
Arthur F. Greenbaum
EXPERT WITNESS REPORTS IN FEDERAL CIVIL LITIGATION: THE ROLE OF THE ATTORNEY IN THE EXPERT WITNESS REPORT’S PREPARATION

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Every day across America, civil litigators in federal court work closely with experts to create required expert reports and hone expert testimony. Yet they do so without clear guidance as to the limits, if any, on their assistance. Despite an attempt in 2010 to clarify the rules in this area with amendments to the Federal Rules of Civil Procedure, that attempt has proven woefully inadequate. Today there is no consensus as to the line between proper assistance and lawyer overreaching. There are major areas of uncertainty over the means by which the degree of lawyer involvement can be discovered. While there is substantial agreement that lawyer assistance at times is so excessive that exclusion of the expert’s report is warranted, or at least that that involvement is relevant to the weight to be afforded the expert’s testimony, some courts so limit the inquiry into the lawyer’s role in assisting the expert that applying these safeguards is nearly impossible. In this Article, I unpack the current doctrine laying bare the areas of disagreement. At a minimum, this arms litigants with competing arguments to assert when discovery disputes in this area arise. With the disagreements clearly identified, courts may yet come to a consensus on these issues, although the experience of the last eight years under the 2010 regime suggests that hope is a remote one. Assuming some courts will continue to frustrate attempts to uncover the extent of lawyer influence under the current rules, I propose a variety of alternatives that can check excessive lawyer involvement without creating the problems the 2010 amendments were intended to address.

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I. INTRODUCTION

Experts play a crucial role in modern litigation.\(^1\) The range of cases in which expert testimony is allowed, or in some cases required, is immense.\(^2\) It is the testimony of these experts that often make or break a case.\(^3\)

In federal litigation, Federal Rule of Civil Procedure 26(a)(2)(B) requires that testifying experts\(^4\) prepare and sign a written report as part of required pretrial disclosures.\(^5\) The role of the report is to facilitate discovery of the opinions the expert may offer at trial. It "exposes the thought process and method of the expert in advance of oral examination. Its discipline both reduces the incentives of witnesses to...\(^6\)"

\(^1\) Stephen D. Easton, Ammunition for the Shoot-Out with the Hired Gun’s Hired Gun: A Proposal for Full Expert Witness Disclosure, 32 ARIZ. ST. L.J. 465, 471 (2000) (noting that experts are “often the most important witness in civil cases”); Paul M. Mannix, Control of Work Product: Avoiding Harmful Expert Disclosures, 46 DRI FOR THE DEF. 30 (2004) (“The expert witness has become a fixture in modern civil litigation. Most cases involve at least some expert testimony, and generally, both the plaintiff and the defendant present an expert with an opinion favorable to their respective positions. The expert typically speaks to the crucial issues in the case and, as the expert is offered as a witness with special knowledge in the critical field, the expert’s testimony is often given great weight. As a result, the outcome of the case frequently depends on which side wins the 'battle of the experts.' Thus, one of the most important tasks in preparing a case for trial is to retain, prepare, and present the most competent, persuasive, and credible expert witness possible.”); David Sonenshein & Charles Fitzpatrick, The Problem of Partisan Experts and the Potential for Reform Through Concurrent Evidence, 32 REV. LITIG. 1, 3 (2013) (“As the system has become inundated with more complex litigation and cases of a more technical nature, the use of expert witnesses has increased.”); William R. Stuart III, Reconciling a Tense Coexistence: Can Federal Rule 26 Both Prohibit Ghost-Writing and Protect Expert-Related Work Product?, 57 DRI FOR THE DEF. 20 (2015) (finding that “[e]xpert witnesses are integral to defending product liability lawsuits, and [that] it is not uncommon for a case to rise or fall on the testimony of a single expert.”).

\(^2\) See supra note 1. See generally JAMES J. MANGRAVITI ET AL., HOW TO WRITE AN EXPERT WITNESS REPORT app. D (2014) (providing model expert reports for numerous different disciplines).

\(^3\) See supra note 1.

\(^4\) These are defined as a witness "retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony." FED. R. CIV. P. 26(a)(2)(B).

\(^5\) The rule requires that the report include:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

\(^6\) Id.
present preliminary or tentative views and to tailor their opinion to an advocate’s case.16

The drafters of the rule recognized that even though the report is to be “prepared” by the expert, the expert could be assisted by a lawyer in this endeavor. As the 1993 Advisory Committee Note to the Federal Rule makes clear:

Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed. Nevertheless, the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness.7

Numerous cases have grappled with the question of how much a lawyer may assist an expert in preparing the expert’s report.8 At some point the degree of involvement is so great that the report ceases to be one “prepared” by the expert, as the rule requires, but instead is really the work of the lawyer. In such cases the expert is seen as a mere “puppet”9 or “avatar”10 of the lawyer rather than as a testifying expert providing independent, expert analysis. Even if the lawyer’s assistance does not supplant the work of the expert, its existence may still compromise the independent analysis of the expert. The line between permissible and impermissible assistance, however, remains unclear.11 Part II of this Article addresses this issue.12

7. FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.
8. See Johnson v. City of Rockford, No. 15 CV 50064, 2018 WL 1508482, at *4 n.1 (N.D. Ill. Mar. 27, 2018) (bemoaning that a “plethora of cases exist addressing the pernicious practice of attorneys commandeering the preparation of expert reports”).
11. See also JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 7.55 (3d ed. 2019) (noting uncertainty as to the degree to which the Federal Rules limit exploration of the lawyer’s assistance in preparation of the expert report); cf. MANGRAVITI ET AL., supra note 2, at 11
A related theme turns on how to control lawyer overreaching. In extreme cases, exclusion of the expert’s report and ultimate testimony may be called for. In less extreme cases, the degree of involvement is controlled, indirectly, by the potential that the level of assistance may undercut the weight the trier of fact will give to the expert’s testimony. If the expert’s credibility is diminished to the degree his work is seen as the product of the non-expert lawyer’s labor, lawyers have an incentive to keep their assistance within bounds. These controls are discussed in Part III of this Article.13

For these controls to be effective, however, one needs a way to identify the lawyer’s involvement in the report’s preparation. From 1993, when the expert report requirement was adopted, until 2010, this was a relatively easy task as most courts allowed discovery of report drafts and communication between counsel and the expert. Drafts, other communications, and examinations at deposition were used to uncover the role lawyers played in the creation of expert reports. In 2010, the Federal Rules were amended to prohibit discovery of draft reports and to dramatically curtail discovery of lawyer-expert communications. Notably, the amendments did not explicitly address the permissible degree of lawyer assistance but only the evidence that would be available to identify it. Significant disagreement exists over the degree to which the 2010 amendments curtail discovery of the lawyer’s involvement. This is discussed in Part IV of the Article.14

Some have argued that excessive lawyer involvement in the creation of expert reports can be regulated through the lawyer disciplinary system. Part V of this Article addresses that approach and ultimately finds it wanting.15

If we are concerned about excessive lawyer involvement in the creation of expert reports, as I believe we should be, an expansive view of the restrictions on discovery imposed by the 2010 amendments makes policing such involvement very difficult at best. If that becomes the norm, it will become important to devise alternative approaches to keep lawyer behavior within acceptable bounds. Part VI of this Article sets forth some possible alternatives to control this problem.16

With the degree of lawyer involvement purportedly on the rise,17 resolving these questions is of increasing importance.18

(noting that the amount of assistance a lawyer may give to an expert in preparing the expert report “is an extremely slippery slope”).

12. See infra Part II.
13. See infra Part III.
14. See infra Part IV.
15. See infra Part V.
16. See infra Part VI.
17. See, e.g., Steven Babitsky, Why Having Retaining Counsel Phrasing and Writing an
II. THE LAWYER’S ROLE IN ASSISTING IN THE PREPARATION OF EXPERT REPORTS

A. The Pros and Cons of Lawyer Involvement in the Creation of Expert Reports

1. The Need to Control Lawyer Assistance in the Creation of Expert Reports

To sustain a claim or defense, a litigant must present witnesses of an occurrence and/or tangible evidence to establish the facts. At times, however, the implications of those facts are not readily apparent. Expert testimony is necessary to help the trier of fact interpret the underlying data. For example, one might agree that a doctor took certain steps in carrying out a medical procedure but need expert testimony to determine whether those steps fell below the ordinary standard of care. To meet this end, the law allows the admission of expert testimony by those that, although lacking first-hand knowledge of the incidents underlying a claim or defense, have specialized training that qualify them to opine on the consequences of those facts. It is the specialized knowledge of such witnesses and the soundness of their methods that justify their testimony.19

Unlike a court-appointed expert whose task is to provide a truly objective opinion, most experts testify on behalf of a party in the litigation.20 In theory, the experts chosen by a party to testify also have

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objectively analyzed the situation. It is not the expert who is partisan, but rather the partisan parties select experts who independently agree with their positions.

Nevertheless, there is certainly a real-world chance that the opinions of experts may be shaped by who employs them. Experts are "at will" employees. An unsatisfactory opinion or an uncooperative attitude may lead to dismissal or at least a decision not to call on the expert to testify. Either alternative has negative compensation implications. The desire to be hired in the future also can play a part. These financial incentives can influence an expert's testimony. A human desire to please those for whom one works and the reliance relationship the expert has on counsel to provide certain facts and assumptions may further taint the process. If the process is also shaped in partisan terms, the expert is the witness for a party and, in the current scheme, is an inside player with the lawyer, with many of their communications protected from discovery, it is likely that some independence and objectivity will be lost.21 The greater the lawyer involvement in the creation of the expert's testimony, the more these negative influences can come into play.

If we start with the assumption that experts are allowed to testify and share their opinions only because of their specialized knowledge and ability to apply accepted principles and methods in their field, then we need to assure that their reports and ultimate testimony, if any, are a product of that knowledge and those methods. Lawyer involvement in the preparation of the expert's report or in the shaping of the ultimate testimony may undercut that paradigm. Excessive involvement may usurp the expert's role and delegitimize the resulting product.22 Some

21. See, e.g., Easton, supra note 1, at 469–73 (noting these and other factors and concluding that "it is difficult to imagine a system that would lead to more biased testimony"); Letter from 37 Law Professors, to Peter G. McCabe, Sec'y for the Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 1, 2 (Nov. 30, 2008) [hereinafter Letter from 37 Law Professors] (noting these and other factors and describing them as "the prime source of the pathologies of expert testimony," while also noting that "[t]he rule that makes an expert witness's communications broadly discoverable is an expression of the basic value of expert independence. Replacing it with a rule that treated the expert more like a client for discovery purposes would send the wrong message."), see also Sonenshein & Fitzpatrick, supra note 1, at 3–16 (exploring at length the forces that lead to expert bias, concluding that this system often leads to biased and partisan testimony from experts).

22. As the court noted in Occulto v. Adamar of N.J., Inc.:

A party receiving an adversary's expert's signed report has a right to rely upon the document for what it purports to be—the expert's considered analysis of facts and statement of opinions applying the expert's special education, training and experience. Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions . . . . They do not participate as the alter-ego of the attorney who will be trying the case.

125 F.R.D. 611, 615-16 (D.N.J. 1989); accord Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934,
believe that this will occur with regularity absent some curb on the practice.\textsuperscript{23}

2. The Need to Allow Some Lawyer Assistance in the Creation of Expert Reports

Lawyer involvement in the creation of expert reports and testimony has its advantages. The lawyer can define the expert’s task by sharing data and assumptions to be utilized in forming opinions. This input is discoverable as it underlies whatever opinions the expert puts forward.\textsuperscript{24} The lawyer also should play a role in assuring that the expert’s report complies with the technicalities of the report rule, Federal Rule of Civil Procedure 26(a)(2)(B).\textsuperscript{25} Most also would agree that the lawyer should play a role in assuring that the expert’s report is both accurate and clear.\textsuperscript{26} The lawyer can help assure that the language used is clear and not misleading. An additional editorial flare to make the report more persuasive is commonly thought as fairly within the game.\textsuperscript{27}

\textbf{B. Differing Conceptions of the Lawyer’s Role}

As the 1993 Advisory Committee Note makes clear, there is a role for the lawyer to play in assisting an expert in the creation of his testimony which is then transmitted in the required expert report. There is disagreement, however, about what that role should be.\textsuperscript{28} Several conceptions of the lawyer’s role play out in the court opinions attempting to draw the line between acceptable and unacceptable lawyer assistance.

1. Lawyer as Drafter and the Ghostwriting Analogy

The most problematic cases are those in which the lawyer simply drafts the report, without initial input from the expert, and asks the expert to sign it. Arguably, if the expert accepts the report as his or her own, that is now the expert’s opinion and in the words of the Advisory Committee Note, the report “reflects the testimony to be given by the

\begin{footnotes}
\item[25] See \textit{infra} Part II.B.3.
\item[26] See \textit{generally infra} Parts II.B.2–4.
\item[27] See \textit{infra} text accompanying note 53.
\end{footnotes}
29. FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.

30. See, e.g., Maxson v. Calder Bros., No. 4:14CV01360 AGF, 2015 WL 4715955, at *1-2, *3 (E.D. Mo. Aug. 7, 2015) (noting that “generally, when an expert reads and signs a report prepared by counsel, the report is viewed as the expert’s” in case where court noted discussion between counsel and the expert preceding delivery of the report to the expert, the report was identical to those of three other experts, and included opinions on matters for which the expert was unqualified and which he later disowned); United States ex rel. Jordan v. Northrop Grumman Corp., No. CV 95-2985 ABC (Ex), 2003 WL 27366249, at *3 (C.D. Cal. Mar. 10, 2003) (finding that “even if much of the [expert’s report] was ‘fully developed’ [by counsel] when it reached [the expert], [the expert’s] adoption of the report is sufficient to meet the requirements of Rule 26(a)(2)(B)”).

