

IN THE MATTER OF

THOMPSON MEDICAL COMPANY, INC.

Docket 9149. Interlocutory Order, March 11, 1983

ORDER ON RESPONDENT'S APPLICATION FOR INTERLOCUTORY REVIEW

It has long been the Commission's policy to provide to the respondents in its administrative proceedings copies of all prior statements of complaint counsel's witnesses, for use in cross-examination. *Inter-State Builders, Inc.*, 69 F.T.C. 1152 (1966); *Ernest Mark High*, 56 F.T.C. 625 (1959). While the Commission is not bound by the Jencks Act, 18 U.S.C. 3500, or compelled to adhere to its principles, it does look to court decisions interpreting it for guidance in enforcing its own policy. *USLife Credit Corp.*, 91 F.T.C. 984, 1036-37 (1978).

On April 30, 1979, the Federal Rules of Criminal Procedure were amended, effective December 1, 1980, to require the production of "Jencks-type" prior statements of *all* witnesses (except the defendant) in criminal trials, on motion of the opposing party. Fed.R.Crim.P. 26.2(a), 18 U.S.C. Rule 26.2 (1982 Supp.). On July 5, 1982, the trial in this proceeding began. On July 30, 1982, complaint counsel moved for an order directing respondent to produce Jencks-type statements of its witnesses, consistent with the amended Rules. The Administrative Law Judge ("ALJ") concluded on August 19, 1982, that the circumstances of this particular case justified an order for the production of such statements by respondent's *expert* witnesses. On September 15, 1982, respondent applied for review of the order, and on October 21 the ALJ certified the review to the Commission under Section 3.23(b) of the Commission's Rules of Practice, 16 U.S.C. 3.23(b), as involving a controlling question of policy as to which there is substantial ground for differences of opinion. The ALJ further concluded that immediate appeal may materially advance the ultimate disposition of the litigation. The trial continued, with respondent tendering all required statements of its expert witnesses, subject to an agreement that this would not be deemed a waiver of respondent's rights to pursue its appeal. On December 17, 1982, respondent completed the presentation of its witnesses.

The Commission has determined to grant review of the order because it presents a controlling question of policy on which the Commission has as yet provided no guidance, and there is substantial ground for differing views. Furthermore, resolution of the question will facilitate the ultimate resolution of this case.

In establishing the defendant's right to examine and use in cross-

examination the prior statements of government witnesses in federal criminal prosecutions, the Supreme Court emphasized the value of eyewitness accounts, and particularly contemporaneous eyewitness accounts, of events in controversy: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks v. United States*, 353 U.S. 657, 667 (1956). Similarly, in upholding a trial judge's order that the report of an investigator for the defendant be revealed to the prosecution for use in the cross-examination of the investigator, the Court reasoned that his contemporaneous report of eyewitness' accounts of an armed robbery "might provide critical insight into the issues of credibility that the investigator's testimony would raise." *United States v. Nobles*, 422 U.S. 225, 232 (1975). The Jencks Act and revised Rule 26.2 were adopted to clarify and circumscribe the authority of the federal judiciary to exercise their inherent power, recognized in the *Jencks* and *Nobles* decisions, to enhance the truth-finding process in criminal proceedings by ordering the discovery of witnesses' prior statements. *Palermo v. United States*, 360 U.S. 343 (1959); Notes of Advisory Committee on Rules, 18 U.S.C. Rule 26.2 (1982 Supp.).

The Commission has concluded that it is unnecessary to adopt the principle of Rule 26.2 to assure adequate cross-examination of expert witnesses in its proceedings, even assuming *arguendo* that the need to uncover prior inconsistent statements of witnesses is as compelling in such proceedings as it is in criminal trials. The Commission's Rules of Practice already provide for extensive discovery concerning expert witnesses. Section 3.31(b)(4)(i) provides that discovery of facts known and opinions held by expert witnesses may be obtained as follows:

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

This section is nearly identical to Rule 26(b)(4) of the Federal Rules of Civil Procedure.¹

¹ Rule 26(b)(4) provides:

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

(A)(i) A party may through interrogatories require any other party to identify each person whom the other

(footnote cont'd)

