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FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

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.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1938; Oct. 1, 1987; Dec. 1, 1993.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, *5 Vand.L.Rev. 414, 426-427 (1952).* While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data . . .".

See also *California Evidence Code § 802*; Kansas Code of Civil Procedure §§ 60-456, 60-457; New Jersey Evidence

Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, *14 Stan.L.Rev. 455 (1962).*

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Notes of Advisory Committee on 1987 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments. This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised *Rules 26(a)(2)(B) and 26(a)(1) of the Federal Rules of Civil Procedure* or with revised *Rule 16 of the Federal Rules of Criminal Procedure*, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

COMMENTARY

Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin

Basic rule

Before the Federal Rules were adopted, Federal Courts disagreed on whether the data used by the experts in formulating their opinions had to be brought out at trial by the party calling the expert as a condition precedent to admission of the expert's opinion. Some Courts required that the expert disclose on direct examination the sources used, while others assumed the credibility of the opinion without requiring such disclosure and left exploration of the sources for cross-examination.

Rule 705 by its terms puts the burden on the adverse party to expose any weaknesses in the basis of the expert's opinion -- including the expert's reliance on out-of-court sources. Description of the basis is not a condition precedent to the admissibility of expert testimony. *See Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980)* (the effect of Rule 705 is to "place 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.").

Flexibility of the Rule

Now that Rule 703 permits experts to rely on certain inadmissible data, the direct examiner may wish to bring out all the data on which the expert relied in order to bolster the testimony. Rule 705 permits the examiner to do this, assuming the Court believes that bringing out the data not independently admissible is acceptable, an issue that is discussed in the Comment to Rule 703. However, the Rule does not *require* that the basis be explicated during direct examination. Apparently the Rule's drafters recognized that the data on which an expert bases her opinion might sometimes confuse the trier of fact and that the examiner should be permitted to forgo testimony as to basis when confusion or undue consumption of time might be avoided by offering the opinion without many supporting details.

Rule 705 does not mandate admissibility for expert testimony that is in fact nothing more than a bare conclusion drawn from erroneous data. The Rule must be read in tandem with Rule 703, which requires an expert to use inadmissible information only if other experts would reasonably rely on it, and with Rule 702, which provides that the expert's testimony must be reliable and must assist the trier of fact. *See, e.g., Slaughter v. Southern Talc Co., 919 F.2d 304 (5th Cir. 1990)* (Rule 705 does not provide for admissibility of an expert's bare conclusion derived from erroneous data).

While Rule 705 provides flexibility, in practice counsel will ordinarily present a significant amount of supporting data on direct examination of the expert. Such disclosure may be necessary to make the opinion understandable; it will also help the expert to appear well-qualified to the jury. Disclosure of the basis on direct also allows counsel to bring out and explain any weakness in the expert's basis, before it is brought out by the adversary on cross-examination.

Discovery of the basis of an expert opinion

The fact that experts are not required to state the basis of their opinions on direct examination makes it extremely important that counsel fully utilize opportunities to discover before trial the basis for expert opinions.

Provision has now been made in the Federal Rules of Civil and Criminal Procedure for expanded pretrial discovery of the basis of expert opinions. A 1993 amendment to *Fed. R. Crim. P. 16(a)(1)(E)* provides that upon request, the government shall disclose to the defendant a written summary of expert testimony that it intends to use. The summary must describe "the witnesses' opinions, the bases and the reasons therefor, and the witness' qualifications." A 1993 amendment to *Fed. R. Civ. P. 26(a)(2)(B)* requires the preparation and disclosure of a report signed by the expert (if the expert has been retained to testify) containing "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions"; and a description of the expert's qualifications, compensation, and a listing of other cases in which the expert has testified within the previous four years.

Rule 705 originally provided that an expert could testify "without prior disclosure of" the underlying facts or data. But that language would have been in conflict with the 1993 amendments to the Federal Rules of Civil and Criminal Procedure, discussed above, which require advance disclosure of the basis of an expert's opinion. Consequently, the Rule was amended to make clear that it is simply a timing device at trial, permitting the expert to give an opinion without first testifying to the basis.

Risks of not bringing out basis on direct

There are risks involved in calling an expert to testify without eliciting the basis of the opinion on direct examination. The upside possibility is that the cross-examiner will actually strengthen the expert's testimony by unwittingly exposing a solid basis for the expert's opinion. The downside risk is that the adversary will sense that a trap is laid -- especially in light to the expanded discovery provided by the Federal Rules -- and forgo cross-examination of the expert, choosing instead to call his own expert. That would leave counsel who called the first expert with no option other than to attempt to bring out that expert's basis on redirect or rebuttal. But this option requires an act of mercy from the Trial Judge under Rule 611. Counsel cannot count on a second chance to do what should have been done earlier.

Summary judgment

There is some dispute about the applicability of Rule 705 when a nonmoving party offers affidavits from experts in an effort to defeat a motion for summary judgment. If the affidavit is essentially conclusory, can the nonmoving party argue that the conclusion creates a triable issue of fact and that Rule 705 dispenses with the need to articulate the basis for the expert's opinion?

