



Attorneys Can Assist in Drafting Expert Reports, But Experts Must Substantially Participate

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Plaintiff Tech Pharmacy argued that the testimony of defendants' expert should be excluded under *Daubert* because the expert's report offered no independent analysis and simply parroted arguments from defendants' *Alice* motion for summary judgment and from another expert's report. Defendants noted that, while Rule 26(a)(2)(B) requires that an expert report be "prepared and signed by the witness," counsel is not precluded from providing assistance to experts in preparing their reports.

Addressing the permissible amount of attorney involvement in drafting an expert report, the court concluded that, "as long as the substance of the opinions is from the expert, the attorney's involvement in the written expression of those opinions does not make them inadmissible." However, the court cautioned that, while some attorney involvement in the preparation of an expert report is permissible, allowing an expert to sign a report drafted entirely by counsel without prior substantive input would read the word "prepared" completely out of the rule.

In this case, defendants' expert testified that defense counsel drafted sections of his report, which the expert edited and with which he ultimately agreed. In total, five of the 43 paragraphs in the expert's report contained duplicative language from defense counsel's prior *Alice* briefing. The court held that, although five paragraphs of the report indicated that defense counsel helped the expert prepare the report, nothing indicated that defense counsel rather than the expert was responsible for the remaining content of the report.

Ultimately, Tech Pharmacy's concerns regarding the extent of defense counsel's influence on the expert's report went to the weight of the expert's testimony rather than its admissibility.

Hence, vigorous cross-examination, the presentation of contrary evidence and a careful instruction on the burden of proof were held to be the appropriate vehicles to challenge the expert's report.

Tech Pharmacy Services, LLC v. Alixa RX LLC et al., Case No. 4:15-cv-766 (E.D. Tex., Aug. 3, 2017)

Categories

§ 101 Analysis under Alice

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