Tagging In: Working With a Professional Trial Consultant To Assist With Witness Preparation

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When it comes to preparing a case for trial, in appropriate cases consideration is typically made to hiring an outside trial consultant to test counsel's opening and closing remarks, trial themes, the impact of select evidence, and potential juror reactions. But trial consultants can also bring significant value to the client in assisting with witness preparation prior to depositions.

Lawyers are experts in the law; trial consultants are experts in people. When the stakes are high or a critical witness may present particular challenges, counsel should consider whether additional resources would help persuasively communicate the client's story through a deposition, which may be presented to the trier in fact through video deposition testimony whether counsel for the deponent intended such or wanted such.[1] Trial consultants typically have backgrounds in psychology, social science, or other people-oriented fields. They are trained to understand how juries react to people and information.

This chapter is designed to assist counsel in determining whether and when use of a trial consultant may benefit the client. It also explores some of the concerns that may prevent lawyers from effectively using a trial consultant and the legal issues regarding discovery of the consultant's work.

WHEN SHOULD LAWYERS CONSIDER USING A TRIAL CONSULTANT FOR WITNESS PREPARATION?

Unlike the United States, where failing to fully prepare your witness for testifying at deposition or trial could be malpractice, several foreign jurisdictions bar or severely restrict witness preparation practices.[2] There are no specific rules in the United States telling lawyers how they can or should prepare a witness, including the use of a professional consultant to assist in the preparation process; there are only general rules, such as prohibiting a lawyer from assisting a witness to testify untruthfully.[3] The American Society of Trial Consultants ("ASTC") has published its own Professional Code that sets forth the main objective of any trial consultant hired to assist with witness preparation—"to increase witnesses' understanding, comfort and confidence in the process of testifying for deposition or in court, and to improve witnesses' ability to truthfully present testimony in a clear and effective manner"—and lists various ways

[1] *See infra* note 12.

[2] Elaine Lewis, *Witness Preparation: What Is Ethical, and What Is Not*, LITIGATION (Winter 2010), at 41, 41–42.

[3] The ethics rules applicable to witness preparation are the subject of Chapter 10.

consultants can work with witnesses and lawyers to achieve this goal.[4] Trial consultants do not script answers or censor relevant but harmful answers (nor should the lawyer).[5] They review case materials provided by the lawyer and come to agreement with counsel on the scope of their services, the roles of both counsel and consultant during mock examinations, and they work with counsel to establish realistic goals and expectations for the preparations.[6] Trial consultants often set up and provide feedback in mock examinations and practice sessions, assess and address a witness' communication strengths and limitations, work to increase a witness' familiarity and comfort with the process, and otherwise identify ways to increase a witness' ability to effectively communicate the facts.[7]

The specific preparation needs vary for each witness. A corporate executive witness might require help controlling tone or body language to avoid seeming aggressive or condescending, while a technical professional could require help communicating facts in a way that will be understandable for jurors. Many witnesses have never testified before and need extensive practice to be able to effectively communicate facts and handle cross-examination. When should counsel proverbially reach a hand outside the ring and "tag in" a professional trial consultant to assist?[8]

The Stakes Are High

Some lawyers hire a trial consultant to help prepare every witness in every case,[9] but this is neither feasible nor necessary for most cases and clients. Higher-stakes litigation—such as "bet the company" cases, large-verdict-risk cases, and "test cases" that could lead to serial litigation—should trigger a deeper consideration of whether to hire a trial consultant. In these circumstances, one bad deposition or trial performance can have devastating financial consequences. Clients should be more willing to engage these additional resources if they understand the need and value added by them.

The timing of hiring a trial consultant is affected by the importance and risks of each case. The earlier a trial consultant is hired and has an opportunity to work with the lawyer, the more the consultant can assist in crafting themes and messages, and, in turn, help witnesses present those themes and messages in language they are comfortable with when the time comes

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[4] AM. SOC'Y OF TRIAL CONSULTANTS PROF'L CODE at 30–35 (2013), *at* http://www.astcweb.org/Resources/Pictures/ASTCFullCodeFINAL20131.pdf (last visited June 29, 2016).

[5] *Id.* at 32.

[6] *Id*.

[7] *Id*.

[8] To help answer this question, the authors interviewed several very accomplished trial consultants to get their perspective. The authors are grateful to Aref Jabbour, Ph.D., Consultant, Trial Behavior Consulting, Inc.; Katherine James, MFA, Founding Director, ACT of Communication; and Richard Jenson, President, Jenson Research and Communications, Inc. and former President of the ASTC.

