In the hands of a skillful cross examiner, a draft expert report is a sword of Arthurian proportions. “Doctor Good, you just testified that because persons with monocular vision — people who have but one good eye — pose a significant safety risk, UPS was justified, despite the Americans With Disabilities Act, in categorically refusing to hire them as drivers. Your final report and your testimony are quite emphatic on this point. Can you explain, then, why your draft report stated that ‘minor difficulties caused by monocular vision can be overcome with conservative driving practices?’” “Well, I, uh, on reflection, er, realized that the difficulties are really not all that minor, and, uh, um, conservative driving practices are not necessarily, well, er, a totally satisfactory solution.” “Right, Doctor,” the cross examiner soothes, “and the reflection you refer to, the epiphany you experienced between your initial opinion and your trial testimony, was that the wood-shedding you got from UPS’s lawyers?”

In EEOC v. United Parcel Servs., 149 F. Supp. 2d 1115 (N.D. Cal. 2000), the court found that the expert testimony at trial varied from draft reports in at least 10 material ways after consultation with counsel. “In context, it seems clear that Dr. Good lost his independence and objectivity. He simply became part of the UPS advocacy team.” Id. at 1139. Because of the roadmap provided by the draft reports, the court had trouble accepting the opinions of the good doctor Good.

Or here’s a good one. In Occulto v. Adamar of New Jersey, Inc., 125 F.R.D. 611 (D.N.J. 1989), a draft report surfaced that was identical to the final report. Well, almost identical – except for the legend at the top of the draft that read “PLEASE HAVE RETYPED ON YOUR OWN STATIONARY. THANK YOU.” So the jury was going to hear that the plaintiff’s expert medical report was actually written by plaintiff’s lawyer, a lawyer who cannot spell stationery correctly. We suspect the lawyer would like a Mulligan.

**Draft Expert Reports Are Potential Minefields**

But isn’t the creation of drafts and the evolution from draft to final unavoidable? God can compose in stone, but if mere mortals had tried to create the Ten Commandments, there more than likely would have been a first draft entitled “A Few Guidelines.”

Your expert is busy doing the things that make her an expert, and you are busy practicing law in the big city 500 miles from the academic ivory tower she inhabits. As a practical logistic necessity, you have to communicate with your expert through some sort of writing. You have to tell the expert what you need, and your expert has to rough out her opinions in draft form. And experts being experts, they know a great deal more about their science than you do, while you know a great deal more about advocacy than they do. So even if the opinions are essentially there in initial drafts, you will have to make substantial edits to improve the final product. There have to be drafts. There have to be edits.

Okay, but if draft reports are dangerous, how do we eliminate the danger?

Well, you could limit your practice to state court actions in New Jersey (unlike the hapless lawyer who was stationary in New Jersey Federal Court), where the development of expert testimony is acknowledged as a collaborative process between expert and counsel and therefore all preliminary or draft reports are deemed trial preparation materials discoverable only upon the special showings necessary to obtain work product. N.J. Court Rules, 1969 R. 4:10-2 (2002).

But the rest of the country has not provided similar comfort. In general, draft reports are discoverable. Krisa V. Equitable Life Assurance Society, 196 F.R.D. 254 (M.D. Pa. 2000); B.C.F. Oil Refining, Inc. v. Consol. Edison of New York, 171 F.R.D. 57, 60 (S.D.N.Y. 1997). And why wouldn’t they be? Notwithstanding New Jersey’s real world recognition that experts become part of the advocacy team, we try to convince our triers of fact that our experts are independent and therefore credible. And if they are independent, what possible basis can there be for withholding communications to and from an independent expert?
Well, when we work with our experts to help them refine their opinions, it is necessary that we share our thought processes and work product. And to the extent that the drafts reflect that work product, they ought to be protectable. FRCP 26(b)(3) codifies the Hickman v. Taylor work product doctrine; work product is discoverable only on a showing of substantial need and even then, core work product — mental impressions, conclusions, opinions or legal theories of the attorney — is protected against disclosure. Uh, huh. But FRCP 26(a)(2)(B) requires disclosure of all materials considered by a testifying expert. “Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used informing their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure.” 1993 Advisory Committee Notes.

Clear enough? In The Nexus Products Co. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass 1999), Magistrate Judge Joyce Alexander, in a well reasoned, well articulated opinion, found that the Advisory Committee Notes and FRCP 26(a)(2)(B) merely require discovery of factual materials but do not require disclosure of core work product. Six months later, Magistrate Judge Robert Collings — of the same District Court — in an equally well reasoned, well articulated opinion, came to exactly the opposite conclusion, respectfully disagreeing with the analysis of his colleague, and ordering production. Suskind v. Home Depot Corporation, 2001 U.S. Dist. LEXIS 1349 (D. Mass. 2001). So if you disclose core work product to an expert witness that ends up in a draft report, your ability to protect it from disclosure will depend entirely on your assignment of judge. Some comfort. Even if you draw the judge whose opinion you like, judges, like experts, sometimes evolve their views. You like Judge Alexander’s decision in Nexus, but how can you be sure she did not rethink her position after reading Judge Collings’ opinion in Suskind? The work product doctrine cannot be counted on to protect drafts from discovery.

