

## DISCOVERABILITY OF EXPERT REPORT DRAFTS<sup>1</sup>

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### I. INTRODUCTION

In the course of preparing an expert report that meets the requirements of Rule 26(2) of the Federal Rules of Civil Procedure, an expert will, by necessity, prepare drafts of his reports. Often, the expert will make notes that he then turns into a report. Throughout the process of writing the report and refining it until it is in final form, the expert will create drafts. Typically, the expert is using a word processor program and simply overwrites his earlier drafts, but he may save his drafts as separate documents or even draft the report in sections to be combined into a complete report. No one but the expert (and possibly those who are assisting him) see these drafts. Occasionally, the expert may use the attorney's office staff to type the report. In that situation, the expert reviews and edits drafts on paper and instructs the attorney's staff on the changes to be made. Are these draft reports, which are not seen by the lawyers or the client, discoverable?

At some point, the attorney working with the expert will see a draft report and will provide comments on the draft to the expert. Sometimes the attorney and expert view the draft report on a computer system simultaneously, discuss the report and make changes to the report as they are talking. Other times, the expert sends the attorney a draft report, the attorney reviews it and sends the expert comments. The expert makes changes and sends a new draft to the

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attorney. The process is repeated until the report is final. Regardless of the procedure used, at some point the attorney will provide comments on, perhaps even changes to, the report. The expert may make changes to his initial draft in response to the comments received from the attorney. Are these drafts and the communications between the expert and counsel regarding drafts discoverable? That is the subject of this Report.

## **II. CASE LAW ON DISCOVERABILITY OF EXPERT REPORT DRAFTS**

### **A. First Circuit**

The First Circuit has not ruled on the discoverability of expert report drafts, attorney-expert communications, or attorney work product provided to expert witnesses. There is a split among district courts in the First Circuit regarding these issues.

In *Nexus Prods. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass 1999), Magistrate Judge Alexander concluded that FED. R. CIV. P. 26 does not require disclosure of “core attorney work product considered by the expert.” Accordingly, the court denied the defendant’s motion to compel documents prepared by the plaintiffs’ attorneys and experts. *Id.* at 16; *see also New Mexico Tech. Research Found. v. Ciba-Geigy Corp.*, No. Misc. 96-085B, 1997 WL 576489, at \*6 (D.R.I. Jan. 3, 1997) (holding that expert’s notes made during conversations with counsel, draft expert report, and counsel’s notes sent to expert were not discoverable).

Two years after the decision in *Nexus*, Magistrate Judge Collings disagreed with the analysis in *Nexus* and ruled that “all materials furnished to a testifying expert, including those composed by the attorney who retained the expert, which the expert received and read in connection with the instant case be disclosed to opposing counsel.” *Suskind v. Home Depot Corp.*, No. CIV. A. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349 at \*3 (D. Mass. January 2, 2001); *see also In re Pioneer Hi-Bred Int’l Inc.*, 238 F.3d 1370 (Fed. Cir. 2001) (stating that

documents and information disclosed to a testifying expert are discoverable and *citing Nexxus* as evidence of “contrary authority at the district court level”).

## **B. Second Circuit**

The Second Circuit has not ruled on the discoverability of expert report drafts, attorney-expert communications, or attorney work product provided to expert witnesses. However, most district courts in the Second Circuit that have considered these issues have ruled in favor of discoverability.

For example, in *Sparks v. Seltzer*, No. 05-CV-1061, 2007 U.S. Dist. LEXIS 6234 (E.D.N.Y. Jan. 29, 2007), Magistrate Judge Matsumoto recently noted that “while the Second Circuit has not ruled on this issue, ‘the overwhelming weight of authority in this Circuit--including several recently decided cases--indicates that the Rule 26(a)(2)(B) disclosure requirement trumps the substantial protection otherwise accorded opinion work product under Rule 26(b)(3).’” (quoting *Aniero Concrete Co. v. N.Y. City Sch. Constr. Auth.*, No. 94 CIV 9111, 2002 WL 257685, at \*2 (S.D.N.Y. Feb. 22, 2002)). The *Sparks* Court ordered the plaintiffs to produce all correspondence from plaintiffs’ counsel to their experts, any draft expert reports, any notes made or reviewed by the experts, and all other material considered by the experts. *See id.* at \*6.