[9] Email Interview with Katherine James, Founding Director, ACT of Communication (June 16, 2016) (on file with authors); Email Interview with Richard A. Jenson, President, Jenson Research and Communications Inc. (June 21, 2016) (on file with authors).

for them to testify.[10] This is especially true where there are many witnesses and there is a complex or technical story to tell.[11]

The Troubling Witness

If the company CEO or crucial witness comes across as disingenuous, evasive, condescending, or combative in deposition, the testimony could show up in the opponent's opening statements or case-in-chief.[12] If the crucial witness displays those characteristics on the witness stand, opposing counsel will likely incorporate them as a central theme in closing. Similarly, witnesses who express reluctance about having to testify, who seem uncomfortable with their role or the process, or who do not seem to grasp how their testimony fits into the overall case can be equally dangerous because of their unpredictability. Lastly, some witnesses think they know how to win the case on their own or feel pressure to take the case on their shoulders without recognizing the risk of engaging opposing counsel in a losing battle during deposition or cross-examination.[13] This latter group of witnesses requires assistance adjusting their presentation style and must understand their role is simply to tell their part of the story and not to advocate a case position;[14] going through several mock examinations should prepare them to testify effectively.

Troubling witnesses are those whose ability to deliver clear, factual, and effective testimony is complicated by one or more of these obstacles:

- ***Personality Obstacles.*** This includes issues with demeanor, tone, presentation, or anything unrelated to the facts and unique to the witness that risks being off-putting to the jury or otherwise distracting from the facts.

- ***Fact Obstacles.*** These are the witnesses most involved in the action or inaction that led to the litigation. Perhaps they said, did, or failed to do something that puts the client at risk. These witnesses may need extra help learning how to "own" the facts or put them in context in a way that the jury can understand and that produces empathy.

- ***Communication Obstacles.*** The facts are good, but the witness, despite presenting well, struggles to reformulate complex concepts in ways that are understandable or

[10] Email Interview with Aref Jabbour, Consultant, Trial Behavior Consulting, Inc. (June 17, 2016) (on file with authors).

[11] *Id*.

[12] Depositions of party opponents and their officers, directors, corporate designees, and managing agents can be used for any purpose, including in the opponent's case-in-chief. FED. R. CIV. P. 32(a)(3). Note that "managing agent" is broadly defined by courts, and the result means that your deponent, if in a position to make decisions on behalf of the company that are within that deponent's job description, may have his videotaped deposition shown at trial (or the transcript read if it was not videotaped) in your opponent's case in chief, even though he was not a 30(b)(6) deponent and even though he is available to testify live at trial.

[13] Interview with Richard A. Jenson, *supra* note 8.

[14] Richard K. Gabriel & Julie Fenyes, *What A Trial Consultant Can Teach You—Even If You Can't Afford To Hire One*, GPSOLO, Oct./Nov. 2003, at 10, 14.

fails to grasp the differences between deposition or trial testimony and ordinary communication.

- ***Emotional or Psychological Obstacles.*** Human emotions are at the core of virtually all disputes and can affect witnesses in varying ways. For example, some witnesses fear their job will be at risk if they do not perform well and "help" their employer's case; this is especially true of witnesses who oversaw or had deep involvement with the specific issues being litigated. Other witnesses may be very afraid of testifying or public speaking. The list goes on. Any of these emotional components can dramatically affect the clarity and effectiveness of testimony.

Each obstacle presents its own unique challenges. Emotional or psychological obstacles may be the hardest for a lawyer to detect and address because of the complexities of human behavior and conditioning. Personality issues are often easy to detect, but witnesses struggling with personality issues usually require more time and special effort to overcome them. While lawyers are better equipped to help prepare clients dealing with communication issues or challenging facts, trial consultants deal with the nuances of communication on a daily basis. They should bring both the benefits of their educational backgrounds and of having seen first-hand how jurors react to information and people. In other words, consultants are trained to understand the audience.

When it comes to identifying troubling witnesses who need professional assistance, go with your instincts. If after first meeting the witness your reaction is that he is unlikeable or cannot explain significant facts clearly, or even after a deposition does not go well, consider hiring a trial consultant to work with that witness.[15] If after working with the witness you have a sense the witness—fact or expert—has too much certainty or too little certainty in how to testify, consider hiring a consultant to help bring them back to center.[16]

The "B" Witness

It is easy to recognize when a witness handles testifying poorly in practice or deposition. It is similarly easy to recognize when a witness does a great job testifying. The "A" or "A+" witness stays focused on the message, accurately and clearly communicates the facts, and handles cross-examination with poise and focus. However, there are many times when a witness was just "okay," or even forgettable. An "okay" witness performance can be damaging because it is a missed opportunity to tell the client's story and bolster the case. In all but the most straightforward cases, each witness' facts build on the others to craft a complete story. When a piece of that story is forgettable or unclear, it can weaken the overall message.

Deciding whether to enlist a trial consultant for a "B" or "B-" witness can be challenging. For one, it may be difficult to identify these witnesses before they testify. Unless it is clear from practice sessions and interviews that a witness has obstacles to overcome, you may not know until the first time the witness is in the hot seat, which usually will be their deposition. If the witness gives a middle-of-the-road performance at deposition, counsel should consider seeking

[15] Interview with Katherine James, *supra* note 8.

