

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****August 7-8, 2006****RECOMMENDATION**

RESOLVED, That the American Bar Association recommends that applicable federal, state and territorial rules and statutes governing civil procedure be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert relating to an expert's report, as follows:

- (i) an expert's draft reports should not be required to be produced to an opposing party;
- (ii) communications, including notes reflecting communications, between an expert and the attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
- (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

FURTHER RESOLVED, That the American Bar Association recommends that, until federal, state and territorial rule and statutory amendments are adopted, counsel should enter voluntary stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

REPORT

Introduction

The law in the federal courts and in state courts on expert witness discovery is both uncertain and varied. Many federal courts require the production of all draft reports, the expert's handwritten notes and all attorney-expert communications. A few judges issue early case management orders to require the preservation of all expert drafts and other work product materials to counter the practice of experts who avoid generating draft reports or discard them in the ordinary course.

Other federal courts and judges continue to hold that these drafts and communications are attorney work product and are not discoverable. Other judges have individual "local local" rules with different requirements. The practice among the states also varies considerably, even in those states that ordinarily adopt federal procedural rules as the norm.

This uncertainty has produced practices that, among other things, (1) impede the collaborative process between attorney and testifying expert, (2) make litigation considerably more expensive, (3) impose unnecessary burdens on preparing expert reports and (4) provide a distinct advantage to the well-heeled litigant. The uncertainty and varied requirements among different courts are themselves problematic.

This uncertainty stems from the 1993 amendment to Fed. R. Civ. P. 26(a)(2), (and state analogues), that expanded expert discovery from the materials *relied on* by an expert to any "data or other information" *considered* by an expert in forming his or her opinion. Some courts have defined "other information considered" to include not only facts or data provided to the expert, but also all draft expert reports and all attorney communications with the expert. Others continue to protect this information as attorney work product under Rule 26(b)(3).

We believe counsel and experts should be subject to consistent rules and court expectations around the country. This will minimize unnecessary expense and properly focus discovery on the soundness of the expert's opinion by itself, rather than on the preliminary mental thought processes and experimentation that led up to it.

We therefore recommend that federal and state rules be adopted or amended, consistent with American Bar Association policy, to protect from discovery draft expert reports and attorney-expert communications that are an integral part of the collaborative process in preparing an expert's report. Although this might bar opposing counsel from inquiring into an expert's preliminary thought processes, we believe that the adverse consequences of allowing inquiry into these issues significantly outweigh their benefits. Nothing in our proposed formulation would preclude counsel from fully exploring the bases for the expert's opinions, including whether the expert considered alternative approaches and views, just as counsel did before the 1993 amendments were adopted.

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Background

Fed. R. Civ. P. 26(a)(2) was amended in 1993 to require a party to provide the other parties with a written report from “a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony.”

Rule 26(a)(2) was also amended to require that the expert’s report disclose not only data or facts *relied on* by the expert in formulating his or her opinion, but also that the report contain “the data or other information *considered by* the witness in forming the opinions” given in the report (emphasis added).

This change was intended to require experts to disclose the data and facts they had available to them for “consideration,” not merely those that they ultimately believe they “relied on.”

As the 1993 Advisory Committee Note states:

The report is to disclose the data and other information considered by the expert and any exhibits or charts and summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

But at the same time, the 1993 Advisory Committee Note also recognizes counsel will normally need to assist experts in preparing their reports:

Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.

Given the language in Rule 26(a)(2)(B) that the report must “disclose the data and other information considered by the expert,” most federal courts and the more recent decisions have held that even attorney trial strategy, mental impressions and other traditional work product, if turned over to a testifying expert, should be produced.

A minority of federal courts have held that this language was not intended to trump the work product protections of Rule 26(b)(3).

As a practical matter, the proviso in the Note that “Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports” has become illusory and offers no protection. Anything the expert looks at or hears, including an attorney’s input, is deemed to have been “considered by the expert” and has become fair game for discovery by the other side. This includes (i) any communications (e-mail, notes of phone conversations, etc.)

between counsel and the expert, (ii) counsel's review of spread sheets or other preliminary or tentative calculations and (iii) preliminary drafts that may have been exchanged between them.

The result, whether intended or not, has been to make virtually every case where an expert is retained both (a) more cumbersome and (b) more expensive. In many cases, particularly ones involving significant dollars or issues, it has also required counsel to retain two sets of experts. The first set are "consulting" experts with whom counsel can freely explore his or her theories of the case or the evidence – without fear that this traditional "work product" will have to be disclosed to the other side. The second set of experts are "testifying" experts whose thought processes are not "tainted" with the input of trial counsel's thoughts and strategies.

Even this expensive practice does not solve the problem. The "testifying" expert still has to communicate with counsel and, except in rare cases, has to prepare a draft that will (and properly should) reflect both the expert's and counsel's mental processes – bringing the issue back to square one.