Similarly, in *Am. Steamship Owners Mut. Prot. and Indem. Assoc., Inc. v. Alcoa S.S. Co., Inc.*, No. 04 Civ. 4309 (LAK) (JCF), 2006 U.S. Dist. LEXIS 3078, at \*9 (S.D.N.Y. Jan. 26, 2006), Magistrate Judge Francis found that “neither the attorney-client privilege nor the work product doctrine protect from disclosure materials considered by” the plaintiff’s expert. In *Am. Steamship Owners*, the expert had been the representative of a succession of law firms that acted as general counsel to the plaintiff for twenty years. *See id.* at \*6. The Court refused to shield from disclosure any documents that the expert reviewed before he was retained by an expert,

concluding that “for the purposes of deciding what information an expert has considered under Rule 26(a)(2)(B), no bright line can be drawn at the time of the expert’s retention.” *See id.* at \*9. The Court required production of all documents that the expert authored or received from the plaintiff that relate to the subject matter of his report. *See id.* However, the Court did not require the production of materials that the expert received from the plaintiff that relate to issues in the case generally, but not to the specific issues addressed in his report. *See id.* at \*10.

However, district courts in the Second Circuit are not unanimous on the discoverability of expert report drafts, attorney-expert communications, or attorney work product provided to expert witnesses. For example, in *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997), the Court held that core attorney work product considered by an expert need not be produced.

### **C. Third Circuit**

Before Fed. R. Civ. P. 26 was amended in 1993, the Third Circuit held that attorney work product provided to experts was not discoverable. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593-96 (3d. Cir. 1984). Since the Rules were amended, district courts in the Third Circuit have split on this issue.

In *Krisa v. Equitable Life Assurance Soc’y*, 196 F.R.D. 254, No. 97-CV-1825, 2000 U.S. Dist. LEXIS 16266, at \*2 (M.D. Pa. May 31, 2000), the Court considered whether draft expert reports and attorney work product communicated to the expert were discoverable.

Addressing the issue of draft expert reports first, the *Krisa* Court found that documents generated by the defendant’s testifying expert are not covered by the work product privilege. *See id.* at \*8-\*9. Noting that defendant’s counsel asserted that it did not write any portion of the final report and did not make specific suggestions regarding the content of the report, the Court concluded that the production of draft reports “will not invade the privacy to be accorded

[defendant's] trial counsel in developing litigation theories and strategies.” *Id.* at \*13. In requiring disclosure of drafts, the Court found that *Bogosian* dealt only with “core work product” and was therefore inapposite.

Turning to the second issue, the *Krisa* Court found that Rule 26 does not provide that attorney work product communicated to the expert is automatically discoverable:

An interpretation of Rule 26 that holds that a party must produce documents containing work product that are disclosed to its expert ignores the language of Fed. R. Civ. P. 26(b)(3), which requires the production of documents containing work product only when the requesting party shows necessity and undue hardship to obtain the substantial equivalent of such documents by other means. An interpretation of Rule 26 that mandates the production of core work product disclosed to an expert would render the language in Rule 26(b)(3) superfluous.

*Id.* at \*24. Under this reading of Rule 26 and the analysis in *Bogosian*, the *Krisa* Court held that “the disclosure of core work product to a testifying expert does not abrogate the protection accorded such information.”

In *Smith v. Transducer Tech., Inc.*, Civ. No. 1995-28, 2000 U.S. Dist. LEXIS 17212, at \*7 (D.V.I. Nov. 2, 2002), the Court followed *Krisa* in finding that “core work product” communicated between the defendants’ counsel and their expert witnesses could be redacted from produced documents (but unredacted versions were submitted to the Court for *in camera* inspection). The defendants were required to produce all draft expert reports, unless the defendants claimed that they contained “core work product” and therefore required in camera review. *See id.* at \*7-\*8.

