

CASE
IN
POINT

Courts Differ on Discoverability of Draft Expert Reports

In today's world of high technology, most experts prepare, revise and edit their expert reports electronically. Without having to print draft reports, questions have arisen on the Federal Rule of Civil Procedures 26(a)(2)(B) ("the Rule") stipulation that requires experts to preserve and produce *information considered*. Some Courts have interpreted this information to include draft reports. Experts today ordinarily maintain working copies of their reports on their computers, with changes and revisions being made on the same file, for the most part without printing prior iterations. In addition, more and more experts are sharing their draft reports with counsel directly from their computers.

The Rule provides in relevant part that:

*(The witness disclosure shall) be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; **the data or other information considered** by the witness in forming the opinions. [Emphasis added].*

Experts did not retain draft reports

Recent rulings have provided differing guidance as to whether draft expert reports should be preserved and produced. In *University of Pittsburgh v. Townsend*,¹ the plaintiff's experts testified that they had exchanged drafts of their report with counsel and that they incorporated some suggestions given by counsel into their final report. However, the experts testified that they maintained only one working draft of the report and had not retained successive drafts or marked-up versions received from counsel via email. They further stated that counsel's suggested changes were primarily editorial, not substantive.

"Rule 26(a)(2)(B) does not impose an affirmative duty on an expert to preserve 'all Documents' particularly draft reports"

The defendants moved to exclude plaintiff's experts' testimony because the experts had destroyed discoverable evidence. The defendants, in anticipation of the experts' deposition, had made an earlier request (a year prior to the disclosure of experts) for production of *"all documents provided to you or by you to, revised by, relied upon, or otherwise used in consultation with or as a basis for consultation with, any expert witness Identified by you pursuant to Fed. R. Civ. Proc. 23(a)(2)"*. The defendants argued that the Rule imposed an affirmative duty upon an expert to preserve and produce all documents considered including emails and draft reports.

Destruction of drafts was not intended to suppress truth

The Court agreed with the defendants, noting that *"[w]hile not technically a required subject of disclosure ... draft reports are certainly discoverable."* It, however ruled that the Rule did not impose an *affirmative duty* on an expert to preserve *"all documents"* particularly draft reports. The Court faulted the defendants on their early discovery request and added that they failed to make a clear request for draft reports until they subpoenaed the plaintiff's experts. By this time the experts had already destroyed previously generated drafts. The Court further determined that the destruction was not intentional, fraudulent or intended to suppress the truth.

A more recent case, *Teleglobe Communications Corp. v. BCE Inc.*,² appears to offer a somewhat different perspective. In this case, the defendants moved to exclude the plaintiff's experts testimony as a sanction for spoliation of information considered in forming their opinions. *(continued on next page)*

Courts Differ on Discoverability of Draft Reports (continued)

During discovery, the defendants had learned that the plaintiff's experts had destroyed certain draft expert reports and notes taken during a meeting with counsel.

Rule does not expressly include draft reports

While agreeing with *University of Pittsburgh* Court that the Rule does not impose an "affirmative duty" on experts to preserve "all documents", this Bankruptcy Court went further and stated that the "Rule does not expressly include draft opinions in the list of what the expert must disclose." The Court's observations were that:

It does not seem logical that the Rule would require the final report to include a list of all the drafts of the report. Further, because most experts now draft their reports in the computer, adding to and from the document, it would be impractical to require the production of all drafts. For example, any time an expert added or subtracted a section, a paragraph, a sentence, or even a word, the Defendants' reading of the Rules would require the expert to save the draft and preserve it for production later. This is a completely unworkable reading of the Rules and would mire the courts in battles over each draft of an expert's report. The Court concludes that this interpretation comports with neither the plain meaning of the Rule nor its policy.

"because most experts now draft their reports in the computer... it would be impractical to require the production of all drafts."

The defendants had also argued that draft expert reports fell within the category of *information considered*, and as such were within the purview of the Rule. The Court disagreed, noting that:

The expert does not really 'consider' prior drafts in forming his opinion; the prior drafts are simply preliminary iterations of his opinion. Rather than 'consider' his prior thoughts and statements, in editing the report the expert is considering the underlying data which forms the basis of the revision.

Proposal to amend Rule 26(a)2(b)

To provide nationwide uniformity, ensure smoother interaction between attorneys and experts, and avoid unnecessary and expensive comparisons of report iterations, the American Bar Association recommended Rule changes which are currently being considered by the Advisory Committee on Civil Rules. The recommended changes include an extension of work-product protection to expert drafts and communications between experts and counsel. The public comment period on this amendment ended on February 17, 2009 and the Advisory Committee will consider the comments and, if needed, will redraft the Rule.

¹ Case No. 3:04-cv-291, 2007 WL 1002317, at *3 (E.D. Tenn. Mar. 30, 2007)

² Case No. 02-11518, Adv. No. A-04-53733 (D. Del. Bankr. Ct. August 7, 2008)

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