

Rule 702

The Agony and the Ecstasy

Faculty of Federal Advocates Presentation

February 11, 2022

Chief Judge Philip A. Brimmer

Overview

- General Principles
- Disclosure Rules

General Principles

1. Persons v. Opinions

Daubert (1993)

Rule 702 – Revised 2000

Revised Rule 702

U.S. v. Crabbe, 556 F. Supp. 2d 1217 (D. Colo. 2008): The 2000 revision “makes the Rule 702 determination more *opinion-centric* than *expert-centric*.”

Focus on Opinions

Rule 702 Motions:

Should not ask to exclude an expert.

Should identify each opinion you want to exclude.

General Principles

2. Gatekeeper

Daubert – Judges must protect juries from junk science.

But what responsibility do the parties have for triggering the gatekeeping function?

Gatekeeper

Opponent must challenge the opinion.

The proponent bears burden of showing the opinion is admissible.

But the gatekeeping function is only triggered by an objection. *Mascenti* (10th Cir. 2001).

And the objection must be timely. *Questar Pipeline* (10th Cir. 2000).

Gatekeeper

Court has discretion in how to resolve a Rule 702 objection

The movant has “no entitlement to a particular method of gatekeeping by the district court.”
Nacchio II, 555 F.3d 1234, 1245 (10th Cir. 2009)

Although a Daubert hearing is the most common way to fulfill the gatekeeper function, it is not specifically mandated. *Nacchio II*, 555 F.3d at 1253-54.

General Principles

3. What is an expert?

Rule 702 – witness who is qualified by knowledge, skill, experience, or education to testify in the form of an opinion

General Principles

3. What is an expert?

Compare Rule 701 – If witness is not testifying as an expert, opinion is limited to:

1. One rationally based on witness's perception;
2. Helpful to clearly understanding witness's testimony; and
3. Not based on scientific or specialized knowledge under Rule 702.

General Principles

3. What is an expert?

Rule 701 “does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience.”

James River Insur., 658 F.3d 1207, 1214
(10th Cir. 2011)

Disclosure

Rule of Civil Procedure 26

Rule of Criminal Procedure 16

Civil Rule 26(a)(2)

1. Witnesses Who Must Provide a Written Report:

- One retained to provide expert testimony

2. Witnesses Who Do Not Need to Provide a Written Report – All Others

Written report under Rule 26 must contain:

1. Complete statement of all opinions the witness will express
2. The bases and reasons for the opinions
3. Facts and data considered by the witness
4. Exhibits that expert will use
5. Qualifications and list of articles authored in last 10 years
6. List of cases where expert testified at trial or by depo in last 4 years
7. Compensation to be paid to expert

How to Avoid Disclosure Problems

Give expert a list of required Rule 26 content for the report

Lay your cards on the table

Experts Not Required to Write a Report:

Disclosure must state:

1. Subject matter of testimony
2. A summary of the facts and opinions to which expert will testify

How to Avoid Disclosure Problems

Non-retained experts:

You cannot simply list topics expert will discuss

You cannot simply say expert will testify consistently with the medical records or future deposition

Did expert reach that opinion before litigation?

If not, expert may have to write a report.

See *Vanderlaan v. Ameriprise Auto*, 2021 WL 4441518 (D. Colo. Sept. 8, 2021)

Sanctions for Disclosure Violations

Rule 37: Unless substantially justified or harmless, failure to disclose means party is not allowed to use that information.

In determining proper sanction, court must use the *Woodworker's Supply* factors.

Woodworker's Supply, 170 F.3d 935 (10th Cir. 1999)

Woodworker's Supply Factors

1. Prejudice to opponent
2. Ability to cure prejudice to opponent
3. Disruption to trial by introducing testimony
4. Proponent's bad faith

Criminal Rules

Rule 16: Upon request, proponent must provide a “written summary”

That describes the expert’s “opinions, the bases and reasons for those opinions, and the expert’s qualifications”

Criminal Rules

Sanctions for Non-Compliance

Rule 16:

1. Grant a continuance;
2. Prohibit the party from introducing undisclosed evidence;
3. Enter any other just order.

Rule 702 Motions

Do: Identify the opinions you challenge.

Don't: Move to strike the expert.

Do: Identify the basis of your challenge, e.g., reliability, relevance.

Don't: Don't confuse Rule 702 challenges with disclosure challenges under Rule 26.

Trial – Non-Disclosure Objections

Opponent objects during expert's testimony that opinion not disclosed.

Rule 26: Report “must” contain a “complete statement” of “all opinions” the witness “will express.”

Rule 16: Summary “must” describe the opinions.

Trial – Non-Disclosure Objections

Response: “Opinion disclosed through expert’s deposition”

Rule 26: Report must describe the opinions.

Rule 26(e): Changes to opinions at a deposition must be supplemented by time Rule 26(a)(3) disclosures are due.

“Rule 26(a)(2) does not allow parties to cure deficient expert reports by supplementing them with later deposition testimony.”

Ciomber, 527 F.3d 635, 642 (7th Cir. 2008)