However, other district courts in the Third Circuit have held that attorney-expert communications and attorney work-product communicated to the expert are discoverable. For example, in *Synthes Spine Co. v. Walden*, 232 F.R.D. 460, 464 (E.D. Pa. 2005), the Court interpreted Fed. R. Civ. P. 26(a)(2)(B) “as requiring disclosure of all information, whether

privileged or not, that a testifying expert generates, reviews, reflects upon, reads and/or uses in connection with the formulation of his opinions, even if the testifying expert ultimately rejects the information.” *See also, e.g., Dyson Tech. Ltd. v. Maytag Corp.*, 241 F.R.D. 247, 250-51 (D. Del. 2007) (finding that “Rule 26(a)(2)(B) requires disclosure of all information considered by a testifying expert in formulating his or her report, without regard to asserted privilege”).

#### **D. Fourth Circuit**

The Fourth Circuit broadened the application of Rule 26(a)(2)(B) in ruling that draft expert reports that were prepared by counsel and provided to a testifying expert, and any attorney-expert communications which explain the lawyer's concept of the underlying facts or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine. *Elm Grove Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 480 F.3d 278, 303 (4th Cir. 2007). The court noted that “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.” FED. R. CIV. P. 26 advisory committee's note.

As the Supreme Court has cautioned, “expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). Proper cross-examination of an expert witness requires that the adverse party's awareness of facts underlying the expert's opinions, including whether the expert made an independent evaluation of those facts, or whether he or she instead adopted the opinions of the retaining lawyers. *Elm Grove*, 480 F.3d at 301.

In addition, the disclosure under Rule 26(a)(2)(B) does not “violate the core precepts of the work product doctrine, which, at bottom, is intended to allow counsel unfettered latitude to

develop new legal theories or conduct factual investigation, because, when an attorney provides work product to an expert retained to offer testimony at trial, this does not result in counsel developing new legal theories or enhance the conduct of fact investigation,” since “the work product either informs the expert as to what counsel believes are relevant facts, or seeks to influence him to render a favorable opinion.” *Musselman*, 176 F.R.D. at 198; *Karn*, 168 F.R.D. at 639-40 (N.D. Ind. 1996).

Furthermore, the bright-line approach permits an attorney to know whether information provided to an expert will later become discoverable and, given this certainty, should not interfere with a lawyer’s development of a case in private consultation with his client. *Lamonds*, 180 F.R.D. at 306. Therefore, courts following the bright-line approach under Rule 26(a)(2)(B) have required disclosure of any information considered by a testifying expert in reaching his or her opinion, which includes anything reviewed by an expert who will testify, including written or oral lawyer-expert communications, even though such information may constitute opinion work product. *Musselman*, 176 F.R.D. at 198-201.

The fact that a lawyer has participated in the preparation of his testifying expert's report does not bar the use of the expert's opinion, or necessarily even impeach the expert's reliability. *Elm Grove*, 480 F.3d at 301. Such participation does, however, potentially impact on the weight to be accorded such opinion evidence. *Id.* In addition, draft reports or attorney communications made or provided to non-testifying or consulting experts are still entitled to protection under the work product doctrine. *Id.* at 303.

In sum, draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyer's concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work

product doctrine in the Fourth Circuit. *Elm Grove*, 480 F.3d at 303; *see also In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d at 1375-76.

It is the burden of the party asserting work product immunity to demonstrate that materials were not furnished to the party's expert to be used in forming opinion, or that the expert did not consider materials in forming opinion. *Musselman*, 176 F.R.D. at 202; *Turnpike Ford*, 2007 WL 1982200, \*2. For example, the *Elm Grove* court held that the pertinent draft reports and attorney-expert communications are subject to disclosure when the experts acknowledge that the lawyer provided them with factual summaries and documents, and that he may have contributed to the substance of their expert reports. *Elm Grove*, at 303.

