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ABA CONVENTION WRAP-UP

Delegates Pass Measure To Shield Experts' Drafts From Discovery

Proposed change would bring federal rules in sync with N.J.

By Lisa Brennan

In the closest tally of its annual meeting in Honolulu, the American Bar Association decided last Monday to push for a federal rule change to protect expert draft reports from discovery.

After vigorous debate, the ABA's House of Delegates voted 207-137 to recommend adding to Federal Rules of Civil Procedure Rule 26(a)(2) a privilege for draft reports and communications between attorneys and their experts.

The measure will be forwarded to the U.S. Supreme Court's advisory Committee on Civil Rules.

The proposed change was prompted by varying judicial interpretations of 1993 amendments that expanded permissible expert discovery from "materials relied on" by an expert to "any data or other information considered by an expert" in forming his or her opinion. Some judges protect drafts until experts turn them over to counsel, while others require counsel and experts to turn over all drafts.

"We believe counsel and experts should be subject to the same rules and court expectations around the country," says Jeffrey Greenbaum, a partner with Newark's Sills Cummis Epstein & Gross and co-chair of the ABA Federal Practice Task Force that authored the resolution.

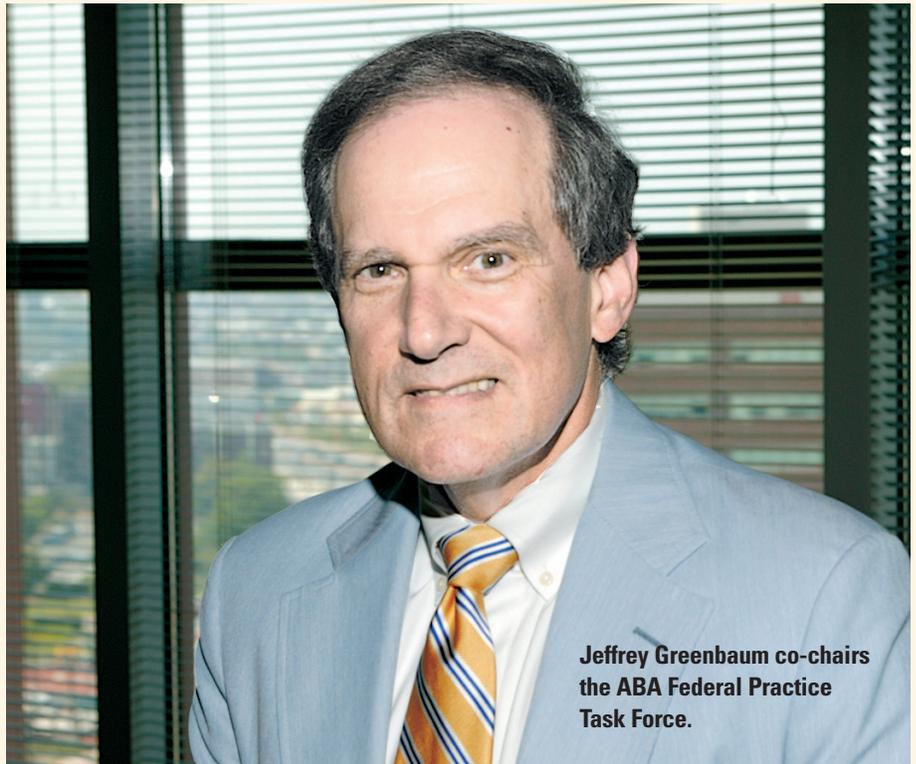
The proposed amendment was patterned on a 2003 rule change in New Jersey that exempted drafts and attorney-expert communications from discovery. Since its implementation, "practitioners

are no longer consumed with the costs of producing draft expert witness discovery based on issues that are red herrings," says New Jersey ABA delegate Dennis Drasco, of Roseland's Lum Danzis

Drasco & Positan. "I saw no need for it in their jurisdictions."