31. See, e.g., Harmon v. United States, No. PX 15-2611, 2017 WL 4098742, at *9 (D. Md. Sept. 15, 2017) (finding that while counsel’s drafting of two expert witness reports was “ill-advised,” it did not warrant exclusion where the experts subsequently determined the reports “accurately reflected their conclusions”); Smith v. Tenmo Cardiovascular Sys. Corp., No. 2:12-cv-00998-DN, 2017 WL 8186899, at *1-2 (D. Utah Aug. 7, 2017) (finding it permissible for the expert report to have been drafted by the lawyer but “strongly encouragi[ng]” the adoption of a different practice in the future); O’Hara v. Travelers, No. 2:11-CV-208-KS-MTP, 2012 WL 3062300, at *9 (S.D. Miss. July 26, 2012) (acknowledging that while an attorney simply writing the report without the expert’s input and then requesting its adoption by signature violates the rule, “the Court does not hold that ‘ghost-writing,’ by itself, is sufficient to render testimony unreliable [and thus excludable] for Daubert purposes, [but] it should be a factor in the Court’s analysis”); Fed. Beef Processors, Inc. v. Royal Indem. Co., No. CIV. 04-5005-KES, 2008 WL 6953895, at *2 (D.S.D. July 18, 2008) (finding the failure of the expert to have any input in the report “troubling,” but finding it harmless error, and thus excused conduct under Federal Rule of Civil Procedure 37, because an attachment to the report was prepared by the expert and because the expert explained, in his deposition, which portions of the report reflected his opinion). Even if the practice does not violate the Federal Rules, it still presents a risky course as the expert will be less likely to be able to explain and defend the report. See Stuart, supra note 1 (pointing out that such a report “will, by all accounts, lead to an ineffective expert who can be discredited on cross-examination”).

32. MOORE ET AL., supra note 6, ¶26.23[5] (“The better view rejects the contention that a report prepared by counsel is the report of the expert, even if the expert ‘substantially’ agrees with its conclusions.”). The most cited case here is Manning v. Crockett, where the court stated:

[Preparing the expert’s opinion from whole cloth and then asking the expert to sign it if he or she wishes to adopt it conflicts with Rule 26(a)(2)(B)’s requirement that the expert “prepare” the report. Preparation implies involvement other than perusing a report drafted by someone else and signing one’s name at the bottom to signify agreement.

No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999). Cf. Anders v. United States, 307 F. Supp. 3d 1298, 1312-14 (M.D. Fla. 2018) (finding expert testimony unreliable where the expert incorporated lawyer-drafted opinions into his expert report and then lied under oath, claiming he had independently authored that portion of his report); DataQuill Ltd. v. Handspring, Inc., No. 01 C 4635, 2003 WL 737785, at *4 (N.D. Ill. Feb. 28, 2003) (excluding expert report which included verbatim language from the party’s interrogatory answers and concluding, “[w]e doubt the value to the trier of fact of a hired expert’s opinion when the party hiring him has put words in his mouth—or in this case, in his report-leaving him, in essence, a highly qualified puppet”).
expert sign the report, but also that the expert "prepare[]" it.\textsuperscript{33} Further, while the Advisory Committee Note contemplates that attorneys may participate in the process, their role is limited to "providing assistance."\textsuperscript{34} Assistance implies a lesser role than serving as sole or even principal author.\textsuperscript{35}

The analogy here is often to the concept of ghostwriting—the expert's name is on the report, but the report really reflects the efforts of the lawyer.\textsuperscript{36} Concerns about lawyer ghostwriting have largely arisen in the context of attorney preparation of pleadings which individuals then file pro se as their own.\textsuperscript{37} Pro se pleadings are treated leniently to compensate for the lack of legal training of most who file them.\textsuperscript{38} That leniency would not be given to a lawyer-drafted pleading. Filing a pleading that appears as though it was drafted by the party when it was really drafted by a lawyer provides that individual an unfair and unwarranted advantage.\textsuperscript{39}

A similar, though distinct, unfair and unwarranted advantage can occur when the expert's report is predominantly the work of a lawyer. Were the lawyer to directly offer the opinions in the report, they would not be admissible in evidence.\textsuperscript{40} Even if they were, they would be seen as the views of a partisan untrained in the area covered by the testimony.

\textsuperscript{33} FED. R. CIV. P. 26(a)(2)(B); see Manning, 1999 WL 342715, at *3 (noting that to allow "an expert to sign a report drafted entirely by counsel without prior substantive input from an expert would read the word 'prepared' completely out of the rule").

\textsuperscript{34} FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

\textsuperscript{35} See Moore ET AL., supra note 6, § 26.23[4] (noting that "the rule does not contemplate blanket adoption of reports prepared by counsel").

\textsuperscript{36} See, e.g., O'Hara v. Travelers, No. 2:11-CV-208-KS-MTP, 2012 WL 3062300, at *9 (S.D. Miss. July 26, 2012) (noting that "the inherent deception involved in such 'ghost-writing' taints the proposed expert testimony to a degree that its reliability may be questioned. Although the Court does not hold that 'ghost-writing,' by itself, is sufficient to render testimony unreliable for Daubert purposes, it should be a factor in the Court's analysis."); McClellan v. I-Flow Corp., 710 F. Supp. 2d 1092, 1118 (D. Or. 2010) (noting that "an expert report 'ghost-written' from 'whole cloth' violates the spirit, if not the letter of the Rule").

\textsuperscript{37} Court decisions and ethics opinions are split on the propriety of ghostwriting in this context. For a recent article summarizing this split, see Debra Lyn Bassett, Characterizing Ghostwriting, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 286, 291–96 (2015).

\textsuperscript{38} See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972) (noting that allegations in pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers").

\textsuperscript{39} See, e.g., Bassett, supra note 37, at 300-02 (noting this as the most common concern raised by those opposed to ghostwriting in this context). But cf. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-446, at 3 (2007) (arguing that if the lawyer's input is valuable, it will be obvious on the face of the pleading and the court can decline to give special deference). Other concerns are that the practice is deceptive, and that it possibly undercuts the lawyer's accountability for the work product. See, e.g., Halley Acklie Ostergard, Note, Unmasking the Ghost: Rectifying Ghostwriting and Limited-Scope Representation with the Ethical and Procedural Rules, 92 Neb. L. Rev. 655, 659-60, 664 (2014) (collecting cases).

\textsuperscript{40} See FED. R. CIV. P. 26(a)(2)(B).
When the expert serves as the conduit for the lawyer's thoughts, the opinions, if the expert meets the evidentiary standards to allow the expert's testimony, are given great weight. The expert often has strong credentials which are presented to assure the admission of the expert's testimony. This may be accompanied by a judicial declaration that the person is a qualified expert based on his or her training and experience who can help the trier of fact in the matter. Such experts may have particularly honed communication skills in an otherwise technical area. Thus, a jury may give the opinions expressed by experts greater weight than those of others.\(^4\)\(^1\)

In *Intermedics, Inc. v. Ventritex, Inc.*, the federal district court for the Northern District of California laid plain the concern. The court noted that:

> [W]ith respect to *expert* witnesses in particular, there is, inevitably, a dense and probatively significant interdependence between, on the one hand, the opinions and reasoning they present in testimony and, on the other, their background, experience, and personal characteristics and attributes.

Given that interdependence, it would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an "expert" in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know *who* is testifying. If it is the lawyer who really is testifying, surreptitiously through the expert (i.e., if the expert is in any significant measure parroting views that are really the lawyer's), it would be fundamentally unfair to the truth finding process to lead the jury or court to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed.\(^4\)\(^2\)

2. Lawyer as Mere Scrivener

On the other end of the spectrum, there is near universal approval of the lawyer as scrivener.\(^4\)\(^3\) In these cases the expert typically has set out the underlying facts, assumptions, findings, and opinions orally or in

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41. *See, e.g.*, Easton, *supra* note 1, at 480-91.
a number of memoranda and the lawyer simply records the information in proper form for an expert witness report. The lawyer is largely a transcriber, although one allowed a little grammatical license. Here the report seems clearly prepared by the expert even if the expert or his staff did not type it.

3. Lawyer as Compliance Counsel

Some cases stress that the requirements for the expert report required under the Federal Rules of Civil Procedure are rigorous and that those untrained in the law, without the assistance of lawyers, may not know how to meet them. Under this conception of the lawyer’s role, the lawyer should be involved, providing assistance to make sure the report is complete. The lawyer should work with the expert to assure that the report contains all that Rule 26(a)(2)(B) requires. The role of the lawyer is as a quality-control agent. The lawyer is to make sure that nothing pertinent is left out of the report that otherwise should be there.

44. See, e.g., Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 943 (E.D. Mich. 2014) (noting that "[i]n most cases, expert witnesses are not attorneys, and they may not apprehend the required components of a report set forth in Rule 26(a)(2)(B). The retaining attorney certainly may explain the rule’s requirements and coach the expert to be sure the report touches all the bases"); see also Manning v. Crockett, No. 95 C 3117, 1999 WL 342715, at *3 (N.D. Ill. May 18, 1999); Marek v. Moore, 171 F.R.D. 298, 301 (D. Kan. 1997) (noting that “[u]nlike the attorney, the expert witness more likely preoccupies himself with his profession or field of expertise. He may have little appreciation or none whatsoever for Rule 26 and its exacting requirements for a legally ‘complete’ report of the expert opinions, including all the ‘data or other information’ and designating all supporting exhibits . . . . [and concluding that] [i]t is essential to complete disclosure of the required information, counsel ordinarily should supervise preparation of the expert’s witness report.”).

45. See, e.g., Numatics, 66 F. Supp. 3d at 942 (noting that lawyer assistance to experts “generally is limited to ensuring that Rule 26’s formal requirements are satisfied”); James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC, No. 5:11-374-DCR, 2014 WL 1744848, at *6 (E.D. Ky. Apr. 30, 2014); cf. Manning, 1999 WL 342715, at *3 (noting that “certain kinds of help are clearly in tune with the concept of assisting the expert . . . . [such as] an attorney’s assistance with the preparation of documents required by Rule 26, such as a list of cases in which the expert has testified, or fine-tuning a disclosure with the expert’s input to ensure that it complies with the rules”).

46. Straying beyond quality control to having an impact on the substance of the testimony may be a step too far. See, e.g., In re Commercial Fin. Servs., Inc., No. 98-05162-R, 908-05166-R, 2005 WL 6725897, at *11 n.8 (Bankr. N.D. Okla. May 10, 2005) (stating that “[a]ssistance by counsel in drafting expert’s report is expected in connection with complying with the formalities required of Rule 26 (to insure that the report contains all information required by Rule 26 and completely discloses information considered by the expert, for instance), but not with respect to the substance of the expert’s opinions,” although determining that excessive assistance goes to the weight of the testimony, not its admissibility).

47. Marek, 171 F.R.D. at 301 (noting the importance of the lawyer in assuring the report comports with Rule 26(a)(2)(B)’s requirements to avoid possible exclusion of the report if it were incomplete).
As such, “counsel’s assistance is generally limited to helping the expert draft a report in a way that satisfies the requirements of Rule 26.”

4. Lawyer as Speaker for the Inarticulate

In explaining proper lawyer assistance to experts in preparing their reports, the Advisory Committee noted that “with experts such as automobile mechanics, this assistance may be needed.” The import of the comment is that some experts are not accustomed to communicating in writing and may need lawyer assistance to do so. If that is meant to be the paradigm for lawyer involvement, then lawyers, arguably, should not provide assistance when experts can prepare their own reports.

5. Lawyer as Collaborator

Most of the court opinions in this area embrace the role of lawyer as collaborator. The rules already contemplate that lawyers may communicate with the expert concerning “compensation for the expert’s study or testimony,” “facts or data” to be considered, and “assumptions” to be relied upon. The cases go further and allow the lawyer to help shape the testimony itself, including presenting it in a more persuasive voice, as long as the expert “substantially participated” in the report’s creation, or words to that effect. A few courts shift the emphasis from

49. FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.
50. See, e.g., Rodgers v. Beechcraft Corp., No. 15-CV-0129-CVE-PJC, 2017 WL 979100, at *6 (N.D. Okla. Mar. 14, 2017) (in evaluating whether the expert played a substantial role in creating the expert report, the court noted that “[t]he Advisory Committee Notes reference ‘automobile mechanics’ as a type of witness who may need assistance, and this could reasonably refer to a category of expert witnesses less familiar with writing reports or who intend to testify primarily on the basis of training or experience instead of academic requirements”; finding assistance to highly educated experts improper since “[t]he Advisory Committee Notes contemplate attorney ‘assistance’ in limited circumstances, but plaintiffs have not shown that this is a situation in which it was necessary for plaintiffs’ counsel to completely draft the report for [the expert]’); Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 54 (S.D. W. Va. 1995) (citing language from the Advisory Committee Note to distinguish automobile mechanics from “[p]laintiffs’ experts . . . primarily attorneys and claims representatives, who are experienced in writing reports and expressing opinions”).
52. FED. R. CIV. P. 26(a)(2)(B).

49. FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment.
50. See, e.g., Rodgers v. Beechcraft Corp., No. 15-CV-0129-CVE-PJC, 2017 WL 979100, at *6 (N.D. Okla. Mar. 14, 2017) (in evaluating whether the expert played a substantial role in creating the expert report, the court noted that “[t]he Advisory Committee Notes reference ‘automobile mechanics’ as a type of witness who may need assistance, and this could reasonably refer to a category of expert witnesses less familiar with writing reports or who intend to testify primarily on the basis of training or experience instead of academic requirements”; finding assistance to highly educated experts improper since “[t]he Advisory Committee Notes contemplate attorney ‘assistance’ in limited circumstances, but plaintiffs have not shown that this is a situation in which it was necessary for plaintiffs’ counsel to completely draft the report for [the expert]’); Smith v. State Farm Fire & Cas. Co., 164 F.R.D. 49, 54 (S.D. W. Va. 1995) (citing language from the Advisory Committee Note to distinguish automobile mechanics from “[p]laintiffs’ experts . . . primarily attorneys and claims representatives, who are experienced in writing reports and expressing opinions”).
52. FED. R. CIV. P. 26(a)(2)(B).

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substantial participation by the expert to a concern that the report’s substance accurately reflect the expert’s opinions. In reality both are required, although substantial participation should lead to opinions that accurately reflect the expert’s views.

The typical scenario in which this approach is explored is where the lawyer is the drafter of the report and the question becomes whether the expert’s contribution is substantial. Numerous cases have found it permissible for the lawyer to prepare the first draft of the report based on input from the expert and to draft the final report after the expert has reviewed it, made corrections as necessary, and adopted it as his own.