There is a division among the courts as to the appropriate scope of discovery under subsection (b)(4)(a)(ii) of Rule 26, which is analogous to subsection 3.31(b)(4)(i)(B) of the Commission's Rules. It has been held that in order to obtain "further discovery" beyond interrogatories under this subsection (specifically, in these cases, copies of reports written by experts), the moving party must show "unique or exceptional circumstances"² or a "compelling" need for such discovery.³ One court has explicitly incorporated into subsection (b)(4)(a)(ii) the "substantial need" standard contained in Rule 26(b)(3)—the analog to Section 3.31(b)(3) of the Commission's Rules—in considering a discovery request for documents prepared by an expert in anticipation of litigation.⁴ However, the prevailing view is more liberal: further discovery should be granted when a request is reasonably framed to enable the movant to prepare for effective cross-examination of the expert or rebuttal.⁵

party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

² *Breedlove v. Beech Aircraft Corp.*, 57 FRD 202, 205 (N.D. Miss. 1972). The decision here may have turned on the fact that discovery of the witnesses' reports was requested before discovery under subsection (b)(4)(a)(i) had been completed. The courts have uniformly agreed that Rule 26 establishes a two-step process for discovery regarding expert witnesses. *E.g.*, *Shackelford v. Vermeer Mfg. Co.*, 93 FRD 512 (W.D. Texas 1982); *United States v. Int'l Business Machines Corp.*, 72 FRD 78 (S.D.N.Y. 1976); *Herbst v. Int'l Telephone & Telegraph Corp.*, 65 FRD 528 (D. Conn. 1975); *United States v. John R.—Piquette Corp.*, 52 FRD 370, 372 (E.D. Mich. 1971).

³ *United States v. 145.31 Acres of Land*, 54 FRD 359, 360 (M.D. Pa. 1972).

⁴ *Wilson v. Resnick*, 51 FRD 510 (E.D. Pa. 1970). The court also applied the standard of Rule 26(b)(3) in evaluating the discoverability of experts' reports in *Breedlove v. Beech Aircraft Corp.*, 57 FRD 202, 205 (N.D. Miss. 1972). However, it is not clear that the court considered that standard to be incorporated into 26(b)(4)(a)(ii); it may have (erroneously) considered 26(b)(3) to offer an alternative ground for discovery of the reports.

The approach in *Resnick* has been criticized as "interject[ing] the work-product doctrine into an area of discovery in which the Advisory Committee [to the Rules of Civil Procedure] explicitly rejected the doctrine." Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U.I.L.L.F. 895, 927. This approach has also been defended as logical, if the expert has taken on a consulting role in the litigation. Comment, *Discovery of Expert Information Under the Federal Rules*, 10 U.Rich.L.Rev. 706, 719-21 (1976). See also, Connors, *A New Look at an Old Concern—Protecting Expert Information From Discovery Under the Federal Rules*, 18 *Duquesne L.Rev.* 271 (1980).

⁵ *Sea Colony West Phase I Condominium Ass'n v. Sea Colony, Inc.*, 438 A.2d 1233 (Super. Ct. Del. 1981) (decided under state court rules, but relying on the Advisory Committee Note on the Federal Rules and the federal case law on Rule 26(b)(4)(a)(ii)); *In Re IBM Peripheral EDP Devices Antitrust Litigation*, 77 FRD 39 (N.D. Cal. 1977); *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 74 FRD 594 (D. Conn. 1977). In *Herbst v. Int'l Telephone & Telegraph Corp.*, 65 FRD 528, 530 (D. Conn. 1975), the court went so far as to conclude that "[o]nce the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than any other witness." Unlike the other cases, *Herbst* concerned a request for deposition rather than the production of a report prepared by an expert. In another case involving requests for both reports and depositions, the court expressed the view that Rule 26(b)(4) provides for "quite liberal" discovery of the opinions of experts; however, the court did not reveal specifically what test it would apply in evaluating requests under (a)(ii) after discovery under (a)(i) was completed. *United States v. John R.—Piquette Corp.*, 52 FRD 370 (E.D. Mich. 1971).

In addition to these reported cases, a survey of federal district judges, magistrates, government attorneys, and private practitioners indicates that:

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

(footnote cont'd)

The Advisory Committee to the Rules of Civil Procedure did not expressly explain how "further discovery" should be evaluated. However, the Committee emphasized in its Explanatory Statement that "[e]ffective cross-examination of an expert witness requires advance preparation. * * * Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side." On the other hand, the Committee recognized the fear, reflected in the caselaw, that "one side will benefit unduly from the other's better preparation," and it advised that the procedure it recommended would minimize the risk of that happening:

Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse.

Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 503-04 (1970). This suggests that "the primary purpose of this subsection is to permit the opposing party to prepare an effective cross-examination" and, further, that discovery should be granted when the court is persuaded that "the party seeking discovery is not abusing the procedure and the information sought would prove helpful in providing for a full and fair adjudication."⁶

Thus, the Commission has concluded that the more liberal view of discovery of experts under the Federal Rules is the one that should apply in Commission adjudications.⁷ It is most consistent with the desire of the Commission in 1978 to "balance a somewhat broadened range of discovery with firm control by Administrative Law Judges of the pace and scope of adjudicative proceedings." 43 FR 56862 (1978).

Accordingly, it is already well within the broad discretion of the

Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U.I.L.L.F. 169, 172. The author recommends that Rule 26(b)(4) be amended to provide "full discovery" to prepare for cross-examination and rebuttal, "to comport with actual practice and with the intentions of the drafters of the Federal Rules of Evidence." *Id.* at 202.

⁶ *Sea Colony West Phase I Condominium Ass'n v. Sea Colony, Inc.*, 438 A.2d 1233, 1235 (Super. Ct. Del. 1981). See also discussions of the Explanatory Statement in the *IBM* and *Herbst* cases cited in note 5; Graham, *supra* note 4, at 921-927; and 8 C. Wright & A. Miller, *Federal Practice and Procedure* Section 2031 (1970).

⁷ When the Commission revised its discovery rules in 1978 and adopted Section 3.31(b)(4)(i) in its current form, it explained how judicial interpretations of the Federal Rules would influence the application of its own rules:

Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, but they are not to be regarded as binding, because application of the Commission's rules must be tailored to the circumstances of Commission proceedings.

43 FR 56862, 56863 (1978).

Administrative Law Judges to order the disclosure of prior statements of expert witnesses such as those described in the Jencks Act.⁸ This being the case, it is unnecessary to transplant to civil administrative proceedings procedures that have been developed for criminal litigation.

Although the ALJ did not reach his decision here under Section 3.31(b)(4)(i)(B), his analysis was appropriate for a determination under that rule. Clearly, it was his judgment from reviewing the summaries of anticipated testimony that effective cross-examination of expert witnesses could be critical to a proper resolution of this case, and that the disclosure of prior statements of those witnesses could allow for more effective cross-examination than would otherwise be possible. An ALJ has broad discretion to rule on discovery requests, and his determinations will be reversed only on a showing of clear abuse. *General Foods Corp.*, 95 F.T.C. 306 (1980); *Warner-Lambert Co.*, 83 F.T.C. 485 (1973); *Boise Cascade Corp.*, Docket No. 9133 (order of Oct. 15, 1982) [100 F.T.C. 512]. Since his order is sustainable under Section 3.31(b)(4)(i)(B), respondent's motion that it be reversed is hereby denied.

⁸ See, e.g., *Xidex Corp.*, Docket No. 9146, (order of Aug. 27, 1981).

IN THE MATTER OF
MEREDITH CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3107. Complaint, March 15, 1983—Decision, March 15, 1983

This consent order requires a Des Moines, Iowa franchisor and operator of the Better Homes and Gardens Real Estate Service (Service), among other things, to cease making false or misleading representations regarding the Service, its members, or services offered. The order prohibits the dissemination of advertisements and promotional materials which represent that all Service members offer consumers "settling-in" services; participate in a home-building program; and offer "exclusive" home-protection insurance, unless the advertisement clearly discloses that not all members offer these services. The corporation is also barred from making unsubstantiated representations concerning the Service's selectivity in choosing members; training of sales associates of Service members; market size, rank and leadership in terms of sales volume of Service members; or any statement which compares Service members to other real estate franchisors as to calibre of members or membership standards. Further, respondent must send to all members of the Better Homes and Gardens Real Estate Service a letter recalling certain advertising and promotional materials, and an acknowledgement form.

Appearances

For the Commission: *Andrew B. Sacks* and *Matthew L. Myers*.

For the respondent: *Perry Bradshaw*, Des Moines, Iowa and *William Cerillo, McDermott, Will & Emery*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Meredith Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Meredith Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa with its office and principal place of business located at 1716 Locust Street, Des Moines, Iowa.