Theodore Roosevelt Inn of Court
Expert Witness Program
November 16, 2009

1. Timing of Expert Disclosure

- Federal Civil - FRCP 26(a)(2)(C)(i), 26(a)(2)(C)(ii)
  - 90 days before trial;
  - If solely to contradict another party or evidence 30 days after other party's disclosure
- State Civil
  - **3101(d)(1)(i)** – Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclosure in reasonable detail the subject matter on which each expert is expected to testify.
    - Where a party for good cause shown retains an expert *an insufficient period of time* before the commencement of trial to give appropriate notice thereof, the party *shall not thereupon be precluded from introducing the expert's testimony* at the trial solely on grounds of noncompliance with this paragraph.
    - Upon motion made by either party, before or during trial, or on its own initiative, the court may make whatever order may be just.
  - **Issues that can arise:**
    - When a party does not respond to numerous discovery demands regarding the expert witness.
    - Intentionally withholding disclosure of witness.
    - Evidence (or lack thereof) that party is injured due to the delay.
- Federal Criminal
  - Fed. Rules of Criminal Procedure **Rule 16 (a)(1)(G)**
    - At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of

the Federal Rules of Evidence during its case-in-chief at trial which includes expert witness testimony.

- State Criminal
  - Upon demand by either Prosecution or Defendant:
    - Party shall make available any report, document or test made by a witness that the party intends to call or introduce at trial. *See* Criminal Procedure Law §§ 240.20(1)(c)/240.30(1)(a).
  - Duty to disclose
    - At a pre-trial hearing where a witness will testify: each party at the conclusion of the direct examination of each of its witnesses, shall upon request give any written or recorded statement which relates to the witness' testimony. *See* C.P.L. § 240.44.
    - At trial: after jury is sworn in and before prosecutions opening remarks, prosecution should make available to defense any written or recorded statement by a person who prosecution intends to call as a witness at trial. *See* C.P.L. § 240.45(1)(a).
      - After prosecutions direct case and before defendant's direct case, defendant must give to prosecution any written statement of a witness defense plans to call at trial. *See* C.P.L. § 240.45 (2)(a).
  - Demand to produce shall be made within thirty days after arraignment and before the trial. *See* C.P.L. § 240.80(1).
    - Refusal to comply with a demand to produce shall be made within fifteen days of service of the demand to produce. *See* C.P.L. § 240.80(2).
    - Absent a refusal, a compliance s hall be made fifteen days of the service of the demand or as soon as possible thereafter. *See* C.P.L. § 240.80(3).

2. Discovery Issues

Expert Report – what must be disclosed

- Federal Civil - FRCP 26(a)(2)(B)
  Must identify any witness and be signed, the report must contain:
  - a complete statement of all opinions the witness will express and the basis and reasons for them;
  - the data or other information considered by the witness in forming them;
  - any exhibits that will be used to summarize or support them;

- the witness's qualifications, including a list of all publications authored in the previous 10 years;
- 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
- a statement of the compensation to be paid for the study and testimony in the case.

- State Civil
  - **Barrowman v. Niagara Mohawk Power Corp**., 675 N.Y.S.2d 734, N.Y.App.Div.4.Dept.,1998: Party is not obligated under statute governing disclosure of expert witnesses to disclose his expert's report; rather, such statute provides for disclosure in reasonable detail of subject matter on which expert is expected to testify and a summary of grounds for expert's opinion. Report of expert witness constitutes material prepared for litigation and is not subject to disclosure unless party seeking disclosure has substantial need for the report and is unable without undue hardship to obtain its substantial equivalent by other means.

- Federal Criminal
  - Federal Rule of Criminal Procedure- Rule 16 (a) (1) (G)
    - **Government Disclosures-Expert Witness**: At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. The summary provided under this subparagraph must describe the witness's opinions, the basis and reasons for those opinions, and the witness's qualifications.

United States v. Mejia, 545 F.3d 179, 2008
United States v. Vasquez,

Federal Rules of Criminal Procedure- **Rule 16 (a)(1)(F)**

- **Reports of Examinations and Tests:** Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
  (i) the item is within the government's
  (ii) the attorney for the government knows--or
  (iii) the item is material to preparing the defense or t

Federal Rules of Evidence Rule 702: Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fa

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
(3) the witness has applied the principles and methods reliably to the facts of the case

Rule 703: Bases of Opinion Testimony by Experts

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 705: Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefore 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

- Federal Rules of Criminal Procedure- **Rule 16(b)(1)(C)**
  - **Defendant's Disclosure:** The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if
    - (i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
    - (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

    This summary must describe the witness's opinions, the bases and reasons for t
- Federal Rules of Criminal Procedure-**Rule 16(d)(1)**
  - **Protective and Modifying Orders**: At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal

- State Criminal
  - What must be disclosed: any written report or scientific test by the testifying expert or any notes made by the police regarding the witness testimony even if the witness will not be called upon at trial and that testimony is considered Brady material. *See* C.P.L. § 240.20.
    - For example, a non-testifying expert witness gives the police a report that is beneficial to the defense (Brady material)