Representative of one view is the First Circuit in *Hayes v. Douglas Dynamics, Inc., 8 F.3d 88 (1st Cir. 1993).* The Court in *Hayes* held that Rule 705 is "inapposite" on a motion for summary judgment. It noted that *Fed. R. Civ. P. 56* requires that the nonmoving party "set forth specific facts showing that there is a genuine issue for trial." The Court declared that Rule 705 was designed to apply "only in the context of trial, where cross-examination provides an opportunity to prove the expert's underlying facts and data." It reasoned that a contrary rule "would make summary judgment impossible whenever a party has produced an expert to support its position."

Representative of the contrary view is the D.C. Circuit in *Ambrosini v. Labarraque, 966 F.2d 1464 (D.C. Cir. 1992),* in which the plaintiffs, to defeat a summary judgment motion, offered two expert affidavits that concluded that a drug marketed by the defendant caused birth defects. The Trial Judge granted the motion, rejecting the affidavits as conclusory and as failing to set forth an appropriate basis. But the Court of Appeals held that summary judgment could not be granted merely because the plaintiff's experts had failed to articulate the basis for their opinions except in a conclusory fashion. It reasoned that under Rule 705, the expert is not required to specifically articulate the basis for his opinion in the first instance -- though the expert must be prepared to articulate a basis upon request. The Court stated

that "pursuant to Rule 705, the court could have required [the experts] to disclose the basis for their opinions so that it could determine whether the opinions had an adequate foundation. . . . Only then could the court determine whether the affidavits were admissible under Rule 703." The Court suggested the use of a show-cause order to test the basis of an expert's conclusory affidavit.

There is little merit to a two-step process that permits the nonmoving party to submit a conclusory affidavit and then to make a supplemental showing of the expert's basis in response to a show-cause order. Rule 705 is premised upon the adversary's ability to cross-examine the expert, and this premise does not apply in the context of a summary judgment motion. Thus, the expert should be required in the first instance to give a reasonably full account of the basis for her opinion.

This does not mean, however, that the expert should be prevented from making supplementary submissions in response to a critique by the adversary on summary judgment. After the Supreme Court's decision in *Daubert*, discussed in the Comment to Rule 702, the Trial Judge must conduct a detailed analysis of the expert's methodology -- that will include an inquiry into what the expert did, what the expert did not do, and why the expert failed to do something that the adversary alleges ought to have been done. Courts should be wary about ruling on the admissibility of expert testimony on summary judgment, unless the testimony is clearly speculative, or unless a trial-like record has been produced. *Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997)* ("[G]iven the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.").

In light of the point and counterpoint that is necessary under *Daubert*, experts should have the opportunity, on summary judgment, to respond to attacks on their basis and methodology by way of supplemental affidavit. The expert should not be permitted to hide her basis on a summary judgment motion; but neither should the expert be required in the first instance to anticipate all possible challenges to her methodology.

NOTES:

Research Guide:

Federal Procedure:

6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 26, Duty to Disclose; General Provisions Governing Discovery § 26.28.

11 Moore's Federal Practice (Matthew Bender 3d ed.), ch 56, Summary Judgment § 56.14.

1 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 103, Rulings on Evidence § 103.41.

4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 612, Writing Used to Refresh Memory § 612.04.

4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 703, Bases of Opinion Testimony by Experts §§ 703.03, 703.06.

4 Weinstein's Federal Evidence (Matthew Bender 2nd ed.), ch 705, Disclosure of Facts or Data Underlying Expert Opinion §§ 705.02 et seq.

3 *Federal Rules of Evidence Manual (Matthew Bender) §§ 702.02, 703.02, 705.02, 705.03*.

4A Fed Proc L Ed, Banking and Financing § 8:18.

7 Fed Proc L Ed, Condemnation of Property §§ 14:95, 100, 102.

7A Fed Proc L Ed, Court of Federal Claims § 19:206.

9A Fed Proc L Ed, Criminal Procedure §§ 22:1212, 1263.

10 Fed Proc L Ed, Discovery and Depositions §§ 26:47, 199.

12 Fed Proc L Ed, Evidence § 33:118.

14 Fed Proc L Ed, Foreign Trade and Commerce § 37:1570.

27A Fed Proc L Ed, Pleadings and Motions § 62:659.

33A Fed Proc L Ed, Witnesses §§ 80:213, 251, 252, 259, 260, 262-264.

Am Jur:

23 Am Jur 2d, Depositions and Discovery §§ 50, 248, 276.
31A Am Jur 2d, Expert and Opinion Evidence §§ 25, 163, 203.
63B Am Jur 2d, Products Liability § 1874-1877.

Am Jur Trials:

82 Am Jur Trials, Defending Against Claim of Ineffective Assistance of Counsel, p. 1.
83 Am Jur Trials, Compensation on Dissolution of Marriage for Spousal Contributions to Education, p. 197.

Am Jur Proof of Facts:

5 Am Jur Proof of Facts 3d, Value of Coin Collection, p. 577.
6 Am Jur Proof of Facts 3d, Act of God, p. 319.
61 Am Jur Proof of Facts 3d, Proof of Identity of Fiber, Fabric, or Textile, p. 501.
65 Am Jur Proof of Facts 3d, Hand Tool Injuries, p. 407.
75 Am Jur Proof of Facts 3d, Proof of Identification of Bite Marks, p. 317.

