Timothy J. Thomason
Streich Lang, P.A.
Two North Central Avenue
Phoenix, Arizona 85004
Co-Chair –
Trial Practice Committee

Keith R. Dutill, Esq.
Stradley, Ronon, Stevens & Young
30 Valley Stream Parkway
Malvern, Pennsylvania 19355-1481
Co-Chair –
Trial Practice Committee

Hilarie Bass, Esq.
Greenberg, Traurig
1221 Brickell Avenue
Miami, Florida 33131
Co-Chair –
Trial Practice Committee

Thomas M. Geisler, Jr., Esq.
205 Church Street, Suite 508
New Haven, Connecticut 06510
Co-Chair –
Publications Subcommittee

Kenneth R. Adamo, Esq.
Jones Day Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Co-Chair –
Publications Subcommittee

Edward Richard Stege, Esq.
Stege and Associates Co., L.P.A.
200 Public Square
The BPAmerica Building, Suite 3220
Cleveland, Ohio 44114
Co-Chair –
Programs Subcommittee

Sara Staman, Esq.
Hangley, Aronchick, Segal & Pudlin
One Logan Square, 12th floor
Philadelphia, Pennsylvania 19103
Co-Chair –
Programs Subcommittee

Christina M. Bond
Magistrate
Court of Common Pleas
Domestic Relations Division
Mahoning County Courthouse
Youngstown, Ohio 44503
Chair –
Membership Subcommittee

John L. North, Esq.
Sutherland, Asbil & Brennan
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3996
Co-Chair –
Technology Subcommittee

John B. Pinney, Esq.
Graydon, Head & Ritchey
511 Walnut Street
Cincinnati, Ohio 45202-3157
Co-Chair –
Technology Subcommittee

Michael C. Towers, Esq.
Fisher & Phillips
945 E. Paces Ferry Road
Atlanta, Georgia 30326-1125
Co-Chair –
Regional Workshops Subcommittee

Stephen A. Best, Esq.
The Falk Law Firm, PLLC
2445 "M" Street NW, Suite 260
Washington, D.C. 20037
Co-Chair –
Regional Workshops Subcommittee

David P. Milian, Esq.
Kozyak Tropin & Throckmorton
2800 First Union Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2335
Chair – Website Subcommittee

TRIAL PRACTICE

The Newsletter of the Trial Practice Committee of the Litigation Section of the AMERICAN BAR ASSOCIATION

Vol. 16, No. 1 **Winter 2000**

TABLE OF CONTENTS

"Trial Practice" is published three to four times a year at irregular intervals by the Trial Practice Committee.
American Bar Association, 750 N. Shore Drive, Chicago, IL 60611

THE EXPERT'S REPORT - PERSUASIVE TOOL OR DEADLY TRAP?

By: John P. McCahey and
Maria A. Arnott*
Hahn & Hessen LLP
350 Fifth Avenue
New York, NY 10118

Expert testimony is often crucial to a litigation's outcome. In view of the expert's importance, attorneys properly devote substantial time in discovery learning as much as possible about the opposing side's trial experts and their anticipated testimony. Rule 26 of the Federal Rules of Civil Procedure facilitates such task by requiring that the expert provide a detailed written report to the other side prior to trial "so that opposing parties have a reasonable opportunity to prepare effective cross-examination and perhaps arrange for expert testimony from other witnesses". *See* Fed. R. Civ. P. 26(a)(2)(B); Advisory Committee Notes, 1993 Amendments, Fed. R. Civ. P. 26(a)(2). The expert's report fosters the "elimination of unfair surprise to the opposing party and the conservation of resources". *See Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir.), *cert. denied*, 516 U.S. 822 (1995). The expert's report may also serve as a basis for a pre-trial motion to exclude the expert's testimony at trial as not reliable under the standards enunciated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999). *See Fitz v. Ralph Wilson Plastics, Co.*, 184 F.R.D. 532, 536 (D.N.J. 1999) (noting that Rule 26's requirements assist the court in making rulings limiting or restricting expert testimony).