“Spoliation” is the willful destruction of evidence or the failure to preserve potential evidence for another's use in pending or future litigation. To establish a claim of spoliation of evidence, a movant must show that the adverse party had a duty to preserve the allegedly spoiled evidence and that the evidence was intentionally destroyed. *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277 (E.D. Va., 2001). If a party has notice that evidence is necessary to the opposing party's claim, that party is under a duty not to take actions that would result in the destruction of the evidence. *Id.* at 287. Therefore, the duty to preserve evidence arises when a party has notice that the evidence is relevant to litigation. *Id.* at 287.

The *Trigon* court reasoned that although the Fourth Circuit has not specifically spoken to the duty to preserve evidence such as draft reports and attorney-expert communications, it is a necessary predicate of the controlling Fourth Circuit decisions that such a duty exists, because, without such an obligation, there would be no wrongdoing in destroying relevant documents. *Id.* at 286. Thus, it is settled that, if a party has notice (by a discovery request, by the provisions of a rule requiring disclosure or otherwise), that evidence is necessary to the opposing party's claim,



that party is under a duty not to take actions that would result in the destruction of the evidence. *Id.* at 287.

Any information reviewed by an expert is subject to disclosure under the discovery rules, including drafts of expert reports sent from and to the expert and thus, there is duty to preserve such materials. *Id.* In case of such documents, district court has inherent authority to control litigation, and thus has the power to sanction the spoliation of evidence, even absent an antecedent order to produce the evidence. *Id.* at 285.

#### **E. Fifth Circuit**

Within the Fifth Circuit, the bright-line rule has been explicitly adopted in two cases: *TV-3* and *Colindres*. The *TV-3* court generally described the two line of cases and adopted the bright-line rule, by holding that correspondence between expert witnesses designated by defendants and counsel for defendants was discoverable under rule governing disclosure of expert testimony, notwithstanding defendants' objection that such correspondence consisted attorney work product. *TV-3, Inc.*, 194 F.R.D. at 589. The *Colindres* court also held that information which an expert creates or reviews "related to his or her role as a testifying expert must be produced," even if the materials are privileged. *Colindres*, 228 F.R.D. at 571. The *Colindres* court further articulated that ambiguity as to the role played by the expert in reviewing or generating documents are resolved in favor of the party seeking discovery, whereas documents that have no relation to the expert's role as a testifying expert need not be produced. *Id.*; *B.C.F. Oil Refining*, 171 F.R.D. at 62. In addition, "the opinion expressed in ... expert reports, whether 'deleted' or not, are clearly subject to examination.... That [the expert] does not now rely on those opinions does not exclude such opinions from the scope of proper examination." *Colindres*, 228 F.R.D. at 571.

Many other cases within the Fifth Circuit have followed *TV-3* and *Colindres*, and thereby adopting the bright-line rule. See *Cherry Kennedy v. Baptist Memorial Hospital-Booneville, Inc.*, 179 F.R.D. 520 (N.D. Miss. 1998); *Culbertson v. Shelter Mutual Ins. Co.*, 1999 WL 109566 (E.D. La. 1999); *Estate of Manship v. U.S.*, 240 F.R.D. 229 (M.D. La. 2006); *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434 (Tex. 2007); *In re Vioxx Products*, 2007 WL 1558700 (E.D. La. 2007); *Southern Scrap Material Co. v. Fleming*, 2003 WL 21474516 (E.D. La. 2003).

#### **F. Sixth Circuit**

In *Regional Airport Authority of Louisville v. LFG, LLC*, the Sixth Circuit held that “Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts.” 460 F.3d 697, 717 (6th Cir. 2006).