[16] *See* Interview with Richard A. Jenson, *supra* note 8.

professional assistance before trial, particularly if the witness is crucial to the case. If all of your "B-" and "B" witnesses become "A" witnesses through practice and professional guidance, you may greatly improve the defense of and/or settlement value of your case.[17]

The Freshman Expert

In a significant case, we hired the top expert in a very specific and emerging field to testify at trial. The expert had written books and taught classes on the subject for years, but had never testified. During a meeting among the trial team one night—not in a practice session—one lawyer asked the expert a cross-examination type question to test a statement the expert expounded. The witness became defensive and scolded the lawyer for his tone and questioning. Despite having been warned about, and prepared to deal with, cross examination, when questioned off the cuff, the witness all-too-quickly retreated to behaviors that would have been damaging if played out on the witness stand. Thankfully, when the witness testified several days later, he handled cross examination with ease. But this shows the unpredictability of those who are not accustomed to testifying. To reduce or even eliminate unpredictability, experts testifying for the first time should practice and be given special attention during preparation.

Also, the way academics or experts normally communicate to a peer group or employer differs greatly from how they must communicate to a jury or other trier of fact. Sometimes lawyers can overcome these obstacles, but if there are preparation roadblocks and time and budget allow, hiring a consultant to assist in preparing the expert for how to communicate with the jury can pay tremendous dividends.

Using a Consultant to Prepare for Depositions

Many lawyers only think of hiring outside consultants for trial preparation. But trial consultants can effectively assist attorneys with witness preparation at the deposition stage, and help cases get resolved early and beneficially to the client. Furthermore,

Cases are (more often than not) won or lost in discovery. Few lawyers who have settled a lawsuit or obtained a summary judgment after or during discovery will tell you that the deposition testimony did not materially impact the parties' decision to settle or the court's ruling on a dispositive motion.

Use of the Managing Agent's Deposition

Furthermore, depositions are typically videotaped and that videotaped deposition (or its transcript if it was not videotaped) may be used by your opponent in their case in chief. Under the Federal Rules of Civil Procedure, the deposition of a "managing agent" may be used at trial in an opponent's case in chief. The Federal Rules state:

> Deposition of Party, Agent or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).[18]

[17] Email Interview with Katherine James, *supra* note 8.

Many lawyers may be surprised to learn that "managing agent" is typically broadly defined not be title, but by job function. Some courts have settled on a three-pronged test that considers the following central questions:

1) Did the corporation invest the person with discretion to exercise his/her judgment, as opposed to a common employee that only takes orders and has no discretion;

2) Could the employee be depended upon to carry out the employer's directions to give testimony if the employer is in litigation; and

3) Could the person be expected to identify him/herself with the interests of the corporation rather than those of the other party? [19]

Use of the Unavailable Witness' Deposition

The deposition may also be used if the witness is unavailable. Under Fed. R. Civ. P. 32(a)(4) A party may use for any purpose the deposition of a witness whether or not a party, if the court finds:

A. That the witness is dead;
B. That the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
C. That the witness cannot attend or testify because of age, illness, infirmity or imprisonment;
D. That the party offering the deposition could not procured the witness's attendance by subpoena; or
E. On motion and notice, that exceptional circumstances make it desirable – in the interest of the justice and with due regard to the importance of live testimony in open court – to permit the deposition to be used.

This means that you can use the deposition of a witness whose deposition you have taken even if it is your own witness, if that witness is unavailable. This lends another reason to make sure that witness is well prepared and provides an outstanding deposition.

How a Consultant Can Add Value to Deposition Preparation

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[18] FED. R. CIV. P. 32(a)(3).

[19] Reed Paper Co. v. Proctor & Gamble Distrib. Co., 144 F.R.D. 2, 4 (D. Me. 1992) (quoting Rubin v. Gen. Tire & Rubber Co., 18 F.R.D. 51, 56 (S.D.N.Y. 1955)). *See also* FED. R. EVID. 801(d)(2) (allowing admission of statements made by employees within scope of their employment). "[A] statement of an agent or employee may be admissible against the principal . . . but a proper foundation must be made for such a statement to show it was [made] within the scope of his agency or employment." Mitroff v. Xomox Corp., 797 F.2d 271, 276 (6th Cir. 1986).

Introspection is a good thing. We asked several leading consultants to identify how a non-lawyer trial consultant can assist with more effective witness preparation. The responses included:[20]

1) Most witnesses learn better from doing, not listening. Trial consultants can focus on the witness' mannerisms and performance from a human behavioral standpoint while the lawyer is engaging in mock examination.

2) They assist in focusing upon prioritizing facts and issues that are important to jurors.

3) They assist counsel and witnesses in placing emphasis on key messages. Memorization often causes witnesses to forget components of the answers and appear rehearsed. They can effectively teach a witness how to dissect and answer questions generally, to avoid witness panic if an unforeseen cross examination question is presented.

