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The trial expert v. the litigation consultant

By Hillary A. Frommer

To most lawyers and clients, the "expert" is the individual who persuades a jury of a party's position with his or her superior knowledge and stature in the professional community, be it in medicine, engineering, accounting, or any other technical area. That is not the only role of an expert.

There are two types of experts in litigation: the trial expert and the litigation consultant. The trial expert is, by virtue of his or her education, training, skill or experience, believed to have proficiency and specialized knowledge in a particular subject beyond that of an average person. Utilized by both sides to advocate their respective positions, the trial expert prepares a written report and testifies at trial. The litigation consultant, on the other hand, does not issue a report or testify at trial. Rather, the consultant provides advisory services to the lawyer and helps prepare a case for trial. Defined as "an adjunct to the lawyer's strategic thought process",[1] the litigation consultant assists in the litigation from its earliest stages by identifying important facts and issues, or the strengths and weaknesses of the case.

The distinction between the two types of experts is critical for purposes of pre-trial discovery. In both the state and federal courts, discovery is generally permitted of the trial expert only. In state court, expert discovery is governed by CPLR § 3101(d)(1), which mandates disclosure of: (1) the name of the expert the party intends to call at trial; (2) the subject matter "in reasonable detail" on which the expert is expected to testify; (3) the substance of the expert's facts and opinions; and (4) the expert's qualifications. On its face, CPLR § 3101(d)(1) does not apply to the litigation consultant who does not testify at trial. However, the consultant is not always (or automatically) immune from discovery. CPLR § 3101(d)(2) allows for discovery concerning the litigation consultant in certain, narrow circumstances, stating:

> Subject to the provisions in paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that party's representative (including… consultant) may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Because the materials are disclosed under CPLR § 3101(d)(2) only pursuant to a court order, the statute instructs the court ordering the disclosure to "protect against the disclosure of the mental impressions, conclusions or legal theories of the representative concerning the litigation."

The Federal Rules of Civil Procedure similarly limit discovery to the trial expert. Rule 26(b)(3)(A) exempts from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's … consultant…)" unless: (1) the materials are otherwise discoverable under FRCP § 26(b)(1), the general rule addressing the scope and limits of discovery; or (2) the requesting party demonstrates a substantial need for them to prepare its case, and cannot obtain their substantial equivalent without undue hardship.[2] If a court orders discovery of a litigation consultant's materials then, under Rule 26(b)(3)(B), it must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of that consultant.

Discovery disputes frequently arise when parties seek documents prepared by or sent to a litigation consultant as such materials are rarely produced without opposition. In those circumstances, courts engage in a fact-based inquiry to determine whether a litigation consultant's materials are in fact discoverable under the applicable rules. Indeed, CPLR § 3101(d)(2) and FRCP 26(b)(3) raise numerous factual questions: was the litigation consultant's work product prepared solely in anticipation of litigation or for trial? Do the materials sought contain the litigation consultant's mental impressions, conclusions or any legal theories? Is the requesting party's need for that material substantial? Can the requesting party obtain substantially the same information from other sources? What constitutes undue hardship?

For example, in *Oakwood Realty Corp. v. HRH Constr. Corp.*, the Appellate Division affirmed the trial court's decision ordering the plaintiff to return a report prepared by the defendant's litigation consultant, upon finding that it had been prepared in anticipation of litigation and thus, was exempt from disclosure under CPLR § 3101(d)(2). Similarly, in *Skolnick v. Skolnick*,[3] the respondent was alleged to have forged certain checks that were the subject of that turnover proceeding. The respondent sought to obtain documents that the petitioner had provided to a handwriting expert, and communications between petitioner's counsel and the handwriting expert. The court denied that discovery, concluding that the handwriting expert was retained as a litigation consultant and the subject materials were prepared in anticipation of litigation. In *Christie's, Inc. v. Zirinsky*,[4] the plaintiff sought from the defendants' engineer, who had been the defendants' "longtime consultant," certain letters between the defendants, defense counsel, and the engineer. The defendants argued that the materials were immune from discovery because the engineer was a nontestifying litigation consultant. The court found, however, that merely naming the engineer as a litigation consultant did not automatically render the materials immune from discovery. The court also stated that the fact that letters between the engineer and the defendants were routed to the defendants' counsel did not protect them from discovery, because the documents must be prepared "primarily if not solely for litigation" in order for such immunity to attach.[5] Importantly, the court ordered an *in camera* inspection of the documents at issue—and the documents were thus potentially exposed to the plaitiff- because it could not determine on the record before it, whether the letters had been prepared in anticipation of litigation.

Although the statutes recognize a clear distinction between the expert as litigation consultant and as trial expert, can the same individual wear both hats? Stay tuned.

Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.

Hillary A. Frommer

1. *Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747 [2d Dept 2008].
2. Fed R Civ P §§ 26(b)(3)(A)(i) and (ii).
3. 2010 NY Slip Op 33074(U) [Sur Ct Nassau County 2010]; *see also Concorde Art Assoc., LLC v Weisbrod Chinese Art, Ltd*, 17 Misc3d 1124[A] [Sup Ct NY County 2007] [court denying the defendant's request for a report prepared by the plaintiff's expert upon finding that it was prepared in anticipation of litigation, because it was done before the action commenced and on counsel's recommendation, and because the defendant failed to show a substantial need for the report or that it could not obtain the same information from other sources].
4. 17 Misc3d 1123[A] [Sup Ct NY County 2007].
5. *Id.*