Attorneys, however, cannot overlook that *their* trial experts are also required to prepare and submit a report to the other side prior to trial. Early in the litigation, the attorney will therefore need to focus on their own expert's report. Besides insuring that it is a persuasive document, the attorney is responsible to see that their expert's report satisfies the detailed requirements of Rule 26. *See Salgado v. General Motors Corp.*, 150 F.3d 735, 742 n.67 (7th Cir. 1998). The consequences that may result from inattention to the dictates of Rule 26 include the preclusion, in whole or part, of the expert's testimony at trial or the imposition of sanctions against the attorney or his or her client.

This article will briefly highlight the requirements of an expert's report under Rule 26. The attorney should also consult the local court rules and those of the assigned judge that apply to experts for any additional requirements.

WHO MUST PROVIDE A REPORT

If the expert was either "retained or specifically employed to provide expert testimony in the case" or is an employee of the party whose duties "regularly involve the giving of expert testimony," the expert must provide a detailed written report "prepared and signed" by the expert prior to trial. *See* Fed. R. Civ. 26(a)(2)(B). An exception will apply to a treating physician whose testimony will be limited to the care or treatment of a patient. *See* Advisory Committee Notes, 1993 Amendments, Fed. R. Civ. P. 26(a)(2); *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173, 175 (D. Nev. 1997); *Riddick v. Washington Hospital Center*, 183 F.R.D. 327, 330 (D.D.C. 1998) (treating physician "may describe what she has seen, describe and explain her diagnosis and the treatment she prescribed, and offer her opinion and expert inferences therefrom - all without running afoul of the constraints of Rules 26 and 37 of the Federal Rules of Civil Procedure"). A report may be required from a treating physician, however, if such physician's trial testimony will be based on professional expertise going beyond the patient's treatment. *See Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1, 2 (D. Mass. 1996) (report from treating physician required "since it seems that plaintiff intends to offer opinion testimony . . . regarding causation and prognosis"). By local rule, order or written stipulation (presumably with court approval), the requirement of a written report may be waived for particular experts or imposed upon experts not otherwise required to provide a written report. *See* Advisory Committee Notes, 1993 Amendments, Fed. R. Civ. P. 26(a)(2).

---

* Mr. McCahey is a member of the New York City Firm, Hahn & Hessen LLP, and Ms. Arnott is an associate at the firm.

WHEN IS THE REPORT DUE

Unless otherwise ordered by the court or agreed to by the parties (presumably with court approval), the identity of trial experts and such experts' report must be provided to opposing counsel at least 90 days before the scheduled trial date or the date the case is ready for trial. *See* Fed. R. Civ. P. 26(a)(2)(C). The court may alter the timing and sequence of the parties' designation of trial experts and exchange of reports. *Id.* For example, the court may direct the plaintiff to identify its expert and produce its expert's report before the defendant is required to make a similar disclosure. *See Smith v. State Farm Fire and Cas. Co.*, 164 F.R.D. 49 (S.D.W.Va. 1995); cf. *Pfohl Bros. Landfill Site Steering Committee v. Pfohl Enterprises*, 187 F.R.D. 462 (W.D.N.Y. 1999) (court declined to require plaintiff to make expert disclosure before defendant absent explanation by defendant as to how it would be prejudiced by simultaneous disclosure). The expert's report should always precede the expert's deposition. *See* Fed. R. Civ. P. 26(b)(4)(A).

In the case of an expert who will be called at trial to contradict or rebut the anticipated testimony of an opposing expert, a written report will be required and, unless otherwise ordered by the court or stipulated by the parties, must be produced to the opposing attorneys within thirty (30) days of the production of the expert's report it seeks to rebut. *See* Fed. R. Civ. P. 26(a)(2)(C). It has been held, however, that a rebuttal report submitted more than 30 days after the submission of the report it was intended to rebut, but more than 90 days before trial, was timely since the "provision for 30 days is subordinate to the requirement of 90 days before trial". *See Dixon v. Certainteed Corp.*, 168 F.R.D. 51, 54 (D. Kan. 1996). It is important to note that an expert who previously submitted a report may not later submit a rebuttal report to cure deficiencies in the initial report. *See Keener v. United States*, 181 F.R.D. 639 (D. Mont. 1998).

