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FINDING, PREPARING, AND DEFENDING AN EXPERT IN THE AGE OF JUDICIAL GATEKEEPERS

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I. INTRODUCTION

In federal courts since 1993, the law, rules, and practices governing expert witnesses have been clarified and tightened in light of several United States Supreme Court decisions. Various amendments to the Federal Rules of Evidence took effect on December 1, 2000. Of specific relevance are amendments to Rules 701 and 702, which pertain to lay and expert witnesses. These rules largely codify the holdings of seminal Supreme Court decisions.

This article briefly summarizes these Supreme Court decisions as the legal backdrop for a more detailed discussion of practical and strategic issues relating to expert witnesses, such as determining whether an expert is necessary, selecting an appropriate expert, and preparing an expert once selected.

The practitioner should be aware, however, that rulings on experts are highly fact sensitive, and judges are granted wide discretion on how to handle matters pertaining to experts.

Practitioners are encouraged to check the local rules, the presiding judge's particular procedures, and the governing legal authorities in the district in which the case is pending.

II. THE LEGAL LANDSCAPE

In *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999), the Supreme Court explained that the trial judge must ensure that any and all scientific, technical, and specialized testimony admitted in evidence is not only relevant, but reliable.¹ The focus is whether the expert's opinion meets the necessary "standard of evidentiary reliability." *Kumho*, 526 U.S. at 148. The *Daubert* requirements provide a "flexible" inquiry; the admissibility of expert testimony is dependent on a showing that the opinions, and the inferences on which they are based are relevant (FED. R. EVID. 401, 702) and reliable (FED. R. EVID. 702 and 703).



"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. To be relevant, therefore, the opinion must be based on facts present in the case. The expert's "knowledge," i.e., her opinion, must be relevant in that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 402 (all relevant evidence is admissible unless excludable on other evidentiary or privilege bases).



As to reliability, the Supreme Court in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), clarified *Daubert* by emphasizing that a district court, in its gatekeeper function for expert evidence, must evaluate whether there is an adequate "fit" between the data and the opinion proffered. The Court is not to assess the expert's conclusions per se to determine reliability; rather, the court should look to the underpinnings and the methodology by which the opinions were derived. Each opinion must be analyzed separately and carefully supported. The burden of proof is on the party proffering the witness, who must show by a preponderance of evidence that the opinion is both relevant and reliable. The trial court has wide discretion in deciding whether an expert may testify to the opinions proffered. Appellate courts will reverse only when that discretion has been abused, so long as the trial court has used the proper legal standards.

The Supreme Court's legal standards have been incorporated explicitly into the Federal Rules of Evidence. An understanding of those rules, as well as related provisions of the recently amended Federal Rules of Civil Procedure, is helpful in making successful strategy decisions on experts.

III. IS EXPERT TESTIMONY NECESSARY, OR ARE LAY OPINIONS SUFFICIENT?

Not only expert witnesses may give opinions in court. Federal Rule of Evidence 701 allows a lay witness to give opinions in certain circumstances:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

The Committee added subsection (c) to Rule 701 in order to eliminate the risk that the reliability requirements of Rule 702, as well as the expert witness disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure, will be evaded through the simple expedient of proffering an expert in lay witness clothing. While a witness may give both

expert and lay testimony, a particular opinion may not be both. If it is deemed an expert opinion, other requirements attach, as explained later in this article.

Rule 701 incorporates the common law collective-facts doctrine and permits a non-expert or lay witness to offer opinions "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony." The basic difference between a lay witness and an expert is that a lay witness has personal knowledge of the underlying facts of the case. An expert witness, in contrast, learns about the events in issue after the fact and relies on expertise, education, and/or experience to explain pertinent matters, such as the propriety of past conduct, the causes of past events, or predictions for the future.

The Committee drafting the Rule 701 amendments noted that traditional notions of permissible lay witness testimony continue. For example, an owner may estimate his business's past profits, a bystander may identify a controlled substance when familiar with that substance, and an eyewitness to an accident may state that a stain appeared to be blood or give testimony concerning the appearance, identity, sound, size, weight, distance, or other characteristics that cannot be described factually in words apart from inferences.