The best analogy here is to a lawyer’s coaching of witnesses. While there are critics of the current witness-coaching practices, substantial leeway is given to lawyers in this regard. As the Restatement (Third) of the Law Governing Lawyers provides:

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer’s client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness’s recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness’s recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness’s observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be


prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness’s meaning clear.\textsuperscript{59}

In helping the expert prepare the report, the lawyer arguably is doing no more than “suggest[ing] choice of words that might be employed to make the witness’s meaning clear.”\textsuperscript{60} That, however, understates the lawyer’s role. To see this, we might draw a distinction between occurrence witnesses and expert witnesses. The former are testifying about what they observed. Permissible coaching is not to change the testimony itself, simply its presentation. With respect to experts, in contrast, the lawyer is helping the expert form the very opinions to be proffered as testimony and thus potentially plays a role in creating the very substance of the testimony to be provided.\textsuperscript{61}

That distinction, however, may not be as stark as it appears. In preparing a lay witness, careful examination of the witness as part of the witness’s preparation might in fact change the testimony itself. Indeed, that is one of the oft-cited concerns about witness coaching.\textsuperscript{62} Further, even if the expert has not observed events about which to testify, the expert comes in with a skill set to develop, evaluate, and form opinions within his or her field of expertise. This skill set may make experts less susceptible to lawyer influence over the substance of their testimony than are lay witnesses.

Even if courts generally embrace this model, sometimes that collaboration can go too far.\textsuperscript{63} For example, in one case, the lawyer who provided assistance was also an expert in the area. Rather than simply assisting the expert by providing some basic information and editorial collaboration, the lawyer contributed to the actual study and its conclusions. Even though the expert played a substantial role in creating


\textsuperscript{60} Id.

\textsuperscript{61} Letter from Stephen D. Easton, C.A. Leedy Professor of Law & Curators Distinguished Teaching Professor, Univ. of Missouri Sch. of Law, to Peter G. McCabe, Sec'y for the Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. (Feb. 16, 2009) [hereinafter Easton Letter]: cf. Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 396-97 (N.D. Cal. 1991) (noting that “[t]he fact that so much expert testimony concerns matters that are essentially out of empirical control makes it all the more important for the trier of fact to know, accurately, the source of the testimony”).

\textsuperscript{62} See, e.g., Wydick, supra note 58, at 12; see also Lisa Renee Salmi, Note, Don’t Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, 18 Rev. Litig. 135, 157-63 (1999).

\textsuperscript{63} Cf. Geders v. United States, 425 U.S. 80, 90 n.3 (1976) (noting, in the context of the propriety of a lawyer discussing matters with a client during trial, that “[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it”).
the testimony and preparing the report, the lawyer's serving as a co-expert was seen as a step too far.\(^\text{64}\)

It should also be noted that the collaborative model is not without its critics. As one court explained:

Moreover, real harm to the truth finding process, as well as to public confidence in the integrity of our system of justice, can be done even when the influence a lawyer has on an expert's testimony is substantially more subtle and less flagrant than was the case in the "parroting" scenario that occurred in \textit{Occulto}. If it occurs at a key analytical juncture, even a modest and subtle redirection of an expert's emphasis, focus, or line of reasoning could have a major impact on the ultimate conclusion or opinion she reaches. Such redirection could be effected (sic) through conversation, written suggestion, or even in the way counsel package and deliver information to the expert. We are aware that at least some lawyers take professional pride in their ability to indirectly "control" their experts, e.g., through the timing or sequencing of the data/information they give the experts. Thus, we need not posit gross and clumsy corruption of the process to feel substantial concern about preserving (or promoting) the reality of independence in thinking that is presented to a jury as independent.\(^\text{65}\)

\textbf{C. The Case Law in Operation}

As the foregoing illustrates, there is no consensus as to the proper role for lawyers in assisting in the preparation of expert witness reports. As a practical matter, however, lawyers acting as a scrivener, compliance officer, or a speaker for the inarticulate is well accepted.\(^\text{66}\) The collaboration model also has been approved in the abstract, but at times the collaboration exceeds the limits of what is acceptable. To act as the principal drafter of the report, however, is seen by many as a step too far.\(^\text{67}\) This Subpart moves beyond an abstract discussion of the lawyer's role and steps into the weeds of the court decisions that have addressed where to draw the line between proper and improper lawyer assistance.

\(^{64}\) United States \textit{ex rel.} Barron v. Deloitte & Touche, LLP, No. SA-99-CA-1093-FB, 2008 WL 7136868, at *4-6 (W.D. Tex. Sept. 26, 2008) (disqualifying the expert and excluding her report and testimony on this ground). Contrast that case with \textit{Arista Records LLC v. Lime Grp. LLC}, in which the court approved assistance to the expert such as "obtaining the sample of files, categorizing the files in the sample, and implementing the statistical protocol" the expert had developed. 784 F. Supp. 2d 398, 412-13 (S.D.N.Y. 2011) (citing to the Advisory Committee Note on permissible assistance by counsel).

\(^{65}\) \textit{Intermedics}, 139 F.R.D. at 396.

\(^{66}\) \textit{See supra} Part II.B.2-5.

\(^{67}\) \textit{See supra} Part II.B.1.
Numerous opinions acknowledge that there is no bright-line test for when lawyer involvement in the creation of expert reports goes too far. Rather it is a case-by-case determination. Nevertheless, looking at those cases where courts found counsel’s assistance excessive helps provide a lens through which the case-by-case determination can be made.

1. Cases in Which Lawyer Assistance Renders the Expert’s Report Invalid

There are two different ways courts approach this issue. One is to focus on the comparative roles of counsel and the expert in preparing the report. The other is to consider whether outside pressures influenced the expert’s report.

Under the first approach, one might focus on the conduct of counsel to determine if the assistance provided exceeds permissible bounds or on the degree to which the expert participated in the creation of her own report. In reality, I suspect both are considered.

The second approach purports to analyze the motive of the expert. The report is considered improper if it appears the report was completed “merely for appeasement or because of intimidation or some undue influence by the party or counsel who has retained him.”

In practice, the courts appear to rely far more heavily on the first type of analysis than the second. The concern is raised in a variety of similar ways. Thus, a problem arises where the lawyer “prepar[es] the expert’s opinion from whole cloth and then ask[s] the expert to sign it.”


70. Id. at 302.

71. See, e.g., Bekaert Corp. v. City of Dyersburg, 256 F.R.D. 573, 578 (W.D. Tenn. 2009) (commenting that “[w]hether an expert report was prepared in a manner consistent with the mandates of Rule 26, usually turns on whether counsel’s participation so exceeds the bounds of legitimate assistance as to negate the possibility that the expert actually prepared his own report, i.e. the expert must substantially participate in the preparation of his report.”).


73. See, e.g., Trigon, 204 F.R.D. at 292; Marek, 171 F.R.D. at 302. See also notes 74-90 and accompanying text.

It is other times noted that "preparation" means involvement in the creation of the report rather than "perusing a report drafted by someone else and signing one's name at the bottom to signify agreement" or that "preparing a report implies involvement other than reviewing a report drafted by someone else and signing one's name in agreement with the contents."  

In reviewing the cases in which the court ordered exclusion of the expert report because of excessive lawyer involvement and insufficient expert input, several patterns emerge. The clearest cases are those where the lawyer writes the report and the expert merely signs it and adopts it as her own. Here the lawyer has done way too much and the expert way too little. But the situation need not be that extreme. In a number of cases, reports have been excluded where the lawyer created a first draft of the report with no input from the expert, the expert reviewed the report before adopting it but made few if any substantive changes. Absent evidence of extensive reworking of the report by the expert, this situation is a close cousin to the first.

The same problem may happen in reverse. If the expert prepares a first draft that is substantially changed substantively by the lawyer after the lawyer reviews it, that may suggest that the final report contains the views of the lawyer rather than the expert.

Tex. 2016).


77. See, e.g., Stein v. Foamex Int'l, Inc., No. CIV. A. 00-2356, 2001 WL 936566, at *5 (E.D. Pa. Aug. 15, 2001) (finding Rule violated where expert played "no apparent role" in drafting the report other than signing it); cf. O'Hara v. Travelers, No. 2:11-CV-208-KS-MTP, 2012 WL 3062300, at *9, *10 (S.D. Miss. July 26, 2012) (applying this principle in an instance where the draft was written by the party, rather than the lawyer, and treating it as one of the factors leading to exclusion of the expert's testimony).

78. See, e.g., Patent Category Corp. v. Target Corp., No. CV 06-7311 CAS (CWx), 2008 WL 11336468, at *4, *5 (C.D. Cal. July 17, 2008) (excluding testimony where first draft of report was prepared before the expert was hired and the expert made only a few changes; the court concluded, "it is clear that [the expert] did not prepare his expert reports, he did not assist defense counsel in drafting the report, nor did defense counsel draft the report under [the expert's] supervision. Under these circumstances, the Court concludes that [the expert's] expert testimony must be precluded."); see also St. Jude Med. S.C., Inc. v. Tormey, No. 11-327 (MJD/TNL), 2013 WL 3270382, at *6, *8 (D. Minn. June 26, 2013) (excluding expert where counsel wrote report before expert first saw it).

79. See, e.g., Cantrell v. BNSF Ry. Co., No. CIV 12-0129 KBM/SMV, 2013 WL 8632378, at *5 (D.N.M. June 28, 2013) (excluding expert's opinions as unreliable, noting that expert's "attorney-authored final expert report contains opinions that dramatically differ from [the expert's] original one paragraph opinion letter to counsel after seeing Plaintiff just one time. . . . [s]uggest[ing] that his final opinions were formed with a litigation purpose, and the
Other factors often are cited to support the proposition that the expert did not sufficiently participate in the report’s creation. In some instances, the expert admits at deposition that they did not in fact review documents upon which the expert’s opinion was formed or at least did not spend sufficient time reviewing them to reflect a serious consideration of them. Other times the expert, at deposition, disavows certain opinions in the report, is unable to defend it, or reveals that it contains opinions clearly outside of the expert’s expertise. A close look at the timing of the expert’s input also can suggest a lack of involvement. For example, in *Weekes v. Ohio National Life Assurance Corp.*, the court ultimately struck the expert report and excluded the expert’s testimony where counsel prepared and submitted the disclosure before the expert finalized his opinion. The court did so even though the expert had spent twelve hours on the matter and engaged in two teleconferences with counsel. The court interpreted this timing anomaly, and other factors, as “suggesting that counsel—not the expert—provided

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80. See, e.g., id., at *7; O’Hara, 2012 WL 3062300, at *9.
81. See, e.g., Rodgers v. Beechcraft Corp., No. 15-CV-0129-CVE-PJC, 2017 WL 979100, at *5 (N.D. Okla. Mar. 14, 2017); James T. Scatourchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC, No. 5:11-374-DCR, 2014 WL 1744848, at *6 (E.D. Ky. Apr. 30, 2014) (treating limited time expert spent in reviewing and revising report prepared by counsel as a factor in finding expert lacked sufficient input to be seen as “preparing” the expert report); Numatics, Inc. v. Balluff, Inc., 66 F. Supp. 3d 934, 942 (E.D. Mich. 2014) (noting among other factors in excluding the report that “[t]he plaintiff says that [the expert] represented that he spent less than eight hours reviewing technical literature, prior art references, and the patent; and he implausibly says that he reviewed nearly 2,600 pages of deposition transcripts in two to three hours”). *But cf.* Accentra Inc. v. Staples, Inc., No. CV 07-5862 ABC (RZx), 2010 WL 11459205, at *5 (C.D. Cal. Oct. 7, 2010) (finding that spending only three to four hours on a report did not make it unreliable where the “report was just over two pages and was not particularly complicated” and the expert had assistance from counsel, but acknowledging that the assistance of counsel matter could be brought up to challenge the weight of the opinion).
82. See Rodgers, 2017 WL 979100, at *6 (noting that the expert denied that he “personally had any knowledge supporting several of the opinions offered in the report”).
83. See, e.g., DataQuill Ltd. v. Handspring, Inc., No. 01 C 4635, 2003 WL 737785, at *4 (N.D. Ill. Feb. 28, 2003); Stein v. Foamex Int’l, Inc., No. CIV. A. 00-2356, 2001 WL 936566, at *5 (E.D. Pa. Aug. 15, 2001). *But see* Tindall v. H & S Homes, LLC, No. 5:10-CV-044(CAR), 2012 WL 3241885, at *2, *3 (M.D. Ga. Aug. 7, 2012) (holding that although deposition showed that expert “was unable to recognize blatant errors and misstatements in the Affidavit,” could not explain a principle asserted in the affidavit, and claimed to rely on sources he did not have, it would not strike the affidavit finding instead “that these matters are more aptly considered in the context of [the expert’s] credibility as a witness”).
the substantive leadership in preparing the expert’s report which warranted the report’s exclusion.

While not in and of itself dispositive, substantial similarities in the language used in the expert report and language used in other expert reports or in other documents may suggest the lawyer has played too much of a guiding hand.

So too would be the lawyers’ participation in the actual study upon which the expert’s opinion is based. Lawyers are expected to provide some factual information for the expert to consider and some assumptions to rely upon, but further entanglement in the study being conducted may go too far.

Ultimately, the court will look at the totality of the circumstances. Multiple indicia of lawyer over-involvement and expert under-

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86. Id.; see also Rodgers, 2017 WL 979100, at *2, *6, *7 (N.D. Okla. Mar. 14, 2017) (excluding the report in part because the expert only received important documents he was to review late in the process, only began reviewing them on January 30 with the report due on February 1, and spent only one hour preparing, reading, and editing the report drafted by counsel).

87. See, e.g., In re Jackson Nat’l Life Ins. Co. Premium Litig., No. 96-MD-1122, 2000 WL 33654070, at *1 (W.D. Mich. Feb. 8, 2000) (finding “undeniable substantial similarities” between the expert report and another expert report in an unrelated case involving the same counsel was proof that the lawyer’s actions “so exceeded the bounds of legitimate ‘assistance’ as to negate the possibility that [the expert] actually prepared his own report within the meaning of Rule 26(a)(2)”). But cf. McClellan v. I-Flow Corp., 710 F. Supp. 2d 1092, 1118, 1127 (D. Or. 2010) (allowing expert report and testimony despite evidence that two expert reports were, in part, similar if not identical, among other factors).


90. See, e.g., Rodgers, 2017 WL 979100, at *7 (applying a totality of the circumstances test); see also Reber v. Lab. Corp. of Am., No. 2:14-CV-2694, 2017 WL 3888351, at *4, *6, *7 (S.D. Ohio Sept. 6, 2017) (predicating exclusion on a variety of factors); Patent Category Corp. v. Target
involvement make it easier for the court to conclude that the report should be stricken, and the expert precluded from testifying.

