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## **2019 ABYC Marine Law Symposium**

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**Renaissance Hotel | Seattle, Washington**

# EXPERTS IN FEDERAL COURT

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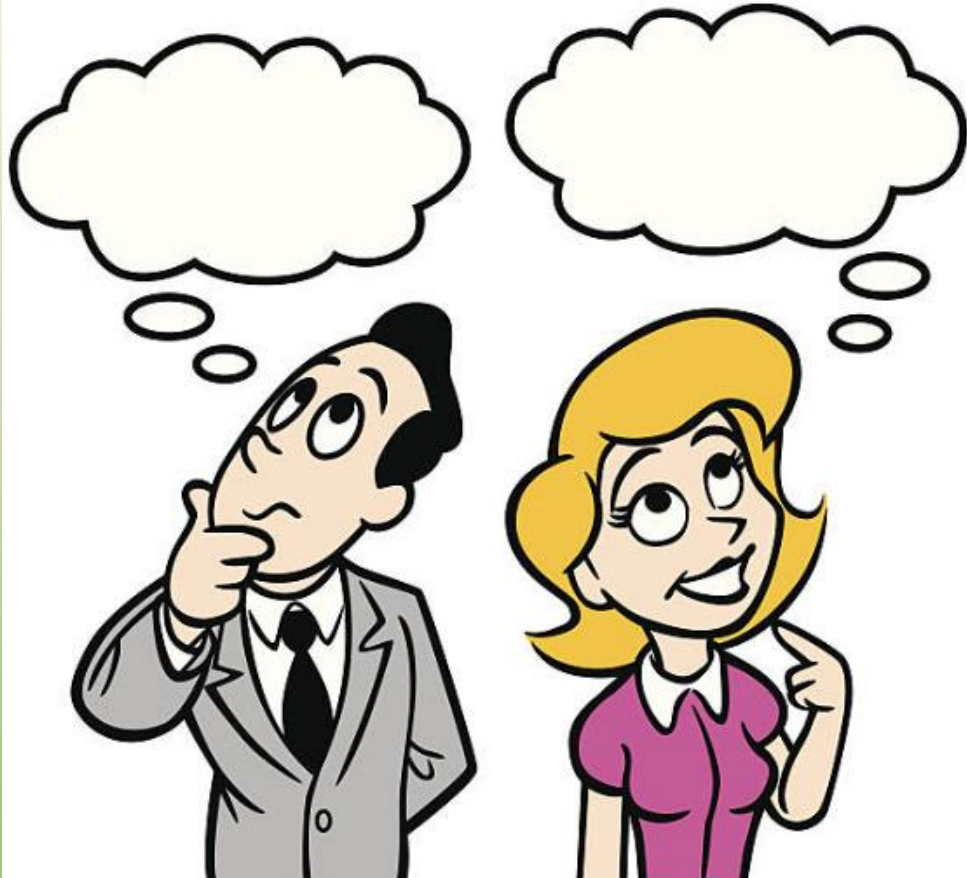
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# SO YOU ARE APPROACHED ABOUT BEING AN EXPERT . . .

- What Is Involved?
- Do you really want to do this?





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**EXPERTS MAKE LOTS OF MONEY  
AND HAVE PRESTIGE**





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P H A N T O M

Hand Built in Goodwood, England



**AND**

What should you consider when hiring an expert?



# Expert Witnesses in Federal Court are Controlled by:

- Federal Rules of Civil Procedure
- The Local Rules of Civil Procedure
- Court Scheduling Orders
- The Federal Rules of Evidence

# Federal Rule of Civil Procedure 26(a)

## (2) *Disclosure of Expert Testimony.*

- (A) *In General.* In addition to the disclosures required by rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

## Federal Rule 26(a) continued:

- (B) ***Witnesses Who Must Provide a Written Report.*** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

## **Federal Rule 26(a) continued:**

- (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;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;



## **Federal Rule 26(a) continued:**

- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

## Federal Rule 26(a) continued:

- (C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
- (I) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
  - (ii) a summary of the facts and opinions to which the witness is expected to testify.

## Federal Rule 26(a) continued:

- (D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
- (I) at least 90 days before the date set for trial or for the case to be ready for trial; or
  - (II) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(b) or (C), within 30 days after the other party's disclosure.

## Federal Rule 26(a) continued:

- (E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).



# Federal Rule 26(a) continued:

## (4) *Trial Preparation: Experts*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(b) requires a report from the expert, the deposition may be conducted only after the report is provided.

## Federal Rule 26(a) continued:

- (B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

## Federal Rule 26(a) continued:

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.*

Rules 26(b)(3)(a) and (B) protect communications between the party's attorney and any witness required to provide a report under rule 26(a)(2)(b), regardless of the form of the communications, except to the extent that the communications:

## **Federal Rule 26(a) continued:**

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.