WHAT MUST THE REPORT CONTAIN

Rule 26 enumerates six (6) categories of information that the expert's report must contain. *See* Rule 26(a)(2)(B). These requirements should be reviewed with any potential expert prior to retention to insure that he or she will be able to issue a report in compliance therewith. At least one court has noted that if a party retains an expert who is unable to meet the requirements of Rule 26, then that party should bear the consequences of non-compliance. *See Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 681 (D. Kan. 1995) ("[a] party may not simply retain an expert and then make whatever disclosures the expert is willing or able to make notwithstanding the known requirements of Rule 26").

The six (6) requirements of Rule 26 are as follows:

(1) *A complete statement of all opinions that will be expressed at trial by the expert and the reasons and basis for each such opinion.* The Advisory Committee Notes stress that the purpose of the report is to set forth the substance of the expert's anticipated trial testimony. *See* Advisory Committee Notes, 1993 Amendments, Fed. R. Civ. P. 26(a)(2); *see also Reed v. Binder*, 165 F.R.D. 424, 428 n.5 (D.N.J. 1996) ("[i]n simple terminology, this mean 'how' and 'why' the expert reached the conclusions and opinions he expressed"). Opinions (and the basis thereof) not disclosed in the report may be excluded at trial under Rule 37(c)(1) of the Federal Rules of Civil Procedure. *See 1st Source Bank v. First Resource Federal Credit Union*, 167 F.R.D. 61 (N.D. Ind. 1996).

(2) *The data and other information considered by the expert in forming his opinions must be disclosed. See Reed v. Binder, supra*, 165 F.R.D. at 428 n.6 ("in simple language, this means 'what' the expert saw, heard, considered, read, thought about or relied upon in reaching the conclusions and opinions to be expressed"). This disclosure applies to data or information considered but not relied upon by the expert. *See* Advisory Committee Notes, 1993 Amendments, Fed. R. Civ. P. 26(a)(2); *see also Karn v. Ingersoll Rand*, 168 F.R.D. 633, 634 (N.D. Ind. 1996) ("'[c]onsidered', which simply means 'to take into account', clearly invokes a broader spectrum of thought than the phrase 'relied upon,' which requires dependence on the information"); *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, 1993 WL 360674 (D.C. Cal. 1993) (citing the amendments to Rule 26 as requiring "automatic disclosure of all information considered by the trial experts" in forming their opinion).

The attorney should be aware that courts have held that this disclosure extends to otherwise privileged information provided to the expert. *See Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305-06 (W.D. Va. 1998) ("work product can remain protected so long as it is not given to the expert to

consider in the development of his opinions"); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *B.C.F. Oil Refining Inc. v. Consolidated Edison of New York, Inc.*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997) ("the drafters of the [1993 amendments to Rule 26] understood the policies behind expert disclosure and the work product doctrine and have decided that disclosure of material generated or consulted by the expert is more important"); *Karn v. Ingersoll-Rand, supra*, 168 F.R.D. at 637 ("text of [Rule 26(a)(2)] supported by its accompanying commentary, was designed to mandate full disclosure of those materials reviewed by an expert witness"); *but see Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999) (required disclosure of material provided to expert does not include core attorney-work product); *Magee v. The Paul Revere Life Insurance Co.*, 172 F.R.D. 627, 641-644 (E.D.N.Y. 1997) (attorney work product reviewed by testifying expert need not be disclosed absent showing required by Rule 26(b)(3) for production of work product); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-296 (W.D. Mich. 1995) (allowing discovery of factual work product, but not opinion work product under Rule 26(a)(2)). The attorney should consider that any privileged materials provided to the expert may wind up in the hands of the opposing side in discovery.

