

2007 BOYD-GRAVES CONFERENCE

SUBCOMMITTEE REPORT

Documentary Information Discoverable from Expert Witnesses

David P. Corrigan, Chair
Stephen D. Busch
Warren David Harless
Linda S. Laibstain
Barbara S. Williams
Charles J. Zauzig, III
The Honorable Daniel R. Bouton

HCCW
HARMAN
CLAYTOR
CORRIGAN
WELLMAN
ATTORNEYS AT LAW

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INNSBROOK CORPORATE CENTER
4951 LAKE BROOK DRIVE, SUITE 100
GLEN ALLEN, VIRGINIA 23060

MAILING ADDRESS
P.O. BOX 70280
RICHMOND, VIRGINIA 23255

DAVID P. CORRIGAN
dcorrigan@hccw.com
804-762-8017

VIA EMAIL ONLY

Thomas L. Appler, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
8444 Westpark Drive, Suite 510
McLean, VA 22102-5138

Re: Report of Boyd Graves Committee to Study Documentary Information
Discoverable from Expert Witnesses

Dear Tom:

I am writing to provide the report for the above-referenced committee. The names of the committee members appear at the end of the report. We met by telephone on three separate occasions and endeavored to address this thorny issue. At this point, our conclusion is that the topic needs further discussion and consideration by the conference at large. While our committee reached conclusions on what types of documentary information should be considered, we did not reach conclusions on how best to address the various types of documents. We recommend only that the conference at large discuss the issue and recommend to the committee whether further efforts to place these concerns into a Rule of Court or Statute should be attempted. The essence of our discussions thus far follows:

The Committee considered 17 categories of information as the types of documents that are typically sought to be discovered from experts. The categories are listed below:

- (1) Expert CV
- (2) Discovery and pleadings
- (3) All documents reviewed by the expert
- (4) All documents relied upon by the expert
- (5) Financial information (a broad category that needs to be addressed more specifically)
- (6) Fee schedules
- (7) Prior testimony if available
- (8) Money earned as an expert in a certain period of time
- (9) The expert's analysis and notes from his own review of materials
- (10) The expert's notes from conversations with retaining counsel
- (11) Correspondence from retaining counsel
- (12) Drafts of reports

- (13) Drafts of designations
- (14) Changes to drafts by counsel
- (15) Changes to drafts by the expert
- (16) Literature reviewed
- (17) Literature relied upon

Initially, we tried to decide which of these documents should be mandatory to produce. We did not start with the question of how and under what specific circumstances the expert would be producing these documents. That is, we did not talk about whether this would be done pursuant to court rule, statute or in response to subpoenas or deposition notices with attached subpoena duces tecum requests.

Nonetheless, the committee generally agreed that the following documents should be mandatory for the expert to produce if he has them:

- (1) Expert CV;
- (2) Discovery and pleadings;
- (4) All documents relied upon by the expert;
- (6) Fee schedules;
- (9) The expert's analysis and notes from his own review of materials; and
- (17) Literature relied upon.

None of these categories was considered particularly controversial.

We then tried to decide what documents we thought should be produced not in every case but with the exercise of some form of discretion by the court. We agreed on the following:

- (5) Financial information;
- (8) Money earned as an expert in a certain period of time;
- (7) Prior testimony if available;
- (3) All documents reviewed by the expert; and
- (16) All literature reviewed by the expert.

There were some who thought that the documents and literature reviewed by the expert should be mandatory. I don't remember anyone saying that the others (financial information, prior testimony and money earned as an expert in a certain period of time) should be mandatory to be produced in all cases.

The third set of documents that we discussed, and there was no real consensus whether these documents should be discretionary to be produced or completely prohibited from production, included the following:

- (10) The expert's notes from conversations with retaining counsel;
- (11) Correspondence from retaining counsel;
- (12) Drafts of reports;
- (13) Drafts of designations;
- (14) Changes to drafts by counsel; and
- (15) Changes to drafts by the expert.

The discussion in these areas, not surprisingly, revolved around whether these interactions between counsel and the expert were ultimately some of what the expert relied upon in reaching his conclusions. In other words, if the expert learned facts from retaining counsel and had not learned those facts from any other source, and he relied upon those facts, then certainly anything related to those facts, whether it be revisions to drafts by the expert or counsel or notes from the expert or counsel or even correspondence from counsel should be discoverable, some thought.

On the other hand, much of the conversation, as we all know, between an expert and counsel, is not the counsel telling the expert the facts of the case, but rather counsel pointing out facts that the expert has obtained from other sources and asking the expert to consider or reconsider those facts, or asking the expert to consider or reconsider what he is thinking about in terms of opinions. I think we all agreed that these conversations occur routinely in the practice of law and the retention and use of experts. The general feeling was that all those conversations are not discoverable. How to draw that line is the problem.

THE BOTTOM LINE

At the end of our discussion, we talked about whether our efforts were going to make this process better or worse. On the one hand, a set of mandatory documents to produce would be helpful. At least one committee member expressed a preference for federal court, where you know what you have to do and what the expert has to produce. There are still disputes in federal court cases about what experts must do in addition to what is required in Rule 26 of the Federal Rules of Civil Procedure when they are deposed, if asked to bring additional documentation, etc. At the first level, however, the federal system does provide some specific guidance that certainly has taken some past points of disagreement out of play.

The good thing about the discussions so far is that clearly what we are talking about cuts both ways, equally for and against a plaintiff's expert and a defense expert. What we really need now is to decide how to put into effect any changes we think would be helpful; and then decide what specific changes we think would be helpful. At the end of the day, there will always be categories of information that are not directly addressed by any rule or statute where the parties will rely upon the discretion of judges to decide whether to force experts or parties to produce certain documents.

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Very truly yours,


David F. Corrigan

DPC/jd

Cc: The Honorable Daniel R. Bouton, Judge
Stephen D. Busch, Esq.
Warren David Harless, Esq.
Linda S. Laibstain, Esq.
Barbara S. Williams, Esq.
Charles J. Zauzig, III, Esq.

Editor's Note:

The Committee failed to achieve a consensus as to a recommendation.
This matter was carried over to the next Boyd Graves Conference.