent may learn by interrogatories the names of these trial witnesses and the substance of their testimony but further discovery concerning them can be had only on motion and court order.

(2) **Experts** retained or specially employed in anticipation of litigation or preparation for trial but not expected to be used at trial. Except as provided in [rule 35](#) for an examining physician, the facts and opinions of **experts** in this category can be discovered only on a showing of exceptional circumstances.

(3) **Experts** informally consulted in preparation for trial but not retained. \*501 No discovery may be had of the names or views of **experts** in this category.

(4) **Experts** whose information was not acquired in preparation for trial. This class, which includes both regular employees of a party not specially employed on the case and also **experts** who were actors or viewers of the occurrences that gave rise to suit, is not included within [Rule 26\(b\)\(4\)](#) at all and facts and opinions they have are freely discoverable as with any ordinary witness. (Footnotes omitted).

[Wright & Miller, Federal Practice and Procedure : Civil s 2029](#), (hereinafter cited as Wright & Miller).

We are here concerned only with the second and third category of **experts**.

*A. Discovery of **Experts** Informally Consulted, But Not Retained or Specially Employed*

[6] No provision in [Fed.Rules Civ.Proc., rule 26\(b\)\(4\)](#), [28 U.S.C.A.](#), expressly deals with non-witness **experts** who are informally consulted by a party in preparation for trial, but not retained or specially employed in anticipation of litigation. The advisory committee notes to the rule indicate, however, that subdivision (b)(4)(B) “precludes discovery against **experts** who (are) informally consulted in preparation for trial, but not retained or specially employed.” We agree with the District Court that this preclusion not only encompasses information and opinions developed in anticipation of litigation, but also insulates discovery of the identity and other collateral information concerning **experts** consulted informally (citations omitted) . . . **Ager** urges that “an **expert** ‘would be considered informally consulted if, for any reason, the consulting party did not consider the **expert** of any assistance’, and that ‘(a) consulting party may consider the

**expert** of no assistance because of his insufficient credentials, his unattractive demeanor, or his excessive fees.” Brief of appellant at p. 37, quoting, *Graham*, Part One at pp. 939-940 n. 182. This view is, of course, at odds with the Trial Court's ruling that:

The commonly accepted meaning of the term “informally consulted” necessarily implies a consultation without formality. If one makes an appointment with a medical **expert** to discuss a case or examine records and give advice or opinion for which a charge is made and the charge is paid or promised what is informal about such consultation? On the other hand, an attorney meets a doctor friend at a social occasion or on the golf course and a discussion occurs concerning the case no charge is made or contemplated no written report rendered such could clearly be an “informal consultation.”

(*R.*, Vol. I, p. 25).

See also, *Nemetz v. Aye*, supra.

[7] We decline to embrace either approach in its entirety. In our view, the status of each **expert** must be determined on an ad hoc basis. Several factors should be considered: (1) the manner in which the consultation was initiated; (2) the nature, type and extent of information or material provided to, or determined by, the **expert** in connection with his review; (3) the duration and intensity of the consultative relationship; and, (4) the terms of the consultation, if any (e. g. payment, confidentiality of test data or opinions, etc.). Of course, additional factors bearing on this determination may be examined if relevant.

\*502 Thus, while we recognize that an **expert** witness' lack of qualifications, unattractive demeanor, excessive fees, or adverse opinions may result in a party's decision not to use the **expert** at trial, nonetheless, there are situations where a witness is retained or specifically employed in anticipation of litigation prior to the discovery of such undesirable information or characteristics. On the other hand, a telephonic inquiry to an **expert's** office in which only general information is provided may result in informal consultation, even if a fee is charged, provided there is no follow-up consultation.

[8][9] The determination of the status of the **expert** rests, in the first instance, with the party resisting discovery. Should the **expert** be considered

informally consulted, that categorization should be provided in response. The propounding party should then be provided the opportunity of requesting a determination of the **expert's** status based on an in camera review by the court. Inasmuch as the District Court failed to express its views on this question, we deem it appropriate to remand rather than attempt to deal with the merits of this issue on appeal. [Dandridge v. Williams](#), 397 U.S. 471, 476 n. 6, 90 S.Ct. 1153, 1157 n. 6, 25 L.Ed.2d 491 (1970). If the **expert** is considered to have been only informally consulted in anticipation of litigation, discovery is barred.

*B. Discovery of the Identities of **Experts** Retained or Specially Employed*

Subdivision (b)(4)(B) of [rule 26](#) specifically deals with non-witness **experts** who have been retained or specially employed by a party in anticipation of litigation. The text of that subdivision provides that “facts or opinions” of non-witness **experts** retained or specially employed may only be discovered upon a showing of “exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Inasmuch as discovery of the identities of these **experts**, absent a showing of exceptional circumstances, was not expressly precluded by the text of subdivision (b)(4)(B), the District Court found the general provisions of [rule 26\(b\)\(1\)](#) controlling. Subdivision (b)(1) provides:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . including the . . . identity and location of persons having knowledge of any discoverable matter. . . .

The District Court's ruling on this issue follows *Arco Pipeline Co. v. S/S Trade Star*, supra; *Weiner v. Bache Halsey Stuart, Inc.*, supra; *Baki v. B. F. Diamond Const. Co.*, supra; and *Sea Colony, Inc. v. Continental Ins. Co.*, supra. Several decisions, however, have held that [rule 26\(b\)\(4\)\(B\)](#) requires a showing of exceptional circumstances before names of retained or specially employed consultants may be discovered (citations omitted).