District courts in the Sixth Circuit have explicitly held expert draft opinions to be discoverable. For example, in *Reliance Ins. Co., v. Keybank U.S.A.*, the expert did not type his report, but rather he communicated his opinions to counsel, who took notes and then transmitted those notes to their staff, who in turn typed the report. 2006 WL 543129, \*3 (N.D. Ohio 2006). The draft report was then routed to the expert who reviewed and corrected the draft. The district court held that the attorney's notes were not entitled to work produce protection because the attorney was merely a conduit between the expert and the secretary who typed the report. *Id.* at \*2. For the same reasons the Court decided that the attorney's “notes” constituted a draft of the report and must be produced. *Id.* The court further opined that opposing counsel had need of the attorney notes to test whether the expert truly wrote the report or whether the attorneys ghost wrote the opinion for him. *Id.* at \*3.

Defendants moved to exclude the plaintiff's experts for failure to retain draft reports and communications with counsel in *Univ. of Pittsburgh v. Townsend*, 2007 WL 1002317 (E.D. Tenn. 2007). One of plaintiff's experts, Wooldridge, testified that he did not retain drafts

because he worked from a single document on a word processing system. He did email draft reports to Plaintiff's counsel. *Id.* at \*2. He testified that counsel added footnotes and Bates numbering and corrected typographical errors in the drafts. Plaintiff's second expert used only one working draft of his report and did not retain drafts. He exchanged emails with counsel regarding the drafts. He indicated that the changes were largely stylistic, but counsel did suggest that he delete a section of the report that address an uncontested issue and that he add a section to address an issue.

The court held that Rule 26(a)(2) does not create an affirmative duty to retain draft expert reports. *Id.* at \*3. However, "draft reports are certainly discoverable." *Id.* Once defendants requested the drafts, counsel and the expert had an obligation to retain and produce them. In this particular case, the drafts had been destroyed before they were requested.

With regard to the email communications between counsel and the experts, the court held that Rule 26(a)(2)(b) requires that such communications be disclosed because they constitute data or other information considered by the expert. Even if not disclosed with the expert report, "any correspondence or communication between counsel and the experts was at the very least discoverable." *Id.* at \*4 (emphasis in original). Despite holding that the communications between experts and counsel should have been retained and produced, the Court refused to exclude plaintiff's report on the ground that the requested sanction was too harsh.

In summary, in the Sixth Circuit, draft expert reports and communications between counsel and experts regarding those drafts are discoverable.

#### **G. Seventh Circuit**

The Seventh Circuit have not specifically addressed the discoverability of draft expert reports and neither had any of the district courts in the Seventh Circuit, at least not in any reported decisions that were uncovered. The district courts in the Seventh Circuit have held that

communications between counsel and experts are discoverable and the reasoning of the district courts would seem to also support the discoverability of draft expert reports. *See e.g., Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 637 (N.D. Ind. 1996) (requiring production of a medical chronology and deposition summaries that counsel prepared and provided to the expert on the ground that the expert considered them even if he did not rely on them); *but see Simon Prop. Group v. mySimon, Inc.*, 194 F.R.D. 644 (S.D. Ind. 2000) (holding that *unintentional* communications to experts of attorney strategy are protected work product). Given the bright-line rule that the courts in the Seventh Circuit have followed permitting discovery of communications between counsel and experts, it would appear that drafts sent to counsel and comments or changes to the draft made by counsel would be discoverable as information the expert considered. *See Karn*, 168 F.R.D. at 640 (“Without pretrial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert's testimony.”); *Barna v. United States*, No. 95 C 6552, 1997 WL 417847, at \*2 (N.D. Ill. July 28, 1997) (“[A] jury is entitled to know everything that influenced an expert's opinion in order to assess his credibility.”).

## **H. Eighth Circuit**

In *In re Pioneer HI-Bred Intern, Inc.*, 238 F.3d 1370 (Fed. Cir. 2001), the Federal Circuit Court held that under Eighth Circuit law, documents and information disclosed to a testifying expert in connection with his or her testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his or her report. The Court reasoned that because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver of the attorney-client and work product privilege to the same extent as with any other disclosure. *In re Pioneer*, 238 F.3d at 1375-76.