4) They identify witnesses' emotions toward the case and feelings about testifying, allowing them to teach coping strategies to dealing with those emotions and feelings.

5) They listen to the lawyers' explanations of the deposition process to the witness, assessing the witness' understanding or lack thereof, allowing them to identify additional messaging/explanations to the witness.

While we lawyers get to be very familiar with the case and the facts of the case, often our witnesses are less so. Trial consultants are trained in psychology and social science with significant experience with judges and juries, and can help ensure that witnesses understand both the facts and counsel's instructions. They also assist the witnesses in making sure the answers are being well-communicated, in an understandable fashion, and without facial expressions or gestures that may negatively impact the judge or jury's perception of the witness.

DISCOVERABILITY & CREDIBILITY ISSUES

Some lawyers may hesitate to enlist professional help due to concerns that the opposition may discover that the witness was given advice by, and practiced their testimony with, a professional witness consultant. Should opposing counsel present that at trial, the jury could perceive the witness as coached or tainted. According to the prevailing law, however, the substance of a trial consultant's advice is highly-protected opinion work product. But the fact that a trial consultant was used to prepare the witness is discoverable. Even so, there is research suggesting jurors do not care that a witness had assistance preparing their testimony; in fact, jurors may even expect it.

[20] *See* Interview with Aref Jabbour, *supra* note 9; Interview with Katherine James, *supra* note 8; Interview with Richard A. Jenson, *supra* note 8.

The Framework: Work Product and Attorney Client Privilege

The work product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Similar rules exist in most states. Rule 26(b)(3) reads, in part:

> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover 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 attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party 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.
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> (B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.[21]

The work product doctrine evolved from the seminal United States Supreme Court case of *Hickman v. Taylor*, where the Court first established the two-tier system of protection: (1) ordinary work product—discoverable only upon a showing of substantial need and the inability to obtain the information by other means without undue hardship—and (2) opinion work product—discoverable only in extraordinary circumstances, if at all.[22]

Recognizing that lawyers and parties rely on the assistance of investigators, consultants, and other agents to prepare for trial, the doctrine extends the opinions, conclusions, and materials prepared by a party's representatives, including consultants.[23] While the text of Rule 26(b)(3) suggests it is limited to documents and tangible material, the doctrine also protects intangible material, such as communications, that would reveal the opinions or mental impressions of the

[21] FED. R. CIV. P. 26(b)(3)(A)–(B) (emphasis in original).
[22] Hickman v. Taylor, 329 U.S. 495, 511–13 (1947); *In re* Sealed Case, 676 F.2d 793, 809–10 (D.C. Cir. 1982).
[23] *See* United States v. Nobles, 422 U.S. 225, 238–39 (1975); *In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 662–63 (3d Cir. 2003) (hereafter, "*In re* Cendant"); FED. R. CIV. P. 26 advisory committee's note (note to 1970 amendment of Rule 26(b)(3) providing the "subdivision . . . protect[s] against disclosure [of] the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party"). *See also* GREGORY B. BUTLER ET AL., *Discoverability of the jury consultant's work*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 64:34 (Apr. 2016 Update).

lawyer or the party's agents.[24] However, facts contained in information protected by the work product doctrine that are otherwise discoverable are not shielded by the privilege.[25]

In contrast to the work product doctrine, the attorney-client privilege provides absolute protection from discovery. For the attorney-client privilege to apply, the communication must be made: (a) in confidence; (b) between privileged persons; (c) for the purpose of seeking, obtaining, or providing legal advice to the client.[26] The privilege extends to communications made between the client and agents of the lawyer hired to assist the lawyer in rendering advice, provided that the communication was made for the purpose of obtaining the lawyer's legal advice.[27]

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[24] *See In re* Cendant, 343 F.3d at 662 ("Rule 26(b)(3) itself provides protection only for documents and tangible things and … does not bar discovery of facts a party may have learned from documents that are not themselves discoverable. Nonetheless, *Hickman v. Taylor* continues to furnish protection for work product within its definition that is not embodied in tangible form…. Indeed, since intangible work product includes thoughts and recollections of counsel, it is often eligible for the special protection accorded opinion work product.") (quoting 8 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 337 (3d ed.)). However, the work product doctrine would not protect intangible work product of a party or the party's employee. *See* Pacific Gas & Elec. Co. v. United States, Nos. 04-74C, 04-75C, 2006 WL 6735871, at *4–5 (Fed. Cl. Mar. 9, 2006) (discussing *In re Cendant* and other cases).

[25] U.S. *ex rel*. Fry v. Guidant Corp., No. 3:03-0842, 2009 WL 3103836, at *4 (M.D. Tenn. Sept. 24, 2009) ("the attorney work product doctrine cannot be asserted to prevent disclosure of underlying facts that are otherwise discoverable"). The same holds true for the attorney-client privilege. *See* Upjohn Co. v. United States, 449 U.S. 383, 395, (1981) ("The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney").