Differences between consulting and testifying

- Federal Civil - *US v. Kovel*, 296 F.2d 918 (2nd Cir. 1961)
  - A consulting expert is considered an extension of the attorney. As a result, all work of a consulting expert is privileged. If the expert is classified as a testifying expert, all his work product produced while he was a consulting expert loses its privileged status.
- State Civil
  - **Delta Financial Corp. v. Morrison,** 14 Misc.3d 428, 827 N.Y.S.2d 601, N.Y.Sup.,2006: Even if litigation consultant were designated as an expert to testify at trial, statute requiring the limited production of information regarding qualifications of the expert, the subject matter of the expert's testimony, the substance of the fact, and opinion on which the expert is expected to testify, and summary of the grounds for the expert's opinion, would not require disclosure of privileged documents that had been either created as a result of counsel's retention of litigation consultant or communications made in furtherance of that retention.
- Federal Criminal
  - Does not apply.
- State Criminal
  - There is a continuing duty to disclose relevant information. *See* C.P.L. § 240.60. A written report by the non-testifying expert must be turned over if it is concerning a test done by the expert (see Criminal Procedure Law 240.20). A written report by a police officer about a conversation with an expert must be turned over if it is Brady material. The conversations may become Rosario material under C.P.L. 240.40 if either the police officer or the expert witness testifies.
  - Notes taken by an ADA about a conversation with a non-testifying expert may be considered work-product and not turned over unless it is exculpatory material. If it is exculpatory, and therefore Brady material, the notes must be turned over.

Depositions of other party's expert

- Federal Civil
  - Parties may depose experts who have been designated as trial experts under FRCP 26(b)(4)(a), but only after expert disclosure under FRCP 26(a)(2)(B).
- State Civil
  - Under 3101(a)(4) – Expert depositions are not permitted in New York State court except where one obtains a court order upon a showing of "special circumstances.
    - The special circumstances that render the taking of such a deposition proper are not specified in the statute, and it is therefore left to the sound judicial discretion of the court, depending upon the facts of the particular case, to determine whether such special circumstances exist.
    - The courts have adopted a liberal construction of the words "special circumstances."
    - Usually, there must be a demonstration supported by evidence or some factual background statement showing materiality or necessity of the examination, and not a naked or unsupported assertion.
    - Special circumstances are not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained through other sources.
- Federal Criminal
  - *U.S. v. Fei Ye*, 436 F.3d 1117 (9th Cir., 2006).
    -Holding that criminal defendants do not have the right to conduct a discovery deposition of prosecution witnesses.
- State Criminal
  - Does not happen in state criminal court. Each party has the right to cross-examine testifying witnesses at trial

3. Privilege Issues

Preserving /Destroying Inadvertently Disclosed information

(Claw-backs)

- Federal Civil - FRCP 26(b)(5)(B)
  If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a

party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.
The producing party must preserve the information until the claim is resolved.

- State Civil
    - **Rosario v. General Motors Corp,** 148 A.D.2d 108, 543 N.Y.S.2d 974, N.Y.A.D. 1 Dept.,1989: When material physical evidence is inspected by expert for one side and then lost or destroyed before other side has had opportunity to conduct its own expert inspection, special circumstance exists that per se warrants disclosure directly from expert concerning facts surrounding his inspection
- Federal Criminal
    - Does not apply
- State Criminal
    - Not applicable to state criminal court: there are the guidelines of production
    - However, a prosecutor must do everything he can to turn over required materials under *Rosario* and *Brady* and if not there can be sanctions or a new trial may be ordered
        - There is a continuing duty to disclose if a party finds either before or during trial additional material subject to discovery. He must promptly comply with the demand for disclosure or refuse to comply where refusal is authorized. *See* C.P.L. § 240.60

Work Product

(Issues surrounding retaining the expert)

- Federal Civil - FRCP 26(b)(3)(A)
    - Trial preparation materials are ordinarily not discoverable. Any claims of privilege must be made pursuit to FRCP 26(b)(5)(A).
- State Civil
    - Delta Financial Corp. v. Morrison: same cite and information above.
- Federal Criminal
- Federal Rules of Criminal Procedure- **Rule 16(2)(A)**

- Information Not Subject to Disclosure**.** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
    - **(A)** reports, memoranda, or other documents made by th
    - **(B)** a statement made to the defendant, or the defenda
        - **(i)** the defendant;
        - **(ii)** a government or defense witness; or
        - **(iii)** a prospective government or defe

- State Criminal
    - Refusal to give witnesses information may occur where the information is outside the scope of Brady or Rosario and the information sought is attorney work product