Alrighty then. If the practical reality is that we cannot be sure that we can protect drafts from discovery, then we simply have to make sure that there are no drafts around to produce.

We have actually encountered experts — seasoned experts who have been through multiple depositions and testimony — who have conspiratorially assured us “Don’t worry (wink), I know how the game is played (wink), and I will be sure to destroy all draft reports.” Leaving nothing to chance, we know lawyers who flat-out instruct their expert witnesses to destroy drafts. Everybody does it, right? Maybe, but so what? We live in Chicago, where vehicular traffic proceeds at one of two paces — gridlock or Indy 500. When they can, everyone speeds. But as we have told our children and have to remind ourselves from time to time, you cannot beat a speeding ticket on the “everyone does it” defense.

In W.R. Grace & Co. v. Zotos International, Inc., 2000 U.S. Dist. LEXIS 18096 (W.D.N.Y. 2000), Zotos’ expert “got rid of” his draft reports at the specific direction of counsel “so as not to confuse things.” Id. at *29. Zotos tried to justify the destruction by pointing out that it occurred prior to the service of formal document requests seeking drafts. Nice try, no good. There is a duty to preserve evidence once litigation is pending even if no requests are ever served. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 778 (2d Cir. 1999). The intentional destruction of drafts is sanctionable spoliation.

In Trigon Insurance Co. v. United States of America, 204 F.R.D. 277 (E.D. Va. 2001) the United States retained Analysis Group (AG) as an expert witness. Pursuant to AG’s internal document retention policy (its euphemism for a document destruction policy), AG’s draft reports were destroyed prior to the time any formal production request was made. No dice, said the court. The government knew that it had an obligation to preserve evidence whether or not a request had been made. And the government could not hide behind AG’s internal policy. AG is in the regular business of providing expert testimony and knows the rules; and AG’s internal rules cannot trump the Federal Rules. Your tax dollars at work: the government was ordered to pay more than $180,000 to have an independent computer expert find and reconstruct the deleted draft reports.

One of the judges of the Northern District of California has a standing order requiring that:

Counsel shall preserve all drafts of expert reports (partial or complete) and evidence of communications with experts (or with any intermediaries between counsel and the experts) on the subject of this actual or potential testimony, and shall instruct their experts and any intermediaries to do likewise. All such materials shall be produced upon expert designation (unless all parties otherwise stipulate in writing). This requirement does not apply to intermediate drafts prepared solely by the testifying expert not provided to or discussed with anyone else. Counsel’s private notes of conversations will be treated as work product and need not be produced absent the showing required by FRCP 26(b)(3).
Clarity given to the proposition that an expert’s internal musings, not communicated to others, ought to be free from discovery. Further clarity given to the reasonable proposition that the attorney’s internal notes remain work product. But a bright line rule of production for everything else. Yet what of the other 700 or so Federal judges? Is there clarity to guide you? Well, yes. It is clear that things are not clear. You can’t be sure that drafts won’t be ordered produced; you can’t be sure that any destruction of drafts won’t be sanctioned. You or your expert may get away with “getting rid” of drafts. But you may not.

Draft Reports – Can’t Live Without Them, Can’t Destroy Them

Well, wait a minute, why can’t you live without them? It may not be proper for you to instruct a witness to destroy a draft; it may not be proper for you to stand idly by knowing that the witness plans to destroy a draft. But we know of no rule that prevents you from advising a witness not to create a draft. So we tell our expert witnesses that we don’t want her to communicate anything to us in writing unless and until we have talked it through orally; and we tell her that if she does communicate a written draft to us, we will retain and produce it – so she had better be able to explain anything she commits to tangible form. Now, those oral communications are just as subject to discovery as would be written drafts. But it will be far more difficult for your opponent to pin your expert down to some inconsistency in the evolution of her thought process if there is nothing in black and white.

And when your expert sends you a draft you asked him not to create, you might want to think carefully before you take out your blue pencil. Remember that it is the testimony at trial you care about, not the report. The report is simply the price of admission to get the expert into the court room. So let the expert clarify or strengthen his language and articulation at his deposition, not in a series of written drafts that have your fingerprints all over them. Don’t destroy drafts; just don’t create them until they’re suitable for etching into stone.

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