Many cases within the Eighth Circuit have applied the bright-line rule. *See Monsanto Co. v. Aventis Cropscience*, 214 F.R.D. 545 (E.D. Mo. 2002) (a court need not compel disclosure of materials an expert considered in his consultative capacity that have no relation to the expert's role as an expert. However, when the subject matter of those materials relates to the facts and opinions the expert expressed in his report, the courts should order disclosure if there is any ambiguity as to whether the materials informed the expert's opinion.); *O'Neal v. Mercer*, 2006 WL 4483374 (Neb. Dist. Ct. 2006); *Williams, Jr. v. City of Davenport, Iowa*, 2005 WL 5190742 (Iowa Dist. 2005).

The State of Missouri has its own discovery rules, and in *Tracy v. Dandurand*, 30 S.W.3d 831, 836 (Mo. 2000), the Supreme Court of Missouri adopted a "bright line rule" requiring that all material given to a testifying expert must, if requested, be disclosed. The Court noted that a party waives the attorney-client privilege as to documents provided to a retained expert witness designated to testify, and that the opposing party is entitled to discover by deposition the facts and opinions to which the expert is expected to testify. *Id.* at 834. The Supreme Court of Missouri also noted that facts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert. *Id.* The bright-line rule includes both trial preparation materials and opinion work product that is given to and reviewed by the expert. *Id.* at 835-836.

## **I. Ninth Circuit**

In *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114 (D. Ore. 2006), plaintiff sued for breach of contract and defendant counterclaimed for contribution and cost recovery on real estate in Oregon. Plaintiff then filed a third-party complaint against another party if plaintiffs were found liable on the counterclaims. All three parties filed motions for summary judgment.

Plaintiffs filed a motion *in limine* for sanctions and to remedy spoliation, asserting that defendants experts destroyed drafts of their expert reports and other discoverable notes. Plaintiffs claimed that the spoliation deprived them of the opportunity either to determine the admissibility of the experts or to properly cross-examine them. Plaintiffs also claimed that defense counsel improperly exerted control over the experts' opinions.

Initially, the court observed that after the 1993 amendments to Rule 26, "courts have held that disclosure of information transmitted to or from the expert, including draft reports is discoverable if the expert considered the information," *id.* at 1122, citing *Fidelity Nat. Title Ins. Co of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 421 F. 3d 745, 751 (7<sup>th</sup> Cir. 2005) ("A testifying expert must disclose and therefore retain whatever materials are given to him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion."). However, the court then noted that there was a split of authority regarding information given to an expert that contained attorney work product, citing to *United States v. City of Torrance*, 163 F.R.D. 590, 593 ( C.D. Cal. 1995) for the proposition that "the approach which is most consistent with the purpose of the Federal Rules of Civil Procedure is to require disclosure."

In this case, the court found that defendants had provided plaintiffs with all drafts and correspondence between the experts and defense counsel and that the only information not produced were some working notes that the experts failed to retain. The court held that this information was not subject to Rule 26 disclosure. Further, even if it were subject to disclosure, there were no grounds for an adverse inference required for spoliation sanctions. The court also found that plaintiffs failed to establish the kind of prejudice from the loss of the experts' notes required for Rule 37 sanctions because the kind of evidence destroyed was not related to a

challenge of the experts' admissibility. Finally, the court rejected plaintiffs' challenge that the destroyed notes prevented them from properly cross-examining the experts on the theory that the experts' opinions were tainted by communications with counsel. Here, the court noted that all communications with counsel had been produced and, in any event, "the central inquiry in cross-examination of an expert 'is not the question of if and to what extent the expert was influenced by counsel,' but instead asks for the basis for the expert's opinion," citing *Nexus Products Co. v. CVS New York Inc.*, 188 F. R. D. 7, 10 (D. Mass 1999).

In *Equal Employment Opportunity Commission v. United Parcel Services, Inc.*, 149 F. Supp. 2d (N.D. Cal. 2000), the issue was whether defendant violated the Americans for Disabilities Act, 42 U.S. 12101, *et seq.*, by categorically excluding from jobs applicants for drivers positions with excellent vision in one eye but little or no vision in the other eye. The court enjoined defendant from using its "vision protocol" to exclude such applicants and that they should be given a fair and individualized opportunity to demonstrate their qualifications to drive safely.

