Who's Your Expert? 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' "long-time 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 non-testifying 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" 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 plaintiff—because it could not determine, on the record before it, whether the letters had been prepared in anticipation of litigation.

So now the question becomes, 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 trial. This is precisely what occurred in *Semi-tech Litigation LLC v. Bankers Trust Co.*[6] 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.*[7] 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."[8] 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.[9] The court noted that the defendant made a "wise" decision and stated that it would have rejected such an argument.[10] 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,[11] 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.

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.*[12] 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."[13] 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."[14]

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.

Endnotes

1. *Oakwood Realty Corp. v. HRH Constr. Corp.*, 51 A.D.3d 747, 858 N.Y.S.2d 677 (2d Dep't 2008).
2. Fed. R. Civ. P. 26(b)(3)(A)(i) and (ii).
3. 2010 NY Slip Op. 33074(U) (Sur. Ct., Nassau Co. 2010); *see also Concorde Art Assoc., LLC v. Weisbrod Chinese Art*, Ltd, 17 Misc. 3d 1115[A] (Sup. Ct., N.Y. Co. 2009) (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 Misc. 3d 1123[A], 851 N.Y.S.2d 68 (Sup. Ct., N.Y. Co. 2007).
5. *Id.*
6. 02 Civ. 0711 (S.D.N.Y. 2004) (Kaplan, J).
7. 15 Misc. 3d 350, 828 N.Y.S.2d 869 (Sup. Ct., Nassau Co. 2007).
8. *Id.* at 351.
9. 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 Misc. 3d 428, 827 N.Y.S.2d 601 (Sup. Ct., Nassau Co. 1996).
10. *Id.* at 352.
11. CPLR 3101(d)(1).
12. 04 Civ. 4309 (S.D.N.Y. 2006) (Francis, J).
13. *Id.*
14. *Id.*

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