Intellectual Property:

5A Chisum on Patents (Matthew Bender), ch 18, Interpretation and Application of Claims--Doctrine of Equivalents--Prosecution History Estoppel § 18.03.
5B Chisum on Patents (Matthew Bender), ch 18, Interpretation and Application of Claims--Doctrine of Equivalents--Prosecution History Estoppel § 18.06.
3 Gilson on Trademarks (Matthew Bender), ch 8, Trademark Infringement Litigation § 8.13.

Criminal Law and Practice:

3A Criminal Defense Techniques (Matthew Bender), ch 68, Developing and Presenting Psychological Evidence in Criminal Defense Proceedings § 68.04.
1 Business Crime (Matthew Bender), ch 4B, Motions Directed at Discovery § 4B.04.

Corporate and Business Law:

4 Antitrust Counseling and Litigation Techniques (Matthew Bender), ch 37, The Use of Experts in Antitrust Litigation §§ 37.03, 37.04.
7 Securities Law Techniques (Matthew Bender), ch 107, The Uses and Functions of Experts in Securities Litigation §§ 107.02, 107.05.

Annotations:

What information is of type "reasonably relied upon by experts" within *Rule 703, Federal Rules of Evidence*, permitting expert opinion based on information not admissible in evidence. *49 ALR Fed 363.*

When will expert testimony "assist trier of fact" so as to be admissible at federal trial under *Rule 702 of Federal Rules of Evidence. 75 ALR Fed 461*.

Admissibility of Expert or Opinion Evidence--Supreme Court Cases. *177 ALR Fed 77.*

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired. *11 ALR5th 497.*

Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense. *58 ALR5th 749.*

Admissibility and necessity of expert evidence as to standards of practice and negligence in malpractice action against attorney. *14 ALR4th 170.*

Admissibility of expert or opinion testimony concerning identification of skeletal remains. *18 ALR4th 1294.*

Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair. *23 ALR4th 1199.*

Admissibility of expert testimony as to modus operandi of crime. *31 ALR4th 798.*

Propriety of cross-examining expert witness regarding his status as "professional witness". *39 ALR4th 742.*

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. *42 ALR4th 879.*

Admissibility at criminal prosecution of expert testimony on battering parent syndrome. *43 ALR4th 1203.*

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony. *46 ALR4th 1047.*

Admissibility of expert testimony that item of clothing or footgear belonged to, or was worn by, particular individual. *71 ALR4th 1148.*

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. *75 ALR4th 897.*

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute--state cases. *83 ALR4th 629.*

Admissibility of DNA identification evidence. *84 ALR4th 313.*

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay-state cases. *89 ALR4th 456.*

Modern status of rules regarding use of hypothetical questions in eliciting opinion of expert witness. *56 ALR3d 300.*

Admissibility of expert medical testimony as to future consequences of injury as affected by expression in terms of probability or possibility. *75 ALR3d 9.*

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like. *21 ALR2d 1200.*

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony. *86 ALR2d 1038.*

Texts:

3 Frumer & Friedman, Products Liability (Matthew Bender), ch 18A, Expert Evidence and Products Liability §§ 18A.03, 18A.04.

Law Review Articles:

Imwinkelried. A final comment -- the importance of the procedural framework [Discussion of How good is good enough? Expert evidence under Daubert *[Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)]* and Kumho *[Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999)]*. D. L. Faigman, D. H. Kaye, M. J. Saks, J. Sanders. 50 Case W. L. Rev. 645-*67 Spr 2000]*. *50 Case W Res L Rev 669,* Spring 2000.

Imwinkelried. The Second Prong of the Daubert *[Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)]* Test: Disturbing Implications of Two Recent Civil Cases, 33 Cri m L Bull 570, November/December 1997.

Faigman; Kaye; Saks; Sanders. How good is good enough? Expert evidence under Daubert *[Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)]* and Kumho *[Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999)]* [Discussion of Should the courts incorporate a best evidence rule into the standard determining the admissibility of scientific testimony?: Enough is enough when it is not the best. E. J. Imwinkelried. 50 Case W. L. Rev. 19-51 Fall

1999]. *50 Case W Res L Rev 645,* Spring 2000.

Reeg; Bebout. What's It All About, Daubert *[Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)], 53 J Mo B 369,* November/December 1997.

Genetics in the courtroom, 36 Judges' J 1, Summer 1997.

Zoeller and Lynch. Expert Testimony under the Federal Rules of Evidence--Introduction and Overview. 2 Legal Notes & Viewpoints 31, May 1982.

McElhaney. Expert Witnesses and the Federal Rules of Evidence. *28 Mercer L Rev 463, 1977.*

Richmond. Regulating Expert Testimony, *62 Mo L Rev 485,* Summer 1997.

Prager; Marshall. Examination of Prior Expert Qualification and/or Disqualification--(Questionable Questions Under the Rules of Evidence). *24 Rev Litig 559,* Summer 2005.

Mullen; Reinehr. Predicting Dangerousness of Maximum Security Forensic Mental Patients. The J of Psychiatry and Law 223, Summer 1982.

Getzoff. Direct and Cross-Examination of an Expert: How to Do It. 22 Trial Lawyer's Guide 267, 1978.