A. Lay Witness or Expert?

The dividing line between lay witnesses and experts is sometimes imperceptible. For instance, a driver's assessments of the speed his car and another car was traveling at the time of an accident are examples of matters where the degree of skill necessary to make the estimate could be either a lay or an expert opinion, depending on the circumstances and possibly the use of the testimony.

In criminal cases, even courts in the same circuit have reached different conclusions on similar facts regarding whether law enforcement agents' opinions deciphering code words by conspirators arranging narcotics transactions in drug prosecutions is expert or lay testimony. In *U.S. v. Miranda*, 248 F.3d 434, 441 (5th Cir. 2001), the Fifth Circuit held that an FBI agent's extensive participation in the investigation of a particular conspiracy, including surveillance, undercover drug purchases, debriefings of cooperating witnesses familiar with the defendants' drug negotiations, and the monitoring and translating of intercepted telephone conversations, allowed the agent him to give lay testimony based on his personal perceptions as to his opinions about the meaning of certain code words used in that drug ring. In contrast, in *U.S. v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997), the Fifth Circuit held that "[i]t is implausible to think that jurors can understand such arcane allusions without expert assistance. Drug traffickers' jargon is a specialized body of knowledge, familiar only to those wise in the ways of the drug trade, and therefore a fit subject for expert testimony."

Moreover, the trial court has broad discretion in making these evidentiary rulings. In most circuits, trial court rulings on the admissibility of expert testimony are difficult to overturn on appeal. As a practical matter, appellate review is often expensive and may be unavailable until after a final adverse trial judgment.

The best course is to assume that even a lay witness who has personal knowledge or experiences of the type referenced by the Committee nevertheless may be deemed an expert for some of the opinions proffered.

B. How to Decide Need for an Expert

To decide if an expert is necessary, counsel must identify precisely the fact questions on each element of proof of the parties' claims, defenses, and damages (collectively referred to herein as "claims"). If the outcome of a fact issue is dependent on knowledge, education, skill, or experience of a person in a specialized, technical, or scientific field, then retention of an expert is appropriate. The expert may also serve as a lay witness on other topics.

“ For example: Physician as Expert. A treating physician may be both a lay witness and an

expert for a party whose physical condition is disputed. Since a treating physician has personal knowledge of the patient's condition and the treatment administered, the physician generally is not deemed an expert "retained or specially employed to provide expert testimony" under Rule 702 on the issue of the treatment and care of the patient. Therefore, a treating physician typically may testify at trial without requiring the preparation of a written report separate from the progress notes or other documents in the patient party's medical file. Courts sophisticated in the new evidentiary rules often refuse, however, to permit the treating physician to give expert opinion testimony concerning the cause of the patient's condition unless the physician has been designated as an expert for that purpose. The proffering party therefore should ascertain during the discovery period, before the deadline for designation of experts, whether the physician actually has sufficient pertinent expertise and a factual basis to provide a reliable expert opinion on the causation issue. If not, the party will need to obtain a separate expert on that issue. This analysis also is pertinent in the damages arena. Some physicians are qualified to testify to the cost of future care and long-term treatment, while others are not.

C. Benefits of Expert Witness

While there are expenses and detailed procedural requirements relating to the designation of a witness as an expert, a party may benefit from designating a witness as an expert. Rule 704(a) of the Federal Rules of Evidence permits experts to give opinions and inferences on the ultimate issue to be decided by the trier of fact without requiring that the data or documents underlying the opinions be admissible evidence. Also, using an expert is valuable in complex cases in which a party wants a witness to summarize voluminous evidence and to supply the jury with a road map of that party's position before counsel's closing argument. There is an exception to this rule, however, for criminal cases: "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or defense thereto." FED. R. EVID. 704(b).

IV. FINDING THE RIGHT EXPERT

The threshold inquiry is whether the expert is qualified to render the opinions being offered. Rule 702 now prescribes the requirements for testimony by experts:

If scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A. Expert Characteristics to Consider

To find the right expert, counsel must consider various characteristics. First, try to determine exactly what profession or expertise is necessary. Often, non-testifying consultants retained early in the case can help with this assessment. A party need not disclose a consulting expert unless and until a decision is made that the consulting expert will testify. This decision is often driven by court-imposed deadlines relating to experts' designations and reports under Federal Rule of Civil Procedure 26. See FED. R. CIV. P. 16(b)(4), 16(c)(6). Subject to these limitations, counsel repeatedly should revisit the assessment of the type of expert necessary for testimony to prove the claim as the case proceeds and technical, factual, and legal issues are refined.

