OUTLINE OF DISCUSSION*
CIVIL LITIGATION
2002 DISTRICT OF ARIZONA CONFERENCE
JANUARY 31, 2002

I. Introduction

- The Federal Rules of Civil Procedure ("FRCP") require a party who has retained an expert to testify to disclose the basis of the expert's opinion before trial.
- The court has a pre-admission "gatekeeper" duty to determine that proffered expert testimony rests on a reliable foundation and is relevant.
- The Federal Rules of Evidence ("FRE"), however, appear to circumvent the FRCP disclosure requirement and perhaps the court's "gatekeeper" duty by permitting the expert to base his opinion on facts or data made known to the expert before *and even during* the trial. Furthermore, the expert may testify as to his opinion without having to reveal the facts or data underlying his opinion on direct examination. Thus, the expert might not be required to reveal the basis of the opinion until cross-examination.

II. Rule 26, FRCP

- A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702 (Testimony by Experts), 703 (Bases of Opinion Testimony by Experts), or 705 (Disclosure of Facts or Data Underlying Expert Opinion) of the FRE. (Rule 26(a)(2)(A)).
- The disclosure of a retained expert shall include a written report prepared and signed by the witness which shall contain a "complete statement of all opinions to be expressed[,] the basis and reasons therefor [and] the data or other information considered by the witness in forming the opinions." (Rule 26(a)(2)(B)).
- The deposition of an expert from whom a report is required shall not be conducted until after the report is provided. (Rule 26(b)(4)(A)).
- "[A]bsen[t] … other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial … or, if the evidence is intended solely to contradict or rebut evidence … within 30 days after the disclosure made by the other party." (Rule 26(a)(2)(C)).
- These disclosures shall be supplemented with respect to both information contained in the report and information provided through a deposition of the

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expert pursuant to Rule 26(e)(1) within the time limits imposed by Rule 26(a)(3).

- Failure to make these disclosures can result in exclusion of any witness or information not disclosed from use as evidence at trial (Rule 37(c)(1)).

III. Rules 702, 703 and 705, FRE (December 2000 additions are italicized)

- "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 on 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*." (Rule 702).
- "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 opinions 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*." (Rule 703).
- "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." (Rule 705).

IV. Facial Conflict between Rule 26 and Rules 702, 703 and 705

- The purpose of a "detailed and complete" expert report under Rule 26, "is in part to minimize the expense of deposing experts, and to shorten direct examination and prevent ambush at trial." *Ortiz-Lopez v. Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De Puerto Rico*, 248 F.3d 29, 35 (1st Cir. 2001).
- "[T]his sort of disclosure [under Rule 26] is consonant with the federal courts' desire to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." *Ortiz-Lopez*, 248 F.3d at 35 (quoting *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992)).
- The purpose of Rule 703 was to alter the common law rule preventing an expert from relying on inadmissible hearsay evidence. *In Re Paoli RR Yard PCB Litigation*, 35 F.3d 717, 749 (3d Cir. 1994).

- Although the purposes of Rules 26 and 703 do not conflict, facially their language appears inconsistent.

V. Rule 703 Should Be Read in Conjunction with Rule 26

- Rule 703 should not be interpreted to alter the requirements of Rule 26.
- Rule 26 mandates that <u>all</u> expert opinions and underlying bases be disclosed well in advance of trial. Rule 26(a)(2)(A), (B), (C); 26(b)(4)(A) (requiring full disclosure at least 90 days prior to trial unless otherwise directed by the court). *See also Smith v. State Farm Fire & Cas. Co.*, 164 F.R.D. 49, 53 (S.D.W.V. 1995) (noting "[a] 'preliminary report' is not contemplated by the Rule, which calls for a 'complete statement of all opinions to be expressed.'").
- Courts have not hesitated to exclude expert opinions when those opinions or the supporting bases were not disclosed as required by Rule 26. *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996) (excluding expert testimony not disclosed in violation of Rule 26); *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277 (8th Cir. 1995) (limiting expert testimony to the opinions and bases properly disclosed); *Williams v. Burlington N. & Santa Fe R.R., Co.*, 13 F. Supp. 2d 1125 (D. Kan. 1998) (excluding expert's opinions not expressed in a report that the parties agreed to construe as a Rule 26 report); *Coastal Fuels v. Caribbean Petroleum Corp.*, 1998 U.S. Dist. LEXIS 22052, at *14-15 (1998) (explaining the exclusion of an expert's testimony was proper because "[t]he bases for [the expert's testimony] … were neither contained in the [Rule 26] report nor in his trial testimony.").
- The combined effect of Rules 703 and 705 has "place[d] the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." *Smith v. Ford Motor Co.*, 626 F.2d 784, 793-94 (10th Cir. 1980) ("Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon.").
- Rules 703, 704, and 705 underscore the importance of complete disclosure. The Advisory Committee Notes to Rule 705 recognize that the absolute need for effective cross-examination is especially strong in light of Rules 703, 704 and 705. *See* Advisory Committee Note to the 1972 Proposed Rules (noting that the Rules "assume that the cross-examiner has the advance knowledge which is essential for effective cross-examination" and <u>explicitly</u> relying on the "substantial discovery" of Rule 26(b)(4) to meet this requirement) (emphasis added). *See also Jefferson v. Davis*, 131 F.R.D. 522, 526 (N.D. Ill.1990) (quoting the Advisory Committee Notes and recognizing that our system requires that the "cross-examiner has the advance knowledge which is essential for effective cross-examination.").

- Rule 703 should be interpreted in conjunction with the scientific reliability requirements of Rule 702 and *Daubert*.
- The requirement that an opinion be the product of reliable principles and methods mandates forming an opinion only after a scientifically valid study of the available facts and data.
- Accordingly, Rule 703 should be read in conjunction with Rule 702 and *Daubert* and interpreted to mean that once an expert has demonstrated that his opinions are the product of the application of reliable principles and methods to a scientifically sufficient amount of information, that expert could further rely upon additional information learned at trial, if the new information is incorporated into the expert's opinion in a scientifically reliable manner.

VIII. Conclusions

- Rules 26 and 702, in conjunction with *Daubert*, require a timely, pretrial disclosure of *all* opinions and the underlying bases therefore.
- Rule 702 and *Daubert* mandate that an expert consider a sufficient amount of information to ensure that his opinion is the product of a reliable scientific methodology.
- Once an expert's opinions and bases have been fully disclosed as required, the expert's testimony must pass scrutiny under Rule 702 and *Daubert*. Only then does Rule 703 apply to the permissible bases upon which an expert can rely.
- If an expert's opinions and bases, as disclosed pretrial, do not satisfy *Daubert*, the expert's testimony must be excluded. Rule 703 should not be applied to avoid this disclosure and "gatekeeping" process. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 748-49 (3rd Cir. 1994) (holding that the same standard for admissibility applies under Rule 703 and *Daubert*); *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679, 691 (5th Cir. 1997) (noting "*Daubert's* description of the trial judge's gatekeeper duty under Rule 702 sheds light on her duty in this capacity under Rule 703 and the relationship between these duties.").
- Instead of overruling these requirements, Rule 703 should be interpreted to allow an expert whose testimony has already passed muster to further rely upon newly acquired previously unavailable, and thus, undisclosed information or data learned at trial.

CIVIL LITIGATION

FEDERAL BAR ASSOCIATION 2002 DISTRICT OF ARIZONA CONFERENCE

Tucson, Arizona

January 31, 2002

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