

*With Compliments of*

## CONDON & FORSYTH LLP

7 TIMES SQUARE  
NEW YORK, NEW YORK 10036  
TEL: 212.490.9100  
FAX: 212.370.4453

1901 AVENUE OF THE STARS  
LOS ANGELES, CALIFORNIA 90067  
TEL: 310.557.2030  
FAX: 310.557.1299

### SPRING 2007

---

#### **EXPERT WITNESSES IN U.S. FEDERAL COURT COMPLEX LITIGATION**

Complex litigation frequently relies heavily upon the work of scientific or technical experts and often teams of experts. Whether a metallurgical engineer conducting a digital fractographic imaging analysis, a propulsion engineer creating a computational fluid dynamic model, a 747 pilot, an orthopedic surgeon or immunologist, experts play a role in the education of counsel, the court and, of course, the jury.

Through procedural and evidentiary rules as well as caselaw, the U.S. federal court system has established stringent requirements for the use of expert reports and testimony in federal litigation. The last significant strengthening of these requirements occurred in 2000 when the Federal Rules of Evidence and the Federal Rules of Civil Procedure both were amended. Since that time, federal courts have struggled with various aspects of the amended rules, *e.g.*, disclosure of an attorney's work product if considered by an expert in formulating his or her opinion or the production of an expert's draft reports. As result of the continuing issues in this area, further amendments may be on the horizon. This Newsletter reviews the evolution of the key requirements for the use of expert witnesses, recent cases interpreting and applying those requirements, and some of the proposed future rule changes.

#### **The *Frye* Standard – “Generally Accepted” as Reliable in the Field and 1975 FRE Amendments**

Dating back to the 1920's, U.S. federal courts have allowed the use of expert witnesses to aid juries when dealing with medical, scientific, engineering or other technical areas outside of a layman's experience. For decades, the decision of *Frye v. United States*<sup>1</sup> governed the admissibility of expert testimony.

Under *Frye* parties were permitted to present expert testimony, provided the underlying analysis was “generally accepted” as reliable within the expert's field of expertise. The *Frye* standard was applied liberally throughout the federal court system, with a view towards allowing a jury to decide on the weight an expert's opinion should carry – at times turning trials into battles between experts without any real regard to the validity of the evidence being admitted at trial.

In 1975, the Federal Rules of Evidence were amended, setting forth new admissibility requirements not premised on *Frye* but, instead, focused on the reliability of the testimony being offered as evidence and the qualifications of the expert giving such testimony. Specifically, Rule 702 provided that “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.” For the better part of two decades, Rule 702 and the *Frye* standard co-existed in the federal court system.

One goal of Rule 702 was to weed out “junk science” – “a catalogue of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and now and again, outright fraud offered by expert witnesses.”<sup>2</sup> Junk science presented by charismatic experts has swayed many a jury, who often accepted junk science expert testimony uncritically. Not having the background to evaluate the merits of some expert opinions, jurors often just accepted them as truth.

### **U.S. Supreme Court Standardizes Admissibility Requirements Through *Daubert* and its Progeny**

In 1993, in part in response to the prevalence of junk science being offered through expert witness testimony, the U.S. Supreme Court tightened admissibility standards for expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>3</sup> In this landmark decision, the Court imposed a “gatekeeper” role on trial judges to allow only reliable scientific evidence to be presented to the jury. The Court held that Rule 702 required the trial judge, as gatekeeper, to determine whether the proffered expert evidence was reliable and relevant. Recognizing that reliable scientific knowledge derives only from the actual application of scientific methodology, the Court outlined several factors to assist judges in determining reliability.<sup>4</sup> Equally important was determining whether the testimony was relevant, *i.e.*, whether the testimony logically advances a material fact of a party’s case – in other words, will the testimony assist the jury in matters beyond the understanding of the average lay person when deciding the case.