Another consideration is whether to retain a "professional witness" or an expert who has previously testified only rarely. Professional witnesses are those who earn a significant amount of their income from giving opinions in litigation. While they may be skilled at explaining complex concepts in lay terms, and may be experienced in responding to hostile questions from opposing counsel, these witnesses are often dangerous because they can

appear officious, biased, or too polished to be sincere. There sometimes is a risk with a professional witness because experts' prior testimony and writings must be disclosed in discovery. (See Disclosure Requirements, discussion below of FED. R. CIV. P. 26(a)(2).)

Before committing to use any particular expert, counsel must determine whether the expert witness's prior testimony is harmful to the expert's credibility in the current case. In any event, an expert, even when qualified because of prior research or practical expertise, needs the ability to explain the reasoning for each opinion concisely and persuasively in plain English to the "uninitiated" judge and jury. Further, academics need some practical as well as academic or theoretical experience in order to be persuasive witnesses to juries.

B. Sources to Find Experts

A wide variety of sources exist to locate experts; many of them have been summarized by Jeffrey Allen, "Hunting Down the Experts," www.abanet.org/genpractice/solo/allen2.html.

Potential sources of experts include:

- professors at colleges, universities, and teaching hospitals
- leaders in professional or trade organizations and associations
- lawyers in relevant practice areas
- business contacts (including the client in the case)
- Internet
- authors of significant books or their protégées
- expert witness directories from bar associations and publications
- associations of experts (such as TASA (800-523-2319), Medically@Speaking (800-MED-SPKG), and Forensic Technologies International Corporation (800-334-5701))
- experts who advertise in legal periodicals

CAUTION: Never retain, use, or list in court pleadings an expert without thoroughly researching the individual.

C. Costs for Experts

The cost of experts is often a factor. Sometimes experts will reduce their fees on request. However, always confirm that for the negotiated price the expert will do the necessary preparation to form opinions supported by the facts of the case; will have ample, professionally appropriate, factual and technical support for each opinion (see FED. R. EVID. 702, 703); and will adequately explain the opinions and rationales to the court and counsel. As discussed below, it is devastating for an expert to arrive at favorable opinions that the expert cannot defend at trial on cross-examination.

The cost of discovery of the opponent's expert generally must be born by the requesting party. The party obtaining discovery under FED. R. CIV. P. 26(b)(4)(B) must pay the party who bore the expert's costs initially "a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining the facts and opinions of the expert." FED. R. CIV. P. 26(b)(4)(C).

V. Ensuring the Testifying Expert Has Value

The next step to obtaining an expert who provides value to the case is to ensure that the expert renders opinions that not only are helpful to the client's claim, but also are admissible. The new amendments to Rule 702 of the Federal Rules of Evidence explicitly incorporate the Daubert/Kumho/Joiner requirements. Rule 702 now prescribes the requirements for testimony by qualified experts:

[A] witness qualified as an expert . . . may testify . . . in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Emphasis added.)

The Committee, after clarifying that expert testimony may arise in scientific and non-scientific areas, see *Kumho*, 119 S. Ct. at 1178, sought to provide general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. The Committee, to explain the "reliability" requirements, added the three subparts at the end of the rule:

- (a) sufficient data,
- (b) reliable principles and methodology, and
- (c) reliable application of the methodology.

A. Quantitative Assessment

Subpart (1) of Rule 702 requires quantitative analysis, i.e., a showing that there are sufficient underlying facts or data to render a reliable opinion in the pertinent field of expertise. Rule 703 envisions that experts will rely on the same information and facts as those generally relied upon in the expert's field. That rule, as amended, now provides: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinion or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The last sentence was added to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted in evidence. This rule applies to the proponent of the expert opinion; it does not prevent the opponent from offering the underlying data or information if desired. However, the opponent must consider the effect of opening the door to admissibility of additional underlying data that otherwise would be inadmissible.

B. Qualitative Assessment

The next two issues focus on the substance of each opinion of the expert. The court first must determine whether each opinion is based on reliable principles and methodology. Then the court must determine if the methodology was reliably applied to the facts of the case. Any opinion that is not supported in this manner is inadmissible.