Graham. Discovery of Experts Under *Rule 26(b)(4) of the Federal Rules of Civil Procedure*: Part One, An Analytical Study. *1976 U Ill L F 895.*

Limpert. Beyond the Rule in Mohan [R v Mohan, [1994] 2 SCR 9]: A New Model for Assessing the Reliability of Scientific Evidence. *54 U Toronto Fac. L Rev 65,* Winter 1996.

Interpretive Notes and Decisions:

1. Relationship to other rules and laws 2. Prior disclosure of underlying facts or data 3.--Employment-related cases 4. Cross-examination disclosure of underlying facts or data 5.--Hearsay 6.--Valuation experts 7.--Other particular cases 8. Admissibility of underlying facts or data 9.--Affidavits or declarations 10.--Insurance 11.--Products liability 12. Hypothetical questions 13.--Particular cases 14. Other particular cases

1. Relationship to other rules and laws

Read together, Rules 703 and 705 reveal that data underlying expert's opinion which is elicited on cross-examination does not come in as substantive evidence, but is admitted for limited and independent purpose of enabling jury to scrutinize expert's reasoning. *United States v Wright (1986, App DC) 251 US App DC 276, 783 F2d 1091, 19 Fed Rules Evid Serv 1473.*

Reading final sentence of *FRCrimP 12.2(c)* with *Fed Rules of Evid 703* and *705,* apparently what defendant says can be considered by trier in evaluating probative force of expert's testimony but not as evidence-in-chief. *United States ex rel. Edney v Smith (1976, ED NY) 425 F Supp 1038,* affd without op (1977, CA2 NY) *556 F2d 556,* cert den *(1977) 431 US 958, 53 L Ed 2d 276, 97 S Ct 2683.*

Provision of state medical malpractice act which provides for pre-litigation hearing by medical review panel (composed of attorney and three health care providers), and makes report of that panel admissible in any subsequent litigation, but provides that it should not be conclusive, amounts, at most, to another legislatively imposed exception to hearsay rule, and Rules 701-705 clearly contemplates such expert testimony. *Hines v Elkhart General Hospital (1979, ND Ind) 465 F Supp 421,* affd (1979, CA7 Ind) *603 F2d 646.*

Defendant's motion pursuant to *Fed. R. Crim. P. 16(a)(1)(G)* for disclosure of any expected expert testimony under *Fed. R. Evid. 702, 703,* or *705* was dismissed as moot because government represented that it had not yet determined whether it would call expert witness but, if it did, it would provide information required. *United States v Ojeikere (2004, SD NY) 299 F Supp 2d 254.*

In husband's suit asserting claims of negligence and wrongful death against U.S. in connection with wife's death

after surgery in hospital operated by U.S., husband's failure to designate wife's treating physician as expert witness did not did not result in exclusion of physician's testimony under *Fed. R. Civ. P. 26(a)(2)(B), 37(c)(1)* because physician was treating doctor, not witness for purposes of *Fed. R. Evid. 705* who was being called just to offer expert testimony, and husband and his attorney did not appear to have acted in bad faith in failing to disclose physician before close of discovery. *Vaughn v United States (2008, SD Ga) 542 F Supp 2d 1331.*

2. Prior disclosure of underlying facts or data

Allowing experts to testify as to results of computer simulation which formed basis for their ultimate conclusion that automotive anti-skid device covered by patent was perfectible was not abuse of discretion by trial court in diversity action for breach of alleged contractual obligation of defendant to use its best efforts to perfect, manufacture, and market such device, even though details of underlying data and theories employed in such simulations were not delivered to defense counsel in advance of trial. *Perma Research & Dev. Co. v Singer Co. (1976, CA2 NY) 542 F2d 111,* cert den *(1976) 429 US 987, 50 L Ed 2d 598, 97 S Ct 507* and (criticized in All-*Flow, Inc. v Fruehauf Corp. (In re All-Flow, Inc.) (1995, WD NY) 1995 US Dist LEXIS 14796)* and (criticized in *Kidder, Peabody & Co. v IAG Int'l Acceptance Group N.V. (1998, SD NY) 28 F Supp 2d 126).*

Failure of government to supply defendant with copy of computer program relating to expert testimony does not preclude government from introducing such expert testimony in trial of defendant for importation and possession with intent to distribute heroin. *United States v Bastanipour (1982, CA7 Ill) 697 F2d 170, 12 Fed Rules Evid Serv 392,* cert den *(1983) 460 US 1091, 76 L Ed 2d 358, 103 S Ct 1790.*

Defendant's motion pursuant to *Fed. R. Crim. P. 16(a)(1)(G)* for disclosure of any expected expert testimony under *Fed. R. Evid. 702*, *703*, or *705* was dismissed as moot because government represented that it had not yet determined whether it would call expert witness but, if it did, it would provide information required. *United States v Ojeikere (2004, SD NY) 299 F Supp 2d 254.*

3.--Employment-related cases

District court did not err during determination of summary judgment motions in plaintiff employees' Americans with Disabilities Act cases in admitting supplemental declaration of vocational rehabilitation specialist retained by plaintiffs after it had struck specialist's initial affidavit as too general to be useful, although it was served on defendant more than month after hearing on summary judgment motion and contained new information, since district court was in far better position to judge whether late-filed evidence would disrupt proceedings too much and to make appropriate adjustments. *Dalton v Subaru-Isuzu Auto. (1998, CA7 Ind) 141 F3d 667, 7 AD Cas 1872.*