The advisory committee notes indicate that the structure of [rule 26](#) was largely developed around the doctrine of unfairness designed to prevent a party from building his own case by means of his opponent's financial resources, superior diligence and more aggressive preparation. Dr. Tappen contends that “(d)iscoverability of the identity of an **expert** retained or specially employed by the other party but who is not to be called to testify hardly gives the discovering party a material advantage or benefit at the expense of the opposing party's preparation. Once those identities are disclosed, the discovering party is left to his own diligence and resourcefulness in contacting such **experts** and seeking to enlist whatever assistance they may be both able \*503 and willing to offer.” Brief of appellee at pp. 12-13. The drafters of [rule 26](#) did not contemplate such a result:

Subdivision (b)(4)(B) is concerned only with **experts** retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against **experts** who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name **experts** retained or specially employed, but not those informally consulted. (Emphasis supplied).

[10] We hold that the “proper showing” required to compel discovery of a non-witness **expert** retained or specially employed in anticipation of litigation [FN5] corresponds to a showing of “exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” [Fed. Rules Civ. Proc., rule 26\(b\)\(4\)\(B\)](#), 28 U.S.C.A.

[FN5](#). The distinction between **experts** who are retained or specially employed in anticipation of litigation is somewhat unclear. [Virginia Elec. & Power Co. v. Sun Shipbuilding & D. D. Co.](#), 68 F.R.D. 397 (E.D.Va.1975); compare, [Seiffer v. Topsy's International Inc.](#), 69 F.R.D. 69, 72 (D.Kan.1975). See also: [Harasimowitz v. McAllister](#), 78 F.R.D. 319 (E.D.Pa.1978).

There are several policy considerations supporting our view. Contrary to Dr. Tappen's view, once the identities of retained or specially employed

**experts** are disclosed, the protective provisions of the rule concerning facts known or opinions held by such **experts** are subverted. The **expert** may be contacted or his records obtained and information normally non-discoverable, under [rule 26\(b\)\(4\)\(B\)](#), revealed. Similarly, although perhaps rarer, the opponent may attempt to compel an **expert** retained or specially employed by an adverse party in anticipation of trial, but whom the adverse party does not intend to call, to testify at trial. [Kaufman v. Edelstein, 539 F.2d 811 \(2d Cir. 1976\)](#).<sup>[FN6]</sup> The possibility also exists, although we do not suggest it would occur in this case, or that it would be proper, that a party may call his opponent to the stand and ask if certain **experts** were retained in anticipation of trial, but not called as a witness, thereby leaving with the jury an inference that the retaining party is attempting to suppress adverse facts or opinions. Finally, we agree with **Ager's** view that “(d)isclosure of the identities of (medical) consultative **experts** would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a potential medical malpractice claim with counsel . . . . (I)n medical malpractice actions (perhaps) more than any other type of litigation, the limited availability of consultative **experts** and the widespread aversion of many health care providers to assist plaintiff's counsel require that, absent special circumstances, discovery of the identity of evaluative consultants be denied. If one assumes that access to informed opinions is desirable in both prosecuting valid claims and eliminating groundless ones, a discovery practice that would do harm to these objectives should not be condoned.” Brief of appellant at pp. 27-28, 29-30.

<sup>[FN6]</sup> We do not here decide the propriety of this action.

<sup>[11]</sup> In sum, we hold that the identity, and other collateral information concerning an **expert** who is retained or specially employed in anticipation of litigation, but not expected to be called as a witness at trial, is not discoverable except as “provided in [Rule 35\(b\)](#)<sup>[FN7]</sup> or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”<sup>[FN8]</sup> [Fed. Rules Civ. Proc., rule 26\(b\)\(4\)\(B\)](#), 28 U.S.C.A. The party “seeking disclosure under [Rule 26\(b\)\(4\)\(B\)](#) carries a heavy burden” in demonstrating the existence of

exceptional circumstances. [Hoover v. United States Dept. of Interior, 611 F.2d 1132, 1142 n.13 \(5th Cir. 1980\)](#).

<sup>[FN7]</sup> [Rule 35\(b\), Fed. Rules Civ. Proc., 28 U.S.C.A.](#), deals with the exchange of information concerning physical or mental examinations of persons. These provisions are not at issue here.

<sup>[FN8]</sup> Professor Albert Sacks, reporter to the advisory committee, listed two examples of exceptional circumstances at a Practising Law Institute Seminar on Discovery held in Atlanta, Georgia, September 25-26, 1970:

(a) Circumstances in which an **expert** employed by the party seeking discovery could not conduct important experiments and test(s) because an item of equipment, etc., needed for the test(s) has been destroyed or is otherwise no longer available. If the party from whom discovery is sought had been able to have its **experts** test the item before its destruction or nonavailability, then information obtained from those tests might be discoverable.

(b) Circumstances in which it might be impossible for a party to obtain its own **expert**. Such circumstances would occur when the number of **experts** in a field is small and their time is already fully retained by others.

See: ALI-ABA, Civil Trial Manual p. 189.

#### *\*504 Disposition*

<sup>[12]</sup> The order of the District Court adjudging Lynn R. Johnson guilty of civil contempt is vacated. The cause is remanded. On remand, the status of the non-witness **experts** against whom discovery is sought should be undertaken as a two-step process. First, was the **expert** informally consulted in anticipation of litigation but not retained or specially employed? If so, no discovery may be had as to the identity or opinions of the **expert**. Second, if the **expert** was not informally consulted, but rather retained or specially employed in anticipation of litigation, but not expected to testify at trial, do exceptional circumstances exist justifying disclosure of the **expert's** identity, opinions or other collateral information?

VACATED AND REMANDED.