As to ascertaining the relevant principles and methodologies, the Committee interpreted *Daubert* to mandate a five-prong inquiry:

- Acceptance
- Testing
- Peer review
- Error rate,
- Maintenance of standards and controls.

These factors should be considered in assessing the reliability of non-scientific expert testimony to the extent applicable. Which of these factors apply will depend on the particular circumstances of each case.

In scrutinizing how the principles and methods have been applied to the facts of each case, the Committee stated, "any step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology," quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994).

Revised Rule 702 now rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. To assist courts and litigants, the

Committee identified five other inquiries (derived from court decisions) to be considered in performing the gatekeeping function:

- (1) whether the testimony concerns matters growing naturally and directly out of research the expert has conducted independent of the litigation;
- (2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- (3) whether the expert has adequately accounted for obvious alternative explanations;
- (4) whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and
- (5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

No single factor is dispositive of the reliability of a particular expert's testimony. In sum, the Committee stated:

The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded.

The Committee reminds courts that the gatekeeping function requires more than "simply taking the expert's word for it." The Committee also notes that "the more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable," a formulation adopted in *O'Conner v. Commonwealth Edison Co.*, 13 F.2d 1090 (7th Cir. 1994). Thus, although experience alone may be sufficient to qualify a person as an expert, the expert will have to establish that "his preparation to give the opinion in issue is of a kind that others in the field would recognize as acceptable." *Kumho Tire*, 119 S. Ct. at 1176.

Despite setting out these more explicit guidelines, however, the Committee stated that rejection of the testimony is the "exception rather than the rule" and emphasized that the "trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system," citing *United States v. 14.38 Acres of Land Situated in Leflore Co., Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996).

The Committee added that it did not expect the rule to become an excuse for an automatic challenge to the testimony of every expert.

The Committee further explained that a judicial determination that an expert testimony is reliable does not automatically mean that contradictory expert testimony is unreliable. Proponents need not demonstrate to the judge that their experts' assessments are correct; "they only have to demonstrate by a preponderance of evidence that their opinions are reliable The evidentiary requirement of reliability is "lower than the merits standard of correctness." Committee Notes (citation omitted). While the rule's focus is "solely on principles and methodology," the Committee noted the practical reality that "conclusions and methodology" are not entirely distinct from one another," citing *Gen'l Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

The Rule 702 reliability requirement should not be confused with the Rule 703 "reasonable reliance" requirement, which is narrower. The Rule 703 inquiry arises when the expert relies on inadmissible information, which requires the court to determine whether that information is of a type on which other experts in the field reasonably rely. If so, then the expert may rely on that information for his opinions. See § H, *infra*.

As a practical matter, counsel must become intimately familiar with each proffered expert's

area of expertise. In this manner, counsel can confirm that the expert has in fact developed opinions that will survive the required scrutiny. The expert must be shown to have used professionally acceptable methods to analyze the facts and reach an opinion or make inferences that are supportable under the scientists', professionals' or the trade's own methods of analysis in the field.

There is a narrow exception to these detailed analytical requirements. A firmly established scientific theory rising to the level of "scientific law" is subject to judicial notice under Federal Rule of Evidence 201. Counsel should not assume that this avenue will be available, however. Counsel should seek from the opposing attorney a comprehensive written stipulation (generally drafted with the aid of an expert) on the points of specialized knowledge before electing to proceed without the proof required by Rules 702 and 703.

C. Assuring that the Expert's Opinions Will Survive Scrutiny at Trial

Before accepting an expert's opinions as worthy of presentation and reliance by a client, counsel should essentially cross-examine their own expert's opinions by asking the expert the following questions and closely analyzing the responses:

- Is the expert's methodology the same as that used by experts outside litigation to determine causation or diagnosis? If not, why is the expert's methodology reliable?
- Has the expert provided any objective research verification for the opinion? If not, why not? How does the expert know that the opinion is correct, other than his own deductive reasoning?
- Does the expert's theory have general acceptability in the field? Are there widespread contrary opinions? If so, why is the expert's view different?
- Is there any published review of the expert's theory or the contrary view? Is the published material (pro or con) in peer-reviewed journals? If not, why not? Are there any peer-reviewed journals in the field?
- Have others conducted any objective research on the subject? What is the rate of error identified for data used or conclusions drawn? What is the volume and accuracy of the data on which the research is done? How does the research compare in methodology to the expert's analysis?
- Was the research done in anticipation of litigation or for independent purposes? If done independently, who funded the research?
- Did the expert engage in improper extrapolation? Scientists generally make only close extrapolation. For example, is the court likely to find that the extrapolation is reasonable (e.g., the leap from bricks to human tissue is not appropriate).
- To what extent has the expert relied on anecdotal evidence and excluded statistical or other objective data?
- Are the opinions carefully drawn from the facts applicable to the parties in this case, or are the opinions drawn from more general sources? Is there sufficient information to form conclusions relating specifically to this case?
- Did the expert carefully consider other potential causes of the incident or injury? Can the other potential causes persuasively be eliminated as a cause in fact or the proximate cause of the problem in issue? In product liability cases, did the expert test the allegedly defective item and/or the plaintiff's proposed alternative design?
- Is temporal proximity the only or the primary evidence of the relationship of the expert's theory to the injury?
- Would other experts in the field rely on information similar to that on which the expert relied?

If there are only few authorities in peer-reviewed publications or very little scientifically valid research to support an expert's opinions outside the litigation, the opinions will face serious evidentiary challenge. Opinions lacking in recognized support in the expert's field will also face an uphill battle.

VI. DISCLOSURE REQUIREMENTS

A. Expert Witness Designation and Disclosure Deadlines

In federal court, trial by ambush largely is a thing of the past. Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure provides that a party must disclose to other parties the identity and opinions of each testifying expert. A similar rule applies in criminal cases. The expert must provide a written report to the opposing party. The report shall contain:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinion;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions,
- the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the study and testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Since Rule 26(a)(2)(B) requires that the expert witness's report include a "complete statement" of "all opinions to be expressed," the expert's report must be comprehensive. The reach of this language is uncertain; it is left to the court to decide how much detail is required in the expert's report and whether non-expert opinions (i.e., lay opinions) should be included. The safest course is to designate as experts all witnesses who will give opinion testimony and to provide reports that include all opinions of the witness. Some argue that this rule does not require disclosure of everything that the expert knows or about which he may testify. For instance, arguably, the expert may testify to impeaching facts or to important non-expert opinions. See Gregory Joseph, "Emerging Expert Issue under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure," 164 F.R.D. 97, 107 (and cases cited therein) (cited hereafter as "Joseph").

The court controls the timing on expert witness disclosures. Virtually all courts require that the expert designations be done during the discovery period. The deadline usually is set in the scheduling order issued by the court early in the case pursuant to FED. R. CIV. P. 16(b) and (e). Often, parties are encouraged to agree on deadlines. Sometimes the deadlines are designated for the "plaintiff" and "defendant"; alternatively, they are set for parties "with" and "without" the burden of proof on pertinent issues. If no agreement is possible, counsel generally are given an opportunity to propose a schedule.

In contrast to expert witnesses, people with knowledge of the facts relevant to the claims and defenses who may become lay witnesses must be disclosed as part of parties' initial disclosures under Rule 26(a)(2) (expert disclosures) and (a)(3) (witness disclosures). Because expert witness designations and disclosures usually occur later in the discovery period, counsel may defer the final decision on whether to designate a person with personal knowledge as an expert or retain that individual on the lay witness list.

B. Supplementation Requirements

Disclosure responsibilities do not end after production of the expert's initial report. Federal Rule of Civil Procedure 26(e)(1) creates a duty to supplement initial disclosures, including experts' reports and opinions given in depositions. Unless changed by the parties' agreement or by the court, each party must supplement at least thirty days before trial, unless otherwise directed by the court in scheduling or other pretrial orders. Often courts set expert designation deadlines much earlier than thirty days before trial. To avoid the sanction of exclusion of the expert's entire testimony or exclusion of the late-issued opinions, parties should supplement before the close of discovery.

In addition, under Federal Rule of Civil Procedure 26(a)(2)(C), parties must make responsive disclosures when a party intends to elicit expert testimony solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B). Particularly in complex cases, parties should provide in the scheduling order the right to name rebuttal experts by a specified deadline. Courts often will permit a rebuttal expert's designation (or the submission of an expert's rebuttal report to augment the original disclosure) on a showing of need; however, the rules do not provide explicit support

for this result.