In subsequent decisions the Supreme Court continued its refinement of expert witness admissibility standards: *General Electric Co. v. Joiner*<sup>5</sup> and *Kumho Tire Co. v. Carmichael*.<sup>6</sup> In *General Electric Co.*, the Court, in essence, instructed trial courts to exclude expert testimony if an “analytical gap” existed between an expert’s reasoning and conclusion. *Kumho Tire* further strengthened a court’s role in preventing the use of “junk science” by extending the court’s gatekeeping role to include expert testimony not only based on “scientific” knowledge, but also testimony based on “technical” and “often specialized” knowledge.<sup>7</sup> *Kumho Tire*, in effect, extended the trial judge’s gatekeeper function to all experts.

### **Amendments to Rule 702 and the Courts’ Gatekeeper Role**

In 2000, Rule 702 was amended to require expert testimony to satisfy three additional criteria for admissibility:

- (1) The expert testimony must be based on sufficient facts or data;<sup>8</sup>
- (2) It must be the product of reliable principles and methods;<sup>9</sup> and
- (3) The expert must apply those principles and methods reliably to the facts of the case.<sup>10</sup>

Under the amended rule, which essentially codified the holdings of the *Daubert* trilogy of cases, a retained expert must be able to explain conclusively his or her methodology in reaching his or her conclusions. Increasingly, federal trial courts are exercising their wide latitude in determining the admissibility of expert testimony. Whether a proposed expert should be permitted to testify is case, and fact, specific and ultimately left to the trial court’s discretion. In *Colony Ins. Co. v. Coca-Cola Co.*,<sup>11</sup> an action arising from a fire which destroyed a restaurant, the District Court of Georgia granted and denied in part defendant’s motion to preclude the testimony of plaintiff’s accident reconstruction expert.

The expert had opined that the fire was caused by an electrical failure in the power supply of a soda fountain dispenser manufactured by the defendant. The defendant moved to preclude the expert’s testimony on the grounds that his opinion was unreliable because *a week before his deposition* he changed his theory on how the fire started. At his deposition the expert testified that his preliminary report was drafted prior to laboratory testing of the subject appliance and he changed his opinion based on the results of the testing.

Although the trial court concluded that there was nothing suspicious in the manner in which the witness “changed” his expert opinion and that he had followed the accepted scientific methodology for the investigation of fires, it did limit the expert from testifying more specifically on causation. He was not permitted to offer testimony as to whether

the fault was a result of maintenance or the manufacturing process because the wiring was destroyed in the fire, and he had failed to recreate the fault through actual testing or computer simulation or any other scientific method. In precluding his causation testimony, the court found the expert's conclusion that the fault arose from defective manufacturing to be "pure speculation."

Although defendant's motion to preclude the expert testimony was granted only in part, the court effectively eliminated the key piece of evidence linking the fire to the manufacturer by precluding testimony on the causation issue.

In complex litigation, especially aviation accident cases, plaintiffs frequently rely on accident reconstruction experts to determine the cause of the accident. Often evidence establishing causation does not exist and expert witnesses are asked to opine based on nothing more than speculation. Pre-*Daubert* and the 2000 rule amendments, trial courts on many occasions have permitted experts to testify under such circumstances on the assumption that a vigorous cross-examination by the defense would provide the jury with a fair opportunity to evaluate the credibility of the testimony. However, with trial courts increasingly embracing their role as gatekeeper of expert testimony, judges are dissecting expert opinions and not relying on cross-examination by defense counsel to expose the defects in the "scientific" evidence being offered. Moreover, federal appellate courts have shown extreme reluctance to overturn district court decisions to preclude expert testimony. As the Supreme Court instructed in *General Electric Co. v. Joiner*, a district court's ruling should be deferred to unless it is "manifestly erroneous."<sup>12</sup>

A recent decision, *Thomas v. Evenflo Co., Inc.*,<sup>13</sup> illustrates this trend. *Thomas* arose from the asphyxiation of an infant left unattended while in a child restraint system (CRS) manufactured by defendant. After excluding several of the opinions of plaintiff's expert witness, the trial court granted summary judgment in favor of the defendant.

Plaintiff's expert witness, a senior engineer specializing in the area of occupant crash protection, had opined, through eight separate

underlying opinions, that the CRS was defectively designed. He suggested that the seat's design permitted the infant to position himself in a manner which obstructed his airway.