(3) *The exhibits expected to be used at trial to summarize or support the expert's opinion must be identified and appended to the report. See United Phosphorus Ltd. v. Midland Fumigant, Inc.*, 173 F.R.D. 675, 677 (D. Kan. 1997) (court precludes expert from using at trial exhibits not attached to his report); *Fritter v. Dafina*, 181 F.R.D. 215 (N.D.N.Y. 1998) (excluding expert from using at trial any data, photographs and videotape from tests conducted after the submission of the expert's reports).

(4) *The expert's qualifications, including a list of all publications authored by the expert within the preceding ten years, must be set forth. See Ohime v. Foresman*, 186 F.R.D. 507 (N.D. Ind. 1999) (expert's report excluded by reason of expert's failure, among other things, to include list of publications).

(5) *A list of other cases in which the expert has testified at trial or by deposition within the preceding four years must be included. See Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296 (D. Nev. 1998) (striking expert's designation because he failed to list other cases he testified in at trial or deposition.) The cost or difficulty of preparing such a list does not excuse non-compliance. *See Palmer v. Rhodes Machinery*, 187 F.R.D. 653, 655 (N.D. Okla. 1999). The identification of "cases" has been construed to require, at a minimum, the courts or administrative agencies, the names of the parties, the case number and whether the testimony was by deposition or at trial. *See Nguyen v. IBP, Inc., supra*, 162 F.R.D. at 682. This information should permit the other side to locate other testimony which might be relevant to the expert's testimony in the pending case. One court has held, however, that the expert need not produce his reports from such other cases. *See Trunk v. Midwest Rubber and Supply Co.*, 175 F.R.D. 664 (D. Colo. 1997).

(6) *The compensation paid for the expert's study and testimony must be disclosed.* The term "compensation" is not limited to the payment of an expert's fee, but encompasses a wide range of compensation agreements involving some type of consideration, payment or reward. *See Smith v. State Farm Fire and Cas. Co., supra*, 164 F.R.D. at 56 ("[o]pposing counsel and the trier of fact are entitled to know what compensation is to be paid the expert for the study and testimony, even if the compensation is not in the form of money to be paid contemporaneously with the civil action").

A court, by local rule or order, may direct additional disclosure by an expert beyond that required by Rule 26(a)(2)(B). *See* Advisory Committee Notes, 1993 Amendments, Fed. R. Civ. P. 26(a)(2). In addition, a party is not precluded from seeking further information in discovery regarding the categories enumerated in Rule 26(a)(2)(B), such as, for example, questioning an expert at a deposition concerning testimony he has given in other litigations beyond the four-year period. *Id.; see also Vitale v. McAtee*, 170 F.R.D. 404 (E.D. Pa. 1997) (permitting disclosure of payments made by defendant's attorneys to defendant's expert in the previous three years).

WHO MUST PREPARE THE REPORT

The report must be "prepared and signed" by the expert. *See* Fed. R. Civ. P. 26(a)(2)(B); *see also Indiana Insurance Co. v. Hussey Seating Co.*, 176 F.R.D. 291, 293 (S.D. Ind. 1997) ("unquestionably, Rule 26 requires an expert witness to prepare his own report"). While the report must be prepared by the expert, the Advisory Committee Notes expressly acknowledge that this rule "does not preclude the attorney from providing assistance to experts in preparing the reports". *See* Advisory Committee Notes, 1993 Amendments, Fed. R. Civ.

P. 26(a)(2); *Marek v. Moore*, 171 F.R.D. 298, 300 (D. Kan. 1997) ("trial counsel may well have legitimate cause to give some assistance to an expert witness in the preparation of the report" since "Rule 26(a)(2)(B) sets exacting requirements for its contents"). As a practical matter, an attorney's assistance should be limited to ensure that the report is complete and that the expert's opinions and how he arrived at them will be understandable by the judge and jury.

