Can an Adversary Explore Lawyers' Role in Drafting Their Testifying Experts' Reports?

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In his October 8, 2014 “Privilege Points” release, Tom Spahn discusses waivers where lawyers are involved in drafting experts’ reports:

Under the 2010 changes to the Federal Rules of Civil Procedure, work product protection generally extends to testifying experts' draft reports. How does that general approach apply if the adversary believes that a party's lawyer helped draft those reports?

In U.S. Commodity Futures Trading Commission v. Newell, Case No. 12 C 6763, 2014 U.S. Dist. LEXIS 117734, at *9 (N.D. Ill. Aug. 25, 2014), plaintiff argued that defendants could not rely on the new rule extending work product protection — because defendants' lawyers had "commandeered" the drafting process. The court rejected this argument, concluding that any exploration of the lawyers' role would necessarily "require an analysis of the degree of counsel involvement (both quantity and quality) in the drafting of the report." Id. at *14. This in turn would "necessarily require production of all of the drafts of the report for comparison," as well as production of communications between the testifying expert and the defendants' lawyers. Id. The court concluded that the 2010 rules changes intended "to protect against that discovery." Id.

Not all courts might be so protective, so lawyers should still take a wary approach in this context.