Where only "testifying" experts are retained, the rule has had other unwarranted consequences. Some courts or judges require that experts preserve all drafts (as well as e-mails and other communications with counsel) and make them available to the other side – because they constitute "information considered by the expert." Carried to its logical conclusion, every keystroke an expert enters into his or her report could arguably be made available to the opposing party because it was considered in arriving at the expert's final views.

The wary testifying expert thinks long and hard about what he or she puts down on "electronic" paper. It is difficult to try out different theories or calculations when the expert (and counsel) knows that they are going to be fair game for the opposing side to use in attempting to discredit or challenge the expert's testimony.

The draft of a "report" is an iterative process by which the expert's analysis is refined, often with false starts. What should matter in litigation is not how the expert arrived at his or her final conclusion, but whether that conclusion holds water and can stand scrutiny tested on its merits.

It has therefore now become common practice for an expert to try to avoid having to keep and then produce information "considered" in arriving at a final opinion.

Experts typically commit to the computer only an unsaved draft, and then to have counsel come to the expert's office (or bring a laptop to counsel's office) so they both can work on the opinion and have it appear as the first – and only – report that is then produced to the other side. The result is that an expert may not realistically have an opportunity to test his or her views before being required to share them with counsel who retained the expert, much less before being required to produce his or her "initial" draft to the other side for scrutiny.

This is not simply a "large case" problem. Nor is it an issue that affects only defendants or plaintiffs. It directly impacts every case in which an expert is being used. It is also a problem on two levels.

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First, it places artificial restrictions on both (i) the relationship between counsel and the expert and (ii) their collaborative search for not only the most persuasive view of the issue, but also the expert's ability to fashion an opinion that has a solid empirical basis.

Second, it pushes lawyers and experts alike toward intellectual dishonesty both in the process used to arrive at an opinion and the ultimate opinion itself.

We are aware of no evidence, empirical or otherwise, that suggests that the requirement to produce drafts, to the extent they exist, provides a better method for presenting and assessing an expert's trial testimony. There are significant countervailing reasons why it should be changed.

Proposed Rule Provisions

Consistent rules should therefore be established throughout the federal and state courts to govern the scope of required disclosures or discovery of experts and expert reports.

In particular, applicable federal and state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and attorney-expert communications relating to an expert's report so that:

- (i) an expert's draft reports should not be required to be produced to an opposing party;
- (ii) communications, including notes reflecting communications, between an expert and attorney who has retained the expert should not be discoverable except on a showing of exceptional circumstances;
- (iii) nothing in the preceding paragraph should preclude opposing counsel from obtaining any facts or data the expert is relying on in forming his or her opinion, including that coming from counsel, or from otherwise inquiring fully of an expert into what facts or data the expert considered, whether the expert considered alternative approaches or into the validity of the expert's opinions.

Until federal and state rule and statutory amendments are adopted, and consistent with the policy expressed in the Association's Civil Discovery Standards (August 2004), counsel should enter stipulations protecting from discovery draft expert reports and communications between attorney and expert relating to an expert's report.

American Bar Association Policy

In August 1999, the American Bar Association's House of Delegates adopted the Association's Civil Discovery Standards. The Standards recognize a need to protect communications between counsel and their testifying experts that convey the attorney's trial strategy or constitute strategic litigation planning.

Civil Discovery Standard 21 provides in pertinent part:

- e. **No Waiver of Attorney Work Product.** The provision in section 21(b)(iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.

The Comment to this Standard explains that

Subsection (e). Other than court-appointed experts, which *are sui generis*, an expert *is* retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. See *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.

At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.

For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), see, e.g., *Musselman v. Phillips*, 176 F.R.D. 194 (D. Md. 1997); *Bama v. United States*, No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. III. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Kam v. Ingersoll Rand*, 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).

For cases holding otherwise, see, e.g., *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993); see also Gregory P. Joseph, *Emerging Expert issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may,

however, assess whether there is “substantial need” for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies – archetypal “work product” – that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammelled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts – one to testify and the other to consult – if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) (“It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed.”). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. *E.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that “substantially increases the likelihood that the work product will fall into the hands of the adversary”).

Other parts of the Civil Discovery Standards were amended by the House of Delegates in August 2004, but Standard 21 remains in the 2004 version unchanged from its 1999 text.

Why Federal and State Rules Should Be Amended

There are seven basic reasons why federal and state rules should be amended or adopted to protect draft expert reports and attorney-expert communications in preparing an expert’s report.

First, the policy underlying the work-product doctrine is that counsel should be free to explore different theories and options in preparing his or her case. This is archetypal work

product – a lawyer’s mental impressions – and a rule requiring their disclosure makes it difficult for counsel to strategize, theorize and develop the client’s case and the expert’s testimony to support it.