The report's contents, however, should reflect the opinions and work of the expert and not that of the attorney. *See Smith v. State Farm Fire and Cas. Co., supra*, 164 F.R.D. at 54 (expert witness may not adopt as part of his report answers to interrogatories prepared by counsel since report "should be written in a manner that reflects the testimony to be given by the witness, and not the closing argument of [p]laintiff's attorney"). As one court has observed, "[a]ny changes in the preparation of a report must be what the expert himself has freely authorized and adopted as his own and not merely for appeasement or because of intimidation or some undue influence by the party or counsel who has retained him". *See Marek v. Moore, supra*, 171 F.R.D. at 302. If the attorney infringes on the expert's role to prepare the report, the credibility of both the expert and the attorney may be seriously damaged at trial. *See State of New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 869 (E.D.N.Y. 1993) (where portions of the expert's report were actually written and edited by the expert's attorney, the court permitted the report to be admitted into evidence, but stated that collaboration "seriously damaged [the expert's] credibility and further diminished the weight the Court gave his testimony"); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611 (D.N.J. 1989) (court orders production of draft report prepared by attorney for expert to retype and sign noting that attorney's actions seriously damaged both his and expert's credibility).

SUPPLEMENTATION OF REPORT

There is a continuing duty to supplement or correct an expert's report if it is later learned that in some material respect the information disclosed in the report is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other side in the discovery process or in writing. *See* Fed. R. Civ. P. 26(e). "Supplementation under the Rules means correcting inaccuracies or filing the interstices of an incomplete report based on information that was not available at the time of the initial disclosure." *See Keener v. United States, supra*, 181 F.R.D. at 640. Unless otherwise directed by the court, this supplementation should be made at least 30 days before trial. *See* Fed. R. Civ. P. 26(a)(2)(C) and 26(e)(1); *see also Grassi v. Information Resources, Inc.*, 63 F.3d 596 (7th Cir. 1995) (upholding trial court's exclusion of expert's supplemental reports submitted on date trial commenced).

SANCTIONS FOR NON-COMPLIANCE

"A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial ... any witness or information not so disclosed." *See* Fed. R. Civ. P. 37(c)(1). The sanction of exclusion under Rule 37(c)(1) has been described as "automatic and mandatory unless the party to be sanctioned can show that its violation of Rule 26(a) was either justified or harmless". *See Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996); *see also 1st Source Bank v. First Resource Federal Credit Union, supra*, 167 F.R.D. at 64 (*quoting* Wright & Miller, *Federal Practice and Procedure* § 2289.1) ("the exclusion of undisclosed information is automatic; there is no need for the opposing party to make a motion to compel disclosure, as authorized by Rule 37(a)(2)(A) in order to compel a further disclosure as a predicate for the imposition of the sanction of exclusion'").

The determination of whether a party's failure to comply with expert disclosure under Rule 26 is substantially justified or harmless is entrusted to the discretion of the court. *See Finley v. Marathon Oil Co., supra*, 75 F.3d at 1231; *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290, 1295-96 (7th Cir. 1993) (affirming order barring expert from testifying as sanction for non-compliance with discovery deadline as within court's discretion). The burden of establishing a substantial justification for non-disclosure or a lack of harm is upon the party who is claimed to have failed to make the required disclosure. *See Nguyen v. IBP, Inc.*, supra, 162 F.R.D. at 680. "Substantial justification" has been construed to contemplate justification to a degree sufficient to satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. *Id.* Likewise, failure to comply with a mandate of Rule 26 is considered "harmless" when there is no prejudice to the party entitled to the disclosure. *See Marek v. Moore, supra*, 171 F.R.D.

at 299 (absence of expert's signature on report was harmless deficiency in that there was no prejudice to opposing party).