[26] *See In re* Sealed Case, 737 F.2d 94, 98–99 (D.C. Cir. 1984) ("The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.").

[27] United States v. Kovel, 296 F.2d 918, 922–23 (2d Cir. 1961) (former IRS agent hired to help attorney understand complicated tax story conveyed by client to lawyer, similar to the role of an "interpreter"; therefore, communications between hired consultant and client did not destroy attorney-client privilege). Similarly, for communications between a lawyer and a hired consultant to be privileged, the communication must have been made for the purpose of obtaining, communicating, or interpreting legal advice. *See, e.g.*, United States v. Ackert, 169 F.3d 136, 139–40 (2d Cir. 1999) (holding "a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client" and finding that *Kovel* had no application to that case because the lawyer was not relying on the hired consultant to interpret information given to him by the client); ECDC Envtl. v. N.Y. Marine & Gen. Ins. Co., No. 96CIV.6033(BSJ)(HBP), 1998 WL 614478, at *8 (S.D.N.Y. June 4, 1998) (holding that while work product applied to documents disclosed to hired consultants, attorney-client privilege was waived as to the documents because "[n]one of the withheld documents contain technical information from plaintiff transmitted to a consultant to 'translate' for the benefit of plaintiff's attorneys. To the contrary, most of the documents appear to relate to test data that was either not confidential or did not originate with plaintiff."); *In re* Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, 265 F. Supp. 2d 321, 331–34 (S.D.N.Y. 2003) (communications between lawyer and public relations firm hired by lawyer for the purpose of giving and receiving advice regarding the client's legal issues were protected by attorney-client privilege and communications between witness, her lawyers, and public relations firm were protected by the work-product doctrine); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000) (communications between public relations firm and lawyers regarding how to put a positive spin on successive developments in the lawsuit not privileged because they did not contain confidential communications from client for the purpose of seeking legal

The work product protection and attorney-client privilege can both be waived if the protected information is voluntarily disclosed to a third party. However, unlike the attorney-client privilege, the work product protection is not *necessarily* waived by disclosing the information to a third party. Disclosing work product to third persons does not waive the protection unless the disclosure was made in a manner that increased the risk of the adverse party getting the information and was inconsistent with the maintenance of secrecy of the information.[28]

The rules applicable to non-testifying expert witnesses also are relevant in this context.[29] Rule 26(b)(4)(B) insulates from disclosure the facts known and opinions held by an expert retained or specially employed in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial, unless Rule 35(b) relating to examining physicians applies or the opposing party demonstrates exceptional circumstances under which it is impracticable to obtain facts or opinions on the same subject by other means.[30]

In re Cendant Corp. Securities Litigation

There are few cases addressing the discoverability of a trial consultant's activities. Only one federal appellate court has addressed the issue directly, and it did so in the context of a consultant (television host Dr. Phil) hired to prepare a witness for testifying at deposition. Applying the legal framework described above, the Third Circuit Court of Appeals, in the case of *In re Cendant Corp. Securities Litigation*, held that the advice of a non-testifying trial consultant hired to assist a witness in preparing for testifying at deposition was highly-protected opinion work product; however, certain limited facts were discoverable, including that a consultant was hired.[31]

In *In re Cendant*, Ernst & Young hired Dr. Phil, then a consulting expert in trial strategy and deposition preparation, to help prepare a former senior Ernst & Young manager for his deposition. In the former manager's deposition, opposing counsel asked:

> "Have you ever met Phil McGraw?"; "On how many occasions did you meet with Phil McGraw?"; "Did you understand Phil McGraw to be a jury consultant?"; "Did Mr. McGraw provide you with guidance in your conduct as a witness?"; "Did you rehearse any of your prospective testimony in the presence of Mr. McGraw?"; "In the course of preparing for this deposition ... did you review any

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advice; waiver also found because public relations firm was not "interpreting" any information to the lawyers so they could render legal advice).

[28] United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) ("[W]hile the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.").

[29] For an extensive discussion of the attorney-client privilege, work product doctrine, and other rules relevant to the discoverability of trial consultants, *see* GREGORY B. BUTLER ET AL., *Discoverability of the jury consultant's work*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 64:34 (Apr. 2016 Update); Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581 (1994).

[30] FED. R. CIV. P. 26(b)(4)(D)(i)–(ii).

[31] *In re* Cendant, 343 F.3d at 660, 665–668.