2. Cases in Which Lawyer Assistance Is on the Line but Permissible

Another class of cases worth considering are those that find the lawyer’s conduct close to the line, but insufficiently improper to warrant striking the expert report and excluding the expert’s testimony. Most courts, while not endorsing the conduct, allow the testimony but note that the conduct does compromise the expert’s credibility which the trier of fact may take into account in evaluating the weight to be given to the expert’s opinion. In short, there remains a constraint on lawyer assistance, but one less severe than a total rejection of the expert and the report. Lawyers assisting experts at the line of permissibility will have to assess whether the benefits of their substantial assistance outweigh the risk to credibility such assistance may create.

The cases themselves share similarities with those where the lawyer’s assistance was found impermissible. For example, in one case, counsel drafted an outline of the report before engaging with the expert. In others, the expert’s report bore a striking resemblance to the

Corps., CV 06-7311 CAS (CWx), 2008 WL 11336468, at *5 (C.D. Cal. July 17, 2008) (predicating exclusion on a variety of factors); In re Jackson, 2000 WL 33654070, at *1 (predicating exclusion on a variety of factors).


92. See, e.g., McClellan, 710 F. Supp. 2d at 1127 (finding that the lawyer’s role in drafting the expert’s report "approaches the outer limits of acceptable assistance" but did not warrant exclusion of the expert’s testimony, though "it may undermine its weight and credibility"); Mack v. AmerisourceBergen Drug Corp., 671 F. Supp. 2d 706, 712 (D. Md. 2009) (recognizing that "expert testimony that has been influenced by a hiring attorney is often afforded less deference by a fact-finder"); Howard, 2008 WL 5130109, at *1 (commenting that although exclusion was not justified, the degree of lawyer assistance, which approached the limits of what is allowed, "may be fertile ground for cross-examination").

93. See generally Mannix, supra note 1 (noting that "[e]ven innocent and non-leading involvement can be spun by an effective adversary as coaching of the witness, which is likely to repel the jury" and that "[a]t a minimum, the attorney will be placed in the unenviable position of trying to convince the jury that the expert’s opinions were not improperly influenced").

94. Accentra, 2010 WL 11459205, at *5 (finding that although counsel prepared an outline for the report before the first meeting with the expert, the expert "was involved enough" subsequently to have "prepared" the document, even though the degree of input rendered the case a
reports of other experts.95 What distinguishes these cases from those in the previous section is that in each there was evidence that the experts involved did in fact play a substantial role in the creation of the reports.96 In calling these “close” cases, the courts implicitly were questioning the nature and extent of the lawyer’s involvement, but ultimately felt the true focus should be on the expert’s conduct. The ultimate question is whether the expert “prepared” the report within the meaning of Rule 26(a)(2). The degree of lawyer involvement is only relevant to the extent it undercuts the argument that the expert was sufficiently involved so as to be seen as preparing the report.97 In these cases the experts’ substantial input was shown.98

III. EXCLUSION AND CREDIBILITY DIMINUTION TO CONTROL LAWYER ASSISTANCE IN THE CREATION OF EXPERT REPORTS

Two remedies are usually raised to control excessive lawyer involvement in the preparation of expert reports. Where the assistance is extreme, the report and testimony by the expert may be excluded. Even if the lawyer’s contribution to the expert witness report is not so extensive as to warrant its exclusion, the lawyer’s participation still may undercut the credibility the trier of fact will give to the expert’s opinion. In numerous instances, courts have found this a sufficient backstop to lawyer overreaching such that substantial lawyer involvement will be allowed.

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95. See, e.g., McClellan, 710 F. Supp. 2d at 1118, 1127 (allowing in report, despite the fact that report of two experts were similar if not identical, where expert “conducted his study and formulated his opinion prior to his retention as an expert,” reviewed and edited the draft, and at deposition “adopted the substance of his report and explained the basis for his opinion”); Howard 2008 WL 5130109, at *1 (finding that although counsel drafted reports for two experts that were “virtually identical,” exclusion of the report was not required since the expert “reviewed substantial documentation provided to him before formulating his opinion, discussed his opinion ‘numerous times’ with defense counsel before signing an expert report, and reviewed the final expert report ‘from beginning to end’ before signing the report”); Lehman, 2007 WL 2265199, at *3 (denying exclusion, despite the fact that lawyer provided witness with a template based on the report of another expert tailored to suit the instant case, where expert was unaware of the origin of the template, had previously reviewed relevant documents and shared his opinions prior to receiving the template, and subsequently made modifications to the template and embraced the opinions as his own).


97. See supra note 71

98. It is unclear the extent to which these courts are simply evaluating similar conduct differently, finding it not quite as improper as exclusion courts, or whether the facts involved are slightly less egregious than those in cases where exclusion is imposed. See supra note 91 (discussing lawyer involvement in the preparation of expert reports at the edge of propriety).
A. Exclusion of Report and Testimony

In this area, the usual argument is that the lawyer’s assistance was so extensive that the expert did not “prepare” the report, as the Federal Rules require, and therefore it should be excluded. Two different vehicles are used to justify exclusion. One is from the Federal Rules of Civil Procedure themselves. The other is from the Federal Rules of Evidence. At times the courts employ both devices.99

Under Federal Rule of Civil Procedure 37(c)(1),

[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e) the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Where attorney assistance is too broad under the prevailing standard, the expert is seen as not having “prepared” the expert witness report as Rule 26(a)(2)(B) mandates and, hence, has not provided the information that rule requires. While justification or the harmlessness of the conduct will undercut the exclusion remedy, this often cannot be shown.

Federal Rule of Evidence 702 provides another vehicle for exclusion. Under that provision, expert testimony is allowed only if it is reliable.100 An expert report that merely parrots the lawyer’s input is not the sort of expert testimony we would deem reliable as it is not the work of a qualified expert.101 As one party argued, “if the opinions in the expert reports are not actually the opinions of the experts, then the report fails to satisfy the requirements of Fed. R. Evid. 702 because the report

99. The cases in this area do not address the real-world differences, if any, that stem from the approach taken.
100. See, e.g., Cantrell v. BNSF Ry. Co., No. CIV 12-0129 KBM/SMV, 2013 WL 8632378, at *2, *3-7 (D.N.M. June 28, 2013) (noting that Rule 702 requires a two-step analysis—that the expert is qualified and that the opinion rendered is reliable and helpful); see also Inventio AG v. Thyssenkrupp Elevator Americas Corp., No. 08-874-RGA, 2014 WL 174301, at *1 (D. Del. Jan. 14, 2014) (applying a 702 analysis to analyze the propriety of lawyer assistance in preparing an expert report).
101. See, e.g., Cantrell, 2013 WL 8632378, at *2-7; EEOC v. Rockwell Int’l Corp., 60 F. Supp. 2d 791, 794-97 (N.D. Ill. 1999) (excluding expert’s report under Daubert where, among other things, the expert overly relied on assistance of counsel); Joel S. Feldman, et al., Expert Witnesses in Insurance Class Actions and Individual Cases: Defense Perspective, SF50 A.L.I.-ABA 278-79, 280-85 (2000) (“Thus, if counsel drafts an expert’s report without substantial input from the expert, the opinions in that report cannot be considered reliable because they are not the opinions of the expert. Likewise, if an expert writes a report simply to appease counsel or the party paying the expert, that too is not a reliable underpinning for his opinions, and the likely result would be exclusion of the report.”).
must be based on the expert's own valid reasoning and methodology to be admissible.\textsuperscript{102}

\section*{B. Credibility Diminution}

Often, however, courts, while questioning the extent of lawyer involvement, find exclusion too harsh a remedy.\textsuperscript{103} Although the report is allowed in discovery, and the expert is allowed to testify in a subsequent trial,\textsuperscript{104} the credibility of the report and testimony may be affected by the lawyer's role. This can occur at two levels. At the most basic, the expert must ultimately defend his testimony. If the expert is little more than a conduit for the lawyer's views, the expert may be unable to defend her report effectively. That, in turn, will diminish its impact. In addition, proof of excessive lawyer involvement may undercut the degree the trier of fact will credit the testimony. It will be clear it is less a product of applied expertise of a well-qualified expert and more the advocacy of a lawyer who lacks the substantive expertise that supports giving weight to such testimony. As one court described it: "[A]n expert who can be shown to have adopted the attorney's opinion as his own stands less tall before the jury than an expert who has engaged in painstaking inquiry and analysis before arriving at an opinion."\textsuperscript{105}

\begin{footnotesize}
\textsuperscript{103} See, e.g., Harmon v. United States, No. PX 15-2611, 2017 WL 4098742, at *9 (D. Md. Sept. 15, 2017) (noting that "while it may be ill-advised for an attorney to take such an active role in drafting the Rule 26 report, the extreme sanction of exclusion is not warranted" where attorney drafted two virtually identical reports which the experts adopted without revision); Patent Category Corp. v. Target Corp., No. CV 06-7311 CAS (CWx), 2008 WL 11336468, at *3 (C.D. Cal. July 17, 2008) (noting that exclusion "is seldom appropriate," although finding it so on the facts before the court).
\textsuperscript{104} In one case, the court allowed the expert report to stand and the expert to testify despite finding that much of the testimony was outside the expert's expertise, was drafted primarily by counsel and amounted to "a legal brief or a patent law seminar [which is] neither normal nor proper." KNAPP Logistics & Automation, Inc. v. R/X Automation Sols., Inc., No. 14-cv-00319-RBJ, 2015 WL 5608124, at *1-2 (D. Colo. Sept. 24, 2015). Instead the court admonished counsel, I need not go through his 62-page report line by line and coach counsel as to what Dr. Derby can and cannot do, nor do I need to review his supplemental report. ECF No. 152-1. Counsel surely gets the drift and, since they hope to be effective advocates at trial, they will conform their questioning of Dr. Derby to the letter and spirit of this order. Otherwise, they are in for repeated interruptions of testimony, exclusions of testimony, and admonitions from the Court.
\end{footnotesize}
IV. Proof of the Degree of Lawyer Assistance in the Creation of Expert Reports

As we have seen, excessive lawyer assistance in the preparation of expert reports is cabined both by exclusion of the expert's testimony, at the extreme, and by the threat that lawyer conduct once exposed will undercut the credibility of the expert's testimony. But how does one create a record of lawyer involvement such that exclusion can be ordered or credibility undercut? The problem is exacerbated by burden of proof issues as the party seeking exclusion of the expert report bears the burden of showing excessive lawyer involvement, yet the information necessary to show so is largely in the hands of the opponent.

A. The 2010 Amendments to the Expert Discovery Rules and Their Impact

When the expert report was added to the Rules in 1993, this was a relatively easy task. The drafters contemplated that draft reports would be discoverable as would material shared by the lawyer with the expert. Comparing drafts might show changes originating from the lawyer. The lawyer's written suggestions would be known and oral.

106. This is true if exclusion is sought under the Federal Rules of Civil Procedure. See, e.g., Long-Term Capital Holdings, LP v. United States, No. 01-CV-1290(JBA), 2003 WL 21269586, at *4 (D. Conn. May 6, 2003); Trigon Ins. Co. v. United States, 204 F.R.D. 277, 295 (E.D. Va. 2001); accord Seitz v. Envirotech Sys. Worldwide Inc., No. H-02-4782, 2008 WL 656513, at *2 (S.D. Tex. Mar. 6, 2008) (citing Long-Term Capital Holdings, 2003 WL 21269586, at *4; Trigon, 204 F.R.D. at 295). However, if noncompliance is shown and the question becomes whether it will be excused under Federal Rule of Civil Procedure 37, the burden is on the party seeking to avoid exclusion. See, e.g., Weekes v. Ohio Nat'l Life Assurance Corp., No. 1:10-cv-566-BLW, 2011 WL 6140967, at *5 (D. Idaho Dec. 9, 2011). In contrast, if exclusion is premised on Federal Rule of Evidence 702, the party proffering the expert has the burden of showing that the expert's testimony meets the Daubert test for admission. See The Daubert Standard: A Guide to Motions, Hearings, and Rulings, Expert Inst. (Nov. 20, 2018), https://www.theexpertinstitute.com/the-daubert-standard-a-guide-to-motions-hearings-and-rulings (noting that "[o]nce a Daubert motion is filed, the party seeking to admit the testimony bears the burden of proof and must prove by a preponderance of the evidence that the expert possesses the requisite level of expertise and the testimony is based on reliable methodologies").


108. As the Advisory Committee noted when adopting the expert report requirement, "litigants should no longer be able to argue that materials furnished to their experts to be used in formulating their opinions—whether or not ultimately relied upon the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Id.

109. This was a common approach prior to 2010 when such information was most often discoverable. See, e.g., EEOC v. UPS, 149 F. Supp. 2d 1115, 1138-40 (N.D. Cal. 2000) (providing the expert's testimony diminished credibility in part because upon reviewing drafts of the expert's report it revealed substantial changes had been made, all at the suggestion of counsel), aff'd in part, rev'd in part sub nom. 306 F.3d 794 (9th Cir. 2002), opinion amended on denial of reh'g, 311 F.3d 1132 (9th Cir. 2002); W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., No. 98-CV-838S(F), 2000 WL
input could be explored. While the federal courts were not unanimous in reading the rule to require disclosure of all lawyer work-product shared with the testifying expert, that was clearly the majority view.\(^\text{110}\)

Transparency was seen as the best method to both allow lawyer assistance and keep it within sensible bounds. Transparency would work as both a deterrent and a protection. Lawyers would cabin their involvement knowing it might well be discovered.\(^\text{111}\) To the extent lawyers nevertheless exceed permissible bounds, discovery could uncover that behavior, subjecting the lawyer to reputational consequences and the expert’s testimony to exclusion or credibility impairment.

By 2010, the drafters noted a growing concern by the Bar that transparency had its own costs, costs that outweighed its alleged advantages.\(^\text{112}\) The argument against the transparency regime was several-fold. First, was an argument that there was no quantifiable evidence that transparency achieved its desired result.\(^\text{113}\) That, however,

1843258, at *5 (W.D.N.Y. Nov. 2, 2000) (noting from seeing lawyer input on drafts that while some changes were matters of form others were substantive thus “rais[ing] an issue of the extent to which [the expert] final report represents [the expert’s] own product or that of Defendant’s attorneys”); Marek v. Moore, 171 F.R.D. 298, 302 (D. Kan. 1997).