Second, the current version of the rule hampers an expert’s ability to arrive at a carefully considered opinion by testing different hypotheses, permutations and calculations.

Third, there is no evidence, empirical or otherwise, that we are aware of that disclosure of preliminary analyses and attorney-expert communications improves the quality of justice.

Fourth, because of the uncertainty attached to the discoverability of drafts and the expert’s mental processes – and the now-universal ability to track editorial changes in a word processing program – lawyers and experts typically avoid “creating tracks” or producing discoverable drafts and attorney-expert communications that the opposing side can use in attacking the report.

Fifth, a disclosure requirement imposes unnecessary costs on the litigation process and advantages the well-heeled litigant who can afford two experts. It therefore runs contrary to the cardinal principle of Fed. R. Civ. P. 1 – “to secure the just, speedy, and inexpensive determination of every action” – and similar state provisions.

Sixth (and consistent with established American Bar Association policy in the Civil Discovery Standards), experienced counsel are simply stipulating around the current version of the rule by agreeing to exempt their case from the requirements to produce draft reports and attorney-expert communications.

Seventh, some states have either not adopted the federal rule or are now adopting rules that depart from it and keep preliminary drafts and attorney-expert communications from being discoverable. The practice in federal courts also varies considerably from court to court and judge to judge. A rule of discovery and disclosure should be consistent around the country so that litigants, counsel and experts know what the ground rules are, regardless of what court they are in or which judge they are before.

A. *Public Policy Favors Encouraging a Collaborative Effort Between Expert and Attorney and a Disclosure Rule Hinders that Effort*

Uncertainty in the legal requirement for discovery of draft expert reports and attorney-expert communications that reveal an attorney’s mental impressions and trial strategy hinders the collaborative effort between attorney and testifying expert.

Rule 26 was amended in 1993 to require experts retained or specially employed to give expert testimony to submit written reports to the opposing side as a matter of course. The written report was never intended as a substitute for testimony at trial. Its sole purpose is to give the other fair side notice of the expected testimony. This allows counsel to decide whether (a) he or she wants to take the expert’s deposition (or simply cross-examine at trial) or (b) he or she needs to retain his own expert, either to challenge the validity of the other side’s expert’s opinion or to offer another one.

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Rule 26, both before and after the 1993 amendment, continued to protect an attorney's work product, including legal theories, mental impressions and strategies disclosed to the attorney's consultants and other agents. Fed. R. Civ. P. 26(b)(3) provides that:

[s]ubject to the provisions of subdivision (b)(4) of this rule [which deals with expert depositions, discovery of the opinions of non-testifying experts, and cost shifting], a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, *consultant*, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. (Emphasis added.)

These provisions incorporate the work product doctrine articulated in *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). They recognize the special protection given to counsel's mental impressions ("core" work product) and that work product is not limited to counsel (material can be prepared by or for a "party's representative").

In *Nexus Products. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999), the defendant moved to compel the production of documents the other side's experts had relied on, including materials related to "exclusively draft versions of the expert reports." After discussing the split among courts and commentators, *id.* at 8-9, the court denied the motion to compel, relying in large part on Advisory Committee Notes to the 1993 amendment that the Rule "does not preclude counsel from providing assistance to experts in preparing the report, and indeed, . . . this assistance may be needed." *Id.* at 8, 10. The court also relied on *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-95 (W.D. Mich. 1994) ("For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute").¹

¹ See also *Kennedy v. Baptist Memorial Hospital-Boonville, Inc.*, 179 F.R.D. 520 (N.D. Mi 1998) (protecting as work product attorney-expert communications before first expert report but permitting discovery of such communications after report's amendment); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) (pre-1993 case protecting attorney work product) ("Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory." 738 F.2d at 595); *Magree v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642-643 (E.D.N.Y. 1997); *All West Pet Supply Co. v. Hill's Pet Prod.*, 152 F.R.D. 634, 638 (D. Kan. 1993).

6 Moore’s Federal Practice, § 26.80[1][a] (2005) takes this view, stating that “nothing in the advisory committee notes to the 1993 amendments . . . suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product [in *Upjohn*]. Moore’s also notes that “the *Haworth* rule has ‘three additional benefits: (1) it does not favor wealthy parties who can afford to hire both testifying and non–testifying experts, (2) it discourages the use of strained hypotheticals between expert and counsel in order to avoid disclosure, and (3) it avoids a potential conflict with the Rules Enabling Act by not abolishing or modifying an arguably evidentiary privilege.’” *Id.*

As a practical matter, many federal courts require the disclosure of anything an expert “considers” – including the input of counsel.² In these courts, counsel would have to be very unwise to “provide assistance” to an expert, whether an auto mechanic or anyone else, because opposing counsel will use this discovery to try to show that the expert is really the other side’s lawyer’s mouthpiece. The idea that counsel can assist the mechanic in making his or her report comprehensible to the finder of fact, when that this assistance will become discoverable, is an illusion. The rule also makes it difficult for counsel to explore alternative theories with a testifying expert. This hurts the plaintiff in a car accident just as much as it hurts the defendant in a multi-million dollar antitrust case.