> work papers?"; "Did you select the work papers that you reviewed?"; "Did you ask anyone for the opportunity to review any particular work papers?"; and "Did you ask to review work papers on any particular subject?"[32]

Counsel for Ernst & Young objected, citing the work product doctrine and attorney-client privilege.[33] The Special Discovery Master found that Dr. Phil was a non-testifying expert retained by counsel to assist in trial preparation.[34] The Special Master then held opposing counsel could inquire into whether the witness met with Dr. Phil, the date and duration of any meeting, and who was present at any meetings, but they could not ask what Dr. Phil told the witness, whether testimony was practiced, whether the meeting was recorded, whether the witness took any notes, or whether Dr. Phil provided any documents to the witness.[35] The District Court overruled the Special Master, taking the narrow view that the work product doctrine and attorney-client privilege should be limited to lawyers and only expanded to non-lawyers in limited circumstances, and reasoning that trial consultants are hired to provide their own advice, not the advice of counsel.[36]

The Third Circuit reversed,[37] noting that the work product protection "extends beyond materials prepared by an attorney to include materials prepared by an attorney's agents and consultants"[38] and holding:

> Litigation consultants retained to aid in witness preparation may qualify as non-attorneys who are protected by the work product doctrine. Moreover, a litigation consultant's advice that is based on information disclosed during private communications between a client, his attorney, and a litigation consultant may be considered "opinion" work product which requires a showing of exceptional circumstances in order for it to be discoverable.[39]

Cendant's counsel argued the jury was entitled to know the consultant's communications with the witness as it would be entitled to know all things that may have informed the witness' testimony and that may impact the witness' credibility.[40] The court rejected this argument, emphasizing counsel's presence during Dr. Phil's communications with the witness and relying on Ernst & Young's assertion that counsel shared its mental impressions, opinions, conclusions, and legal theories with Dr. Phil because they expected the communications to remain confidential.[41] Accordingly, the disclosure of Dr. Phil's notes or the substance of his conversations with the witness and counsel would intrude into core opinion work product, which is only discoverable under extraordinary circumstances that had not been demonstrated.[42] The court adopted the Special Master's ruling as "essentially correct" but diverged on whether the

[32] *Id.* at 660.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* at 660–61.
[37] *Id.* at 661.
[38] *Id.* at 662.
[39] *Id*. at 665 (internal citations omitted).
[40] *Id.* at 666.
[41] *Id.* at 667.
[42] *Id*. at 667–68.

witness could be asked whether his testimony was practiced or rehearsed. While allowing the opponent to ask this question, the court cautioned that the inquiry "should be circumscribed."[43]

Because the court found the work product doctrine prohibited disclosure of the substance of the consultant's work, including the consultant's advice and communications, it declined to address whether the attorney-client privilege also protected these communications.[44] However, one member of the panel wrote a concurring opinion to express their view that "the attorney-client privilege was operative when Dr. [Phil], the client [], and [Ernst & Young's] counsel were engaged in contemporaneous and simultaneous discussions concerning the instant litigation."[45] The concurring judge reasoned that it would be impossible to "carve out" from any three-way discussions among counsel, the witness, and the hired consultant any potentially non-privileged two-way communications.[46]

Lessons for Practitioners

Aside from *In re Cendant*, there is a notable lack of authority on discoverability of trial consultant work. To date, there has been only one reported decision directly applying *In re Cendant* in analogous circumstances.[47] The Northern District of California expressly adopted *In re Cendant*'s reasoning and held the parties could only ask witnesses: whether the witness met with a jury consultant, the purpose of any such meeting, who was present, the duration of the meeting, and whether the witness practiced or rehearsed his or her testimony.[48] The court held counsel could not ask questions that would go toward discovering how the consultant told the witness to improve their testimony or any issues they identified about the witnesses' appearance or behavior (fidgeting, sweating, voice, demeanor, etc.).[49] The court expressed reservation about protecting "coaching a witness to act credible," but nevertheless found that line of questioning would distract from the factual issues and should be precluded under Federal Rules of Evidence Rule 403.[50] Regarding the attorney-client privilege, the court stated: "[i]f the witness is a 'client,' the substance of any communication between the jury consultant, the client, and the attorney is probably [attorney-client] privileged," but it made no specific ruling on the privilege's applicability because there were open questions about whether the witnesses qualified as "clients."[51]

Perhaps the dearth of authority on these issues reflects an implicit recognition among the bar that the activities of trial consultants are protected by the work product doctrine, attorney-

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[43] *Id*. at 668.
[44] *Id*. at 661 n.4.
[45] *Id*. at 668.
[46] *Id*. at 668–69 (citing Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581 (1994)).
[47] Hynix Semiconductor Inc. v. Rambus, Inc., Nos. CV-00-20905 RMW, C-05-00334, C-06-00244 RMW, 2008 WL 397350 (N.D. Cal. Feb. 10, 2008).
[48] *Id*. at *2, 4.
[49] *Id*. at *4. *But see* Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581, 627 (1994) (expressing skepticism that consultant advice such as "don't fidget", "avoid pausing in mid-sentence", and "look at the jury while you are testifying" would be protected).
[50] *Hynix*, 2008 WL 397350, at *4.
[51] *Id*. at *3 (many of the witnesses were former employees hired as consultants at the time of trial preparation).

client privilege, and/or Rule 26(b)(4)(B).[52] *In re Cendant* suggests a strong work product argument exists, but the law is less settled regarding the application of the attorney-client privilege.[53] Lawyers should research analogous attorney-client and work product decisions in their jurisdictions to better understand how their local courts would treat these issues.