110. See Fed. R. Civ. P. 26 advisory committee’s note to 2010 amendment (indicating that “many” courts held this view); Tanis et al., supra note 18 (noting that “[u]nder the 1993 version of Rule 26(a)(2)(B), most courts held that everything disclosed to and considered by an expert witness was discoverable,” (citing inter alia Reg’l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 717 (6th Cir. 2006) (finding that “the overwhelming majority of courts” had adopted a “a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts”))).

111. Easton Letter, supra note 61, at 13 (stressing the deterrent effect of transparency); Letter from 37 Law Professors, supra note 21, at 2 (stressing the deterrent effect of transparency).

112. See, e.g., COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 10-11 (2009). Numerous organizations, collectively representing a wide-range of those involved in the civil litigation process, supported the amendments. Among them were the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice, the Federal Magistrate Judges’ Association, the Lawyers for Civil Justice, the Federation of Defense and Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice. Id. Expert witness groups, such as the American Institute of Certified Public Accountants, also weighed-in in favor of the proposal. See, e.g., Letter from Patrice Schiano, Chair, Am. Inst. of Certified Pub. Accountants’s (“AICPA”) Forensic & Litig. Serv. Comm., and Thomas E. Hilton, Chair, AICPA’s Forensic & Valuation Serv. Exec. Comm., to Peter G. McCabe, Sec’y for the Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S. 2 (Feb. 17, 2009). A notable exception was the input of law professors, many of whom had trial and expert witness experience, who opposed the amendments. See, e.g., Easton Letter, supra note 61, passim; Letter from 37 Law Professors, supra note 21.

113. A major impetus for the rule revision was a report and resolution from the ABA to limit the discovery of drafts and attorney-expert communications. In the report, the American Bar Association noted that there was “no evidence, empirical or otherwise” supporting open discovery of such communication as being superior to the more limited discovery approach. See, e.g., AM. BAR. ASS’N, SECTION OF LITIGATION, DISCOVERABILITY OF EXPERT REPORTS 7 (2006),
was a bit of a makeweight as there also was no empirical evidence that it did not.¹¹⁴ Second, there was an ad hominem attack that the transparency approach was the product of academic theoreticians not grounded in the real world of practice.¹¹⁵ More powerful was the critique of what was actually happening on the ground—lawyers and experts adapted to the transparency regime in several ways. It became common for the parties to agree not to inquire about draft reports or lawyer involvement in the creation of the expert report.¹¹⁶ Where this was unavailable, experts ceased creating written drafts of their reports and elaborate processes were put in place to avoid creating a paper trail of the lawyer’s input.¹¹⁷ The primary impetus for this behavior was to protect opinion work product from discovery.¹¹⁸

In addition, it was alleged that much of discovery turned not on the merits of the expert’s report and the expert’s ability to defend that report but rather on the process of preparation itself and the lawyer’s role in it.¹¹⁹ Those who objected to transparency found such inquiries a costly exercise that seldom bore fruit.¹²⁰ In short, transparency was thwarted when it could be, and when it could not, little was gained by shedding light on the lawyer-expert collaborative process.¹²¹

https://www.americanbar.org/content/dam/aba/migrated/litigation/standards/docs/120a_report.authcheckdam.pdf. This recommendation led to an ABA resolution in support of such discovery limits. See AM. BAR ASS’N, RESOLUTION 120A, DISCOVERABILITY OF EXPERT REPORTS (2006), https://www.americanbar.org/content/dam/aba/migrated/litigation/standards/docs/120a_policy.pdf.

¹¹⁴ See generally AM. BAR ASS’N, supra note 113, at 7 (noting only that “there is no empirical evidence of which we are aware that disclosure of draft expert reports and attorney-expert communications has improved the quality of justice, or that without that disclosure, counsel or the trier of fact has been hindered in the ability to test the merits of an expert’s opinion.”).

¹¹⁵ See, e.g., COMM. ON RULES OF PRACTICE & PROCEDURE, supra note 112, at 13 (noting opposition to the amendments by academics, but finding their concerns “not borne out by the practitioners’ experience”); CIVIL RULES ADVISORY COMM., DRAFT MINUTES 18 (Sept. 7-8, 2006), https://www.uscourts.gov/sites/default/files/fr Minute/CV09-2006-min.pdf (summarizing testimony of ABA representative that those who favored open disclosure “tend to be judges and professors not involved in daily expert-witness practice,” deriding their views as mere “theory”).

¹¹⁶ See, e.g., COMM. ON RULES OF PRACTICE & PROCEDURE, supra note 112, at 12 (acknowledging that under the 1993 discovery regime “[m]any experienced lawyers routinely stipulate[d]” to such limitations).

¹¹⁷ See, e.g., id. at 10-11; see also David Herr & Steve Baicker-McKee, Expert Disclosures—Review of the Expert’s File-Role of Counsel in the Drafting Process, FED. LITIGATOR, June 2013, at 15 (describing several of the common steps taken to avoid creating a paper trail of lawyer-expert interaction).

¹¹⁸ See COMM. ON RULES OF PRACTICE & PROCEDURE, supra note 112, at 10, 11.

¹¹⁹ See id. at 11-12.

¹²⁰ See id. at 10-13 (arguing that exploration into the lawyer’s role in preparing the expert report was “rarely successful” and “was time-consuming and expensive”).

¹²¹ A related concern was that lawyers were forced to hire two sets of experts, one set being non-testifying experts with whom conversation was largely immune from discovery and testifying experts subject to the open-discovery regime. See, e.g., FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment. With greater protection from discovery, one expert could be used for both
In response, the drafters added restrictions on discovery in this area. First, the rule extends work product protection to all lawyer communications with testifying experts except those that relate to expert witness compensation, “facts or data” considered, or “assumptions” relied upon by the expert. If a communication contains both information falling within the three exceptions, and some that does

testifying and consultative purposes.

122. For a discussion of some of the case law interpreting these restrictions, see 3 BUS. & COM. LITIG. FED. CTS. § 29:10 (4th ed. 2018).

123. FED. R. CIV. P. 26(a)(2)(B)(ii). The Advisory Committee Note states that the phrase “facts or data” should be “interpreted broadly” to include any material “that contains factual ingredients.” FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment. To the extent facts and data are provided by an attorney, disclosure in discovery is required “only [as] to communications ‘identifying’ the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.” Id. The drafters also made clear that the phrase “facts or data” is narrower than the previously used phrase “data or other information” and does not encompass theories or mental impressions of counsel. Id.; see also Carpenter v. Deming Surgical Assocs., Civ. No. 14-64 JCH/SCY, 2015 WL 13662880, at *3 (D.N.M. Apr. 20, 2015) (noting that “mere stylistic edits are not discoverable communications pursuant to the facts, data, or assumptions exceptions, as [the expert] did not consider or rely on them in forming his opinion”). Whether this distinction between “facts and data” and other information can be clearly ascertained is open to debate. See, e.g., William H. Gussman Jr., Amended Expert Discovery Rules One Year Later: Has Anything Changed?, N.Y.L.J., Jan 18, 2012, at 4, 4-5 (arguing that “[a]lmost any communication between an attorney and an expert could arguably contain a ‘fact’ or an ‘assumption’ and recommending that lawyers ‘continue to be cautious in working with testifying experts, mindful that just about anything shared with a testifying expert may still be fair game in discovery’”). To lessen this concern, it has been suggested as a best practice that lawyers seek to separate communications of fact and data from those containing mental impressions and theories in order to minimize any confusion. Robert J. Liubicic, Expert Q&A on the Rule 26 Amendments: Developing Case Law, PRAC. L.J. LITIG., Feb.-Mar. 2014, at 23.

124. As one court held with regard to material sent to testifying experts, the term “considered” should be interpreted broadly to require “disclosure of all information a testifying expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected.” In re Benicar (Olmesartan) Prods. Liab. Litig., 319 F.R.D. 139, 141 (D.N.J. 2017) (quoting Synthes Spine Co. v. Walden, 232 F.R.D. 460, 463 (E.D. Pa. 2005)); accord Millsaps Coll. v. Lexington Ins. Co., No. 3:16CV193-CWR-LRA, 2017 WL 3158879, at *3 (S.D. Miss. July 24, 2017) (quoting In re Benicar, 319 F.R.D. at 141). This is true even if the expert testifies that she did not “consider” the information. E.g., In re Commercial Money Ctr., Inc., Equip. Lease Litig., 248 F.R.D. 532, 537 (N.D. Ohio 2008) (noting that “experts have been deemed to have considered materials even when they have testified, under oath, that they did not consider the materials in forming their opinions”); accord Wellin v. Farace, No. 2:16-cv-00414-DCN, 2018 WL 7247056, at *6 (D.S.C. Dec. 5, 2018), report and recommendation adopted sub nom. No. 2:16-cv-0414 DCN, 2019 WL 466461 (D.S.C. Feb. 6, 2019).

125. FED. R. CIV. P. 26(b)(4)(C)(ii). The phrase “relied upon” is narrower than the term “considered.” It “means that the expert’s opinion depended upon the assumptions provided by the attorney.” Johnson v. City of Rockford, No. 15 CV 50064, 15 CV 50065, 2018 WL 1508482, at *2 (N.D. Ill. Mar. 27, 2018).

126. To the extent a lawyer’s communication to the expert falls into one of the three exceptions to work-product protection, must the communication itself be produced in response to an appropriate discovery request? Federal Rule 26 eliminates work-product protection for “communications” containing certain kinds of information which suggests that the communications
not, the protected information will be redacted and the remainder disclosed.\(^{127}\) Second, the Rule provides work product protection for drafts of expert witness reports,\(^{128}\) unless a draft is used by the lawyer to convey facts or data to be considered or assumptions ultimately relied upon by the expert.\(^{129}\)


127. See, e.g., Mitchell v. Mgmt. & Training Corp., No. 3:16 CV 224, 2018 WL 4957290, at *6 (N.D. Ohio Mar. 9, 2018); Dongguk Univ. v. Yale Univ., No. 3:08-CV-00441 (TLM), 2011 WL 1935665, at *2 (D. Conn. May 19, 2011); FED. R. CIV. P. 26 advisory committee’s note to 2010 amendments (noting that if a communication contains both protected and unprotected material “the protection applies to all other aspects of the communication beyond the excepted topics”); see also In re W. States Wholesale Nat. Gas Antitrust Litig., No. 2:03-cv-01431-RCJ-PAL, 2017 WL 2991347, at *7, *8, *10 (D. Nev. July 12, 2017) (holding that evidence notebooks prepared by counsel and relied upon by the expert do not have to be disclosed where underlying documents it contained had been disclosed and that producing notebooks which showed counsel’s excerpting, organizing, and commenting on those documents would reveal lawyer mental impressions); 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2016.5 (3d ed. 2010) (stating “where the documents reviewed by the witness have already been produced, there is no justification for requiring revelation by counsel of the exact identity or sequence of materials actually reviewed”).

128. FED. R. CIV. P. 26(b)(4)(B). A distinction has arisen, however, between expert notes, which are discoverable, and draft expert reports which are not. For a thoughtful decision providing guidance on how to draw this distinction, see Wenk v. O’Reilly, No. 2:12-cv-474, 2014 WL 1121920, passim (S.D. Ohio Mar. 20, 2014); see also In re Application of Republic of Ecuador, 280 F.R.D. 506, 512, 513 (N.D. Cal. 2012) (distinguishing notes, task lists, outlines, memoranda, presentations, and draft letters from draft reports); In re Asbestos Prods. Liab. Litig. (No. VI), No. MDL 875, 2011 WL 6181334, at *6-7 (E.D. Pa. Dec. 13, 2011) (finding that expert’s notes do not constitute drafts within the meaning of the rule). While the rule explicitly protects drafts of expert reports, it is not limited to reports written by experts. If the lawyer provides a draft of the report as part of the process, it is also protected unless it conveys material subject to discovery under Rule 26(b)(4)(C). See, e.g., United States ex rel. Wall v. Vista Hospice Care, 319 F.R.D. 498, 510-11 (N.D. Tex. 2016).

129. See, e.g., United States ex rel. Wall, 319 F.R.D. at 509 (“Accordingly, reading Rule 26(b)(4) to require disclosure of those portions of a draft expert report transmitted between an attorney and an expert that identify facts, data, or assumptions provided by an attorney—even though the vehicle of communication between the attorney and the expert was a draft of a report or an attorney’s revision to the expert’s draft—does not undermine the purpose behind providing work-production protection to draft reports or render Rule 26(b)(4)(B)’s extension of work-product
By limiting the information available to an adversary, it makes it harder for the adversary to prove the level of lawyer assistance in order to determine its propriety or the impact it should be accorded by the trier of fact. As one author described it, if one cannot discover draft reports and most lawyer-expert communications, "what will stop attorneys from ghost-writing reports in violation of the rule?" Another author cautioned:

Recent rule changes even preclude discovery of interactions between lawyers and hired gun experts. This rule change permits attorneys to secretly coach highly paid witnesses and coordinate a tailored opinion with little or no fear that opposing attorneys or the jury will ever learn of the attorney’s suggestions or rewrites.

To understand this new world of expert discovery and the degree discovery is limited, one needs to explore the motivations for the restrictions imposed. One concern was that inquiries into the role

protection to drafts a nullity. The discovery authorized by the Rule 26(b)(4)(C)(ii)-(iii) exceptions does not extend beyond the specific topics listed in the exceptions. The remainder of any draft report would be covered as work-product under Rule 26(b)(4)(B) and, for that matter, insofar as it is transmitted between the attorney and the expert, Rule 26(b)(4)(C)."

See, e.g., Newell, 301 F.R.D. at 352 ("The CFTC’s approach would require an analysis of the degree of counsel involvement (both quantity and quality) in the drafting of the report . . . . which would necessarily require production of all of the drafts of the report for comparison, as well as production of all, or virtually all, communications between expert and counsel. The drafters intended Rule 26(b)(4)(B) and (C) to protect against that discovery."); Goodness Films, LLC v. TV One, LLC, No. CV 12-08688-GW (JEMx), 2013 WL 12136374, at *2 (C.D. Cal. Aug. 13, 2013) (rejecting, as inconsistent with the purpose of the 2010 amendments, a party request for production of an expert’s draft report in order to determine the extent of lawyer involvement).

See supra note 1.