B. *The Current Rule Hampers an Expert’s Ability to Arrive at a Carefully Considered Opinion*

² See, e.g., *In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (“the Federal Rules of Civil Procedure make clear that documents and information disclosed to an expert in connection with his testimony are discoverable by the opposing party”); *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002) (“the overwhelming majority of district courts in this Circuit as well as in other jurisdictions have concurred” that “Rule 26(a)(2)(b) requires a party to disclose core work product, or other privileged or protected material supplied by the party to its testifying expert”); *Aniero Concerte Co, Inc. v. New York City School Constr. Auth.*, No. 94CIV.9111CSHFM, 2002 WL 257685, at *3 (S.D.N.Y. Feb. 22, 2002) (“any documents ‘that were provided to and reviewed by the expert,’” including core attorney work product found in counsel’s letter to expert, were discoverable); *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 282 (E.D. Va. 2001) (“[a]ny information reviewed by an expert will be subject to disclosure including drafts of reports sent from and to the testifying experts”); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) (“when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial – whether factual in nature or containing the attorney’s opinions or impressions – that information is discoverable”); *Fidelity National Title Ins. Co. of N.Y. v. Intercounty National Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005) (requiring production of expert’s notes even if he did not rely upon them); *Lacy v. K.L. Villeneuve*, 2005 U.S. Dist. LEXIS 31639 (W.D. Wa. 2005) (requiring production of e-mail conversations between counsel and testifying expert); *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567 (S.D. Tex. 2005) (requiring production of counsel-expert e-mails); *American Fidelity Assurance Co. v. Bayer*, 229 F.R.D. 520 (D.S.C. 2004); *Synthes Spine Co., L.P. v. Walden*, 2005 U.S. Dist. LEXIS 34974 (E.D. Pa. 2005); *In re Omeprazole Patent Litigation*, 2005 U.S. Dist. LEXIS 6112 (S.D.N.Y. 2005).

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The risk that drafts and attorney-expert communications will face discovery makes it very difficult for the expert to do the necessary independent thinking and testing to arrive at a considered opinion. One leading expert consulting firm has noted that “when there are rules setting forth what is discoverable, there is a good chance that the potentially discoverable material simply will not be created.”

This creates at least four significant problems:

- Counsel may be hesitant in asking the expert to prepare analyses for settlement purposes.
- Counsel may also be hesitant in asking the expert to prepare a critique of the opposing expert for fear that it would have to be disclosed in discovery and forewarn the other side of questions that might be asked in deposition or at trial.
- The expert will take pains to avoid creating anything that might be used to trap him or her or confuse the issues.
- Most important, counsel may be hesitant to explore alternative analyses with their experts for fear that, if disclosed, they could be used to cast doubt on the strength of the expert’s convictions and the methodology ultimately used in the expert’s report. Just as important, counsel, who have lived with their cases longer than the experts, may be more hesitant to focus the experts or their reports on the critical issues in the case for fear that this focusing will be perceived as “testifying” for the experts.

C. There Is No Evidence that Disclosure of Draft Reports and Attorney-Expert Communications Improves the Quality of Justice

Although counsel may have strong views based on their own practices or experiences, there is no empirical evidence of which we are aware that disclosure of draft expert reports and attorney-expert communications has improved the quality of justice, or that without that disclosure, counsel or the trier of fact has been hindered in the ability to test the merits of an expert’s opinion.

Many attorneys, aware of court requirements to require disclosure of draft reports, routinely ask for their production. There is considerable disparity in the extent to which draft reports are produced. Drafts are often destroyed in the ordinary course and most rules do not forbid this practice. Drafts are usually available only from the unwary or the careless expert.

In jurisdictions where drafts are required to be produced, even if none exists, attorneys almost uniformly ask questions of experts in depositions about their preparation of drafts, their retention of them and the extent to which counsel has had input in the preparation of the expert’s report. This questioning almost always prolongs expert depositions, frequently with little corresponding benefit. The expert will ultimately be gauged by the strength of the opinion and the facts or data on which the expert relies, not on the extent to which the opinion was influenced by counsel or on the mechanics of the report preparation process.

In 2002 the State of New Jersey therefore changed its rule to protect from discovery draft expert reports and communications between expert and attorney that constitute the collaborative process in preparing the expert's report. After careful consideration, the subcommittee's report supporting the rule change found as follows:

The subcommittee believes that the desirability of the retaining attorney and expert discussing the contents and format of an expert's report substantially outweighs the potential loss of information which might have been used to attack an expert's credibility and particularly his or her independence. After all, the value of an expert's opinion is based on the facts assessed and/or assumed and the reasoning process used to analyze them. Too much time is now spent on discovery with little benefit gained in examining the report preparation process. In the subcommittee's view, a bright line standard reflected in this safe harbor recommendation should simplify discovery, streamline judicial review and focus the cross-examination on the veracity of an expert's opinion rather than the attorney's role in the production of the final report.

