

FEDERAL RULES QUALIFYING AS AN EXPERT WITNESS AND FEDERAL RULES CHANGES

PANEL:

JUDGE G. MURRAY SNOW

U.S. District Judge, District of Arizona

JUDGE SAMUEL A. THUMMA

Arizona Court of Appeals, District 1

JOHN W. ROGERS, ESQ.

Perkins Coie, LLP



INTRODUCTION

- General introduction of panel objectives.
- Background of Federal Rules for Expert Witnesses.
- Arizona's Rules of Evidence Governing Experts.
- Significant Rule Changes Impacting Expert Witnesses.
- View from the Bench and Practice Tips.
- Questions/Discussion



Qualifying as an Expert Witness Judge G. Murray Snow



Qualifying as an Expert

- Federal Rules for Qualifying as an Expert Witness.
- Federal Rules of Evidence Article VII. Opinions and Expert Testimony
- Federal Rule of Evidence 702.
- What does this mean in practice?
- Gatekeeper function.



***Daubert* Trilogy**

- ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993)
(non-exclusive factors to determine admissibility of expert evidence)
- ***General Electric Co. v. Joiner***, 522 U.S. 136 (1997)
(abuse of discretion standard of review on appeal)
- ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137 (1999) (*Daubert* applies to all expert evidence)



Deadlines for Completion of Fact Discovery

- a. The Plaintiff(s) shall provide full and complete expert disclosures as required by Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than ____.
- b. The Defendant(s) shall provide full and complete expert disclosures as required by Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than ____.
- c. Rebuttal expert disclosures, if any, shall be made no later than _____. Rebuttal experts shall be limited to responding to opinions stated by initial experts.



The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them[.]

Arizona Rules of Evidence Governing Experts Judge Samuel A. Thumma

Evidentiary Rules Pre-*Daubert*

- **Common Law**
- ***United States v. Frye***, 293 F. 1013 (D.C. Cir. 1923)
 - Murder conviction affirmed on appeal, with court finding lie-detector test not “sufficiently established to have gained general acceptance in the particular field in which it belongs.”
 - ***Frye’s*** “general acceptance in the relevant scientific community” test became the standard for novel scientific evidence in many federal and state courts.
- ***Federal Rules of Evidence*** adopted effective 7/1/1975
- ***Arizona Rules of Evidence*** adopted effective 9/1/1977



Post-*Daubert* Trilogy: Generally

- FRE 702 amended effective 12/1/2000 to reflect ***Daubert*** Trilogy.
- FRE 702 restyled effective 12/1/2011.
- ***Daubert*** is the rule in Federal Court.
- ***Daubert*** (in whole or in part) now used in more than half of the state court systems.



Post-*Daubert* Trilogy: Arizona

- Arizona Supreme Court twice said it was “too early” to consider *Daubert*. *State v. Johnson*, 922 P.2d 294 (1996); *State v. Bible*, 858 P.2d 1152 (1993).
- *Logerquist v. McVey*, 1 P.3d 113 (2000).
 - Repressed memory expert excluded under *Frye*.
 - “Does the *Frye* rule apply to this case, or should this court adopt *Daubert*?”
 - Four different opinions.
 - Two Justice plurality & concurring Justice retain *Frye*.
 - Two dissenting Justices would adopt *Daubert*.
 - Allows “training and experience” opinion evidence.



Post-*Daubert* Trilogy: Arizona

ARE amended effective 1/1/2012 to do three things:

- (1) ARE restyled to generally include FRE restyling (changes **not** meant to be substantive).
- (2) Some ARE deliberately different from FRE (e.g., ARE 404; 412).
- (3) Some ARE changed to adopt FRE (e.g., Rule 702) (changes **may be** substantive).
 - Squarely adopts *Daubert* in Arizona.
 - **Lengthy** comment to New ARE 702.
 - Ongoing application of *Logerquist* is unclear.



Frye v. Daubert

Frye/Old ARE 702

- Only novel scientific evidence.
- “Generally accepted in the relevant scientific community.”
- *De novo* standard of review on appeal.
- When issue resolved by binding appellate decision, resolved for future cases.

Daubert/New ARE 702

- All evidence subject to Rule 702.
- Non-exclusive factors.
- Abuse of discretion standard of review on appeal.
- Case-by-case analysis.

Federal Rules Changes

John W. Rogers, Esq.

Expert Disclosures & Discovery: 2010 Rule Amendments and Recent Developments

- John W. Rogers
- September 7, 2012

- Perkins Coie LLP
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2010 Amendments to the Federal Expert Disclosure Rules

- Went into effect in December 2010
- **Topic #1:** What changes were made?
- **Topic #2:** What has happened since the amendments' adoption?
- **Topic #3:** Practice pointers



What Changes Were Made?