Fact that Title VII plaintiff testified that she began having nightmares long after alleged harassment ended contradicted facts upon which psychiatrist said he relied did not mean that psychiatrist's testimony was not based on reliable data and should not have been admitted; psychiatrist disclosed underlying facts on which he relied and jury was then free to credit or not to credit psychiatrist's testimony and diagnosis. *Skidmore v Precision Printing & Packaging, Inc. (1999, CA5 Tex) 188 F3d 606, 81 BNA FEP Cas 1252, 16 BNA IER Cas 1081, 77 CCH EPD P 46256, 53 Fed Rules Evid Serv 44.*

4. Cross-examination disclosure of underlying facts or data

Rule 705 removes need for expert to make elaborate disclosure of bases of his opinion; onus of eliciting bases of opinion is placed on cross-examiner; cross-examiner is entitled to delve into basis of expert's opinion in detail. *Polk v Ford Motor Co. (1976, CA8 Mo) 529 F2d 259, 1 Fed Rules Evid Serv 545,* cert den *(1976) 426 US 907, 48 L Ed 2d 832, 96 S Ct 2229.*

When expert witness testifies as to his opinion in response to questions other than traditional hypothetical question, Rule 705 requires that underlying basis for opinion evidence reveal factual premise which opinion assumes to be true.

Daniels v Mathews (1977, CA8 Mo) 567 F2d 845.

Effect of Rule 705 eliminating need for hypothetical questions is to place full burden of exploration of assumptions underlying testimony of expert witness on shoulders of opposing counsel's cross-examination. *Smith v Ford Motor Co. (1980, CA10 Wyo) 626 F2d 784, 29 FR Serv 2d 1462,* cert den *(1981) 450 US 918, 67 L Ed 2d 344, 101 S Ct 1363.*

If on cross-examination adversary succeeds in demonstrating that conclusion of expert lacks adequate support as required by Rule 702, trial court should strike testimony. *Logsdon v Baker (1975, App DC) 170 US App DC 360, 517 F2d 174.*

Read together, Rules 703 and 705 reveal that data underlying expert's opinion which is elicited on cross-examination does not come in as substantive evidence, but is admitted for limited and independent purpose of enabling jury to scrutinize expert's reasoning. *United States v Wright (1986, App DC) 251 US App DC 276, 783 F2d 1091, 19 Fed Rules Evid Serv 1473.*

Cross-examination is appropriate method of eliciting facts underlying expert's opinion, and burden of establishing these underlying facts through cross-examination rests with adverse party. *People v Whitfield (1986, 5th Dist) 140 Ill App 3d 433, 94 Ill Dec 840, 488 NE2d 1087* (superseded by statute on other grounds as stated in *People v Clemons (1995, 1st Dist) 275 Ill App 3d 1117, 212 Ill Dec 408, 657 NE2d 388).*

5.--Hearsay

Rule 705 shifts burden of eliciting basis of expert witness' opinion to cross-examiner, so that evidence which is otherwise hearsay, but which reveals underlying sources of expert's opinion, should be as permissible on cross-examination as on direct; moreover, evidence which is otherwise hearsay, but which is used in disclosing basis of expert witness' opinion, should be admissible to impeach if strictly limited to that purpose by instructions, and if impeaching evidence has sufficient guarantee of reliability that prophylactic effect of hearsay rule is not necessary to ensure trustworthiness. *Bryan v John Bean Div. of FMC Corp. (1978, CA5 Tex) 566 F2d 541, 2 Fed Rules Evid Serv 919.*

Cross-examination which attempts to impeach by slipping hearsay evidence into trial is impermissible particularly in case where cross-examiner has previously succeeded in keeping out closely related evidence. *Bobb v Modern Products, Inc. (1981, CA5 Fla) 648 F2d 1051, 8 Fed Rules Evid Serv 812, 31 FR Serv 2d 1248* (criticized in *Fashauer v New Jersey Transit Rail Operations (1995, CA3 NJ) 57 F3d 1269)* and (ovrld on other grounds by *Gautreaux v Scurlock Marine (1997, CA5 La) 107 F3d 331, 1997 AMC 1521).*

Court may impose reasonable limits upon cross-examination where its purpose is to support cross-examiner's case by bringing out inadmissible hearsay rather than to undermine the expert's opinion. *United States v Taylor (1975, App DC) 167 US App DC 62, 510 F2d 1283,* reh den (1975, App DC) *170 US App DC 315, 516 F2d 1243.*

6.--Valuation experts

Rule 705 requirement of disclosure by expert of facts underlying testimony is not applicable to facts of price paid by condemnor for flowage easement in comparable sale, of which witness was expressly ignorant and on which expert witness did not rely in estimating value of defendant's land. *United States v 10.48 Acres of Land (1980, CA9 Wash) 621 F2d 338, 6 Fed Rules Evid Serv 411.*

Fed. R. Evid. 705 required that debtors' valuation expert was required to disclose underlying facts or data on cross-examination, but because of confidentiality agreements, expert declined to do so at his deposition and continued in his refusal at trial, which led to court's disallowance of testimony. *In re Leap Wireless Int'l, Inc. (2003, BC SD Cal) 301 BR 80, 42 BCD 32.*