Report of the Subcommittee of the Civil Practice Committee on The Discoverability of Experts' Draft Reports to the Supreme Court Civil Practice Committee (September 5, 2001).

To arrive at a considered opinion, experts should therefore be free to think about their analysis as broadly as possible without the artificial constraints placed on them by having to turn them over as part of discovery.

D. Seasoned Experts and Counsel Now Go to Great Lengths to Avoid Creating Discoverable Drafts and Communications

Although we have not conducted exhaustive research, it appears that it is standard operating procedure for experienced experts to go to great lengths to avoid creating a "trail" that would disclose how they arrived at their opinions or to reveal counsel's input.

One expert reported on his standard methodology. He never writes anything down that could be viewed as "even an appearance of opinion." He never prints a draft, and always takes care to overwrite or delete anything he is removing from the draft. If an attorney wants to review the draft, the expert takes his laptop to the attorney's office and they both make edits at the same time. He defragments his computer at least once a month using a Department of Defense quality "file scrubber" so there is no recoverable data other than well-organized files. Before preparing his actual expert report, he saves it in Rich Text Format, then defragments his hard disk, runs the file scrubber, and then defragments it again. He then prints the report in "pdf" format, deletes it from his hard disk, and repeats the defragment-scrub-defragment process.

Some may argue this procedure should not be viewed as within the spirit if not the letter of the requirement to disclose all drafts and other information considered by the witness in forming the opinions. And given modern computer forensics, it is not at all clear that it would succeed. But it does show the lengths to which the rule now drives experts in the preparation of their opinions.

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A leading expert consulting firm has commented that the current version of the rule not only fosters the kind of clandestine environment described above, but cautious counsel will studiously avoid sending any “bad documents” to their testifying experts, even if they will not impact the experts’ conclusions. This often results in the expert’s not seeing certain documents until their deposition or when they testify at trial. As they put it, “surprising an expert with new information serves no purpose for the court, if the expert could have taken account of that information when forming the opinions.”

The same firm noted that “experts make a habit and a virtue of not taking notes during meetings or conference calls. This means that the expert’s final opinions will be based on their recollection of information . . . rather than on notes or records.” And “notes and summaries of materials reviewed are not prepared, even if [they] would assist the expert in more efficiently preparing for trial.”

In the “old days” an expert would write or type a draft, consider it and revise it. Only when the expert was satisfied that it truly reflected his or her views would it be given to counsel. And counsel could then comment on it and make sure that it was based on accurate information. When both counsel and expert were satisfied, the report would then be put in final and given to the opposing side, who would be able to probe its strength and weaknesses based on what the expert was relying on to support it.

The advent of electronic discovery – with its ability to track not only the existence of a document, but every stroke of the word processor and an expert’s every thought (at least if he or she commits it to the keyboard) – has dramatically changed the equation. Every iteration can now be viewed – literally – by the other side. Those who believe they have protected drafts, by overwriting them, may nevertheless have them disclosed by zealous adversaries willing to spend what may be needed in forensic experts. The written report, designed to give fair notice of testimony at trial, without a rule change, may become the focus of a trial within a trial – the trial of the expert’s tentative thought processes leading to his expert conclusions.

E. The Requirement to Produce Draft Expert Reports and Attorney- Expert Communications Imposes Unnecessary Costs on the Litigation Process and Advantages the Well-Heeled Litigant Who Can Afford Two Experts

To avoid revealing counsel’s and the expert’s mental processes – *i.e.*, work product – well-heeled litigants frequently retain two sets of experts. One set is used to formulate the expert opinions, with the usual free exchange between counsel and the experts that is not discoverable. Once they have arrived at those opinions, counsel then has to retain another set of experts to testify. They are then carefully spoon fed only the “the data or other information considered by the witness in forming the opinions” within the meaning of Rule 26(a)(2)(B) to be used in the case.

This is expensive. It goes against the fundamental premise of the Federal Rules of Civil Procedure articulated in Rule 1: “to secure the just, speedy, and inexpensive determination of every action.” *See also* Fed. R. Civ. P. 16(a)(3) (“discouraging wasteful pretrial activities”); 26(c) (authorizing a protective order to avoid “undue burden or expense”).

Less well-heeled parties may not be able to afford the luxury of two experts and they risk greater exposure of discovery of their experts' drafts and attorney-expert communications. They also face greater risk of producing overlooked drafts that were inadvertently created and potentially embarrassing attorney-expert communications.