- New disclosure requirements for experts who are not required to prepare reports.
- Narrowing the disclosure obligation of retained experts who must prepare reports.
- Extending work product protection to drafts of expert reports and disclosures.
- Extending work product protection to communications between a lawyer and a retained expert, but with several important exceptions.

The Non-Retained Expert: Background

- Rule 26(a)(2)(A) requires disclosure of the identities of **all** testifying experts.
- But, under Rule 26(a)(2)(B), a testifying expert must prepare a report **only** if he or she is "retained or specially employed to provide expert testimony in the case or . . . [has] duties as the party's employee [that] regularly involve[s] giving expert testimony."

The Non-Retained Expert: Background, cont.

- No report is required if an expert does not fall within one of these categories (e.g., treating physician, govt. employee).
- Before the rule amendment, this left an adverse party in the dark about the opinion of this type of expert unless his or her deposition was taken.
- It is impractical to require these experts to prepare reports because they are frequently outside the offering party's control and don't have the time or financial interest to prepare a report.



The Non-Retained Expert: Rule 26(a)(2)(C)

- As amended, Rule 26(a)(2)(C) requires the offering party to disclose for such experts:
 - The subject matter of the expert's testimony; and
 - A "summary of the facts and opinions to which the witness is expected to testify."



The Scope of Expert Discovery: Background

- In 1993, Rule 26(a) was amended to require expert reports, which were to disclose "the data or other information considered by the witness."
- The Advisory Committee's Note to the Rule encouraged a broad interpretation of this provision, which led to routine demands for drafts of expert reports and for the disclosure of all communications between an expert and counsel.



The Scope of Expert Discovery: Background, cont.

There was a growing belief that this went too far:

- Parties were creative in avoiding disclosure (no drafts are created, communications were not committed to paper, lawyers avoided sharing doubts with their experts).
- These techniques added to litigation costs and hampered an expert's preparation while adding little to discovery.



Narrowing the Scope of Disclosure: Rule 26(a)(2)(B)(ii)

- Expert reports to disclose "the facts or data considered by the witness" rather than the "data or other information considered by the witness."
- Intent was "to limit the disclosure to material of a factual nature by excluding theories or mental impressions of counsel."
- But the Rule also requires disclosure of "any material considered by the expert, whatever the source, that contains factual ingredients."

Drafts of Expert Reports: Rule 26(b)(4)(B)

- Drafts do not need to be disclosed and fall within the protection of the work product rule.
- The Rule's protection extends both to drafts of expert reports and to drafts of opinion summaries prepared for experts who are not required to prepare expert reports.

Attorney-Expert Communications: Rule 26(b)(4)(C)

- As a general rule, work product protection extends to communications between "a party's attorney" and an expert who is required to prepare a report.
- This general rule applies "regardless of the form of communications" (i.e., it protects oral communications as well as written or electronic communications).



Attorney-Expert Communications: Rule 26(b)(4)(C), cont.

Exceptions:

- Communications that "relate" to the expert's compensation.
- Communications that "identify facts or data that the party's attorney provided and that the expert considered" (but not the attorney's comments about the relevance of the facts or data).
- Communications that "identify assumptions that the attorney provided and that the expert relied on" (but not unused assumptions or unused hypotheticals).



New Rule 26(b)(4)(C): Key Caveats

- Protection does not extend to communications with experts who are not required to prepare reports.
- "Party's attorney" refers to not only the attorney of record but also to in-house counsel and lawyers in related cases.
- Protection is not absolute: it can be overcome by "substantial need" but the Advisory Committee's Note says it would be "rare" for a party to be able to make such a showing.
- Does the protection extend through trial? Unclear.

Post-Amendment Developments

- Surprisingly few cases have interpreted the 2010 amendments.
- But it is clear that there are still some issues to be worked out . . .

The Issues About Which There Is Agreement

- Consistent with the text of the amendments, "facts or data" do not include *all* information considered by the expert, only *factual* information.
- Drafts of expert reports and disclosures are generally not discoverable.
 - But still unresolved is whether a prior draft is discoverable if it discloses "facts or data" that did not make it into the final report.



The Issues About Which There Is Agreement, cont.

- Protection for attorney-expert communications does not extend to an expert's communications with others, including other experts or party employees.
 - But the touchstone remains whether those communications contain "facts or data" considered by the expert.
 - If that is not the case, then they would not be discoverable.



The Issues About Which There Is Agreement, cont.

- The protection for drafts and attorney-expert communications does not extend to preparatory work the expert does or has others do for him/her.
 - Fact summaries prepared by assistants or others.
 - Notes, to the extent they disclose "facts or data" considered by the expert.