Some courts have indicated a reluctance to exclude expert testimony under Rule 37(C)(1) where the expert's report is untimely or incomplete. *See ABB Air Preheater, Inc. v. Regenerative Environmental Equipment Co., Inc.*, 167 F.R.D. 668, 671-72 (D.N.J. 1996) (indicating that courts in the Third Circuit should exercise restraint in excluding expert testimony under Rule 37(c)(1)). The court will weigh several factors in deciding whether or not to exclude the expert's testimony, including (i) the prejudice resulting from the non-disclosure; (ii) the ability to cure such prejudice; (iii) the extent to which such cure will delay the trial, and (iv) the bad faith or willfulness of the non-disclosing party. *See In re Complaint of Kreta Shipping, S.A.*, 181 F.R.D. 273, 277 (S.D.N.Y. 1998); *Texas Instruments, Inc. v. Hyundai Electronics Industries Co. Ltd.*, 50 F.Supp.2d 619, 622 (E.D. Tex. 1999); *Seymour v. Consolidated Freightways*, 187 F.R.D. 541, 542 (S.D. Miss. 1999).

Rule 37(c)(1) also permits a court, upon motion and after affording an opportunity to be heard, to impose "appropriate" sanctions "in addition to or in lieu of" the sanction of exclusion. *See* Fed. R. Civ. P. 37(c)(1). These sanctions may include the payment of reasonable expenses, including attorneys' fees, caused by the failure to disclose, the sanctions permitted under subparagraphs (A), (B) and (C) of Rule 37(b)(2), and informing the jury of the party's failure to make the disclosure. *See* Fed. R. Civ. P. 37(c)(1) and 37(b)(2). Sanctions may also be imposed under Rule 16(f) for failing to provide timely expert disclosure as required by the court's scheduling order. *See* Fed. R. Civ. P. 16(f); *Barrel v. Atlantic Richfield Co.*, 95 F.3d 375 (5th Cir. 1996) (holding that district court acted within the discretion permitted under Rule 16(f) and Rule 37(b)(2) by striking plaintiff's expert witness because of failure to timely comply with scheduling order).

The Federal Rules afford the district court wide latitude in imposing sanctions for failure to make full and timely disclosure. "[T]he court of appeals will not reverse the district court in the absence of a clear abuse of discretion." *See Boardman v. National Medical Enterprises*, 106 F.3d 840, 843 (8th Cir. 1997) (*quoting Hazen v. Pasley*, 768 F.2d 226, 229 (8th Cir. 1985)). Some courts, exercising their discretion, have imposed sanctions other than exclusion in response to a party's failure to make the necessary expert disclosure. *See Reed v. Binder*, *supra*, 168 F.R.D. at 431 (finding exclusion of expert testimony "unduly harsh" and ordering the non-complying party to bear fees charged by their experts for depositions necessitated by non-disclosure); *Nguyen v. IPB, Inc.*, *supra*, 162 F.R.D. at 682 (allowing non-complying party additional time to cure report's deficiencies before excluding report).

The interplay between Rule 26 and Rule 37 may make it difficult, if not impossible, for the attorney to test the sufficiency of the report submitted by his or her expert prior to submission to the opposing side. Attorneys, therefore, should strive to err on the side of caution when submitting a report under Rule 26. *See 1st Source Bank v. First Resources Federal Credit Union*, *supra*, 167 F.R.D. at 64. Unwise tactical decisions may result in the exclusion of the expert's testimony at trial. *See Miksis v. Howard*, 106 F.3d 754, 760 (7th Cir. 1997) (rather than wait and see how the court rules on party's motion to modify discovery order, "the proper course was to obey the court's order...").

CONCLUSION

The requirement of an expert's report under Rule 26 is more than just a tool to be used by an attorney against the experts produced at trial by the other side. It can also be an effective means for the attorney to persuade a judge or jury as to the soundness of the positions taken by his or her experts, as well as to expose fallacies embraced by the opposing experts. In many cases, a well-prepared expert's report can be the catalyst to bring the opposing side to the settlement table. The attorney then is well advised to spend time working with his or her own experts to insure that the reports submitted are both persuasive documents and in compliance with Rule 26. Overlooking the importance of one's own expert report may not only result in a missed opportunity, but could result in a deadly trap.