The district court evaluated each of the underlying opinions and determined that the expert: (1) was only qualified to render four of the underlying opinions; (2) did not offer evidence that he used a reliable methodology when forming three of his opinions; and, (3) offered cumulative testimony in one opinion which would not assist a trier of fact. Additionally, the court stated that two of the opinions were "merely general conclusions regarding the effectiveness of the CRS. They fail to determine whether the alleged defect forming the basis for these exceedingly broad statements contributed in any way to [the] death."<sup>14</sup>

In affirming the district court's preclusion and the summary judgment order's grounds, the appellate court agreed that "the risk that these [expert] opinions would mislead the jury and unfairly prejudice the companies far exceeds any probative value, which we view as nil."<sup>15</sup>

### **FRCP Rule 26 Unlocks the Door to Discovery of the Basis for Expert Opinions**

The key to challenging junk science, *i.e.*, the admissibility of certain expert testimony, begins with Rule 26 of the Federal Rules of Civil Procedure. Rule 26 requires that an expert report must contain not only "a complete statement of all opinions" but also "the data or other information considered by the witness in forming the opinions."<sup>16</sup>

The key word "considered" was included in a 1993 amendment to the rules and has been interpreted to mean "to take into account."<sup>17</sup> "Considered" is clearly broader than the previously used phrase - "relied upon" - which required dependence by the expert on the data or information.<sup>18</sup>

In *Manufacturing Administration & Management Systems, Inc. v. ICT Group, Inc.*,<sup>19</sup> the trial court explained that the word "considered" in the amended Rule 26 embraces an expanded notion of discovery and is much broader than, for example,

“relied upon” or a like phrase that might call for more limited disclosure. Rule 26, therefore, plainly requires disclosure of all information reviewed in the formulation of an expert’s opinion, notwithstanding the weight of any actual or perceived impact of such information on the expert’s ultimate opinion(s).

In its note to practitioners on the 1993 amendment, the Advisory Committee on the Federal Rules of Civil Procedure stated:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions ... are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Materials considered by experts, therefore, should be disclosed as part of an expert’s report. This includes documents provided by counsel, draft expert reports, notes taken by the expert<sup>20</sup> and, a number of courts have even held, the recorded mental impressions and opinions of the attorney if considered by the expert.<sup>21</sup>

Obtaining the information considered by an expert in formulating his or her opinion is essential in determining whether the data considered was accurate and if it supports the expert’s opinion. Additionally, an expert’s file may reveal: (1) a reliance on counsel for factual information as opposed to actual factual evidence; (2) the existence of undisclosed experts who may have generated unfavorable reports or findings; (3) failed tests; or (4) that tests were actually performed by the expert’s staff or someone else other than the expert. Any of these circumstances could establish grounds for a preclusion motion or, at a minimum provide important information for an effective cross-examination at trial. The majority of federal jurisdictions have long recognized that the “discovery of draft reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.”<sup>22</sup>

In addition, in the event the expert has destroyed the supporting documentation, draft reports or notes, this behavior is subject to sanctions.<sup>23</sup> Sanctions may include preclusion of expert testimony if the party’s failure to comply with mandatory discovery requirements is without substantial justification.<sup>24</sup>

The pro-disclosure stance taken by the majority of federal courts in interpreting the amended Rule 26 requirements has prompted attorneys to re-think how they work with expert witnesses.

For example, many aviation product liability actions require the assistance of several experts to provide testimony or to educate counsel on the science behind the accident. Topics can vary from weather conditions, fluid dynamics, and materials analysis to piloting and crew resource management. Normally, these different disciplines are interrelated and require coordination.

Prior to the 1993 amendments, it was commonplace for counsel to schedule a conference for the experts involved in the action, draft a detailed agenda, encourage note taking, and set forth different theories of the case, often in memorandum form, to be discussed. It was routine for counsel to distribute select materials for the experts to review prior to meeting. At the close of the meeting, counsel would stress to each expert that the discussions and attorney-drafted documentation was to be considered privileged as attorney work product and not discoverable.

The 1993 rule amendments and subsequent caselaw require testifying experts to disclose attorney work product furnished to them if such work product was considered in the formulating of the expert’s opinions.