133. As discussed in the text, there were two principal motivations behind the 2010 amendments. One might sensibly construe the amended rules in a way that achieves both goals. Nevertheless, the cases appear to choose between the two with that choice affecting the interpretation given to the amended provisions. See infra text accompanying notes 134-37.
counsel played in the creation of expert reports was too costly and often provided little of true value in return.\textsuperscript{134} If that is the primary motivation, then discovery of the role played by the lawyer should be highly limited.\textsuperscript{135}

Another motivation was a desire to allow lawyers to speak freely to experts without fear that their mental impressions, theories of the case, etc. would be revealed.\textsuperscript{136} If this concern is the key, then discovery that does not reveal this information or otherwise inhibit such discussions might be permissible. As one court wrote: "The bright-line rule [everything shown to the expert is discoverable] is no longer valid; attorneys' 'theories or mental impressions' are protected, but everything else is fair game."\textsuperscript{137}

\section*{B. Disagreement over the Means by Which Lawyer Assistance May Be Discovered\textsuperscript{38}}

Take, for example, questions about the role the lawyer played in preparation of the expert's report. If our goal is streamlining the discovery process in this area, such questions would be impermissible. If our goal is protecting lawyer mental impressions from discovery, providing gross information about the lawyer's role (e.g., the lawyer wrote the first draft after input from the expert) would be permissible. Questions about who wrote a particular paragraph might be more problematic as it shows the lawyer's thinking. Then again, actual input

\begin{footnotesize}
\begin{enumerate}
\item See supra text accompanying notes 119-21.
\item See, e.g., Republic of Ecuador v. Mackay, 742 F.3d 860, 870 (9th Cir. 2014) (noting that "the driving purpose of the 2010 amendments was to protect opinion work product—i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery").
\item The history of the adoption of the 2010 amendments provides no clear answer to this issue. Judge Mark. R. Kravitz, Chair of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, argued strongly that no inquiry into the lawyer's role in assisting in the preparation of the expert's report would be allowed under the proposed 2010 amendments. He appeared to embrace the extreme position (at least in the case law) that it makes no difference who drafts the report. If the expert adopts it as her own, that is sufficient; the role of the lawyer in its preparation is irrelevant. Others disagreed on a variety of grounds. See \textit{Comm. ON RULES OF PRACTICE AND PROCEDURE, STANDING COMM. MINUTES}, June 2008, at 34-39 (2008), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2008.
\end{enumerate}
\end{footnotesize}
as to the report itself often falls within the discoverable categories of information or data the expert considered or assumptions the expert relied upon. Once the material is in the report it is clear the expert considered it and in fact relied upon it.¹³⁹ Even if the choice to add the material reflects the lawyer’s legal theories and opinions, they cease to be such when adopted by the expert. This is just like contention interrogatories. While the decision as to what contentions to allege is a lawyerly judgment, knowing which contentions the party has chosen to assert is discoverable.¹⁴⁰

Given these differences, it is not surprising that the case law is mixed on some fundamental issues.¹⁴¹ For example, is it permissible to ask the expert what role the lawyer played in the final report or which paragraphs the lawyer drafted?

Some courts find that it is.¹⁴² For example, in Johnson v. City of Rockford, the parties fought over whether it was proper to inquire about who drafted which portions of the expert’s report.¹⁴³ When raised at the expert’s deposition, the opposing party instructed the expert not to answer, claiming such information was work product and therefore protected by Rule 26(b)(4)(C).¹⁴⁴ The court, however, held that that information was discoverable.¹⁴⁵ The court pointed out that, by raising the defense, the party was implicitly admitting that the lawyer drafted portions of the expert’s report since the defense raised only protects attorney/expert communications from disclosure, not communications

¹³⁹. See, e.g., Johnson, 2018 WL 1508482, at *5 (articulating this analysis); Gerke v. Travelers Cas. Ins. Co., 289 F.R.D. 316, 328-29 (D. Or. 2013) (arguing that if the expert report contains analysis provided by the lawyer, it is information considered in forming the opinion—a communication expressly exempted from work-product protection).


¹⁴¹. Perhaps because of this, one commentator cautions that even with the 2010 limitations on expert discovery, while “[l]awyers can take comfort in the protections offered by the rule, . . . they must still not become complacent.” John M. Barkett, Draft Expert Reports and Work Product, NAT. RES. & ENV’T, Fall 2015, at 52, 53.

¹⁴². See, e.g., Gerke, 289 F.R.D. at 324, 328; Cantrell v. BNSF Ry. Co., No. CIV 12-0129 KBM/SMV, 2013 WL 8632378, at *6-7 (D.N.M. June 28, 2013); Lehman Bros. Holdings v. Laureate Realty Servs., Inc., No. 1:04-cv-1432-RLY-TAB, 2007 WL 2265199, at *2 (S.D. Ind. Aug. 6, 2007); cf. Gergacz, supra note 11, at § 7.55 (arguing that the amended rule limiting discovery should be narrowly construed to “accommodate the needs of justice” which are promoted by allowing discovery of the expert’s role except as explicitly limited by the Rule 26(b)(4)(B) and (C)).


¹⁴⁵. Id. at *6-7.
from others. The court then asked the expert to identify, for in-camera inspection, which portions of the report were written by the attorney. That, in turn, allowed the court to analyze which portions of the report contained facts considered and assumptions relied upon, information unprotected by the work-product doctrine. In a colorful conclusion, the court explained why such inquiry should be allowed:

The Defendants should be allowed to cross-examine the Plaintiffs’ expert with the fact that somebody else typed portions of his report. Perhaps the Plaintiffs have a good reason why somebody else typed portions of Mr. Libby’s report. Maybe Mr. Libby’s hand was bitten by a dog, smashed in a car door or had a piano keyboard cover slammed onto it. If so, then Plaintiffs’ counsel will be able to elicit that fact on redirect examination. Maybe the reason for having somebody else type portions of Mr. Libby’s report is not as good. For example, maybe Mr. Libby failed to comprehend the Plaintiffs’ counsels’ belief of the import of certain facts, data, and assumptions, and, consequently, counsel decided to include those into the report, lest Mr. Libby not be able to testify to them. Fed. R. Civ. P. 37(c)(1). The charade regarding “preparation” of expert disclosures and reports contained in Rule 26 surely does not go so far as to allow counsel to write an expert’s report—or portions of it—and then hide that fact from the jury. Cross examination will allow the jury to determine how much weight to give to Mr. Libby’s opinions.

Another argument in favor of disclosure is that the work-product protection only applies to attorney/expert “communications” and knowing that the attorney participated in the report’s drafting does not reveal a communication. Further, permitting counsel through deposition questions to identify the role opposing counsel played in the

146. Id. at *5 n.2.
147. Id. at *3.
148. One could argue that any material in a report written by the lawyer and adopted by the expert is material relied upon and therefore unprotected by the work-product doctrine. As the court commented: “Counsel cannot argue that [the expert] did not consider the facts or data or rely upon the assumptions when this information is contained in the final report.” Id. at *5. On the other hand, if the underlying facts and data and assumptions have already been disclosed, the further information of how the lawyer reformulated that into testimony may still warrant protection. As the 2010 Advisory Committee’s note to Rule 26 provides, “[t]he exception applies only to communications ‘identifying’ the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.” FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment; cf. WRIGHT ET AL., supra note 127, at § 2016.5 (stating “where the documents reviewed by the witness have already been produced, there is no justification for requiring revelation by counsel of the exact identity or sequence of materials actually reviewed”).
150. Knowing that the lawyer participated in the drafting is one thing. Knowing precisely which sentences in the report are the lawyer’s work, in contrast, certainly reveals a communication.
creation of the expert report allows a party to uncover the degree of lawyer involvement while keeping the lawyer-expert communications themselves protected from discovery.151 Allowing such discovery seems essential if we are to adequately police the boundary between legitimate assistance of counsel and the impermissible usurpation of the expert’s role.152

In contrast, other courts believe inquiry about the lawyer’s role in the authorship of particular portions of a testifying expert’s report is off limits.153 They see this as just the sort of time-consuming and costly inquiry the 2010 amendments concerning discovery of testifying experts were adopted to avoid.154 Arguably, as long as we know the facts and data considered and the assumptions relied upon, along with the expert’s ability to defend the report, including inquiry about communications from non-lawyers, that should be sufficient for the trier of fact to

151. See, e.g., Carpenter v. Deming Surgical Assocs., Civ. No. 14-64 JCH/SCY, 2015 WL 13662880, at *5 (D.N.M. Apr. 20, 2015) (finding that the availability of deposition examination about the lawyer’s role obviates the need for the communications themselves).

152. See David Herr & Steve Baicker-McKee, supra note 117, at 21-22 (advocating that rule should be read “to allow opposing counsel to explore during the deposition who wrote which parts of the expert report . . . . so that), at trial, counsel can argue to the jury either that opposing counsel drafted the expert report or that the expert cannot even identify which parts the expert drafted and which parts counsel drafted”).

153. See, e.g., In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig., No. 1:14-md-2570-RLY-TAB, 2018 WL 6113466, at *4-5 (S.D. Ind. Nov. 21, 2018) (prohibiting inquiry into who typed which portions of the expert’s report as beyond the limited discovery allowed under Rule 26(b)(4)(B)); John Wiley & Sons, Inc. v. Book Dog Books, LLC, No. 13ev816, 2015 WL 5022545, at *1 (S.D.N.Y. Aug. 17, 2015) (holding that question posed to expert, and objected to by counsel, as to whether counsel wrote report “runs afoul of the 2010 Amendments to Fed. R. Civ. P. 26(b)(4) and (C),” but that inquiry about input by others is permissible); Medicines Co. v. Mylan Inc., No. 11-cv-1285, 2013 WL 2926944, at *3, *5 (N.D. Ill. June 13, 2013) (upholding counsel’s objection at deposition to questions about the authorship of the expert’s report); see also I STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY § V, Rule 26 (2019) (arguing that allowing “discovery into the role that the lawyer played in the development of the expert’s opinions . . . . would undermine the whole purpose of the amendment, which is to allow lawyers to freely and openly interact with their retained experts”); Easton Letter, supra note 61, at 6 (fearing that “[u]nder the amended Rule 26, some might consider it improper to ask the expert about the extent of [the lawyer’s] influence”). One case goes even further by prohibiting questions asking as a general matter whether the expert relied upon assumptions provided by the attorney. Sarkees v. E. I. DuPont de Nemours & Co., No. 17-CV-651V, 2019 WL 1375088, at *6 (W.D.N.Y. Mar. 27, 2019). However, the exact import of the case is unclear in that it seems to allow such questions if they are directed to each specific opinion expressed rather than to the report as a whole. Id. And, it can be read to suggest that even the general question might be relevant if other evidence suggested that such reliance had taken place but was not otherwise disclosed. Id.

154. See, e.g., In re Cook, 2018 WL 6113466, at *4-5 (finding the question of whether one might depose the expert as to who typed which portions of the final report a “closer question,” but ultimately determining the inquiry improper since “the 2010 amendments to Rule 26 sought to end extensive and burdensome discovery into communications between counsel and testifying experts”).
evaluate the testimony.\footnote{155}{See, e.g., FED. R. CIV. P. 26 advisory committee's note to 2010 amendment; cf. Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (stating, in a case predating the current Federal Rule, that "[e]xamination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory").} Implicit in this approach is acceptance of substantial lawyer participation in the expert report's creation, or at least a reluctance to police it.\footnote{156}{This "Don't Ask; Don't Tell" approach can be seen as a sub rosa way to decide the permissible degree of lawyer involvement—i.e. anything goes. While there may be ramifications to unbridled lawyer involvement in the expert's report preparation, such as an expert being unable to support the report on examination, the degree of lawyer involvement itself would be irrelevant.} This "Don't Ask; Don't Tell" approach can be seen as a sub rosa way to decide the permissible degree of lawyer involvement—i.e. anything goes. While there may be ramifications to unbridled lawyer involvement in the expert's report preparation, such as an expert being unable to support the report on examination, the degree of lawyer involvement itself would be irrelevant.

A third position, in between the first two, would condition the scope of discovery on the extent to which other information points to the possibility of substantial lawyer involvement in the preparation of an expert's report.\footnote{157}{See, e.g., Gerke v. Travelers Cas. Ins. Co. of Am., 289 F.R.D. 316, 328 (D. Or. 2013) (allowing expanded discovery of lawyer-expert communication "when the record reveals the lawyer may have commandeered the expert's function or used the expert as a conduit for his or her own theories"); see also Sarkees, 2019 WL 1375088, at *6-7 (denying further discovery when "[n]othing so far suggests that plaintiffs' counsel drafted or significantly edited any part of [expert's] reports," suggesting a different outcome if there were); cf. Largent, supra note 28, at 3 (noting in Canada "[w]here there is a factual foundation supporting a reasonable suspicion that counsel improperly influenced an expert or their opinion, draft reports and details of communications with counsel will be producible"). But see In re Cook, 2018 WL 6113466, at *3-4 (finding that even though there was substantial circumstantial evidence to show that the lawyer played a heavy role in drafting the expert witness report, discovery is still limited to "the facts and data [the expert] considered and the assumptions [he] relied on, in accordance with Rule 26(b)(4)(C)(ii) and (iii)").} The degree of involvement that would have to be shown to open up discovery is unclear, but it must be more than mere speculation that the lawyer was excessively involved.\footnote{158}{Nevertheless, indirect indicia could be used to suggest substantial lawyer involvement which may trigger further discovery.\footnote{159}{For example, one may scrutinize the time records of the expert "as evidence of the amount of effort that}}
he/she has devoted to the report." Where it appears disproportionately low given the extent of the report provided, it supports an inference that someone else, probably the lawyer, had a substantial role in its preparation. The same might be true if the expert is unable to explain certain language in the report or how he came to his opinion.

The seminal case endorsing this approach is *Gerke v. Travelers Casualty Insurance Co.* A number of courts, however, have strongly criticized *Gerke* as being a product of the court's pique at counsel's conduct of the case and the court's reliance on case law superseded by the 2010 amendments to the expert discovery rules. In declining to follow the decision, these courts have found it inconsistent with the policies underlying those amendments.


161. See, e.g., *Gerke*, 289 F.R.D. at 328 (finding that limited time expert spent on reviewing the file and writing the report "create[s] a genuine question whether [the expert] came to these additional opinions and analyses so quickly because they were suggested or given to him by Plaintiff's counsel").