Testimony of valuation witnesses in condemnation proceedings stating dollar amounts of comparable sales they considered in arriving at opinions of value was admissible under Rules 703 and 705. *Department of Transp. v Beeson (1985, 2d Dist) 137 Ill App 3d 908, 92 Ill Dec 700, 485 NE2d 511.*

7.--Other particular cases

Although defendant in personal injury action was not permitted to interrogate plaintiff's expert economist with respect to reasons for plaintiff's demotion and what effect, if any, those reasons would have on projections of plaintiff's loss of future earnings, it was sufficient for purposes of Rule 705 that defendant was permitted to cross-examine plaintiff's expert as to what effect fact of demotion would have on projections, where other data and assumptions relied on by expert were fully open to cross-examination and were questioned by defense counsel, and where, although expert testified that he was not aware of demotion and had not researched its possible effects, his wage calculations were based on plaintiff's earnings at new, lower grade without promotion, and his longevity figure was based on Bureau of Labor Statistics average that took into account such causes of work termination. *Monroe v Nightingale Trucking Co. (1984, CA4 Va) 17 Fed Rules Evid Serv 186.*

In trial of defendant charged with interstate transportation of stolen motor vehicle, inter alia, in which defendant's expert testified that defendant suffered from pathological gambling and stated that he based his conclusion upon diagnosis several years earlier and fact that defendant had since failed to receive proper treatment, it was not abuse of discretion for trial court to allow government to inquire on cross-examination into defendant's involvement in prior motor vehicle theft, where that theft formed integral part of basis for expert's earlier diagnosis, where government avoided any mention of outcome of defendant's previous trial, and where entire area of questioning could easily have been avoided by defendant; in instant case it was important that factfinder know basis of expert's diagnosis in order to attribute to it proper credibility and weight. *United States v Gillis (1985, CA4 Md) 773 F2d 549.*

Allowing FBI agents to give expert testimony regarding La Cosa Nostra and gambling operations without disclosing informant information on cross-examination was not erroneous since expert testimony was based solely on tape recordings presented at trial. *United States v Angiulo (1990, CA1 Mass) 897 F2d 1169, 29 Fed Rules Evid Serv 1011,* cert den *(1990) 498 US 845, 112 L Ed 2d 98, 111 S Ct 130,* motion den sub nom *United States v Angiulo (1994, DC Mass) 852 F Supp 54,* subsequent app (1995, CA1 Mass) *57 F3d 38.*

Plaintiff having elicited testimony from defendant surgeon in cross-examination, pursuant to *FRE 705*, that certain theory was not held in high regard by researchers in field of surgical sepsis, district court did not abuse its discretion when it overruled plaintiff's objection to further inquiry into subject on re-direct. *Sosna v Binnington (2003, CA8 Mo) 321 F3d 742, 60 Fed Rules Evid Serv 925.*

In action in which defendant appealed from judgment of district court convicting him of possessing firearm as felon in violation of *18 USCS § 922(g)(1),* and sentencing him to 120 months' imprisonment, judgment was affirmed where district court did not abuse its discretion by limiting cross-examination of government's fingerprint expert. *United States v Lee (2007, CA7 Ill) 502 F3d 691,* reh den (2007, CA7 Ill) *2007 US App LEXIS 24423.*

It was not improper for defendant in patent infringement action to offer patent attorney as expert or for that expert to testify on "ultimate questions" such as infringement; *Fed. R. Evid. 705* permitted plaintiff to challenge during cross-examination basis for attorney's opinions regarding infringement or any other "ultimate issue" in litigation. *Engineered Prods. Co. v Donaldson Co. (2004, ND Iowa) 313 F Supp 2d 951,* judgment entered, motions ruled upon (2004, ND Iowa) *330 F Supp 2d 1013,* amd on other grounds, costs/fees proceeding, motion gr, in part, motion den, in part, request den (2004, ND Iowa) *335 F Supp 2d 973,* affd in part and revd in part on other grounds, remanded, vacated, in part (2005, CA FC) *147 Fed Appx 979.*

8. Admissibility of underlying facts or data

Rule 705 did not preclude admission of expert testimony where, on direct examination, expert's qualifications were

established, particularly where court accorded wide latitude in length and scope of defendant's cross-examination of experts. *United States v Kail (1986, CA8 Minn) 804 F2d 441, 21 Fed Rules Evid Serv 1219.*

Admission of tax court decision in case in which defendant had been party was not abuse of discretion since decision was admissible under Rule 705 as underlying basis in support of agent's expert opinion in action for tax evasion and subscription to false tax return, and defendant's actual receipt or possession of decision was not necessary foundation to admission of it. *United States v Blood (1986, CA4 Md) 806 F2d 1218, 7 EBC 2613, 22 Fed Rules Evid Serv 156.*

Fact that defendant's expert relied on portions of plaintiff's expert's report in testifying did not make report admissible since that plaintiff's expert did not testify so there was no opportunity to cross-examine him regarding his methodology or any other shortcomings report might contain. *Polythane Sys. v Marina Ventures Int'l, Ltd. (1993, CA5 Tex) 993 F2d 1201, 39 Fed Rules Evid Serv 104,* reh, en banc, den (1993, CA5 Tex) *4 F3d 992* and cert den *(1994) 510 US 1116, 127 L Ed 2d 383, 114 S Ct 1064.*

