The Metropolitan Corporate Counsel®
www.metrocorpcounsel.com
Volume 14, No. 12 © 2006 The Metropolitan Corporate Counsel, Inc. December 2006

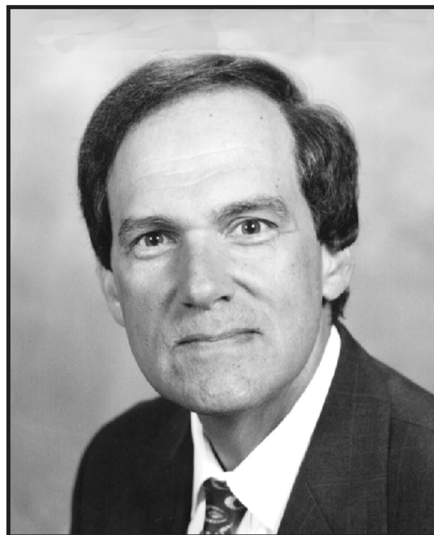
Reduce Costs And Protect Expert Draft Reports And Communications With Expert Witnesses – An ABA Proposal That Corporate Counsel Should Consider Supporting

*The Editor interviews **Jeffrey J. Greenbaum**, Chair, Class Action Practice Group, Sills Cummis Epstein & Gross P.C.*

Editor: Please tell our readers about the problems of working with expert witnesses under the Federal Rules of Civil Procedure and how New Jersey has solved these problems.

Greenbaum: In 2002 New Jersey amended its Rules to protect drafts of expert reports and communications between the attorneys and the experts from discovery. These rules facilitate the process of working with experts because you do not have to limit contact with experts to telephone or in person communications or worry about draft reports being used to discredit them in court.

The current Federal Rules do not provide this protection in the view of many judges. A 1993 Rule change included a note indicating that experts had to disclose "facts or other information considered" to formulate their opinion. The interpretation of this phrase has evolved over time so that the majority of federal courts now require experts to turn over drafts of their reports and their communications with attorneys. This information often misleads the jury into believing that it is improper for an attorney to consult with an expert during the report drafting period. This has chilled communications with experts and led attorneys and experts to resort to expensive efforts to limit the drafts and communications available for discovery. It has also led to expensive discovery efforts to find draft reports, which many times do not exist, and wasteful depositions to explore the minutia of the report preparation process.



Jeffrey J. Greenbaum

Editor: I understand that you were involved in an ABA Task Force that issued a report to the House of Delegates recommending changes in the federal, state, territorial rules and statutes. How did you get involved with this effort?

Greenbaum: The chair of the ABA Section of Litigation directed its Federal Practice Task Force, which I co-chaired, to develop a recommendation for a uniform rule regarding working with experts so lawyers would not face conflicting rules around the country. The ABA Section of Litigation approved our recommendation and sponsored it for adoption by the ABA House of Delegates, which occurred in August 2006.

Editor: What were the Task Force's recommendations?

Greenbaum: The first concern raised was to bring uniformity to the inconsistent practices around the country that now vary by jurisdiction and judge. At the federal level, the District Courts are also all over the map on disclosure requirements. This has caused much confusion around the country for attorneys working with experts. Some attorneys have been caught in situations where their communications with experts were used against them because they did not know the rules. Others operate as if they are governed by the most restrictive rules even when they are before a court that does not require disclosure. Working with experts has become a cumbersome process because of the possibility that draft reports and communications might ultimately be disclosed.

Editor: Are the draft reports and communications protected as work product?

Greenbaum: There is a split of authority. The 1993 changes to the Federal Rules required experts to provide a report on their testimony to the other side so they would have notice of what was going to be said. This would provide the opportunity to either depose the expert or hire another expert to rebut the testimony. The report was never intended as a substitute for in-court testimony.

While some courts protect attorney-

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expert communications as work product, over time, the requirement for disclosure of all "facts and other information considered" has been interpreted by some judges to include draft reports and communications between experts and attorneys. When there are differences between early drafts and the final report, juries have been misled into believing that the attorney-client collaboration was improper. Yet Federal Rules recognize that there should be collaboration between experts and the lawyers who hire them.

In order to avoid this result, many attorneys have had to limit their communications with experts. For example, experts no longer work on several drafts of a report. They will work on one copy and seek input from counsel either over the telephone or in person. This process limits the interim products available for discovery but it also forces experts to work primarily from memory and without proper input from attorneys who know the facts and record of the case more intimately than the experts.