The resolution's opponents also contend that many developments take place during discovery and litigants should be allowed to examine the draft reports to resolve uncertainties.

"We won quite handily, but it was



Jeffrey Greenbaum co-chairs the ABA Federal Practice Task Force.

Drasco & Positan.

Those who voted against the proposal did not see the lack of national uniformity as a problem. "My view is, if it isn't broke, don't fix it," says W. Scott Welch of Jackson, Miss.'s Baker, Donelson, Bearman, Caldwell & Berkowitz. "While the proponents saw a need for it in their jurisdictions, I saw no need in mine, and the other opponents from the California delega-

tion saw no need for it in their jurisdictions," says Lawrence Fox of Philadelphia's Drinker Biddle & Reath, who gave a closing statement supporting the resolution.

Other Floor Action

In addition, the ABA delegates approved more than a dozen other measures, including those that would:

- Amend the Federal Rules of Civil Procedure or the Federal Evidence Rules to allow parties to reassert privilege for inadvertently disclosed material. The resolution, proposed by Greenbaum's task force, passed unanimously.

- Oppose *H.R.5219* and *S.2678*, which would create an inspector general for the federal judiciary, answerable to Congress. Such a law, the ABA resolution states, would undermine separation of powers and impede the judiciary's ability to make impartial decisions free of congressional influence. The resolution mirrors a report last December by the Federal Judicial Conference opposing the legislation. However, some federal judicial workers, who are at-will employees, support the legislation as a means of promoting accountability.

- Seek changes in the government's deferred prosecution program in which charges are dropped if a company cooperates in an investigation. In particular, the ABA wants the companies to be able to pay the legal fees of employees who are potential defendants.

"The government should not use cooperation guidelines to pressure companies to not provide counsel to their directors, officers and employees who are defendants in actions related to corporate activities," says William Ide of Atlanta's McKenna Long & Aldridge, who presented the measures for the Task Force on Auditors and Employee Rights.

"It has been an established principle of corporate law that companies defend their own until there is a finding that the employee was not acting properly. There is no sound reason to allow the Justice Department to interfere with that relationship."

- Support multinational cooperation in immigration laws and policies.

- Urge courts to take mental illness into account in capital punishment cases.

- Urge federal, state, local and territorial governments to enact legislation prohibiting discrimination on the basis of gender identity or expression in employment, housing and public accommodation.

- Urge the U.S. government to support the Darfur peace accord.

- Adopt a program to provide civil legal aid to low-income and immigrant populations.

- Encourage law firms to consider alternatives to mandatory minimum billing requirements so as to reduce emphasis on billable hours, and to consider compensation systems based on factors other than billable hours.

Signing Statements

The House of Delegates last Tuesday unanimously passed a measure opposing President Bush's practice of using presidential signing statements to disregard or decline to enforce laws. The resolution says the practice is "contrary to our constitutional system of separation of powers"

and urges Congress to require the president to promptly account for his signing statements. It also asks Congress to create a system so courts can review claims by the president that he has the authority to bypass laws he signs.

The delegates rejected a motion to postpone a tally after outgoing ABA president Michael Greco urged an immediate vote. "The Constitution says the president has two choices: either sign the bill or veto it. If you sign it, you can't have your hand behind your back with your fingers crossed," he says.

Exodus of Minority Women

The ABA released a study during its annual meeting that says minority women are leaving the nation's large law firms because of pervasive, subtle and blatant discrimination.

The study, "Visible Invisibility: Women of Color in Law Firms," was conducted with input from the National Opinion Research Center at the University of Chicago. Questionnaires were sent to about 1,300 male and female lawyers, with a response rate of 72 percent, or 920 participants.

Minority women participants say they are excluded from golf outings, after-hours drinks and other networking events. Young minority women say they are ignored by partners who are supposed to mentor them. The study says firms routinely hand minority women inferior assignments. ■