Occasionally, parties make repeated or untimely supplements. Courts will be more receptive to the opponent's motion to exclude late-designated experts or opinions if the opponent can demonstrate that

- (i) the information on which the late designation is based was available to the party before the expert's disclosure deadline,
- (ii) the party proffering the expert was not acting in good faith or was negligent or willful in failing to make earlier disclosure
- (iii) the opponent has met all obligations in similar circumstances during the case, and
- (iv) there is prejudice to the opponent (which could include the time remaining before trial, the importance of the disclosure, and the ability to cure the prejudice such as by re-opening discovery).

Opinion testimony by lay witnesses technically need not be disclosed as part of the Rule 26(a)(2)(B) obligation. See *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995). That rule incorporates by reference FED. R. CIV. P. 26(a)(2)(A), which in turn describes expert testimony as that offered pursuant to FED. R. EVID. 702, 703, and 705, the expert witness evidentiary rules. See *Joseph*, 164 F.R.D. at 107-08.

There are small but potentially significant inconsistencies between Federal Rule of Civil Procedure 26 and Federal Rule Evidence 703. In particular, under Rule 703, experts are permitted to give opinions based on facts or data "perceived by or made known to the expert at or before the hearing." However, as a practical matter, an expert who relies solely or primarily on the facts elicited at trial (which facts are truly unavailable before that time) cannot give a pretrial written report of any substance as contemplated by Rule 26(a)(2)(A).

A court may impose harsh remedies for a party's failure to timely disclose the identity of all testifying experts, their opinions, or other pertinent matters. Similarly, strong sanctions are available for failure to timely supplement prior witness and expert opinion designations. Under Rule 37 of the Federal Rules of Civil Procedure, the sanctions include preclusion of a party from contesting a pertinent matter, refusal to permit evidence on the subject, striking a pleading or part thereof, dismissal of the action, or entering a default. However, if the subject matter is somewhat technical but is the subject of commonplace experience (e.g., age, handwriting, physical expression or condition) and there has been timely disclosure of the potential of lay opinions on the subject, a court for practical reasons often will allow the opinions despite prior non-disclosure. The key to this ruling is the issue of unfair prejudice.

VII. DISCOVERY OF EXPERTS AND THE INFORMATION THEY HAVE CONSIDERED

Federal Rule of Civil Procedure 26(a)(2)(B) mandates disclosure of all the "data or other information considered by the witness in forming the opinions." It is unclear whether attorney work product (such as compilations, factual summaries, and the like) are disclosable as "data or other information." Rule 26(b)(5) contains the requirement that a party prepare a privilege log that lists the nature of the documents, communications, or things not produced or disclosed in such a manner that will permit the requesting party to assess the applicability of the privilege or protection. Nothing in this rule precludes its application to experts and their work materials. One distinguished commentator argues persuasively that the phrase "data or other information" is not designed to require disclosure of "core work product" material such as "attorney-expert mental-impression communications." See *Joseph*, 164 F.R.D. at 103-06.

The inquiry is highly case specific, however, and the outcome on this issue in any particular case cannot be predicted. Caution thus is necessary: Many courts will rule that showing an attorneys' work product to a testifying expert in the course of the expert's analysis waives work product protection. See FED. R. CIV. P. 26(a)(2)(B) and FED. R. EVID. 705. For this

reason, counsel also must be careful not to show privileged or work product material to the expert for the purpose of refreshing the witness's recollection in preparation for a deposition or trial testimony. Federal Rule of Evidence 612 entitles an adverse party to see all writings used for this purpose. The adverse party may cross-examine the witness on the material and may introduce pertinent portions in evidence.

Expert discovery includes the opportunity to take the expert's deposition after receiving a report. See FED. R. CIV. P. 26(b)(4)(A). As an economy measure, some counsel dispense with the requirement of a report before taking the deposition. However, in most cases, this shortcut carries serious risk. Failure to obtain the opposing party's expert report before the expert's deposition may leave counsel unable to prepare and then unable to delve meaningfully into the bases of the expert's opinions at the deposition or trial.