162. See, e.g., United States ex rel. Wall v. Vista Hospice Care, 319 F.R.D. 498, 503 (N.D. Tex. 2016) (party relied on expert's inability to "articulate the methodology that she used" and her inability to remember what corporate documents she read or how she summarized them to argue that counsel must have been involved in the preparation of the expert report to a degree that supported further discovery); see also Stern et al., *supra* note 18, at 358 (arguing that under Pennsylvania rule limiting discovery, inquiry about whether an opinion expressed is that of counsel or the expert is likely to be allowed "if there are terms or phrases that appear in the expert's report which are more consistent with 'lawyer related' language, as opposed to words more commonly used by an expert in a given field"); id. at 362 (opining that a question as to whether counsel supplied certain language should be allowed if the opinion expressed is "completely outside the expert's area of expertise"). Of course, if this information alone undercuts the credibility of the expert's report and testimony, one could argue that knowing about the lawyer's involvement in the process is unnecessary. Cf. Medicines Co. v. Mylan Inc., No. 11-cv-1285, 2013 WL 2926944, at *5 (N.D. Ill. June 13, 2013) (finding extensive discovery opportunities along with the ability to offer rebuttal witnesses and to cross-examine the expert sufficient without ordering the expert to disclose which paragraphs of the report were written by counsel).


164. See, e.g., Carpenter v. Deming Surgical Assoc's., No. CV 14-64 JCH/SCY, 2015 WL 13662880, at *4-5 (D.N.M. Apr. 20, 2015) (noting that "[t]he judge's displeasure with Plaintiff's counsel's conduct appears to have prompted the court to adopt a parsimonious reading of the work product protections Rule 26(b)(4) affords to attorney-expert communications"); Commodity Futures Trading Comm'n v. Newell, 301 F.R.D. 348, 351 (N.D. Ill. 2014) (noting that the *Gerke* court "was dealing with what it concluded was inappropriate behavior of counsel").


166. See, e.g., Carpenter, 2015 WL 13662880, at *5 (holding that *Gerke* is inconsistent with "[t]he Advisory Committee comments and the plain language of Rule 26(b)(4)"); *Commodity Futures Trading Comm'n*, 301 F.R.D. at 352 (holding that "this court respectfully disagrees with [Gerke]'s interpretation of the amendment to that rule"); see also John Wiley & Sons, Inc. v. Book Dog Books, LLC, No. 13cv816, 2015 WL 5022545, at *1 (S.D.N.Y. Aug. 17, 2015) (approving the
Assuming we are to open up discovery, the question is how far it should be extended. At a minimum this might allow questioning the expert about the lawyer’s role. Attempting to get the communications themselves or draft reports that reflect the lawyer’s input may still be a step too far given their explicit protection from discovery in the Federal Rules.167

A similar approach is recognized in the 2010 Advisory Committee Note, that the work product protection given to most lawyer-expert communication could be overcome by a showing of special need and undue hardship.168 However, the Note also cautions that the instances where this standard could be met would be rare due to the extensive discovery already allowed.169 In several cases, trial courts have been cautious about finding special need in the simple desire to enhance cross-examination and have rejected undue hardship claims because sufficient information is available through examination of the expert at a deposition.170

When we cannot even state with certainty what kinds of questions we can ask, if any, about the role a lawyer has played in the creation of a testifying expert’s report, we have a situation crying out for clarification in the Federal Rules.


167. Carpenter, 2015 WL 13662880, at *5 (denying discovery of lawyer communications to the expert as insufficiently necessary since counsel could “cross-examine Plaintiff’s experts about Plaintiff’s counsel’s involvement in the preparation of their reports”).

168. FED. R. CIV. P. 26 advisory committee’s note to 2010 amendment (referencing the availability of Rule 26(b)(3)(A)(ii) to obtain lawyer communications otherwise protected).


170. See, e.g., Powerweb Energy, Inc. v. Hubbell Lighting, Inc., No. 3:12CV220(WWE), 2014 WL 655206, at *5 (D. Conn. Feb. 20, 2014) (“Preparing for cross examination is not a sufficient ‘substantial need’ to overcome work-product protection. If it were, every party could compel documents properly withheld by claiming a need to prepare for cross-examination. This is especially true where defendants had the opportunity to test the bases of Mr. Burkert’s opinions through deposition testimony.”); Medicines Co. v. Mylan Inc., No. 11-cv-1285, 2013 WL 2926944, at *5 (N.D. Ill. June 13, 2013) (rejecting the argument that there was a substantial need to know about counsel’s possible authorship of parts of the expert’s report given extensive discovery otherwise available). But see Reliance Ins. Co. v. Keybank U.S.A., No. 1:01CV62, 2006 WL 543129, at *3 (N.D. Ohio Mar. 3, 2006) (“[G]iven the inconsistent testimony offered by [the expert], together with Swiss Re’s suggestion that its attorneys drafted the expert reports, Key has a substantial need for the notes [exchanged between the expert and counsel, as they] are essential to permit Key to effectively cross-examine [the expert] . . . . [and given the expert’s] less than forthright testimony . . . [Key] has no other means to obtain the information [so that] . . . . even assuming the notes are otherwise protected by the work product doctrine, Key is entitled to them pursuant to Rule 26(b)(3).”).
C. Best Practices in an Age of Excessive Uncertainty

Until that clarification is accomplished, lawyers need to think about what practices will best prepare experts while avoiding the downside if the degree of their participation becomes known.\(^\text{171}\)

As the safest course, one author recommends that "experts prepare their own reports and that attorneys limit involvement to ensuring compliance."\(^\text{172}\) Others caution that attorneys "not take a significant role in drafting the report."\(^\text{173}\) Because of the vulnerability expert credibility is to attack for over-involvement of attorneys in preparing expert witness reports, one group of authors advise that an "[e]xpert[,] ... should not permit counsel to write, significantly alter, or dictate the opinions expressed in their reports,"\(^\text{174}\) since "[t]he more influence counsel has on the report, the more vulnerable the expert becomes."\(^\text{175}\)

Nevertheless, the law seems to allow greater assistance:

as long as the attorney does not change the substance of the opinion of the expert witness [and] any changes . . . [are] freely authorized and adopted by the expert as his or her own, and not merely for some appeasement or because of intimidation or undue influence by the party or counsel.\(^\text{176}\)

To the extent lawyers decide to take a permissible but significant role in assisting in the preparation of the expert’s report, based on the case law, the following appears to be the safest advice on providing assistance without the threat of exclusion or substantial credibility impairment.

The lawyer should get input from the expert before creating a first draft.\(^\text{177}\) This helps show that the underlying opinion is the expert's

\(^\text{171}\) See, e.g., Tanis et al., supra note 18 (recommending that “[f]or now, counsel and experts would be wise to heed the advice of the American Institute of Certified Public Accountants: ‘Experts should not rely on the protection of these new amendments to open the floodgate to unabated communication with retaining counsel. Opposing counsel will continue to retain some avenues to discover communications between experts and retaining counsel although the Committee recommended that these avenues be restricted to rare use, for example, due to ‘undue hardship.’ Accordingly, as before, it will continue to be important for experts to exercise good judgment and educate their professional staff as the amendments are implemented”

\(^\text{172}\) Stuart, supra note 1.

\(^\text{173}\) District Court Sanctions Ghostwriting of Expert Reports, supra note 160.

\(^\text{174}\) MANGRAVITI ET AL., supra note 2, at 12.

\(^\text{175}\) Id. at 13.

\(^\text{176}\) MOORE ET AL., supra note 6, at § 26.23[5].

\(^\text{177}\) See, e.g., Tindall v. H & S Homes, LLC, No. 5:10-CV-044(CAR), 2012 WL 3241885, at *1 (M.D. Ga. Aug. 7, 2012) ("The Court is not convinced, however, that counsel’s assistance and involvement in drafting the report is completely prohibited—even if the assistance involves preparing the entire first draft—so long as there is ‘prior, substantive input’ from the expert.

https://scholarlycommons.law.hofstra.edu/hlr/vol48/iss1/6
rather than the lawyer’s which the expert may feel some pressure to adopt.

The expert should thoroughly review and make changes or corrections to that first draft. Even if the first draft does a nice job of capturing the expert’s opinion, revision is helpful to show the expert’s continuing involvement in the preparation of her own report.178

Although cost considerations may tempt lawyers and their clients to limit the time spent on the project by the expert, that may well be shortsighted. The hours expended should be commensurate with the task. This provides another factor to show that the expert’s involvement was real and meaningful.179

As in any situation, the expert needs to understand and be able to support statements made in the report. Where lawyer assistance is extensive, however, the need for such command of the document is heightened to fend off attacks that the report is really the product of the lawyer not the expert.180

V. EXTERNAL CONTROLS ON EXCESSIVE LAWYERS ASSISTANCE—PROFESSIONAL DISCIPLINE

Both courts181 and commentators182 have raised the issue of whether excessive lawyer assistance poses ethical concerns.183 Arguably,

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178. See, e.g., Hoskins v. Gunn Trucking, No. 4:07-CV-72-WCL, 2009 WL 2970399, at *2, *4 (N.D. Ind. Sept. 14, 2009) (finding the expert was substantially involved in the creation of his testimony evidenced by his making substantive changes to the lawyer’s draft report).

179. See supra text accompanying notes 80-81 (discussing exclusion or credibility impairment when insufficient time has been spent by the expert in preparing the report).

180. See supra text accompanying notes 82-84 (discussing exclusion or credibility impairment when expert cannot support statements in the expert report).


182. See, e.g., MICHAEL CALLAHAN & COLIN NEWBOLD, FAMILY LAW UPDATE § 3.02[A] (2018) (noting that “[a] finding by a court of inappropriate participation in an expert’s report can lead to both ethical sanctions and/or non-admittance of the testimony”); Keith A. Call, Ghostbusting Experts, 28 UTAH B.J. 32, 33 (2015) (noting that “the court’s description [of lawyer conduct in the Numatics case] is hauntingly similar to the ethical rules’ prohibition on “conduct that is prejudicial
discipline through professional conduct rules may provide an alternative way to police lawyer behavior in assisting experts in the preparation of their reports.\textsuperscript{184} As one commentator put it in defending a Pennsylvania rule that bars the discovery of attorney/expert communication in most circumstances, "[w]hile the opponents of the current rule fear that experts would write opinions that are not factually sound and based solely on what an attorney told the expert to write, the Model Rules of Professional Conduct prevent that improper result."\textsuperscript{185}

That, I believe, is a vain hope. Professional discipline is unlikely to control the problem for at least two reasons. The first is that it is unclear that lawyer assistance in preparing an expert's report presents a clear violation of existing professional ethics rules.\textsuperscript{186} Second, even if the conduct does violate these rules, it is unlikely it will be robustly regulated through the disciplinary system.\textsuperscript{187}

To the extent excessive lawyer involvement is likely to hurt one's client's case by undercutting the credibility of the expert or having the expert disqualified, engaging in such conduct could violate the duty of competence.\textsuperscript{188} This concern, however, is more theoretical than real. Given that some assistance is not only proper but contemplated, and the fact that the line between permissible and impermissible degrees of assistance is not clear, most lawyer conduct that is called into question will simply reflect a judgment call, not a lack of competence.\textsuperscript{189} Further, unless the excessive involvement violates a clear norm and is done

to the administration of justice""); Stuart, supra note 1 (raising ethical issues surrounding excessive attorney assistance in preparing expert reports). See generally Largent, supra note 28.

183. Of course, if the lawyer's assistance results in the creation of false evidence, that constitutes a particularly egregious violation of one's ethical duties. See generally MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 2013) (prohibiting a lawyer from falsifying evidence or assisting a witness in doing so); MODEL RULES PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2013) (prohibiting a lawyer's "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation"). Even assistance that produces truthful evidence, however, has been seen to raise ethical concerns. That is where the ethics implications become less clear.

184. Cf. Largent, supra note 28, at 1 (noting that "while the Federal Rules may evolve with regard to the depth, breadth, scope, and reach of permissible discovery, the obligations the Model Rules [of Professional Conduct] impose on the attorney remain largely the same and serve as a guiding light to the shifting 'norms' of federal discovery").

185. Stern et al., supra note 18, at 355.

186. See supra text accompanying notes 188-96. In this Subpart, I focus on whether excessive lawyer assistance violates the Model Rules of Professional Conduct. While the Model Rules have no legal effect, they are just a model promulgated by the ABA, they have had a major influence on state codes of professional responsibility. As such they are illustrative of the kinds of rules that might be implicated by such lawyer conduct.

187. See infra text accompanying notes 195-200.

188. MODEL RULES PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013).

189. Cf. Largent, supra note 28, at 4 (acknowledging that the point at which lawyer assistance in the preparation of the expert's report crosses the line and becomes unethical is unclear).
repeatedly, the matter would likely not be serious enough to draw disciplinary attention.

A second concern involves the duty of candor to the tribunal. If the lawyer serves as the unacknowledged author of what is purportedly a report prepared by the expert, this could constitute "mak[ing] a false statement of fact or law to a tribunal."190 This prohibition extends to failure to disclose certain information where failing to do so "is the equivalent of an affirmative misrepresentation."191 Producing a report that is purportedly the expert's work but is actually the lawyer's, might be seen to violate this provision. This concern has been raised by those who oppose lawyer ghostwriting of pro se pleadings.192 Nevertheless, given the explicit recognition in the Advisory Committee notes that lawyers may assist in the creation of expert witness reports, and given the common knowledge that they do so, it is hard to see how silence on the extent of that participation creates an "affirmative misrepresentation."193

To the extent the lawyer's conduct involves "knowingly disobey[ing] an obligation under the rules of a tribunal" an ethics violation will be present.194 But given the present uncertainty about the line between permissible and impermissible conduct, showing that the lawyer "knowingly" violated the discovery rules through his assistance will be a difficult task.195 That said, if the requirements before a
particular tribunal are clear, whether through case law, local rule, or standing order, failure to follow them might be seen as a violation. The outcome would depend on how disciplinary authorities construed the phrase "rules of the tribunal."

To the extent we see such conduct as undermining the role of the expert as a witness, that may violate the prohibition on "engag[ing] in conduct that is prejudicial to the administration of justice."196 But given the substantial disagreement as to the proper scope of lawyer involvement, this would be a stretch.

While there are arguments to treat excessive lawyer assistance in creating expert witness reports as professional misconduct, it is unlikely that this will occur with any frequency. As has been noted in other contexts, disciplinary enforcement of lawyer litigation misconduct is often a low priority for disciplinary authorities.197 In fact, I have found only one disciplinary case addressing the ethics of lawyer assistance in the drafting of expert reports.198 It has either seldom been raised or

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196. Model Rules of Prof’l Conduct r. 8.4(d) (AM. BAR ASS’N 2013); see also Call, supra note 182, at 33.