There are other transactional costs associated with requiring an expert to disclose everything he or she considered. Requests for electronic versions of expert's reports, including "meta-data" showing how the report evolved at each step, are now commonplace. The focus becomes not on the merit of the report but on the process by which the expert arrived at the final conclusions in the report. This, too, is not only time-consuming and expensive, but creates satellite litigation that serves no meaningful purpose in the overwhelming majority of cases.

F. Experienced Counsel Are Stipulating Around The Rule

As noted above, the ABA's Civil Discovery Standard 21 specifically provides that

... In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.

And the Comment points out that

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) ("It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed."). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Even in jurisdictions where disclosure will likely be required, a growing number of experienced counsel are therefore stipulating at the start of the case to provisions that avoid these problems.

A typical stipulation provides that

3. The following categories of data, information, or documents need not be disclosed by any party, and are outside the scope of permissible discovery (including deposition questions):

a. any notes or other writings taken or prepared by or for an expert witness in connection with this matter, including correspondence or memos to or from, and notes of conversations with, the expert's assistants and/or clerical or support staff, one or more other expert witnesses or non-testifying expert consultants, or one or more

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attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter;

b. draft reports, draft studies, or draft work papers; preliminary or intermediate calculations, computations or data runs; or other preliminary, intermediate or draft materials prepared by, for or at the direction of an expert witness;

c. any oral or written communication between an expert witness and the expert's assistants and/or clerical support staff, one or more other expert witnesses or non-testifying expert consultants, or one or more attorneys for the party offering the testimony of such expert witness, unless the expert witness is relying upon those notes or other writings in connection with the expert witness' opinions in this matter.

Instead of having to stipulate to these "opt out" provisions, this practice should be the rule.

G. Consistent Practice in Both Federal and State Courts Calls for One Rule, Not Different Ones

A basic policy underlying the ABA's Civil Discovery Standards is that best practices should be used throughout the American justice system.

It does no service to the system itself – or its users – to have separate rules for how experts prepare their reports, and what information they are required to keep and then disclose, to have inconsistent rules and practices.

States such as New Jersey, Massachusetts, Texas and others expressly exempt drafts and attorney-expert communications from disclosure or discovery. Although the weight of authority in the federal courts now seems to require this disclosure, there are still courts who hold that attorney-expert communications are protected work product.

Even in those federal districts where courts require disclosure, individual judges have different rules. Some require that experts and counsel retain – and then turn over – any and all drafts of whatever ilk and however preliminary they may be. Other judges may have a rule that protects drafts up until the expert turns one over to counsel. Still others protect the drafts until a report is turned over to the other side.

The result is uncertainty and does not materially advance the truth-finding process of litigation. As noted above, this uncertainty also fosters conduct that could be viewed as counterproductive and adding unnecessary cost to litigation.

Litigants, counsel and experts, as well as the public at large that relies on our justice system, deserve a consistent rule, for all cases – if not in both federal and state courts, then certainly in all federal courts.

Recommendations

A. Federal and State Rules Should Be Amended or Adopted

We therefore recommend that federal and state rules should be amended or adopted to make it clear that draft expert reports and attorney-expert communications other than the facts and data considered or relied upon by the expert should ordinarily be protected from discovery.

B. Counsel Should Enter Stipulations to Protect Draft Expert Reports and Their Collaborative Communications with their Experts

Until federal and state rules can be amended to make clear that draft expert reports and attorney-expert communications are protected from discovery, consistent with established ABA policy, counsel should stipulate that they will not seek this discovery from each other.

Brad D. Brian, Chair
Section of Litigation
August 2006

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Appendix – American Bar Association Civil Discovery Standard 21 (August 2004)

21. **Written Reports From Each Testifying Expert.**

- a. **When the Report Should Be Disclosed.** At the same time a party discloses the identity of its expert, it should also furnish to the other side a written report signed by the expert.
- b. **What the Report Should Contain.** The expert's report should contain:
 - i. A complete statement of each opinion the expert will give;
 - ii. The basis and reason(s) for that opinion;
 - iii. The data or information the expert is relying on in formulating the opinion and a description of where this data or information can be found if it is not part of the record or has not been produced in discovery;
 - iv. Any exhibit(s) to be used as a summary of or support for the opinion;
 - v. The expert's qualifications, including a list of any publication written by the expert in the last ten years;
 - vi. The compensation paid or to be paid to the expert;
 - vii. A list of any cases, including each case's name, court, docket number and the name, address and telephone number of each counsel of record, in which the expert has testified at trial or in deposition in the last four years; and
 - viii. If not provided in response to subsection (v) above, the expert's current resume and bibliography, if any.
- c. **When a Non-Testifying Consultant Becomes a Testifying Expert.** A testifying expert who was initially retained as a non testifying consultant and who prepared a written report in a consultant capacity should disclose the written report to the opposing party in the same manner and subject to the same requirements as any other testifying expert.
- d. **Supplementation of an Expert's Opinion.**
 - i. Ordinarily an expert's report, as well as his or her deposition testimony, should be final and complete when given, and not subject to later revision or amendment. The parties may stipulate that an expert's opinion can be supplemented within a reasonable specified time before trial.