## Federal Rule 26(a) continued:

(D) *Expert Employed Only for Trial Preparation.*

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

## **Federal Rule 26(a) continued:**

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

## Federal Rule 26(a) continued:

- (E) **Payment.** Unless manifest injustice would result, the court must require that the party seeking discovery:
- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
  - (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

# LCR 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

## (a) Required Disclosures.

...

- (3) ***Pretrial Disclosures.*** Unless otherwise directed the court, the disclosures listed in Fed. R. Civ. P. 26(a)(3) shall be made in the manner and in accordance with the schedule prescribed in LCR 16. A party shall state any objections to exhibits in the manner prescribed in that rule. Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.



# THE FEDERAL RULES OF EVIDENCE

## ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

## **RULE 702. TESTIMONY BY EXPERT WITNESSES**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and



(d) the expert has reliably applied the principles and methods to the facts of the case.

## Court is the Gatekeeper of the Substance of Expert Testimony

- Expert testimony must be **Reliable**. District Court has the task “of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993).

- Court must decide whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.

- Can the theory be tested?
- Has the Expert's theory or technique been subjected to peer review and publication?

- Is there a rate of error of the scientific theory?
- Is an Expert's opinion based upon theories and methodology generally accepted in the scientific community?

- Expert testimony should NOT INCLUDE  
“unsubstantial speculation and subjective belief.”  
*Diviero v. Uniroyal Goodrich Fire Co.*, 114 F.3d  
851, 853 (9th Cir. 1997).



- An expert's findings **MUST** be based on “sound science and this will require some objective, independent validation of the expert’s methodology.” *Myrick v. United States Saws, Inc.*, 2013 WL 766192 at 3 (W.D. Wash. 2013).

- A district court’s “gatekeeping obligation” applies to expert testimony based upon BOTH:
  - Scientific knowledge; and
  - “Technical” and “other specialized knowledge” such as Engineers. *Kumho Tire Company, Ltd. v. Patrick Carmichael*, 119 S. Ct. 1167 (1999).

# **RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY**

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

# RULE 704. OPINION ON AN ULTIMATE ISSUE

- (a) **In General-Not Automatically Objectionable.** An opinion is, not objectionable just because it embraces an ultimate issue.
- (b) **Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

## **RULE 705. DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION**

Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.



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**WHEN THINGS GO WRONG!**





## Examples Of Challenges And Exclusion Of Expert Testimony:

- Court excluded fire causation opinion when theory was not subjected to testing to establish that device could cause a fire.  
*Truck Ins. Exch. v. Magnetek, Inc.*, 360 F.3d 1206, 1212 (10th Cir. 2004).

- Fire causation expert excluded because failed to test the hypotheses with generally accepted scientific principles. *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000).

- Court excluded expert on cause and origin when testimony did not establish that device would start a fire. *Nelson v. Safeco Ins. Co. of North America*, 396 F. Supp. 2d 1274, 1278-79 (D. Utah 2005).

## Challenges and Exclusions:

- Expert excluded because engaged in expectation bias. *State Farm Fire & Cas. Co. v. Steffen*, 948 F. Supp. 2d 434, 444 (E.D. Penn 2013).

- Expert's theory not supported by a single peer reviewed article. *Am. Intern. Specialty Lines v. Blakemore*, 2012 WL 4482392 at \*6 (W.D. La. Sept. 28, 2012).

- Expert excluded because opinion based on insufficient facts. *Avila v. Willits Env'tl. Remediation Trust*, 633 F.3d 828, 839 (9th Cir. 2011).



# WHAT MAKES AN EXPERT VULNERABLE



## **EXAMPLE:**

**How an expert can fall into a trap by stating unfounded opinion and telling lawyers only what they want to hear.**

## **RULE 706. COURT-APPOINTED EXPERT WITNESSES**

- (a) **Appointment Process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

## **RULE 706. COURT-APPOINTED EXPERT WITNESSES**

- (b) **Expert's Role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
- (1) must advise the parties of any findings the expert makes;
  - (2) may be deposed by any party;
  - (3) may be called to testify by the court or any party; and
  - (4) may be cross-examined by any party, including the party that called the expert.

## **RULE 706. COURT-APPOINTED EXPERT WITNESSES**

- (c) **Compensation.** The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:
- (1) in a criminal case or in a civil case involving just compensation under the fifth amendment, from any funds that are provided by law; and
  - (2) in any other civil case, by the parties in the proportion and at the time that the court directs and the compensation is then charged like other costs.

## **RULE 706. COURT-APPOINTED EXPERT WITNESSES**

- (d) **Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.
- (e) **Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.



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**QUESTIONS?**





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**Thank you!**