Whether courts will depart from the Third Circuit's ruling has yet to be seen, but *In re Cendant* provides some important lessons lawyers should follow to improve the likelihood that witness preparation sessions and the consultant's advice are subject to the attorney-client and opinion work product protection. These include:[54]

6) Outside counsel should execute the engagement letter or agreement with the trial consultant, not the client. The letter or agreement should state the consultant is being engaged to help the lawyer more effectively provide legal advice to the client and to prepare for trial. It should also set forth a clear protocol for the consultant to send all communications or reports directly to the lawyer.
7) A lawyer should be present for all meetings and communications between the consultant and the witness.[55]
8) All communications and reports should have a notation that the information is protected by the attorney-client privilege and the work product doctrine, although as every lawyer knows, this is not dispositive. Likewise, recorded preparation sessions *should* be protected from disclosure,[56] but it is wise to make a statement at the

[52] Additionally, the trial consultants interviewed for this chapter all expressed that instances of lawyers inquiring into whether a witness worked with a consultant are rare.

[53] With respect to the attorney-client privilege, when a trial consultant is present during communications between the lawyer and witness, arguably, this additional presence is inconsistent with the intent the communication remain confidential. *See* David A. Perrott & Daniel Wolfe, *Out and Proud: Ethical and Legal Considerations in Retaining a Trial Consultant to Assist with Witness Preparation*, 22(1) THE JURY EXPERT 54–62, at 59 (2010), *available at* http://www.thejuryexpert.com/2010/01/out-and-proud-ethical-and-legal-considerations-in-retaining-a-trial-consultant-to-assist-with-witness-preparation/. Similarly, as expressed by the District Court in *In re Cendant*, the consultant's advice could be categorized as assisting with the provision of the consultant's own advice, not the legal advice of counsel, thereby precluding application of the privilege. *Id*. *See also* Blumenthal v. Drudge, 186 F.R.D. 236, 243 (D.D.C. 1999) (acknowledging the attorney-client privilege could be extended to non-lawyers in certain situations, but declining to apply to the facts because the consultant was hired to provide his own advice); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) ("If what is sought is not legal advice . . . or if the advice itself is the accountant's rather than the lawyer's, no privilege exists").

[54] GREGORY B. BUTLER ET AL., *Discoverability of the jury consultant's work*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 64:34 (Apr. 2016 Update); David A. Perrott & Daniel Wolfe, *Out and Proud: Ethical and Legal Considerations in Retaining a Trial Consultant to Assist with Witness Preparation*, 22(1) THE JURY EXPERT 54–62 (2010), *available at* http://www.thejuryexpert.com/2010/01/out-and-proud-ethical-and-legal-considerations-in-retaining-a-trial-consultant-to-assist-with-witness-preparation/; Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581 (1994).

[55] Communications between a hired trial consultant and the witness should be protected by the work product doctrine, even without counsel being copied or involved on the communication because work product protection extends to the lawyer's agents. However, this practice creates unnecessary risks of disclosure and should be avoided if feasible.

[56] GREGORY B. BUTLER ET AL., *Discoverability of the jury consultant's work*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 64:34 (Apr. 2016 Update). *See also* Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581, at 627 (1994). In one case from the Texas Court of Appeals that did not involve a hired consultant, the court recognized videotaped witness practice sessions generally contain information properly classified as work product, but ordered the trial judge to conduct an *in camera* review of the witness' recorded

beginning of a recording that the videotape is being used for work product purposes and is covered by the work product protection and attorney-client privilege.

9) Trial consultants should avoid giving witnesses documents to keep. They should also avoid giving documents containing generic advice or publicly available advice or practice pointers about testifying, as those documents could be discoverable.
10) Advise the witness that the purpose of the session is to prepare the witness for trial and not to practice or rehearse scripted testimony. Practice what the witness will say if asked whether he or she worked with anyone in preparing to give their testimony.
11) Do not allow the witness to bring notes or documents from the preparation sessions when they testify (unless subject to a valid subpoena *duces tecum*).
12) Consider filing a motion *in limine* to exclude evidence that a trial consultant was used.

Circumstances where counsel uses a consultant to help prepare a testifying expert for deposition or trial require special consideration. While the same analysis above applies, testifying experts must disclose their opinions and the data or information they considered in forming their opinions.[57] Thus, if an expert considers any information from the preparation session or from a report generated by the consultant to formulate her opinion, or states an opinion in a recorded practice session, disclosure could potentially be required.[58] Again, counsel would be well-advised to research jurisdiction-specific law regarding the interplay of the rules on privilege and testifying experts.