- ii. **In the absence of stipulation, a party wishing to supplement an expert's opinion less than 30 days before trial or a discovery cut-off or other date set by the court should first obtain leave of court. Factors that a court should consider in determining whether or not to allow supplementation include:**
 - A. **The good faith of the party seeking to supplement the opinion;**
 - B. **Whether the information was available to that party and/or the expert at an earlier date;**
 - C. **Unfair prejudice to any party; and**
 - D. **Whether it would result in an unfair delay of the trial.**
- iii. **A party that is permitted to supplement its expert's opinion less than 30 days before trial or a discovery cut-off date should promptly make the expert available for deposition.**
- e. **No Waiver of Attorney Work Product. The provision in section 21(b)(Iii) above that an expert's report describe "the data or information the expert is relying on in formulating [his or her] opinion" does not require the disclosure of communications that would reveal an attorney's mental impressions, opinions or trial strategy protected under the attorney work product doctrine. The report should disclose, however, any data or information, including that coming from counsel, that the expert is relying on in forming his or her opinion. In jurisdictions where this issue has not been addressed or decided, the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.**
- f. **Failure to Provide a Report or Opinion. The court should consider whether a party's failure to disclose the identity of its expert or to provide the expert's written report or a deposition within a reasonable period of time before trial or by a date set for doing so should preclude that party from (i) calling the expert at trial or (ii) introducing that part of the expert's opinion *that was not* timely disclosed.**
- g. **Sanctions: Factors to Consider. Among the factors a court should consider in assessing what sanctions, if any, should be imposed for a party's failure to identify an expert or to provide the expert's report in timely fashion are:**
 - i. **The party's good or bad faith in the matter;**
 - ii. **Whether or not the failure was due to circumstances beyond the party's control;**

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- iii. **Whether there has been unfair surprise or prejudice to the opposing side; and**
- iv. **Whether the failure will unreasonably delay the trial or any other key events in the case.**

Comment

Subsection (a). See Comment above for Standard 20(a). Unlike the federal rule, this Standard requires that reports be provided by any person, other than a "hybrid" fact-opinion expert, who will give expert testimony at trial. In jurisdictions where there is no requirement that all experts furnish written reports containing the information listed in this Standard, it would be prudent to serve interrogatories that ask for this information.

Subsection (b). This Standard is modeled on the disclosure and discovery requirements in Fed. R. Civ. P. 26(a)(2)(B) and similar state rules, *e.g.*, Tex. R. Civ. P. 194.2(f). Compare Cal. Civ. Proc. Code § 2034(f) (which requires less detailed information); *Castaneda v. Bornstein*, 43 Cal. Rptr. 2d 10, 17 (Ct. App. 1995) (expert should not be excluded for failure to disclose the "general substance" of testimony).

Subsection (d). A party has a duty to supplement its expert's disclosure whenever it learns that the disclosure is incomplete or incorrect in some material respect. This duty applies to changes in the opinions in the expert's report, as well as those the expert gives in deposition. While supplementation should be made promptly after the deficiency has been discovered, the Standard sets a 30-day deadline before trial or a discovery cut-off after which a party must obtain the court's permission to make the change. *Accord* Fed. R. Civ. P. 26(e), (a)(3).

Subsection (e). Other than court-appointed experts, which *are sui generis*, an expert is retained to provide testimony to assist one side in the case. The expert is entitled to have the benefit of the theories, however tentative or preliminary they may be, of the counsel that has retained the expert. Experts logically come within the "zone of privacy for strategic litigation planning" that is the rationale for the attorney work product doctrine. See *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (construing Fed. R. Civ. P. 26(b)(3) in an unrelated context). Counsel should be able to explore counsel's theories or ideas about the litigation with an expert without the worry that the discussion is tantamount to disclosure to the other side.

At least in federal practice, however, there is a split of authority as to whether communications to an expert of an attorney's "core" or "opinion" work product are immune from disclosure after the 1993 amendments to Rule 26.

For cases holding that all work product is now discoverable under Fed. R. Civ. P. 26(a)(2)(B), *see, e.g.*, *Musselman v. Phillips*, 176 F.R.D. 194 (D. Md. 1997); *Bama v. United States*, No. 95 C 6552, 1997 U.S. Dist. LEXIS 10853 (N.D. Ill. July 23, 1997); *B.C.F. Oil Ref. v. Consolidated Edison Co.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997); *Kam v. Ingersoll Rand*, 168 F.R.D. 633, 639-40 (N.D. Ind. 1996).

