

Ghostbusting Experts

by Keith A. Call

Some of you may recall the ghost problems at my house – missing food, clogged toilets, and a host of other problems for which no one admits responsibility. Keith A Call, *A Ghost Story*, 26 UTAH B.J. 24 (Nov./Dec. 2013). It's gotten worse. Now the ghosts in my house have driver licenses. I'm having to deal with unexplained dents in and scratches on the family cars. One time, the police came to my house because someone had reported suspicious activity involving a vehicle of the same type that was parked in my driveway. Remarkably, the only candidate-driver in my family had a perfect alibi, and the engine on the car was cold.

Either the police got the wrong car, or the ghosts have really become expert.

Which brings me to the topic of ghostwriting expert reports.

Can Counsel Ghostwrite an Expert's Report?

A Federal District Court in Michigan recently excluded an expert report and criticized the practice of counsel drafting expert reports as a “remarkable breach of ethics and protocol.” *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014). In doing so, the court strictly enforced Federal Rule of Civil Procedure 26(a)(2)(b), which requires an expert's report to be “prepared and signed by the witness.” *Id.* at 942 (emphasis omitted). In contrast, Utah Rule of Civil Procedure 26(a)(4)(B) requires that the report shall be “signed by the expert”; it does not include the word “prepared.” See Utah R. Civ. P. 26(a)(4)(B).

In *Numatics*, defense counsel in a patent dispute retained a technical expert to opine that the patents at issue were invalid. The expert submitted a sixty-four page report, asserting that the

claims in the patent were obvious in light of prior art references. During his deposition, the expert admitted that he did not author his report. During oral argument on a motion to exclude the report, defense counsel admitted she had authored a first draft of the report, and the expert had made only minor changes. 66 F. Supp. 3d at 944. The court acknowledged that counsel can assist an expert in the drafting process but strongly rejected “abject ghostwriting, which is not allowed under any circumstances.” *Id.* at 943. Identifying the line between permissible assistance and improper participation

requires a “fact-specific inquiry.” *Id.* at 942. The court offered the following guidance:

The key question is “whether counsel's participation so exceeds the bounds of legitimate assistance as to negate the possibility

that the expert actually prepared his own report.” [A]ssistance in the fine-tuning of an expert report in order to ensure compliance with [Rule 26(a)(2)(B)] is permissible, while “preparing the expert's opinion from whole cloth and then asking

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the expert to sign it if he or she wishes to adopt it” is not.

Id. at 942–43 (alteration in original) (citations omitted).

An Ethical Issue

The motion to exclude the expert in *Numatics* was brought – and decided – under the Federal Rules of Civil Procedure and Federal Rules of Evidence. The court, however, clearly viewed the issue as an ethical one and sharply called the offending lawyer out. *See, e.g., id.* at 941 (calling the lawyer’s conduct “a remarkable breach of ethics and protocol,” which the lawyer “brazenly” attempted to justify). The court cited no rule of professional conduct. But it referred to the expert as the “lawyer’s avatar” who surrendered his role to defense counsel “and that is not how the adversary process works.” *Id.* at

941–42. The court’s description is hauntingly similar to the ethical rules’ prohibition on “conduct that is prejudicial to the administration of justice.” Utah R. Prof’l Conduct 8.4(d).

Conclusion

As I have pointed out previously, the same rules of professional conduct govern in both state and federal courts, but the application of those rules in the ghostwriting context differs. *See, A Ghost Story, supra.* Given that the Federal and Utah State rules on expert reports are different, it is possible that the rules on ghostwriting expert reports in state court are more lenient. But after reading the sharp rebuke the court handed down to the lawyer in *Numatics*, I’m going to leave it to someone else to test the limits in our courts.

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