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THE "TWO HATS" PROBLEM: WHEN EXPERTS ARE OPEN TO DISCOVERY

By Phil Kaplan

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Litigators often engage outside experts to consult or testify about complex issues, like accounting or business valuation. When experts are involved in litigation, the discovery rules limit the information they need to disclose to the opposing party. But what if, in addition to litigation work, an expert provides services outside the litigation context? In this situation, the expert is wearing "two hats." And the amount of discovery the opposing party can take into the expert's work depends on which "hat" the expert was wearing when he or she did the work.

The rules limiting expert discovery are closely related to the work product doctrine. Both protections apply to opinions or information developed "in anticipation of litigation." *See* Minn. R. Civ. P. 26.02(e) (expert discovery rules); *City Pages v. State*, 655 N.W.2d 839, 846 (Minn. Ct. App. 2003) (work product doctrine).

To determine if an expert's work was done "in anticipation of litigation," such that it would be protected in discovery, the court must decide the purpose of the expert's work. "Materials or documents will be protected when they were prepared by, or for, an attorney who 'was preparing for or anticipating some sort of adversarial proceeding involving his or her client.'" *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 513 (D. Minn. 1997) (quoting *In re Grand Jury Subpoena Duces Tecum*, 112, F.3d 910, 923 (8th Cir. 1997)). "Conversely, even though litigation may have already been contemplated, materials which are prepared in the regular course of business receive no protection . . . ." *Id.* Simply put, expert work that helps an attorney's litigation efforts is protected from discovery, but expert work done for a business purpose is not.

One way to determine the discoverability of an expert's work is to pretend the pending lawsuit never existed. If the expert would have done the work irrespective of litigation, then the work is not protected from discovery. *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 393–94 (S.D.N.Y. 2015).

Another consideration is the expert's involvement in the underlying events that led to the lawsuit. If the expert was an "actor or viewer with respect to the transactions or occurrences" that are being litigated, then the expert is treated as an ordinary witness with no special protection under the discovery rules. Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules – 1970 Amendment; *see also* Minn. R. Civ. P. 26.02, Advisory Committee Note – 1975.

The "two hats" problem arises when someone is both an eyewitness or participant in the events that led to the lawsuit and an expert specifically engaged to provide litigation support services to an attorney in the lawsuit. Examples include: a physician who treats the plaintiff's injury, and is then engaged to provide expert testimony at trial; an appraiser who values real estate for the owner's business purposes, and is later engaged to testify about valuation in a condemnation action over that real estate; and an investigator who reviews an employee's conduct so the employer can decide whether to take disciplinary action, and is also engaged by the employer's attorneys to consult about litigation strategy once the employee sues for wrongful termination.

In these situations, discoverability does not turn on the witness's mere status as an "expert" under the rules. Discoverability turns on the "hat" the witness was wearing when he or she created or received that information. The witness's litigation "hat" and non-litigation "hat" trigger different discovery rules. The expert's litigation work may be protected from discovery, but the expert's non-litigation work is fair game. *See Atari Corp. v. Sega of Am.*, 161 F.R.D. 417, 421 (N.D. Cal. 1994).

Litigators should consider these distinctions when they communicate with experts, or potential experts, outside the litigation context. A litigator cannot take someone who participated in the transaction at issue, designate him or her as an "expert," and thereby shield the witness from discovery. *See Gerber Sci. Int'l, Inc. v. Roland DGA Corp.*, 2010 WL 3803206, at *6 (D. Conn. Sept. 20, 2010). The litigator should instead assume that any work the expert did for a business purpose, as opposed to a pure litigation purpose, will be discovered by the opposing party.

Phil Kaplan is a business litigator and trial lawyer at Anthony Ostlund Louwagie Dressen & Boylan P.A. Phil represents both plaintiffs and defendants in a range of cases, primarily focusing on commercial real estate litigation, shareholder/partnership disputes, and business-related appeals.