### **Has the Pendulum Swung Too Far – Expert Discovery vs. Attorney Work Product Privilege – The Current Debate**

Despite the clear language of Rule 26,<sup>25</sup> considerable disagreement still exists concerning the discoverability of attorney-expert communications, as well as notes and draft reports from an expert’s file.

Courts have set forth essentially three reasons for requiring complete disclosure under the term “data considered” by an expert. First is the recognition that this information is vital to an effective cross-examination.<sup>26</sup> Second, once counsel shares attorney work product with a third party, the privilege ceases to exist. Lastly, courts have recognized benefits to establishing a clear rule to avoid expensive discovery disputes.<sup>27</sup>

This bright line rule – focused directly on counsel who ghostwrite expert reports/opinions – says that if you continue this questionable practice, you also must be prepared to disclose draft reports (as well as attorney notes on draft reports) to your adversary for use on cross-examination to test the reliability, methodology and, ultimately, the credibility of the expert’s opinions.

Although it is well settled that counsel may assist an expert in the preparation of an expert report,<sup>28</sup> it is possible for an attorney to go from providing acceptable assistance to unacceptable independent authorship.<sup>29</sup> This questionable conduct was highlighted in *Occulto v. Adamar of N.J. Inc.*,<sup>30</sup> a slip and fall case where discovery uncovered that counsel provided a letter to his testifying expert physician which stated at the top of the draft expert report (in bold capital letters) “Please have retyped on your stationary. Thank you.”<sup>31</sup>

Most counsel are ethical and do not ghostwrite expert reports nor do they engage experts that dabble in “junk science.” However, for those that do, an attorney ghostwriter normally will take several steps to protect this work product, including instructing experts to remove drafts copies from files, or objecting to deposition questioning on attorney-expert communications. Rule 26 provides the tools to combat these questionable practices.

Rule 26 provides counsel with discovery tools to educate the court and jury through motion or cross-examination about the extent of attorney influence on an expert and ultimately whether the expert’s opinions are admissible and, if so, credible.

## **Attorney Work Product and the Other Side of the Debate**

On the other side of the debate is the argument based on attorney work product concerns, *i.e.*, the importance of a fundamental interest in preserving the privacy of a lawyer’s thought processes and mental impressions.<sup>32</sup>

A few courts have disagreed with Rule 26 expert disclosure requirements, holding that documents containing “core work product” were protected by the attorney work product privilege despite disclosure to an expert and suggesting that an attorney’s handwritten notes would also be protected from discovery.<sup>33</sup>

A fundamental consideration that must be acknowledged is that attorneys often require experts to educate them on the technical aspects of complex cases. This requires open and frank communication with experts designed to educate the attorney that often involve e-mails, letters, or teleconferences, all of which could be discoverable. During this education process, counsel needs the protection of the work product doctrine in order to learn about the case.

Currently counsel handle this discovery dilemma in essentially two ways: (1) by retaining a consulting expert for education purposes only because communications with the non-testifying expert are not subject to the disclosure requirements of a testifying witness; or, (2) by the parties agreeing to stipulate out of the expert disclosure requirements of Rule 26.

This debate has returned to the Advisory Committee for the Federal Rules of Civil Procedure. At a January 13, 2007 Subcommittee “mini conference” to discuss possible new amendments to Rule 26, the Advisory Committee spent considerable time considering both sides of the debate. Various legal associations, federal judges and practitioners offered their thoughts. In April 2007, the Subcommittee forwarded several proposed tentative amendments to the Advisory Committee, one of which restricts disclosure of draft reports except upon a showing of exceptional circumstances. The Subcommittee advised that it expects to make a

recommendation on the discoverability of attorney-expert communications, to the Advisory Committee in the Fall of 2007.

### Conclusion

Judges and jurors are faced with difficult decisions in expert dominated civil trials. The federal court system and its rules on expert reports, disclosure and admissibility will likely see additional changes in upcoming years influenced by attorneys on both sides of the bar.