Read together, Rules 703 and 705 reveal that data underlying expert's opinion which is elicited on cross-examination does not come in as substantive evidence, but is admitted for limited and independent purpose of enabling jury to scrutinize expert's reasoning. *United States v Wright (1986, App DC) 251 US App DC 276, 783 F2d 1091, 19 Fed Rules Evid Serv 1473.*

It is clear from *Fed. R. Evid. 703, 705* that expert's opinion is evidence, whether or not underlying facts or data are ever disclosed to trier of fact, and whether they are independently admissible. *Bice v United States (2006) 72 Fed Cl 432.*

Unpublished Opinions

Unpublished: In action to recover for injuries sustained in accident, because defendants had introduced evidence at trial of intoxication of plaintiff's son, driver of one vehicle, accident reconstruction expert was entitled to use that evidence, under *Fed. R. Evid. 705*, as part of basis of his own expert opinion. *Powell v W&W Hauling, Inc. (2007, CA11 Ga) 2007 US App LEXIS 8141*.

9.--Affidavits or declarations

Doctors' affidavits stating that changes in plaintiff's vagina were caused by her mother's ingestion of DES while she was pregnant with plaintiff were admissible in opposition to motion for summary judgment by defendant drug manufacturers, even though doctors did not describe in detail how they arrived at their opinions, since experts stated their opinions were based on observed tissue changes and no greater detail was requested. *Bulthuis v Rexall Corp. (1985, CA9 Cal) 789 F2d 1315.*

Declaration of expert opinion is not inadmissible merely due to omission of recitation of facts upon which it is based, where District Court has not required such recitation. *Bulthuis v Rexall Corp. (1986, CA9 Cal) 4 FR Serv 3d 835.*

Although expert affidavits offered to defeat summary judgment motion need not include details about all of raw data used to produce conclusion, or about scientific or other specialized input which might be confusing to lay person, it must include factual basis and process of reasoning which makes conclusion viable in order to defeat motion for summary judgment. *Hayes v Douglas Dynamics (1993, CA1 Mass) 8 F3d 88, CCH Prod Liab Rep P 13686,* cert den *(1994) 511 US 1126, 114 S Ct 2133, 128 L Ed 2d 863.*

District court did not err during determination of summary judgment motions in plaintiff employees' Americans with Disabilities Act cases in admitting supplemental declaration of vocational rehabilitation specialist retained by plaintiffs after it had struck specialist's initial affidavit as too general to be useful, although it was served on defendant

more than month after hearing on summary judgment motion and contained new information, since district court was in far better position to judge whether late-filed evidence would disrupt proceedings too much and to make appropriate adjustments. *Dalton v Subaru-Isuzu Auto. (1998, CA7 Ind) 141 F3d 667, 7 AD Cas 1872.*

10.--Insurance

In action against insurance company to recover proceeds of life insurance policy, in which insurer denies liability because of suicide by insured within one year of issuance of policy, inter alia, court did not err in admitting testimony by plaintiff's experts regarding possibility of homicide, since experts are entitled to give reasons for their opinions and to explain how and why they arrived at that result, and since plaintiff's experts had considered homicide but rejected it and this was part of their ideology in arriving at conclusion that death was accidental. *Wilmington Trust Co. v Manufacturers Life Ins. Co. (1985, CA11 Fla) 749 F2d 694, 17 Fed Rules Evid Serv 358.*

In action by insureds against insurer to recover under insurance policies, report written by engineer for insurance company which was not party to case, dealing with mudslide at issue, was not admissible under Rules 705, 803(6), or 803(5), where engineering expert, through whom insured attempted to introduce report, did not mention using report as basis in formulating his opinion, insured did not succeed in establishing prerequisites for admitting report into evidence under "business record" exception, and expert testified that he did not even remember reading report before it was issued. *O'Malley v United States Fidelity & Guaranty Co. (1985, CA5 Miss) 776 F2d 494.*

Report of appraisal of newspaper's tangible assets performed for newspaper by appraisal company for fire insurance purposes was not admissible as business record, where preparer of appraisal report was not present in court to be cross-examined on substance of report. *Forward Communications Corp. v United States (1978, Ct Cl Tr Div) 3 Fed Rules Evid Serv 1076.*

11.--Products liability

Doctors' affidavits stating that changes in plaintiff's vagina were caused by her mother's ingestion of DES while she was pregnant with plaintiff were admissible in opposition to motion for summary judgment by defendant drug manufacturers, even though doctors did not describe in detail how they arrived at their opinions, since experts stated their opinions were based on observed tissue changes and no greater detail was requested. *Bulthuis v Rexall Corp. (1985, CA9 Cal) 789 F2d 1315.*

Trial court did not err in product liability case involving child restraint seat in permitting manufacturer to introduce evidence of tests it had conducted, for purpose of assisting expert witness in demonstrating physical principles which formed basis of his opinion, notwithstanding their somewhat prejudicial effect on plaintiffs' case, since tests were clearly relevant and plaintiffs were given ample opportunity to attack credibility of expert's conclusions by pointing out inconsistencies and shortcomings in sled test design. *Gilbert v Cosco, Inc. (1993, CA10 Okla) 989 F2d 399, CCH Prod Liab Rep P 13446, 38 Fed Rules Evid Serv 557.*