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practice session with attorneys to determine whether the video contained the lawyer's strategy, evaluations of the strength and weaknesses of the case, or mental impressions, which would be subject to protection, or information that tended to "mold the witness' testimony," which would not be protected. S. Pac. Transp. Co. v. Banales, 773 S.W.2d 693, 694 (Tex. Ct. App. 1989). The witness submitted an affidavit swearing that "he never saw the videotape, nor was it utilized in any way after it was taken." *Id*. This ruling is likely an anomaly and could be attributable to the fact there were accusations that the witness was "independent," rather than a party, and that the attorneys were trying to shape this critical witness' testimony. *See also* Grenier v. City of Norwalk, No. X06CV000169483S, 2004 WL 3129077 (Conn. Super. Ct. Dec. 16, 2004) (attorney-client privilege waived because videographer was present during communications between the lawyer and client, noting "[w]hile the videographer was necessary for the videotaping of Johnson's statement, he was not necessary for Johnson to consult with her attorney. The attorney could have easily and effectively communicated with his client outside of [videographer's] presence.").

[57] FED. R. CIV. P. 26(a)(2)(B).

[58] David A. Perrott & Daniel Wolfe, *Out and Proud: Ethical and Legal Considerations in Retaining a Trial Consultant to Assist with Witness Preparation*, 22(1) THE JURY EXPERT 54–62, at 56 (2010), *available at* http://www.thejuryexpert.com/2010/01/out-and-proud-ethical-and-legal-considerations-in-retaining-a-trial-consultant-to-assist-with-witness-preparation/; Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581, 627–31 (1994) (mock examination of a testifying expert witness normally should be afforded opinion work product protection); Quinn Const., Inc. v. Skanska USA Bldg., Inc., 263 F.R.D. 190, 194–197 (E.D. Pa. 2009) (report of non-testifying expert may lose its protection from discovery if it is provided to a testifying expert and is "considered" by the testifying expert; in that case; court held the report of the non-testifying construction consultant was discoverable because although the testifying expert said he didn't rely on it in generating his expert report or opinions, he did review the non-testifying expert's report to obtain an "overview" of the issues in the litigation prior to conducting his own analysis); Synthes Spine Co., L.P. v. Walden, 232 F.R.D. 460, 463–64 (E.D. Pa. 2005) (noting the term "considered" is broadly interpreted and that the "overwhelming majority of courts addressing this issue [of discoverability of expert witness materials] have adopted a pro-discovery position, concluding that, pursuant to Rule 26(a)(2)(B), a party must disclose all information provided to its testifying expert for consideration in the expert's report, including information otherwise protected by the attorney-client privilege or the work product privilege").

Counsel should also use greater caution when using a trial consultant to prepare a non-party witness or non-retained expert, including former employees. These situations could be afforded no attorney-client protection, and they risk being subject to the lesser protection afforded to ordinary work product.

Do Jurors Care?

The discoverability of the fact a witness met with a trial consultant is not surprising; it is well-established that the fact someone met with legal counsel generally is not privileged—only the substance of those conversations are privileged. The question then becomes: Will the fact the witness prepared with a professional cause the jury to perceive the witness as coached or unduly influenced, such that it outweighs the benefit of using a consultant? Some empirical research suggests this might be a non-issue:

> A research project conducted by members of the ASTC involving more than 500 jury-eligible citizens throughout the United States found 73 percent of respondents believe preparing witnesses to testify is a good idea. Another 66 percent agree that it is appropriate for a witness to practice before testifying. Less than 15 percent of respondents believe that witnesses who practice their testimony have something to hide.[59]

Based on this research, it is probably safe to assume most people either expect or do not care that a witness practiced and prepared prior to testifying. Because many other factors indicate that hiring a trial consultant provides significant benefits, counsel should not base the decision about whether to engage a consultant's assistance on the overblown fear of negative jury perception. As a reminder, every case is unique. Opposing counsel's effectiveness in introducing the use of a trial consultant to the jury varies, and it may warrant introducing the fact preemptively in direct examination or moving for exclusion prior to trial.

IT'S "ALL ABOUT THE BENJAMINS." OR IS IT?

Budgetary concerns are undoubtedly an important factor to consider when deciding whether to hire a trial consultant to help with witness preparation. But use of a trial consultant that results in an outstanding deposition for your client, or a devastating deposition for the other side's client/witness, can make or break the case and result in an outstanding outcome for your client.

Clients hire lawyers for results: to get them from Point A to Point B. If lawyers believe a key witness may hamper their ability to effectively communicate the client's message for one of the reasons discussed, they should consider enlisting a professional witness consultant and discuss it with their client.

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[59] Craig C. New, Samantha Schwartz, & Gary Giewat, *Witness Preparation by Trial Consultants*, 18 THE JURY EXPERT 8–11, at 10–11 (Aug. 2006).

Witness preparation, including the use of a hired trial consultant, is an art, not a science. With heightened self-awareness and the recognition of the potential benefits of hiring a trial consultant, lawyers are better equipped to make the right decision and to articulate their reasoning to their clients.