Consulting Experts – The Danger of Discovery

by Maggie Tamburro

When, if ever, is initial expert consulting work performed by assistants to a testifying expert in danger of being subject to discovery by an opposing party?

Wait – you say – *the Federal Rules of Civil Procedure protect against another party's discovery of consulting experts retained in anticipation of litigation who are not expected to be called at trial.* But at what point can that protection fail?

A recent case out of the U.S. District Court for the N.D. of California shows how the lines between a consulting expert and testifying expert can become dangerously blurred, leading the court, in this instance, to allow a party to probe further into potential discovery of an opposing party's consulting experts.

Knowing what the court ruled might just help you guard against discovery of your own consulting experts in such a case.

The Case

The published discovery ruling, dated April 1, was made in the case of *Apple Inc. v. Amazon.com, Inc.* and concerned whether plaintiff, Apple, should be required to produce initial survey work of two assistants to Apple's testifying expert.

In this trademark infringement action brought by Apple, Amazon sought to compel production of Apple's two consulting experts' initial survey work, claiming that they potentially "influenced and informed" the work of Apple's testifying expert, who allegedly used the consulting experts as assistants in her later survey work.

Apple, meanwhile, claimed that the assistants' early survey work was not discoverable, as the two assistants were retained as non-testifying, consulting experts and their prior work was – as contended by Apple – never considered by Apple's testifying expert.

What the Federal Rules Say

• ***Consulting Experts***

As many readers know, FRCP 26(b)(4)(D) protects against another party's discovery of facts and or opinions of consulting experts who are retained in anticipation of litigation

and not expected to testify at trial. Material reviewed or generated by such non-testifying experts is generally protected by the work-product privilege absent a showing of exceptional circumstances.

Specifically, the Rule states:

> (D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
> (i) as provided in Rule 35(b); or
> (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."

• ***Testifying Experts***

Meanwhile, FRCP 26(a)(2)(B) requires disclosure to the other party, in the form of a written report, a statement of the opinions a party's testifying expert will express and the basis for the opinions, as well as facts or data considered by the testifying expert in forming them. Specifically, that portion of the Rule states:

> (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case."

The Court Digs Deeper

Following a well-developed discussion of current precedent, the court ruled that Apple must produce its testifying expert's two assistants for limited deposition, for the purpose of testifying as to their level of involvement with the testifying expert's report.

While the court stopped short of granting Amazon's full discovery request – which would have required Apple to produce the initial survey or allow the two assistants to be deposed on its contents – it perhaps opened the door for further production – stating, "If, following the deposition, Amazon believes the testimony reveals that [the assistants'] consulting work is discoverable, it may return to court to seek additional discovery, provided no agreement can be reached."

In its reasoning, the court found that "the undisputed facts suggest that the [assistants' initial survey] work may not have been independent of [the testifying expert's] later survey work…. That is to say, [the testifying expert] may have considered, if not relied on, the initial survey work in forming her opinion because [the assistants] completed the initial survey work sometime before or during their work on the later surveys [with the testifying expert].

The court found that the testifying expert, "perhaps even unknowingly to her," may have been exposed to the assistants' initial survey work due to the proximity in time of their respective projects and the "dependent nature" of their working relationship.

Lessons from the Ruling

1. Overlapping billing records can be demonstrative of whether a testifying expert's work is independent of consulting, non-testifying experts who act as assistants.

The court found that, despite Apple's claims that the two consulting experts who generated the initial survey work were protected by work-product privilege under FRCP 26 (b)(4)(D), "the undisputed facts suggest that that work may not have been independent of [the testifying expert's] later survey work in mid-2012."

Although the court noted that Apple's testifying expert's deposition testimony indicated that she was not aware of the consulting experts' initial survey work, the court pointed out that evidence, in the form of billing records produced by Apple, indicated that for the relevant period of time – the time period spanning the testifying expert's later survey work in 2012 – the consulting experts each worked double the hours that the testifying expert worked. The court found that this "called into question" Apple's contention that the testifying expert and her assistant's later survey work was independent of the initial survey work.

2. Be sure that any stipulation agreements specifically tackle the issue of discovery of an assistant to your testifying expert.

The court also discussed a stipulated protective order entered in the case – which might at first blush have appeared to protect the alleged consulting experts – and what effect it had on the issue of discovery of the initial survey work of Apples' consulting, non-testifying experts.

Interestingly, as the court pointed out, the stipulated protective order entered into by the parties actually set a *higher* standard than the Federal Rules for discovery of materials provided to the testifying expert.

In the stipulated protective order, the parties agreed that *reliance* by the testifying expert would be required in order for materials provided to the expert to be subject to discovery. In contrast, as the court pointed out, FRCP 26 requires something less for production – the facts or data *considered* by the testifying expert in forming an opinion.

However, the court found the stipulated protective order was inapplicable to the present dispute, concluding that the stipulated protective order in this case governed only "discovery of materials provided to a testifying expert, not materials generated by a testifying expert's *assistants* (emphasis added)."

Accordingly, the court ruled that plaintiff had to produce the testifying expert's assistants for limited deposition, and carved out specific areas for inquiry.

Tackling Tricky Areas Early On…

In sum, FRCP 26 and the laws governing discovery of consulting experts can be tricky to interpret. Knowing case precedent, at least in this jurisdiction, and perhaps tackling the issue of how assisting experts will be treated early on might successfully head off a looming discovery problem down the road.

The case and court Order, (which incidentally offers a well-developed analysis of case precedent on this sometimes thorny area for those who would like the court's full discussion), is *Apple Inc. v. Amazon.com, Inc.*, Case No. 11-1327-PJH (JSC) (N.D. Ca. Apr. 1, 2013).

Do you think the court went too far in allowing limited deposition of the testifying expert's assistants?

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