For cases holding otherwise, see, e.g., *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634 (D. Kan. 1993); see also Gregory P. Joseph, *Emerging Expert issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 101-04 (1996) (collecting cases, and outlining reasons why the continuing recognition of protection for opinion work product is appropriate after recent amendments to Rule 26).

Particularly where an expert is acting as a consultant, the expert's report is likely to reflect counsel's mental processes and legal theories. The court may, however, assess whether there is “substantial need” for using the report to impeach the expert that would outweigh the policy of protecting work product. *National Steel Prods. Co. v. Superior Court*, 210 Cal. Rptr. 535, 543 (Ct. App. 1985).

An attorney's mental impressions, theories and strategies – archetypal “work product” – that have been conveyed to an expert should not have to be disclosed if the expert is not relying on them in his or her testimony. The ability to have untrammelled access to the process by which an expert has formulated his or her final opinion(s) in the case is outweighed by (1) the undesirability of placing substantial barriers to a full and free exchange of ideas and theories between counsel and the expert; (2) the fact that the expert has been retained to advise and assist one side in an adversary trial system; (3) the added, unnecessary expense of having to retain two experts – one to testify and the other to consult – if a lawyer wants to maintain the confidentiality of his or her work product, and (4) the ability of counsel to obtain and cross-examine the expert on anything the expert is actually relying on in his or her opinion.

If there is no controlling contrary case law in a particular jurisdiction, counsel should assume that there is a reasonable possibility that any communication with the expert will be fair game for inquiry by the other side. 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2031.1, at 442 (2d ed. 1994 & Supp. 1999) (“It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed.”). Until there is a clear legal rule, the best way to deal with the issue is to try to obtain an agreement from all the parties to the case on how they will treat the issue or seek a ruling from the court on it.

Although a stipulation that there will be no waiver by sharing work product with an expert would probably protect the information in the particular case, there is no guarantee that it would protect it against nonparties in another setting. E.g., *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) (the test is whether disclosure is done in a way that “substantially increases the likelihood that the work product will fall into the hands of the adversary”).

Subsection (f). This Standard is modeled on Fed. R. Civ. P. 37(c)(1). The Standard creates a presumption that an expert will not be permitted to give trial testimony that has not first been disclosed in either a report or a deposition. *But see Martinez v. City of Poway*, 15 Cal. Rptr. 2d 644, 646 (Ct. App. 1993) (if an expert declaration has been submitted the expert cannot be excluded based on the inadequacy of the information in the declaration). The Standard also recognizes the court's discretion to use other remedies than an absolute bar on the expert's testimony.

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Subsection (g). This subsection identifies factors that are among those to be considered in determining whether or not a failure to identify an expert or to provide a report in a timely fashion should result in some form of sanction and, if so, what form. The list is not exclusive and a court should consider any other factors that would promote the interests of justice.

GENERAL INFORMATION

Submitting Entity: Section of Litigation

Submitted By: Brad D. Brian, Section Chair

(Federal Practice Task Force Co-Chairs Jeffrey J. Greenbaum, Loren Kieve and Michael P. Lynn)

1. Summary of Recommendation(s). That consistent rules should be adopted throughout the federal and state courts to govern the scope of required disclosures for discovery of testifying experts and their reports; that draft expert reports and attorney-expert communications relating to the expert's report be protected from discovery in accordance with the proposed Resolution.
2. Approval by Submitting Entity. Section of Litigation Council, April 21, 2006
3. Has this or a similar recommendation been submitted to the House or Board previously?
No
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? This recommendation is consistent with ABA Civil Discovery Standard 21 which is set forth in full in the accompanying Report.
5. What urgency exists which requires action at this meeting of the House? The Resolution is an important step forward in seeking consistent rules throughout the federal and state courts on this subject.
6. Status of Legislation. (If applicable.) N/A
7. Cost to the Association. (Both direct and indirect costs.) None
8. Disclosure of Interest. (If applicable.) None
9. Referrals.

Standing Committee on Ethics and Professional Responsibility
All Sections and Divisions

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10. Contact Person. (Prior to the meeting.)

Jeffrey J. Greenbaum
Sills Cummis Epstein & Gross
One Riverfront Plaza
Newark, NJ 07102
(973) 643-5430
jgreenbaum@sillscummis.com

Loren Kieve
Quinn Emmanuel
50 California Street
22nd Floor
San Francisco, CA 94111
(415) 875-6320
lorenkieve@quinnemmanuel.com

Michael P. Lynn
Lynn Tillotson & Pinker
750 North Saint Paul Street
Suite 1400
Dallas, TX 75201
(214) 981-3801
mlynn@lynnllp.com

Patricia Lee Refo
Section Delegate
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004
(602) 382-6290
prefo@swlaw.com

11. Contact Person. (Who will present the report to the House.)

Patricia Lee Refo
Section Delegate
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004
(602) 382-6290
prefo@swlaw.com