4. What is Expert Testimony? – "Gate Keeper"

- Federal Civil
    - *Rules of Evidence 702- Admission of Expert Testimony*
    - Experts must first establish that their testimony will assist the fact finder's understanding of the evidence.
    - The court will make a preliminary determination under Rule 104(a) that the witness is qualified to give an expert opinion.
    - A witness may qualify as an expert by knowledge, skill, experience, training or education.
        - *Rules of Evidence 703- Basis of Expert Testimony*
    - An expert may be base an opinion on: (1) scientific, technical or other specialized knowledge derived from education and experience; (2) firsthand out-of-court observation of facts; (3) facts, data, or opinions already admitted or to be admitted, into evidence and present to the expert at trail either by hypothetical questions or actual testimony; and (4) facts, data, or opinions not admitted into evidence but presented to the expert outside the courtroom and reasonably relied on by experts in the particular field.
    - The witness may refer to the content of any inadmissible documents only if the court determines that their protective value in assisting the jury substantially out-weights their prejudicial effect.
- State Civil
    - **Frye v. U.S. 54 App.D.C. 46, 293 F. 1013.:** Provides that expert opinion based on a scientific technique is admissible only where the technique is generally accepted as reliable in the relevant scientific community.
    - **Daubert** and **Kumho Tire** have emphasized the role of the trial judge as gatekeeper in determining the admissibility of expert testimony. New York state courts have continued to

rely on the Frye standard but may also invoke Daubert. Nevertheless, the debate will continue on the importance, necessity and impact of utilizing Daubert, Kumho and Frye in determining the admissibility of proposed expert testimony.

- Federal Criminal

  ***Daubert* Test 509 U.S. 579 (1993)**

  - The court applies the test outside the jury's presence, usually during a pretrial ***Daubert*** hearing. At the hearing, the proponent must show that the expert's underlying reasoning or methodology and its application to the facts are scientifically valid. In ruling on admissibility, the court considers a flexible list of factors, including:

    (1) whether the theory can be or has been tested,

    (2) whether the theory has been subjected to peer review or publication,

    (3) the theory's known or potential rate of error and whether there are standards that control its operation, and

    (4) the degree to which the relevant scientific community has accepted the theory
  - Similar scrutiny must be applied to nonscientific expert testimony (*Kumho Tire Co. v. Carmichael*, 536 U.S. 137 (1999)

- State Criminal
  - The testimony if an expert witnesses may be received when such testimony would be helpful and an opinion expressed on any issue when such an opinion would be helpful. *See* Delong v. Erie, 60 N.Y.2d 296 (1983); People v. Cronin, 50 N.Y.2d 430 (1983).
    - It is the discretion of the trial judge to allow testimony and appellate review is not warranted unless there was an abuse of discretion. *See* People v. Cronin, 60 N.Y.2d 430, 433 (1983)
  - Expert should possess requisite skill, training, education, knowledge or experience from which it can be assumed that information is reliable. *See* Mattot v. Ward, 48 N.Y.2d 455 (1979).
    - Expert may be qualified to testify from actual experience, observation or study. *See* Karasik v. Bird, 98 A.D.2d 359 (1984).
  - The Court of Appeals has made it clear that opinion evidence must be based on facts in the record or those personally known to the witness. He cannot reach his conclusion by assuming material facts not supported in the evidence. *See* Cassano v. Hagstrom, 5 N.Y.2d 643, 646 (1959.

- Later cases have allowed an expert to base his opinion on professionally reliable sources or information derived from witnesses subject to cross-examination at trial. *See* People v. Jones, 73 N.Y.2d 427, 430 (1989); People v. Sugden, 35 N.Y.2d 453, 461 (1974); People v. Stone, 35 N.Y.2d 69, 75-76 (1974).

- In Hambsch v. NYCTA, 63 N.Y.2d 723, 726 (1984), characterized the two exceptions, professionally reliable sources and information elicited subject to cross-examination as limited.

- If an expert's testimony is based on professionally reliable sources, the trial judge must be satisfied that the info used is generally accepted in the profession as reliable. *See* Hamsbsch v. NYCTA, 63 N.Y.2d 723 (1984).

    - To determine whether the particular science or opinion is generally accepted, the court may conduct a Frye hearing before trial. Frye v. U.S., 293 F. 1013, 1014 (1923).

- Reliability is established:

    - When it is generally accepted as notorious that the court can take judicial notice of it without conducting a hearing

    - When it is established by reference to legal writings and judicial opinions. *See* Matter of Lahey v. Kelly, 71 N.Y.2d 135, 144 (1987)

    - Or through a Frye hearing at which the proponent may establish admissibility by offering evidence of acceptance, including the expert's own testimony. *See* People v. Altweiss, 48 N.Y.2d 40, 49-50 (1979).

- Presently, in New York, the Court of Appeals has endorsed the use of a Frye hearing to determine if novel science is generally accepted within the scientific community as articulated in *Frye*. *See* People v. Wesley, 83 N.Y.2d 417, 435 (1994). The test of reliability is not whether a particular procedure is unanimously endorsed by the scientific community, but whether it is generally accepted as reliable. *See* People v. Middleton, 54 N.Y.2d 42, 49 (1981).

- In New York, the standard for acceptance is whether the science or opinion is generally accepted within the scientific community. *See* People v. Wesley, 83 N.Y.2d 417.

  · Once the Frye question is satisfied (whether the science is generally accepted within the scientific community) the focus moves from the general reliability to the specific reliability of the procedures followed to generate evidence proffered and whether they establish a trial foundation for the reception of evidence at trial. *See* People v. Wesley, 83 N.Y.2d at 439.