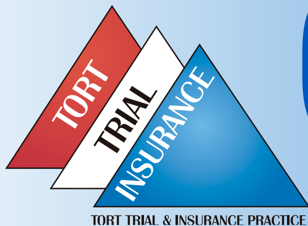

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EXPERT REPORT DRAFTS, LITIGATION STRATEGY, AND THE IMPORTANCE OF KNOWING THE RULES OF THE ROAD

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Whether expert report drafts are discoverable is an issue that has split courts, both state and federal alike, in recent years. Adding to the debate is the increasing use of technology in litigation, particularly in the context of online communications and collaboration between experts and litigation counsel. Citing Federal Rule of Civil Procedure 26(a)(2)(B), a party seeking discovery may demand drafts of these reports, while the party resisting discovery may invoke the protection of Rule 26(b)(3) and claim that drafts constitute attorney work-product. This debate has implications for how attorneys should instruct experts with respect to the creation and preservation of drafts, and the collaboration among the expert and litigation counsel in reviewing drafts and formulating a final report.

The discoverability of draft reports turns on an analysis of the Federal Rules of Civil Procedure. Rule 26(a)(2)(B) requires disclosure of all information considered by the expert in forming his or her opinion. The Rule goes beyond merely requiring a complete statement of all the expert's opinions and extends to "the data or other information considered by the [expert] witness in forming the opinions." The use of the word "considered," which in 1993 replaced the phrase "relied upon," was deliberately chosen to capture a larger field of discoverable material. On the other hand, Rule 26(b)(3), which documents the work-product rule, protects work prepared in anticipation of litigation from discovery demands. Since the 1993 Amendments to the Federal Rules, courts have been split as to which of these rules prevails in considering the discoverability of expert reports. A minority of federal courts have held that drafts continue to be protected as attorney work-product, but the majority has required full discovery of draft reports pursuant to Rule 26(a)(2)(B). Among state courts, too, the minority has ruled in favor of protecting drafts, and the majority has favored disclosure. Knowing the rules of the relevant jurisdiction is critical. To illustrate, in a jurisdiction following the majority rule, litigation counsel who directs the expert to destroy drafts risks the possibility of the exclusion of expert testimony or other sanctions.[1]

Yet, subtle distinctions exist. In a majority jurisdiction, the obligation to produce drafts does not necessarily create an obligation to preserve them. Although it is clear that in these jurisdictions drafts of experts reports are discoverable, it is unclear at what point the obligation to preserve them arises. For example, in one federal case, the trial judge held that Rule 26(a)(2) does not impose an affirmative duty upon an expert to preserve all documents, particularly report drafts.[2] There is, after all, no obligation to disclose an expert when he or she is first retained, and much of the expert's analysis and drafting may be discarded long before a disclosure is made under Rule 26. The judge in *Pittsburgh* held that the affirmative duty to preserve drafts is created only when a subpoena for such drafts is served.[3] Nor does the obligation to produce drafts create a corresponding obligation to create them in the first place. Under current case law, there is no clear prohibition against instructing an expert to work on a single version of a single electronic document, to avoid a physical "paper trail" of discoverable material. Similarly, newer technology has paved the way for experts and litigation counsel to meet online and together review a draft report while the expert may edit its contents for all to see in real-time. Under this method, there is no physical "paper trail" or e-mails with document changes being exchanged.

Similarly, there is no prohibition against notifying an expert that, once he or she is retained, everything written is potentially discoverable and, thus, what is written should be kept to a minimum. Attorneys should also consider instructing their experts to avoid creating drafts that have comments on them offered or written by non-testifying, consulting experts. Although generally the work of non-testifying experts is not discoverable, some courts have held that these comments, because they are written on discoverable drafts and are considered by the testifying expert, are nonetheless discoverable.[4] Further complicating the issue, some courts have also held that drafts of expert reports containing the comments of attorneys are discoverable, notwithstanding the work-product doctrine.[5]

1 *See, e.g.*, West v. Goodyear Tire and Rubber Co., 167 F.3d 776 (2d Cir. 1999); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D.N.Y. 1991).

2 *See* Univ. of Pittsburgh v. Townsend, 2007 WL 1002317 (E.D. Tenn. Mar. 30, 2007).

3 *Id.* at *4.

4 *See, e.g.*, Trigon Ins. Co. v. States, 204 F.R.D. 277 (E.D. Va. 2001).

5 *See, e.g.*, Weil v. Long Island Sav. Bank, 206 F.R.D. 38 (E.D.N.Y. 2001).

Again, knowing the relevant jurisdiction is critical. Given the current split in authority, a prudent attorney will carefully direct an expert on the jurisdiction-appropriate process for drafting, revising, and formulating a final expert report. Although courts seem to tolerate "draft dodging" to a certain extent, the line between an appropriately strategic process and a potential problem remains a fine one.

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