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Can your expert wear two hats?

By Hillary A. Frommer

Last month's article discussed the difference between the litigation consultant and the trial witness under the CPLR and FRCP, and why that distinction is important in pre-trial discovery.

So now I ask, can one expert wear both hats in the same litigation? Technically, yes. Neither the state nor federal rules prohibit a party from retaining a consultant to help prepare a case for trial, and then designating that same individual as a trial expert. But beware. By engaging the same expert as consultant and trial witness, a party runs the risk that information provided to the consultant which is generally not subject to disclosure under CPLR § 3101(d)(1) or FRCP 26(b)(3)(A), may become discoverable.

For example, materials an expert obtains while acting as a consultant may become discoverable if the expert then relies on them in forming the opinions to which he will testify at a trial. This is precisely what occurred in *Semi-tech Litigation LLC v Bankers Trust Co*[1] The plaintiff retained an expert as a litigation consultant and subsequently designated him as a trial witness. During discovery, the plaintiff refused to produce documents that it had provided to the expert while the expert was acting in his consultant capacity and before he was designated as a trial witness, but which the expert relied on in forming his opinions. The plaintiff's counsel also prohibited the expert from answering questions at his deposition about communications he had with the plaintiff during that "consultant" period, even though the expert testified that he relied on those very communications in forming his opinions. Pursuant to FRCP 26(a)(2), an adverse party may question an expert on the data he considered in forming his expressed opinions. The court therefore ordered the plaintiff to produce all documents the expert considered in forming his opinions, regardless of when the expert obtained them, and ordered the expert to answer all questions at his deposition concerning that same subject matter.

A similar situation arose in *Beller v William Penn Life Ins. Co*[2] The defendant retained one accountant as both a litigation consultant and testifying witness. During the accountant's deposition, agreed to by the parties notwithstanding CPLR § 3101(d)(1)(B), the expert was instructed not to answer questions unless he could do so without divulging his "thought process in connection with the litigation."[3] Unsurprisingly, the accountant refused to answer questions about certain communications he had with defense counsel on the grounds that he could not distinguish between attorney work-product and the mechanics of the assignment itself. A discovery dispute ensued. However, in arguing against the disclosure, the defendant did not attempt to differentiate the accountant's role as consultant from that as trial witness.[4] The court noted that the defendant made a "wise" decision and stated that it would have rejected such an argument.[5] Instead, the defendant argued that the communications were immune from discovery as attorney work-product (under CPLR § 3101(c)), and as materials prepared in anticipation of litigation (under CPLR § 3101(d)). Because an expert's report must contain in reasonable detail the substance of the facts and opinions of the expert's expected testimony and a summary of the grounds for each opinion,[6] the court determined that at a deposition, the adversary may inquire into the information the expert relied on in rendering the opinion. Examining the communications at issue, the court found that the attorney had indeed provided the expert with explanations necessary for the accountant to complete his report, but that parts of the conversations at issue could be protected from disclosure either as attorney work-product or trial preparation materials because they may have included the attorney's mental impressions. Ultimately, the court determined that the plaintiff was entitled to learn from the defendant's expert what was said to him during conversations with the defense counsel which the expert used as grounds for his opinion.

Hillary A. Frommer

A party may also be required to disclose information it provides to a consultant if a court concludes that an expert realistically cannot segregate that material from the information the expert obtains while acting as a trial witness. *American Steamship Owners Mut. Protection & Indemnity Assoc., Inc. v Alcoa Steamship Co.*,[7] is a perfect example. There, the plaintiff retained an attorney as a consultant and then subsequently designated him as a rebuttal expert at trial. The defendant sought production of a letter which the expert obtained while acting in his consultant capacity. Although the expert neither prepared that letter nor reviewed it in forming his opinion, the court ordered the plaintiff to produce it because it was "unlikely that an expert can cast from his mind knowledge relevant to the issue on which he is asked to opine merely because he learned of it prior to receiving the assignment."[8] The court appeared keenly aware that the plaintiff placed itself in that discovery situation by designating its litigation consultant as a rebuttal witness, as it stated in a footnote, "of course, the [plaintiff] could have avoided this result by choosing an expert with whom it had no prior relationship and then being circumspect in choosing what documents to provide for the expert's review."[9]

As the case law reveals, using one expert as a consultant and trial witness in the same case may result in the disclosure of communications between the attorney, client, and expert which may otherwise be immune from discovery. Before designating a consultant as a trial witness, an attorney should consider whether such disclosure, if court ordered, will impact the case, and to what degree. Will a communication be exposed at trial? If so, will it negatively alter the jury's perception of the expert witness or dilute the strength of the expert's opinion? One way to avoid both the disclosure and potentially problematic results thereof, as noted in *American Steamship Owners*, is to retain two distinct experts. However, if there can be only one expert, attorneys and clients should be very careful what, when, and how they communicate with the expert.

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.

[1] 02 Civ 0711 [SDNY 2004] (Kaplan, J).

[2] 15 Misc3d 350 [Sup Ct, Nassau County 2007].

[3] *Id*. at 351.

[4] Although the defendant did not make that argument, the court turned to the retainer letter to see if it revealed whether the accountant was acting as a consultant when he communicated with the defendant's attorney *(id)*. That proved unhelpful. In light of the dates of the retainer letter and expert report, the court concluded that the accountant was retained simultaneously as a litigation consultant and trial witness. The retainer letter is an important tool. If a party uses the same expert as both a litigation consultant and trial witness, it is crucial to clearly delineate when the expert's role changes. One way to accomplish this is with a clearly stated, dated retainer letter. Courts often turn to the retainer letter to determine whether an expert was functioning as litigation consultant or trial expert (*see id.; Delta Financial Corp. v Morrison*, 14 Misc3d 428 [Sup Ct, Nassau County 2996]).

[5] *Id*. at 352.

[6] CPLR § 3101(d)(1)

[7] 04 Civ 4309 [SDNY 2006] (Francis, J).

[8] *Id*.

[9] *Id*.