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REPLY TO:

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THE IMPACT OF DAUBERT, THE FEDERAL RULES OF CIVIL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE ON USE OF EXPERTS IN FALSE CLAIMS ACT CASES

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Increasingly, FCA practitioners are hiring experts before, during and after the case is presented to the United States. The potential use of those experts in litigation, after intervention or declination, demands that practitioners anticipate at the time of obtaining an expert whether these experts will be admissible in litigation. Litigation using experts presents issues similar to those in general litigation, related to picking the proper expert, the proper issues on which an expert can opine, and the admissibility of the expert and her/his report. This paper will attempt to explore the legal landscape related to expert under the Federal Rules and caselaw, and the minefields to be evaluated before hiring an expert, and during dealings with the expert.

Federal Rule of Evidence 702 governs the use of experts and their opinions:

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.

Fed. R. Evid. 702

The main cases dealing with the admissibility of experts in Federal Court are *Daubert v. Merrell Dow Pharma*, 509 U.S. 579, 113 S.Ct. 2786 (U.S. 1993) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (U.S. 1999). These cases established the basic standard for use of expert reports and testimony in Federal court litigation. Each circuit has used these cases as starting points for interpretations of the law.

The first, and most important directive of *Daubert* (and its progeny), is that a district court must, pursuant to F.R.E. 702, hold a hearing in which it "engage[s] in a three-step analysis before admitting expert testimony. It must determine whether the witness is qualified; whether the expert's methodology is scientifically reliable; and whether the testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 644 (7th Cir. 2010) (quoting *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007)); see also *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 893–94 (7th Cir. 2011).

These standards are applied in slightly differing manners depending on whether the expert is used for scientific or non-scientific matters. However, a district court's inquiry is "flexible," *Daubert,* 509 U.S. at 594, 113 S.Ct. 2786, as "Rule 702 should be applied with a 'liberal thrust' favoring admission," *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014), (quoting *Daubert*, 509 U.S. at 588, 113 S.Ct. 2786).

In science related matters, the district court

> looks at five factors: (1) [W]hether the particular scientific theory "can be (and has been) tested"; (2) whether the theory "has been subjected to peer review and publication"; (3) the "known or potential rate of error"; (4) the "existence and maintenance of standards controlling the technique's operation"; and (5) whether the technique has achieved "general acceptance" in the relevant scientific or expert community.

Deputy v. Lehman Bros., Inc., 345 F.3d 494, 505 (7th Cir. 2003) (quoting *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786).

In non-scientific matters, courts evaluate whether the expert is qualified by means of having specialized knowledge or expertise; whether the opinion is reliable; and whether the opinion is relevant. The expert's qualifications are fact specific. The opinion's reliability evaluates whether the opinion contains "evidence based on scientific, technical, or other specialized knowledge" under Rule 702. *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir.2008) Reliability means that the opinion is "based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." *In Re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 742 (quoting

Daubert, 509 U.S. at 589, 113 S.Ct. 2786).

Relevancy evaluations examine whether the expert and opinion will be "useful to the finder of fact in deciding the ultimate issue of fact." *Elcock v. Kmart Corp.*, 233 F.3d 734, 745 (3d Cir. 2000). Some jurisdictions call this factor the "Fit" of the expert and opinion to the facts under consideration.

Once litigation has commenced, litigants are subject to Fed.R.Civ.P. 26, which requires the disclosure of all documents related to the expert.

Rule 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.
>
> (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:
>
> > (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;
> >
> > (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.

Fed. R. Civ. P. 26. Non-testifying experts are also subject to the Rule, which requires

(a) (2) (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.

Fed. R. Civ. P. 26

A party's disclosure must include all facts and data upon which the expert relied in forming her or his opinion. This issue is increasingly becoming the subject of litigation since the amendment of the Rule 26 in 2010 "to address concerns about expert discovery." Advisory Committee Note to 2010 Amendments.

"Facts and data" as now contained in Rule 26 is to be "interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert." Id.

However, non-testifying experts, now called "reporting witnesses," [as opposed to "reporting experts,"] are required to produce summary disclosures of opinions, if those persons will testify as fact witnesses, under Rule 26(a)(2)(c). These "reporting witness" experts are also required to produce the facts supporting their opinions, a less extensive production than that required by Rule 26(a)(2)(B).

The 2010 Amendments "provide work-product protection against discovery regarding draft expert disclosures or reports and--with three specific exceptions[1]--communications between expert witnesses and counsel." Id. Courts had previously "read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports." Under these Amendments, the mental impressions or theories of counsel do not need to be produced. Advisory Committee Note to 2010 Amendments.

Communications between the experts and the party's counsel are protected under traditional work product privileges. "The protection is limited to communications between an expert witness, and her/ his assistants, required to provide a report under Rule 26(a)(2)(B), and the attorney for the party on whose behalf the witness will be testifying, including any preliminary expert opinions." Id.

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[1]The exceptions include communications about fees; communications identifying the facts or data (but not the mental impressions regarding those facts and data); and assumptions provided by the attorney upon which the expert relied.

However, communications between attorneys and expert witnesses under Rule 26(a)(2)(c) are not protected. Rule 26's Amendments do not exclude protection under other doctrines, such as privilege. Id.

Some cases that discuss issues raised by the 2010 Amendments include *PacifiCorp v. Northwest Pipeline GP*, 879 F.Supp.2d 1171 (2012). *PacifiCorp* noted that, under the 2010 Amendments, expert witnesses can be pure expert witnesses, thereby subject to the attorney protections of Rule 26, or "hybrid" witnesses, who testify about facts and expertise, thereby opening up some of their attorney communications to scrutiny. Noting that the Ninth Circuit had yet to address the issue of whether designating a witness as a non-reporting expert waives all applicable privileges and protections of communications with that expert. and citing *United States v. Sierra Pac. Indus.,* 2011 WL 2119078, at *2 (E.D.Cal. May 26, 2011), the *PacifiCorp* court found that

> by designating hybrid fact and expert witnesses who had investigated the cause of a fire and therefore had percipient knowledge of facts at issue in the litigation, plaintiff waived all applicable privileges and protections for communications between counsel and those witnesses, because the fact-finder was entitled to evaluate potential biases in the witnesses' testimony revealed in communications with counsel.

PacifiCorp, 879 F.Supp.2d at 1212.

United States v. Dish Network, L.L.C., 297 F.R.D. 589 (2013), a case out of the Central District of Illinois, provides a good discussion of what is meant by "facts and data." There, the Court dismissed the expert's own representations of the "facts and data," upon which he had relied, and instead held that "[a] court should not solely credit the subjective representations of the expert when determining what the expert "considered." *Dish Network*, 297 F.R.D. at 596.

Adopting the reasoning of district courts in New York, Missouri, Kansas and California, the *Dish Network* court found that facts and data related to prior expert opinions was discoverable, as "when the subject matter of the expert's prior work relates to the facts and opinions the expert expresses in his report, courts should order disclosure when there is at least an ambiguity as to whether the materials informed the expert's opinion." *Dish Network,*297 F.R.D. at 596, citing *Monsanto Co. v. Aventis Cropscience, N.V.,* 214 F.R.D. 545, 546–47 (E.D.Mo.2002).