One Gray Area: Attorney Communications

- The rule extends work product protection to attorney-expert communications.
- The rule, however, also says that attorney communications are discoverable if they "identify facts or data" provided by the attorney that are considered by the expert.
- How broad is that exception?



One Gray Area: Attorney Communications, cont.

- Attorney to expert in a traffic case:
 - "John Doe admitted in his deposition that he is as blind as a bat, even when he has his glasses on. That is significant because it will show that he couldn't tell whether the light was green or red."
- Second sentence is clearly protected.
- Is the first sentence protected?



One Gray Area: Attorney Communications, cont.

- It is clear that the exception would apply if the attorney-provided "facts or data" are the expert's only source for the information.
- But does it apply if the "facts or data" set forth in a communication already have been disclosed to the expert in documents, depositions or other case-related materials that the attorney has sent to the expert?



One Gray Area: Attorney Communications, cont.

- One approach is to say that an attorney's restatement of a previously disclosed fact is discoverable, at least to the extent the attorney is restating an "objective fact."
- A couple cases seem to adopt this approach, but they may be distinguishable on the ground that the attorney's communication may have been the expert's only source for those facts.



One Gray Area: Attorney Communications, cont.

- But, if this interpretation is correct, the exception would seem to swallow most of the rule.
- Can an attorney ever discuss the relevance of the facts without first restating what those facts are?
- It would make most attorney discussions of the facts at least partially discoverable, which would seem to be contrary to the amended rule's intent.



One Gray Area: Attorney Communications, cont.

- The interpretation also fails to serve any disclosure interest, as a restated fact reveals nothing about what "facts or data" the expert considered because the "fact" has already been disclosed to the expert.
- It also unnecessarily intrudes on the attorney's work product because the restatement of an "objective fact" in itself signifies that the attorney thinks it is relevant.



One Gray Area: Attorney Communications, cont.

- The "objective fact" approach is not the only way to interpret the exception.
 - The exception uses the word "identify" rather than "mention" or "contain."
 - As used elsewhere in the rules, "identify" means "disclose."
 - And "disclose" means "making known something that was previously unknown." *Black's Law Dictionary*.



One Gray Area: Attorney Communications, cont.

- If this interpretation is correct, then an attorney's communication can "identify" a fact only if it was not already known to the expert.
- Under that interpretation, the exception would not include attorney communications that merely restate facts disclosed to the expert in previous communications or in materials previously provided to the expert.
- No case, however, has considered or adopted this interpretation.



Other Gray Areas

- If an expert has a conversation with counsel that is otherwise protected under the rule, are the expert's notes of the conversation protected?
 - One case says the notes are discoverable because they do not constitute "a communication[]" between the party's attorney and the expert witness."
 - But that would seem to be contrary to the rule's intent, as well as Advisory Committee Note's comment that such communications are protected "regardless of the form of the communications."



Other Gray Areas, cont.

- Are privilege logs required?
 - The rule amendments do not mention such a requirement.
 - But one case suggest that they should be prepared.
 - And Rule 26(b)(5)(A) seems to require a log whenever "a party withholds information otherwise discoverable" by claiming work product protection.



Other Gray Areas, cont.

- If a privilege log is required, what must be logged?
 - One case suggests that parties must prepare a privilege log of **all** protected attorney-expert communications.
 - But that ignores that the rule requires disclosure only of "facts or data" considered by an expert.
 - Thus, if a privilege log is required, the only items it should list are attorney communications that contain protected work product in addition to discoverable "facts or data."
 - That obligation's scope depends on how you define "identify" in interpreting the attorney-communication exception.



Practice Pointers

- Protecting Drafts
 - Put the "draft" legend on drafts, including initial drafts of sections that will be later inserted into the report (or, better, draft the sections in a "master" draft).
 - Don't get carried away—notes, memos, internal analyses are not "drafts."
- Keep written communications with the lawyer at a minimum and assume they will be produced.
 - Uncertainty about the "identify facts" exception
 - Uncertainty about identifying documents on a privilege log



Practice Pointers, cont.

- To the extent there are written communications, encourage counsel to separate communications restating facts from those in which counsel is analyzing facts or discussing their significance.
 - To the extent feasible, communications regarding the significance of facts should not be in writing.
 - Do you really want to leave it to the judge to distinguish between unprotected "facts" and protected "analysis"?



Practice Pointers, cont.

- Assume that your notes are discoverable, even if they summarize communications with counsel.
- Remember that work product protection extends only to communications with counsel, ***not*** communications with party employees, other experts or others.

View from the Bench & Practice Tips

QUESTIONS/DISCUSSION