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Lawyer or Client: Does It Matter Who Hires the Expert?

By Davis B. "Pepper" Allgood – August 28, 2017

Should the lawyer hire the testifying or consulting expert for a litigation assignment, or should the client retain the expert directly? In other words, does it matter in terms of compromising the client's interests in the lawsuit? In general, the answer is that it makes no difference.

Financing Arrangements: Six of One, Half a Dozen of the Other

Given a choice, the attorney may prefer that the client pay the expert directly. However, client expectations, or client policies regarding billing and the advancement of costs, may dictate that the attorney hire and pay the expert, with the client reimbursing the attorney. Also, some experts prefer to rely on a law firm for payment.

Regardless, having the client retain and pay the expert directly usually will not compromise the client's interests in the lawsuit. In the same vein, having the lawyer obligate himself for the expert's fees will confer no advantage in the litigation.

It is important to note, however, that regardless of who pays for the expert, lawyers normally should take the lead in identifying and selecting experts. They ordinarily should draft or participate in drafting expert engagement letters, and, for convenience, a lawyer may act as the client's agent in executing such an agreement. The lawyer should document any arrangement clearly and explain it thoroughly, and the arrangement should comply with the ethics rules of the jurisdiction.

Confidentiality Concerns

Some clients, and some lawyers, mistakenly think that having the lawyer retain the expert significantly enhances the protection given to communications with the expert. Clients may use this rationale to ask that the lawyer assume initial responsibility for the expert's fee.

On the contrary, Federal Rule of Civil Procedure 26 and state rules patterned after it prescribe detailed rules on expert discovery that apply without regard to whether it is the lawyer or the client who formally retains the expert or assumes the obligation to pay the expert's fee.

A sampling of Rule 26 illustrates that confidentiality has nothing to do with whether the lawyer or the client pays the expert's fee. Under Rule 26(a)(2), a party who plans to use a testifying expert must disclose specific information about the expert and the expert's proposed testimony, regardless of who executes the engagement letter or pays the fee. Rule 26(b)(3)(A) protects documents that a consulting expert prepares in anticipation of litigation or for trial—whether he serves as the party's consultant or the attorney's consultant. Furthermore, although "core work product" receives heightened protection under Rule 26(b)(3)(B), that elevated standard depends on the origin and content of the material—regardless, though, it

protects such information even when disclosed to a client-retained consultant. *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 667 (3d Cir. 2003).

Similarly, Rule 26(b)(4) sets parameters for discovery from both testifying and consulting experts. For example, Rule 26(b)(4)(B) and (C) provide that the Rule 26(b)(3) protections for trial preparation materials apply, respectively, to draft expert reports and to communications between a party's attorney and a testifying expert who is required to provide a report. Rule 26(b)(4)(D) shields the facts known or opinions held by a consulting expert, absent a showing of exceptional circumstances. None of these rules turns upon the attorney's involvement in retaining or paying the expert.

Privilege: Protecting Against Exceptional Circumstances and Substantial Need
Rule 26(b)(4)(D)(ii) does allow discovery from consulting experts under "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Similarly, Rule 26(b)(3)(A)(ii) lets a party discover documents prepared in anticipation of litigation when it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."

Conceivably, having the lawyer retain a consultant could help protect communications with a consultant that otherwise could be discovered because of "exceptional circumstances" or "substantial need." That would be the case if doing so supported an argument that the attorney-client privilege applied. Rule 26(b)(1) limits the scope of discovery to "nonprivileged matter" and could thus exempt privileged attorney-client communications from Rule 26(b)(4)(D)(ii) "exceptional circumstances" or Rule 26(b)(3)(A)(ii) "substantial need" discovery.

Consultants and the *Kovel* Doctrine
The attorney-client privilege generally protects confidential communications that involve a lawyer, the client, or a representative of either when the communications help the lawyer provide legal advice to the client. Attorneys sometimes need to retain consultants to act as their representatives in communicating with their clients by putting confidential client information into usable form. Thus, for example, the attorney-client privilege can attach to communications involving accountants retained by attorneys to help the attorneys understand client financial information: the accountants essentially act as translators for the lawyers so that the lawyers can advise the clients. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989). Some courts refer to this reasoning as the *Kovel* Doctrine.

The existence of the attorney-client privilege, even in these cases, does not depend upon the attorney having retained the consultant. *In re Hardwood P-G, Inc.*, 403 B.R. 445, 458–59 (Bankr.

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W.D. Tex. 2009) ("It has, literally, nothing to do with who hired them."). A consultant whom the client retains and pays can fill the "expert as translator" role. *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 210 (S.D.N.Y. 2000) (investment banker retained by client served "an interpretive function . . . akin to the accountant in *United States v. Kovel*").

However, having the lawyer retain the consultant could make citation to this line of cases more persuasive, according to *Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.)*:

> The Court in this decision does not directly address the question of whether retention of an accountant by a lawyer, in contrast with retention by the client directly, should make any difference with respect to the protection to be afforded an accountant's work product. Nonetheless, the Court notes that Deloitte & Touche was retained by counsel . . . and such a retention may augment an argument based on *Kovel* that the accountant, having been retained by counsel has a role here that may be analogous to that of an interpreter.

No. 04–01078, 2007 WL 1964852, at *4 n.5 (Bankr. S.D.N.Y. July 2, 2007).

Notably, though, the *Kovel* Doctrine will seldom apply to communications with consulting experts hired to help with pending litigation. Parties and their lawyers usually hire a litigation consultant to provide the consultant's own advice or knowledge, not to translate confidential client information. In such a case, the privilege does not apply. *Kovel*, 296 F.2d at 922 (". . . if the advice sought is the accountant's rather than the lawyer's, no privilege exists"); *see also United States v. Ackert*, 169 F.3d 136, 139–40 (2d Cir. 1999) (where the consultant did not interpret client information for the lawyer but rather provided information to the lawyer that the client lacked, the communication was not privileged).

Conclusion

In most cases, no legal or strategic consideration dictates that the lawyer take any responsibility for the expert's fee. Who hires and pays the expert usually should turn on relationships and practical considerations, not protecting communications from discovery.

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