Defendant's motion to strike expert testimony in products liability action was denied because experts could express opinions on penultimate issues and plaintiff's counsel questioned experts regarding their knowledge of facts and data underlying their opinions before using jury instructions to inquire whether they believed that defendant was negligent. *Rush v Wyeth (In re Prempro Prods. Liab. Litig.) (2007, ED Ark) 474 F Supp 2d 1040.*

12. Hypothetical questions

According to pre-Rule authority, it is proper to phrase hypothetical question by clear reference to certain specified testimony for which there is sufficient evidence to support jury finding that these facts exist. *Twin City Plaza, Inc. v Central Surety & Ins. Corp. (1969, CA8 Neb) 409 F2d 1195; Frankel v Lull Engineering Co. (1971, ED Pa) 334 F Supp 913,* affd (1973, CA3 Pa) *470 F2d 995.*

Hypothetical questions which misstate facts in evidence and stated facts not in evidence are unfair. *J. Gerber & Co. v S.S. Sabine Howaldt (1971, CA2 NY) 437 F2d 580, 13 ALR Fed 301.*

According to pre-Rule authority, it is proper to phrase hypothetical question by enumeration of certain basic facts adduced in other testimony for which there is sufficient evidence to support jury finding that these facts exist. *Mears v Olin (1975, CA8 Neb) 527 F2d 1100.*

Expert may properly decline to state opinion when he believes basis provided in hypothetical question to be inadequate. *Kaufman v Edelstein (1976, CA2 NY) 539 F2d 811, 1976-1 CCH Trade Cases P 60841, 2 Fed Rules Evid Serv 546, 21 FR Serv 2d 1232; Fernandez v Chios Shipping Co. (1976, CA2 NY) 542 F2d 145, 1 Fed Rules Evid Serv 355.*

Rule 705 allows counsel to make use of hypothetical questions, disclosing underlying facts or data as preliminary to giving of expert opinion. *Bryan v John Bean Div. of FMC Corp. (1978, CA5 Tex) 566 F2d 541, 2 Fed Rules Evid Serv 919.*

13.--Particular cases

Expert witnesses for prosecution may be asked hypothetical questions which assume facts upon which defendant's guilt is predicated. *United States v Morgan (1977, CA2 NY) 554 F2d 31, 1 Fed Rules Evid Serv 961,* cert den *(1977) 434 US 965, 54 L Ed 2d 450, 98 S Ct 504.*

Just as court may not permit expert to testify on basis of pure conjecture, neither may it exclude any and all expert testimony not premised entirely on facts already proven by evidence before jury; thus, expert witness may state his opinion in response to hypothetical question where basis of question has at least partial support in record. *Coleman v De Minico (1984, CA1 Mass) 730 F2d 42, 15 Fed Rules Evid Serv 523.*

In action under Federal Employers' Liability Act (*45 USCS §§ 51-60*) alleging that harassment by railroad foreman caused railroad employee to suffer paranoid schizophrenia, District Court did not abuse discretion in permitting employee's counsel to pose lengthy hypothetical question containing specific references to employee and foreman, including reference to incident involving foreman and section member other than employee that used several sexually explicit epithets, where there was no allegation that question assumed facts not in evidence. *Taylor v Burlington N. R.R. (1986, CA9 Wash) 787 F2d 1309, 20 Fed Rules Evid Serv 744.*

Unpublished Opinions

Unpublished: District court properly allowed government to ask defendant, while cross-examining him in connection with *18 USCS § 922(g)(1)* possession of firearm by felon charge, about how he would have reacted if third party had asked to take possession of gun-containing backpack found in defendant's home; district court did not violate *Fed. R. Evid. 705* in allowing government to ask that question because it was not type of hypothetical question that lay witness could not be asked. *United States v Johnson (2007, CA3 Del) 2007 US App LEXIS 22403.*

14. Other particular cases

Where, pursuant to *Fed. R. Evid. 705*, parties stipulated to testimony of forensic chemist, that she had personally tested drug exhibits and found all to contain marijuana, jury was entitled to credit this stipulation of opinion without further testimony regarding particular analyses supporting chemist's conclusions. *United States v Gaskin (2004, CA2 NY) 364 F3d 438,* cert den *(2005) 544 US 990, 125 S Ct 1878, 161 L Ed 2d 751* and (criticized in *United States v Anderson (2006, CA9 Cal) 172 Fed Appx 172).*

In proceedings before Provider Reimbursement Review Board, Rule 705 does not preclude allowance of opinion testimony by witness who relies on extraneous matters for basis of his testimony; it is not a denial of right to

cross-examination nor a denial of fundamental due process for opposing party not to be afforded access to extraneous materials relied upon by witness giving opinion testimony. *Hospital Affiliates International, Inc. v Schweiker (1982, ED Tenn) 543 F Supp 1380.*

Although examiner appointed by bankruptcy court and consultant, who were both expert accountants, had no first-hand knowledge of bankruptcy debtor's operations, their determination that debtor was entitled to carryback adjustment was reasonably based on information and records provided to them and experts were not required to testify as to each fact underlying their ultimate opinions. *In re Indus. Commer. Elec., Inc. (2004, BC DC Mass) 304 BR 24, 42 BCD 138, 2004-1 USTC P 50228, 93 AFTR 2d 721.*

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