Generally, the work of a non-testifying expert is not subject to discovery. A party cannot obtain discovery of facts known or opinions held by a non-testifying expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, except under Rule 26(b)(4)(B), which requires "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by any other means."

There is one other exception to the protection from discovery of non-testifying experts. There is a special rule for discovery of an examining specialist appointed under Rule 35(a) of the Federal Rules of Civil Procedure. Rule 35 is crafted to address the sensitive nature of physical and mental examinations and the potential for their abuse. Rule 35 requires court approval before a mental or physical examination of a party (or a person under the legal control of a party) may be obtained, and no such examinations of non-parties are permitted. To obtain this examination, Rule 35(a) requires that the requesting party give notice to the person to be examined and all parties to the case. The motion must establish (i) why the mental or physical condition of the party "is in controversy" and (ii) that there is good cause for the examination.

The requesting party thus must meet a higher standard than that required for most other discovery. Many courts will not grant a Rule 35(a) request in response merely to a routine request for damages for mental anguish or emotional distress (as opposed to a separate tort or other claim for emotional distress or ongoing severe mental injury). These examinations are to be conducted by a physician or a psychologist. If the Rule 35(a) motion is granted, then pursuant to Rule 35(b)(1), the examiner must prepare a report. On request, the person examined or the related party shall be provided with a copy of the report, setting out the findings, results of tests, diagnoses, and conclusions, together with reports of all earlier examinations of the same conditions. No showing of good cause is required to obtain this discovery. If this report is disclosed, then the requesting party is entitled to copies of "like reports" by other examining physicians, if available. Under Rule 35(b)(2), if an examined party requests and obtains a copy of the examiner's report, that party waives any privilege it might have regarding the testimony of every other person who has examined or may examine the party concerning the same mental or physical condition.

This rule must be considered in the context of FED. R. EVID. 705, which permits an expert to testify by giving an opinion or inference and giving her reasons "without first testifying to the underlying facts or data, unless the court requires otherwise." In any event, the expert may be required to disclose the underlying facts or data on cross-examination. Also, experts may testify to opinions and inferences on the ultimate issue to be decided by the trier of fact, FED. R. EVID. 704(a), except in criminal cases on the issue of the defendant's intent, *id.*, 704(b).

VIII. WHETHER AND WHEN TO CHALLENGE THE OPPONENT'S EXPERT

The timing of a challenge of the opponent's expert is one that requires tactical and legal analysis. Challenges theoretically may be asserted at any time. Often the challenges are

made after the close of discovery, after the expert has provided a report and given a deposition. Counsel must review the presiding judge's procedures and the district's local rules. Rule 104(a) of the Federal Rule of Evidence provides that "[p]reliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court." Under Rule 104(c), such hearings are to be conducted out of the hearing of the jury "when the interests of justice require." If the issue is not raised until the eve of trial, however, judges often are loathe to delay a trial for this purpose. In a bench trial, courts frequently will insist that the decision on the expert's qualifications to testify or the admissibility of his opinions be made during the trial, when the court knows more about the facts in dispute. In a jury trial, an expert's qualification to testify or the admissibility of an expert's testimony will often be determined in a pretrial hearing or on pretrial written submissions.

Technically, the proper methods of attacking an expert's witness's testimony during pretrial proceedings are by a motion to strike or by an objection included in the objecting party's summary judgment motion or opposition.

Like at trial, the objections must be specific and explain the deficiencies in the proffered expert's opinions by attacking one or more of the Rule 702 elements (i.e., the expert's qualifications, the sufficiency of the data relied upon, the methodology used, or the application of the methodology to the facts of the case).

Counsel must note that, generally, a challenge limited to an expert's qualifications does not preserve objection to admission of the opinions per se. The attack on qualifications constitutes an objection to the expert's competence and/or credibility, not to admissibility of his opinions under Rule 702.

If a determination on the admissibility of an expert's testimony is important to the parties - whether for assessment of trial risk for settlement purposes or to save litigation expense by avoiding trial preparation and trial altogether - the parties should so inform the court. A court is far more likely to be willing to make an earlier determination of the admissibility of the putative expert's testimony if the court knows that a ruling is likely to affect parties' views on settlement.