In the opinion, the court noted that initially, defendant's expert failed to produce drafts of his expert reports, despite the court's standing order that such reports be retained produced. When this fact came to light at the final pretrial conference, the court ordered their production. Defendant then produced the drafts and plaintiffs took a follow-up deposition, which revealed that substantial changes had been made from the draft to the final report, that these changes were all made at counsel's suggestion, and that they changed the substance of the report in material ways. The court then noted in its findings of fact that it had not rejected all of the expert's conclusions but evaluated them critically "in light of his strong prejudice in favor of" defendant. *Id.* at 1140.

A case decided before the 1993 amendments to Rule 26 is *Hewlett-Packard Co. v. Bausch & Lomb*, 116 F. R. D. 533 (N.D. Cal. 1987). Plaintiff sought to discover from defendant documents drafts of a declaration that defendant's expert submitted to the Patent Office as part of defendant's effort to survive a reexamination of the patent whose validity plaintiff was challenging in the litigation. The court held that the expert's drafts were relevant and discoverable under Rule 26(b)(4), even though they were prepared for a patent reexamination. The reexamination proceeding and the litigation commenced at nearly the same time and were closely related parts of the same struggle. A disclosure of the material was to better equip plaintiff to cross-examine the expert and was not protected by the work product doctrine.

**J. Tenth Circuit**

The Tenth Circuit has not yet addressed the discoverability of draft expert reports in any reported decisions.

**K. Eleventh Circuit**

The Eleventh Circuit has yet to rule on the discoverability of drafts of expert reports. The district courts of the Eleventh Circuit have held that “the term “consider” should be construed broadly, and encompass all documents and information disclosed to a testifying expert in connection with his testimony, whether or not the expert relies on the documents and information in preparing his report.” *Stephens v. Trust for Pub. Land*, 475 F.Supp.2d 1299, 1306 (N.D. Ga. 2007) (internal quotation marks omitted)(holding expert's draft reports to be discoverable). “Once materials are furnished to the experts to be considered in forming their opinions, regardless of whether or not ultimately relied upon by the expert, privilege or protection from disclosure is waived because the plain meaning of Rule 26(a)(2)(B) trumps protections afforded by the attorney-client privilege and the work product doctrine.” *In re McRae*, 295 B.R. 676, 679 (N.D. Fl. 2003). “Courts must be careful to not allow the testifying expert's opinion to be a



conduit for the attorney's opinion or allow the testifying expert to be influenced by the attorney or non-testifying experts,” and “[w]ithout discovery of these types of materials there would not be the opportunity for a full and fair cross-examination of the expert witness.” *In Re Tri-State Outdoor Media Group*, 283 B.R. 358, 365 (M.D. Ga. 2002). Arguably, these decisions support an argument that draft expert reports that are sent to counsel and any communications with counsel regarding those reports should be discoverable.

#### **L. D. C. Circuit**

The D. C. Circuit has not yet addressed the discoverability of draft expert reports in any reported decisions.

#### **M. Federal Circuit**

The Court of Appeals for the Federal Circuit does not apply its own interpretations to purely procedural questions: “For procedural matters that are not unique to patent issues, [the court] appl[ies] the perceived law of the regional circuit.” *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996); *Nat'l Presto Indus. v. West Bend Co.*, 76 F.3d 1185, 1188 n.2 (Fed. Cir. 1996). The discoverability of expert draft reports is not unique to patent issues: almost any substantial tort case, for example, will have a damages expert. As a result, the Federal Circuit is unlikely to develop much of its own precedent in this area.

Nevertheless, at the time this paper was drafted, there was one Federal Circuit decision regarding the discoverability of expert draft reports. The Federal Circuit applied Eighth Circuit law in deciding that Rule 26(a)(2) created a bright-line rule that “documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report.” *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001).