# When A Draft Blows In: What Lawyers Need To Know About Draft Expert Reports

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Litigation of any size can present a need for expert testimony. Although experts are usually "outsiders" to the litigation, it is common for a company to call on its own employees to serve as experts. Whether an employee or an outsider, every expert who produces a report also produces a discovery dilemma: The draft. Frankly, it is rare to encounter a "seasoned" expert who keeps drafts (electronic or hard copy). However, all counsel – in-house and outside – working with an expert must be familiar with the discovery rules if drafts do exist.

Two questions typically arise with draft expert reports: (1) Must experts retain drafts if it is not their practice to do so? and (2) Does an attorney have a duty to retain a draft received from the expert?

Since draft expert reports are discoverable under must local rules and precedent, the answers are (1) "NO" and (2) "YES." Here's why.

## Experts Need Not Retain Drafts

The federal rules do not require an expert to retain drafts. Indeed, the courts that have addressed the question simply assume without discussion that an expert has no such obligation. *See, e.g., Adler v. Shelton*, 778 A.2d 1181 (N.J. Super. 2001) and *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 283 (E.D. Va. 2001). The *Adler* court observed that "[e]xperts familiar with the litigation process usually destroy their draft reports and the rules do not forbid this." 778 A.2d at 283 n.8. Similarly, the *Trigon* court briefly observed that "[t]here are cogent reasons which militate against such a requirement" to force experts to maintain their drafts. *Id.* at n.8.

## But Attorneys Must Retain Drafts Received From Experts

If a testifying expert does share a draft with the retaining attorney, the attorney should retain the draft for possible production. However, an attorney should never advise the expert to discard drafts. *Amster v. River Capital Int'l Group*, No. 00 CIV.9708 DC DF, 2002 WL 1733644 (S.D.N.Y. July 26, 2002) and *W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc.*, No. 98-CV-838S(F), 2000 WL 1843258 (W.D.N.Y. Nov. 2, 2000), illustrate the rationale for and consequences of these rules.

For example, in *W.R. Grace*, the court examined counsel's responsibility regarding expert drafts. The plaintiff had moved for sanctions against a defense counsel who advised a testifying expert to discard earlier drafts (even though they had not been requested in discovery) so as not "to confuse things." 2000 WL 1843258, *9. Defense counsel argued that it was the expert's routine practice to discard drafts, so no harm, no foul. The court disagreed.

First, the court noted that drafts of a testifying expert's reports are subject to disclosure pursuant to Rule 26(a)(2)(B). Thus, counsel is on notice that drafts are (at least potentially) discoverable. Second, the court ruled that the destruction of drafts constituted spoliation: that is, the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Id.* at *10 (*quoting West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 778 (2d Cir. 1999)). The attorney's explicit direction that the expert destroy drafts was intentional destruction of evidence for pending litigation.

The *W.R. Grace* court noted that spoliation typically lends "support for an inference that the evidence would have been unfavorable to the party responsible for its destruction" or for a similar sanction designed to have a deterrent effect. *Id.* at *11. However, the court held open the question of appropriate sanction against the defendant for two reasons. First, since the expert used a computer, there was a possibility of restoring the

deleted drafts. Second, the expert had transmitted some drafts to counsel, and those were to be produced. Accordingly, it might have been possible to recreate the editorial evolution of the report. This re-creation could show whether the opinion was "sanitized" by defense counsel, with opinions less favorable to the defendant, expressed at an earlier date, having been purged.

*Amster* involved a dispute about "whether certain of plaintiff's draft expert reports, claimed by plaintiff to contain notations reflecting attorney work product, should be produced to defendants in redacted or unredacted form." *Amster*, 2002 WL 1733644, *1. Counsel edited a draft and discussed those edits with the expert – but did not provide the expert with a physical copy of the marked-up drafts. Because the parties agreed "that any attorney notes or editorial comments actually provided to the expert in writing" were discoverable, *id.* at *2, the plaintiff produced the drafts that its counsel received, but redacted the attorney comments.

The *Amster* court ruled that the plaintiff did not have to produce any handwritten attorney notes not physically provided to the expert. The decision rested on the 1993 revisions to Rule 26(a)(2)(B). Under that Rule, a party must disclose all "information considered by the expert in forming the [expert's] opinion." Thus, the court distinguished attorney comments merely "communicated" to the expert from attorney comments "transmitted" to the expert. The court upheld the claim that the non-transmitted comments were attorney work product and did not have to be produced.

The *Amster* court noted that defense counsel could, when deposing the expert, "test [the expert's] recollection of his conversations with counsel" since conversations between testifying experts and counsel are not privileged. If the expert were "unable to testify as to how his report evolved, and, more specifically, as to which changes from draft to draft were suggested by counsel," thus indicating it may not have been his own work, then the court suggested that defendants renew their application for production of the notes that may have been "communicated" (even if not "transmitted") by plaintiff's counsel to its expert. *Id.* at *3.

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