197. See, e.g., Peter A. Joy, The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers, 37 Loy. L. Rev. 765, 765-66, 815 (2004). In this article Professor Joy discusses the interplay between Federal Rule of Civil Procedure 11 and professional discipline. He found that although both treat the same abuses, most Rule 11 cases never lead to public sanction in the disciplinary system. He offers a number of explanations including, inter alia, that:

[L]awyer disciplinary agencies are unable or unwilling to control litigation conduct; . . . the legal profession has determined that trial judges are more effective in controlling litigation conduct in pending matters; [and] . . . prevailing standards for enforcing lawyer discipline and standards for imposing lawyer sanctions downplay imposing public sanctions for litigation conduct.

Id. at 807; see also id. at 809-10 (noting that "data supports the view that lawyer discipline is primarily focused on client-centered issues; abusive litigation conduct, such as frivolous filings, does not commonly trigger complaints leading to lawyer discipline").

198. The one disciplinary case I found addressing this matter is In re Donziger, 80 N.Y.S.3d 269 (App. Div. 2018). It should be noted that in that case ghostwriting the expert’s report was part of a litany of misconduct of which ghostwriting was only a small part. Id. at 269 (lawyer suspended from practice for engaging in “judicial coercion, corruption of a court expert and ghostwriting of his report, misrepresentations concerning the expert’s independence, obstruction of justice, witness tampering, improperly threatening criminal prosecution, and judicial bribery”). To the extent this matter is analogous to lawyer ghostwriting of pro se complaints, there are numerous ethics opinions which split on when, if ever, the practice violates the ethics rules. See Bassett, supra note 37, at 291-93 (describing the split). There also are cases in which discipline was imposed for ghostwriting pro se complaints, although often other more serious misconduct was also involved. See, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. Rauch, 746 N.W.2d 262, 265 (Iowa 2008) (revoking lawyer’s license for numerous ethical violations including ghostwriting a pro se complaint); cf. In re Mungo, 305 B.R. 762, 770-71 (Bankr. D.S.C. 2003) (admonishing lawyer for engaging in ghostwriting of pro se pleading but warning that suspension or disbarment from practice before the court might be ordered in future cases now that the court’s position on ghost-writing was made clear in this opinion).

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publicly pursued in materials reported in easily accessed databases. In the absence of clear guidance as to the line between proper and improper conduct, it seems unfair to punish lawyers for their actions in this context.199

It should also be noted that in none of the court cases I reviewed concerning lawyer assistance in creating an expert’s report did the court sanction the attorney for this behavior, other than through exclusion of evidence.200 A verbal admonition is the most that appears in the cases.201 If the courts before which this behavior occurs do not more forcefully sanction the lawyers involved, it seems improper to use license restriction as the means to control this issue. That is not to say that lawyer self-reflection is inappropriate here—lawyers should consider whether the extent of their assistance seems professionally proper202—but only that the norms are unlikely to be enforced through disciplinary sanctions.

VI. ALTERNATIVE CONTROLS ON EXCESSIVE LAWYER INVOLVEMENT

The present situation with its disagreement about how much lawyer assistance is too much, or at least gives rise to credibility concerns, and about how, if at all it can be inquired into, is untenable. Perhaps the courts will come to some sort of consensus on these matters, but the experience of the last eight years provides little hope in that regard.

There are, however, a number of alternative ways to help manage these issues through amendments to the Federal Rules that do not undermine the core concerns underlying the 2010 regime.203 Robust control of excessive attorney assistance in preparing expert reports can

199. Cf. In re Liu, 664 F.3d 367, 372-73 (2d Cir. 2011) (refusing to discipline attorney for ghostwriting a client’s complaint given that the court lacked any rule or precedent explicitly governing attorney ghostwriting, some authorities nationally permit the practice, and there was an absence of evidence that the attorney was attempting to mislead the tribunal).

200. But cf. Indiana Ins. Co. v. Hussey Seating Co., 176 F.R.D. 291, 294-95 (S.D. Ind. 1997) (where costs were assessed for mishandling the expert report, but the extent to which counsel’s criticized role in the report’s drafting was the impetus for the sanctions is unclear).


202. Cf. Wydick, supra note 58, at 27-28 (noting that the boundaries of proper witness preparation are, for the most part, controlled by a “lawyer’s own informed conscience”); see also Arthur F. Greenbaum, Judicial Reporting of Lawyer Misconduct, 77 UMKC L. REV. 537, 553-54 (2009) (noting that the underenforced duty to report rules for both lawyers and judges still spur self-reflection when considering whether to report).

203. Given the broad array of constituents that supported the 2010 expert discovery amendments, see supra note 112, it is unlikely that they will be substantially changed.
be achieved without devolving into excessive discovery battles or costly in-camera review.\textsuperscript{204}

\textbf{A. Discovery Conference Consultation}

One approach is to leave the question of the degree to which the role of the lawyer can be explored to the parties.\textsuperscript{205} Rule 26(f) could be amended to make this a subject of discussion at the mandatory discovery conference.\textsuperscript{206} If the parties cannot agree amongst themselves as to the scope of permissible discovery on this topic, the court might assist during a scheduling or pretrial conference.\textsuperscript{207} The potential drawback to this approach is that it allows the parties to deprive the trier of fact of information that the trier might find relevant in assessing the expert's testimony if, for example, the parties agreed not to allow inquiry about the lawyers' roles in assisting in the expert reports. While information is routinely withheld from the trier of fact by the lawyer's choices, as the lawyer decides what evidence to put on and what line of questioning to pursue, we might decide the inherent deception in presenting the expert as a neutral, unsullied by the lawyer's involvement in the creation of the expert testimony, goes too far.\textsuperscript{208}

\textsuperscript{204} One concern expressed over approaches that require courts to determine if particular documents should be discoverable once some level of need is established is that the in-camera review process is costly and inefficient. See supra text accompanying notes 142-48; see, e.g., Stern et al., supra note 18, at 329, 338-39, 356.

\textsuperscript{205} See, e.g., In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig., No. 1:14-mi-2570-RLY-TAB, 2018 WL 6113466, at *5 (S.D. Ind. Nov. 21, 2018) (enforcing party agreement "that allows them each to withhold communications between counsel and expert witnesses, even if Rule 26 permits the other side to discover them"); In re W. States Wholesale Nat. Gas Antitrust Litig., No. 2:03-cv-01431-RCJ-PAL, 2017 WL 2991347, at *3 (D. Nev. July 12, 2017) (discussing stipulations and proposed order by the parties concerning expert discovery); Reliance Ins. Co. v. Keybank U.S.A., No. 1:01 CV 62, 2006 WL 543129, at *1 (N.D. Ohio Mar. 3, 2006) (discussion of parties' agreement to share all drafts of expert reports); see also Gregory P. Joseph, \textit{The Temptation to Depose Every Expert}, \textit{Litig.}, Winter 2014, at 38, 39 (suggesting that the best course in this area of uncertainty is for the parties to reach an agreement limiting the scope of discovery to providing the report and the expert for deposition; but author does not address the scope of allowable questions at the deposition).

\textsuperscript{206} See generally FED. R. CIV. P. 26(f)(3). Arguably, these issues are already the subject of discussion since the Rule requires the parties to discuss "what changes should be made in the limitations on discovery imposed under these rules or by local rule." \textit{Id}. But, we are addressing an area where those limitations are uncertain, so this provision may not apply. In any event, it would be best to explicitly call this matter to the attention of the parties through a rule change.

\textsuperscript{207} See generally FED. R. CIV. P. 16.

\textsuperscript{208} This, however, is probably not the case. Prior to the 2010 amendments to the Federal Rules, parties routinely agreed to opt out of the extensive discovery of lawyer-expert communication. See supra text accompanying note 116.
B. Expert Report Disclosure

A second approach would be to add additional requirements to the expert report rule itself requiring the expert to spell out the respective roles the expert and lawyer played in the report's creation. This is similar in policy to the present requirement that compensation information be provided in the report.209

In numerous cases in which courts have expressed concern over the comparative roles of the lawyer and the expert in preparing the expert's testimony, courts have expressed that this can be controlled by credibility determinations by the trier of fact210 as excessive lawyer involvement can undercut the credibility afforded the expert and her testimony.

The Federal Rules of Civil Procedure already address one ground on which the trier of fact might discount the weight of an expert's testimony—financial bias. Rule 26(a)(2)(B)(vi) requires that the expert include in her report "a statement of the compensation to be paid for the study and testimony in the case." Rule 26(b)(4)(C)(i) allows discovery of communications between counsel and the expert that "relate to compensation for the expert's study or testimony." The rationale for allowing this inquiry, which is not directly relevant to the substance of the testimony, is "to permit full inquiry into such potential sources of bias."211 While many expert reports simply provide the hourly rate being paid to the expert,212 the rule is not so limited.213 It requires disclosure of, and allows inquiry about, the "compensation to be paid for the [expert's] study and testimony in the case."214 Details such as the number of hours spent are discoverable as well,215 unless there is some fear that the discovery is being undertaken for an improper purpose.216

210. See supra Part II.B.
212. See, e.g., Mangraviti et al., supra note 2, at 359 (noting in its examples that as little as the hourly rate may be enough and quoting an expert—"It is sufficient to list the magnitude of your flat fee or the hourly rate.").
213. See, e.g., Cary Oil Co. v. MG Ref. & Mktg., Inc., 257 F. Supp. 2d 751, 756 (S.D.N.Y. 2003) (noting that "while most expert reports disclose the expert's hourly rate, the plain language of the rule clearly refers to the expert's 'compensation,' which encompasses more information than simply a billing rate").
215. See, e.g., Invention Toys, LLC v. MGA Entm't, Inc., No. 07-6510, 2012 WL 12990384, at *6 (E.D. La. Oct. 17, 2012) (finding that "the parties must be apprised of the number of hours that their opponent's expert witness has billed in order to gauge his financial interest in this
Since the overinvolvement of lawyers similarly can undercut the value of the expert’s testimony, similar disclosure should be required. Rule 26(a)(2)(B) should be amended to require a statement of the hours spent by the expert in conducting the study and resulting report, including what the hours were spent on and a statement of the role lawyers played in the process. While more intrusive, the rule could require the expert to identify every sentence in the report that was created by the lawyer rather than the expert.

To accompany this rule change, courts should provide jury instructions noting that lawyer involvement in helping prepare the expert’s testimony is not improper, but that it can be considered in determining the weight to give the expert’s testimony.

C. Certification of Conduct

A third approach would be to have the expert and/or the lawyer certify that they played their proper roles. First, we would need to define what the proper roles should be. For argument, let us adopt the role definition most courts articulate allowing lawyer assistance so long as the expert played a substantial role in the report’s preparation. Rule 26(a)(2)(b) could be amended to require that the expert include in the report a statement that he played a substantial role in the report’s creation. Rule 26(g) could be amended to require that the lawyer

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216. See, e.g., Cary Oil, 257 F. Supp. 2d at 757 (shaping scope of discovery about compensation because of the court’s concern “that such disclosure requests could be abused” in the case before it).
217. Since this information may already be available as part of the compensation inquiry, an amendment may not be necessary, but the rule would be stronger if the requirement were explicit and the degree of detail defined.
218. In the ghost-writing context in which lawyers prepare pleadings for pro se litigants, at least one court has allowed it as long as “the attorney signs the document and discloses thereon his or her identity and the nature and extent of the assistance that he or she is providing to the tribunal and to all parties to the litigation.” FIA Card Servs., N.A. v. Pichette, 116 A.3d 770, 784 (R.I. 2015).
221. See supra notes 51-53 and accompanying text.
222. It should be noted that the advisory committee rejected a similar proposal during their
certify that the expert played a substantial role in any expert report provided pursuant to Rule 26(a)(2)(B).

There are, admittedly, some problems with this approach. Defining exactly when the expert has played a substantial role in the report’s preparation may be hard to articulate, but the best practices standards articulated previously could be a start. A second concern is that certification requirements rely on the good faith of the certifiers. If all discovery of the lawyer’s role is curtailed in favor of this approach, finding violators would, in most cases, be impossible. Nevertheless, we often rely on actors proceeding in good faith in the litigation system. Finally, the substantial participation test was developed with the added protection that more details could be learned on discovery and used for impeachment. Here the impeachment protection is lost. Nevertheless, if the predominate reason behind the 2010 amendments was to eliminate virtually all inquiry into lawyer-expert communication, this would provide some protection while honoring that desire.

VII. CONCLUSION

Experts play a crucial role in modern civil litigation. They prepare their testimony with input from the attorneys who hire them. Neither proposition is remarkable. But beyond those two propositions, the world of expert-attorney interaction becomes murkier.

At its core, we really have not decided on the proper role lawyers should play in assisting experts in the creation of their expert reports and ultimate testimony. Instead most courts have acquiesced in allowing significant attorney involvement so long as the expert can be seen as being substantially involved in the creation in her own report and testimony. We largely leave it to the trier of fact to determine the degree to which the lawyer’s involvement undercuts the credibility of the expert.

At the same time, we have limited the extent to which we can discover the comparative roles of the expert and attorney, thus making it harder for the trier of fact to evaluate the impact of their interactions.

work leading up to the 2010 discovery amendments. The question was whether to require experts to certify that the report was “prepared by the witness.” ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK 1, 13, Nov. 8-9, 2007, https://www.uscourts.gov/sites/default/files/fr_import/CV2007-11.pdf. That, however, was coupled with the thought that if the witness could not certify, the lawyer’s draft would become discoverable. My proposal does not go that far.

223. See supra Part IV.C.

Even with some limited direction from the Federal Rules about what "communications" between counsel and the expert can be explored, there is substantial disagreement over what kinds of questions may properly be asked about the process of their interaction.

Within the current framework of the Federal Rules, one resolution would be to abandon the inquiry. Let expert testimony stand or fall by the extent to which the expert can support the opinions expressed. Another would be to allow expansive discovery about the process so that the trier of fact can have a global sense of the degree of lawyer participation while protecting the substance of that input. The former abandons a needed protection from lawyer overreaching. The latter raises the specter of substantial discovery costs the 2010 amendments to the Federal Rules attempt to avoid.

Given this, it may be time to try new approaches. Party negotiation about the degree of discovery to be allowed, required disclosures about the extent of lawyer involvement, or sworn certifications about the lawyer's and the expert's role, all provide possible ways out of the current morass while both limiting excessive lawyer involvement and avoiding exorbitant discovery costs.