In the past, courts held that failure to object at trial to expert testimony forfeits the objection, precluding full review on appeal. However, the 2000 amendments to the Federal Rules of Evidence provide in Rule 103(a) (last paragraph) that "[o]nce the court makes a definite ruling in the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer proof to preserve a claim of error for appeal." This rule applies to trial rulings as well as to rulings on evidence offered to support or oppose summary judgment. However, given judges' past training and experience, it not clear that Rule 103 fully protects a party who objected to the expert's opinion in a summary judgment motion, but did not assert the objection at or in connection with trial. To advance the objection in connection with the trial, a party should file with the pretrial order an objection, motion in limine, or motion to strike the expert's testimony. If no objection to admission of the expert's opinions is made, the standard of review on appeal is only for plain error.

When to raise a challenge to an opponent's expert witness is as important as the question of whether such a challenge should be raised in the first place. The Federal Rules of Evidence allow a challenge to be raised before trial or after trial starts; however, each alternative involves various considerations that depend on the facts and procedural posture of the case.

The potential strategic advantages of raising a pretrial challenge are gaining certainty concerning the opponent's witnesses, weakening the opponent's case by eliminating a critical witness, and improving the settlement value of your case. The potential disadvantages of pretrial challenge are the time and cost involved, educating your opponent about possible weaknesses in his expert's qualifications or substantive analysis,

losing tactical control over the issue once it is in the judge's hands, and inviting a reciprocal attack. In evaluating whether a pretrial challenge is appropriate, you should consider whether your expert can withstand a similar challenge. If you believe your expert is not as strong as your opponent's, perhaps a pretrial challenge is unwise as well as premature. Of course, if you are the defendant, this consideration may be less important, since at trial you will have to challenge the plaintiff's expert first. A final consideration is whether the court will allow the opponent to cure deficiencies. In some jurisdictions, the court will extend the time to designate experts (and to engage in discovery) after striking an expert.

Assuming the presiding judge's rules permit a challenge to an expert during trial, the Rules of Evidence permit the objection either before the expert has been called, such as the morning that the expert is to testify, or during the expert's direct examination through voir dire (as to the expert's qualifications), or after the expert's direct examination. The obvious advantage to withholding a challenge until trial is that it will likely prevent your opponent from curing the defect. Also for plaintiffs, delaying the challenge until the defendant's expert is called to testify at trial during the defense's case eliminates the potential for a reciprocal challenge by the defense. However, as noted earlier, many judges may prefer or require that challenges to expert testimony be raised before trial. If so, the chances of striking an opponent's expert at trial are seriously diminished.

IX. ISSUES PERTAINING TO EXPERT TESTIMONY AT TRIAL

As noted above, Rule 703 of the Federal Rules of Evidence permits experts to rely on information that is inadmissible in evidence, if the material is of "a type reasonably relied upon by experts in the particular field in forming opinion or inferences upon the subject." The facts or data need not be admissible in evidence in order for the opinion or inference to be admitted in evidence. Rule 703 contains a restriction that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." This restriction applies to the party offering the expert opinion but does not prevent the opponent from offering the underlying data or information if desired. This restriction is similar to the balancing test in Federal Rule of Evidence 403, but reverses the weight of the two factors; for admissibility under Rule 703 the court must find that the probative value substantially outweighs the prejudicial value of the questioned information. This assessment must be made separately regarding each piece (or category) of information on which the expert relied. However, the opponent must consider the effect of opening the door to admissibility of additional underlying data that otherwise would be inadmissible.

If admitted in evidence, the underlying data should not be received for all purposes. Counsel opposing admission of the evidence should request, before receipt of the evidence, that the trial judge give a limiting instruction. Specifically, counsel should urge the court to inform the jury that the otherwise inadmissible information is before the jury only for the purpose of assisting the evaluation of the reliability, credibility, and weight the jury should give to the expert's opinion, but not for the truth of the underlying information, and that the information must not be used for any other purpose. See FED. R. EVID. 105.

X. CONCLUSION

Use of an expert has many advantages and is often necessary to prove a claim or defense. However, courts have abandoned old-fashioned, freewheeling procedures for experts. Careful attention to whether an expert is needed, the selection of a particular expert, his qualifications, his preparation of opinions, and his manner of presenting the opinions are all crucial to the efforts to gain admission of the evidence and to persuade the fact finder.

¹ *Daubert*, 509 U.S. at 589; *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276-77 (5th Cir. 1998)