### EDITORS

MICHAEL J. HOLLAND  
KATHERINE B. POSNER  
PARTNERS, NEW YORK OFFICE  
mholland@condonlaw.com  
kposner@condonlaw.com

CONTRIBUTOR TO SPRING 2007 ISSUE

ANTHONY U. BATTISTA  
ASSOCIATE, NEW YORK OFFICE  
abattista@condonlaw.com

<http://www.condonlaw.com>

This Condon & Forsyth LLP Newsletter is intended to provide a summary of aspects of the subject matters covered, not to render comprehensive legal or other professional advice.

© 2007 CONDON & FORSYTH LLP

<sup>1</sup> 293 F. 2d 1013 (D.C. Cir. 1923).

<sup>2</sup> Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom*, (1990) (further defining junk science as – a “hodgepodge of biased data, spurious inferences, and logical legerdemain, patched together by researchers whose enthusiasm for discovery and diagnosis far outstrips their skill”).

<sup>3</sup> 509 U.S. 579 (1993).

<sup>4</sup> *Id.* at 590.

<sup>5</sup> 522 U.S. 136 (1997).

<sup>6</sup> 526 U.S. 137 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g., Brooks v. Outboard Marine*, 234 F. 3d 89 (2d Cir. 2000).

<sup>9</sup> *See, e.g., Wills v. Amereda Hess*, 379 F. 3d 32 (2d Cir. 2004).

<sup>10</sup> *See, e.g., Amorigianos v. Amtrak*, 303 F.3d 256 (2d Cir. 2002).

<sup>11</sup> 2002 WL 174406 (N.D. Ga. Jan. 16, 2007).

<sup>12</sup> 522 U.S. at 142.

<sup>13</sup> 2006 WL 3248031 (11th Cir. Nov. 6, 2006).

<sup>14</sup> *Id.* at \*\*3-4.

<sup>15</sup> *Id.*

<sup>16</sup> Fed. R. Civ. P. 26(a)(2)(B).

<sup>17</sup> *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996).

<sup>18</sup> *Id.*

<sup>19</sup> 212 F.R.D. 110, 115 (E.D.N.Y. 2002).

<sup>20</sup> *Hewlett-Packard v. Bausch & Lomb*, 116 F.R.D. 533, 537 (N.D. Ca. 1997).

<sup>21</sup> *Mfg. Admin & Mgmt. Sys. v. ICT Group, Inc.*, 212 F.R.D. 110, 114 (E.D.N.Y. 2002)(Other courts have ruled that core attorney work product is not discoverable even if communicated to an expert) (Collecting cases).

<sup>22</sup> *See, e.g., Quadrini v. Sikorsky Aircraft Div. United Aircraft Corp.*, 74 F.R.D. 594, 594-595 (Conn. 1977).

<sup>23</sup> *Trigon Ins. Co. v. United States*, 2004 F.R.D. 277 (E.D. Va. 2001).

<sup>24</sup> *Alves v. Mazda Motor of America, Inc.*, 448 F. Supp. 2d 285 (D. Mass. 2006).

<sup>25</sup> *Sparks v. Seltzer*, 2007 WL 295603 at \*1 (E.D.N.Y. Jan. 29, 2007) (Collecting cases).

<sup>26</sup> *B.C.F. Oil Rev., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 171 F.R.D. 57, 66 (S.D.N.Y. 1997).

<sup>27</sup> *Id.*

<sup>28</sup> 125 F.R.D. 611 (D.N.J. 1989).

<sup>29</sup> Fed. R. Civ. P. 26(a)(2)(B).

<sup>30</sup> *Weil v. Long island Sav. Bank*, 2006 F.R.D. 38, 41 (E.D.N.Y. 2001).

<sup>31</sup> *Id.* at 612-613.

<sup>32</sup> Fed. R. Civ. P. 26(b)(3).

<sup>33</sup> *See, e.g., Krista v. Equitable Life Assurance Soc'y*, 196 F.R.D. 254, 260 (M.D. Pa. 2000); *Ladd Furniture, Inc. v. Ernst & Young*, 41 Fed.R.Serv.3d 1633, 1638-39 (M.D. N.C. 1998); *Cf. Synthes Spine Co. v. Walden*, 232 F.R.D. 460 (E.D. Pa. 2005).