Editor: What has been the economic impact of the current Federal Rules?

Greenbaum: In cases where expert drafts and notes are produced, burdensome depositions have resulted where each line of the report is examined against earlier drafts. The expert then has to explain each change. The time and cost of discovery is increased dramatically with usually little resulting benefit.

In addition, costs associated with electronic discovery will increase in the search for draft reports. This means that a party is forced to spend money to recover documents that do not go to the ultimate result of the case. As reflected in the ABA report, experts may elect to invest in Defense Department level systems to scrub computers to make sure that there are no fragments that could be used to recover prior drafts. Of course, use of such procedures may also create problems.

Companies with more resources are now hiring two experts where one is a consulting expert and the other is the trial expert. The consulting expert's reports are never disclosed so counsel will work with them and then hire a trial expert when the arguments have been tested. While this process protects the client from the extra level of discovery, it is costly and not available to those with limited resources.

Editor: Have you encountered these problems during your practice?

Greenbaum: Absolutely. I worked on a matter in New Jersey before the New Jersey rules were amended to protect communications with experts. At that time I had to go to the expert's office to review his work without a copy to review on my own. I did not receive a copy until I had the bound final report. The matter was reversed and retried after the rules were changed. Under the new rules I was able to communicate with the expert through email protected by the privilege. I could see his drafts and comment on what the report should focus on. The process was much more open because there was no longer the possibility of having to disclose our communications.

The difficulties of working with experts under the old rule coupled with the inefficiencies and extra expense, led me to propose a rule change in New Jersey. I was a member of the Civil Practice Committee of the New Jersey Supreme Court, the rulemaking body that makes recommendations, and I was a member of the Discovery Sub-Committee that proposed the rule change.

The experience in New Jersey has been a continued robust cross-examination of experts without unnecessary costs and burdens on the parties. As with New Jersey, Massachusetts has had a similar experience where it is less expensive to work with experts in state court.

As an attorney, you want to be able to use your expert to the full extent possible without fear of creating discoverable material that can unfairly hurt your case. You may want your expert to provide help in cross examining another expert and critiquing the other expert's report. Without protection, we cannot do that comfortably without risk of disclosure and discovery.

Editor: How will the new rules benefit corporate counsel?

Greenbaum: Corporations will no longer have to hire additional consulting experts unless there is a valid reason to do so. Also, under the current rules corporate counsel may not be able to work as closely with experts as they would like, because they do not have the time to travel to an expert's office to communicate in person. A proper consultation with an expert should include in-house and outside counsel – and geography should not make this impossible.

Editor: Would the new rules limit a judge's ability to dismiss cases based on junk science?

Greenbaum: No. An expert is still required to disclose the facts and data considered in formulating an opinion. If there is no scientific basis for his conclusions, it is a fair subject for discovery and that will come to light. There would not be an increase in cases based on junk science. Because, while the attorney's input into the report would not be disclosed, the expert's methodology would still be subject to scrutiny.

Editor: What has the ABA done with its proposal to help bring about a rule change at the federal level?

Greenbaum: The proposal was presented to the U.S. Judicial Conference Advisory Committee on Civil Rules at its September 2006 meeting. If the Advisory Committee decides to proceed with a rule change, it will go through the rulemaking process for adoption, at the earliest, in December 2009.

Editor: Would commentary from in-house counsel be welcomed by your task force?

Greenbaum: Absolutely. One of the jobs of the Federal Practice Task Force of the ABA Litigation Section will be to continue to keep this on the agenda before the Advisory Committee and in various states and jurisdictions to get changes across the country. They will also alert attorneys that, until such changes take place, they should encourage opposing counsel to stipulate treating the proposed rules as if they were in effect so that people can practice in an environment where they do not have to spend extra money and go through unnatural steps to avoid discovery of materials that should not be discovered in the first place.

Editor: Are you working with other organizations to garner more support for the proposed rules?

Greenbaum: The Sedona Conference issued a similar proposal with respect to economic experts in antitrust matters. They recommended that the draft reports and communications between experts and attorneys should be protected from disclosure.

Editor: Should corporate counsel be working to implement similar changes at a state level?

Greenbaum: Yes, currently, most state courts do not have rules in place so lawyers must assume that disclosure will be required. These concerns should merit an effort on the part of corporate counsel to support rule changes on the state as well as federal level.