The Collision Between New Discovery Amendments and Expert Testimony Rules

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The young litigator's nightmare was always the same. He was in medieval Europe, ready to engage in a sword fight with the expert swordsman representing his arch rival. After countless hours of preparation, he felt confident that he would be able to hold his own against the swordsman. But when the swordsman drew his lengthy rapier from its sheath, the young attorney pulled only a short dagger from his scabbard. Realizing that he was doomed to defeat, he tossed his dagger into the air and ran from the scene with the laughter of the onlookers ringing in his ears.

The young litigator needed no dream analyst to tell him the nightmare's symbolism. He knew that the sword fight represented cross-examination and that his swordsman opponent was simply an expert witness. As hard as he practiced and studied and researched, he never felt comfortable cross-examining his opponent about the expert's field of expertise. He might as well admit his failure now and become a tax attorney, he thought.

Fear of expert witnesses can indeed be disabling. With the increase in litigation about complex business transactions, products liability, and professional malpractice, expert testimony continues to become more important. The modern litigator must learn to deal effectively with opposing experts or be faced with the embarrassment of his worst nightmares.

Handling the opponent's expert has become more difficult because the rules of evidence have been liberalized over the years, while the rules of discovery recently have been restricted.

Relaxing the evidentiary rules has increased the scope of expert trial testimony. Matters formerly thought to be solely in the province of the jury have become a kind of star wars—an intense courtroom battle between stellar experts in their fields. At the same time, restrictions on discovery about expert witnesses make it more difficult to cross-examine experts effectively.

Expert witnesses provide valuable assistance to the triers-of-fact, but unscrupulous "hired guns" can hoodwink them. Sadly, the full disclosure essential to sort the charlatans from the genuine experts often falls victim to the move to restrict discovery. Either the balance must be struck between pretrial disclosure and evidentiary rules at trial, or control of the courtroom must be relinquished to those who have become expert at testifying.

Typical of modern evidentiary provisions encouraging the broad use of experts is Article VII of the Federal Rules of Evidence. Article VII—and indeed, most of the Federal Rules of Evidence—is copied by the evidence codes and the rulings of most states.

Article VII relaxes former restrictions on the use of experts in the following ways:

1. A lay witness may give opinions and conclusions if they are rationally based on the witness's perception and are "helpful" to the fact-finder. Rule 701, Fed. R. Evid. This replaces the common-law test that allowed lay testimony in opinion or conclusion form only if it was "essential." Under the common law, the opinion or conclusion was inadmissible unless it was necessary as a kind of shorthand to express a collection of underlying facts that could not be articulated separately.

2. The class of witnesses who can be considered "experts" is expanded beyond those with formal education and degrees in the subject under consideration, and now includes people who gained their special experience or skill in the school of "hard knocks," namely, through practical, on-the-job experience. Rule 702.

3. No longer must a matter be totally beyond the knowledge and experience of lay jurors for it to be appropriate for expert testimony. It is enough that, although lay jurors may know quite a lot about the subject, an expert could be of some assistance to them. Rule 702.

4. The open-court hypothetical question no longer is the only or even the preferred format for presenting testimony of an expert who has not personally observed the facts. Alterna-

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But "forearmed" is the key, and often the difficulty. Discovery is restricted in criminal cases; yet the relaxed evidentiary rules apply. Disclosure is broader on the civil side, but recently there has been concern about too much discovery in civil cases, a concern that was codified in 1983 by amending the Federal Rules of Civil Procedure, most notably by adding Rule 26(g). In the words of the Advisory Committee, this rule "is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions."

More specifically, the rule requires the attorney requesting discovery to certify that the request is consistent with the rules; is not interposed for an improper purpose, such as harassment or bad faith; and is "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." A companion provision requires—surprisingly for our adversary system—that the attorney consider in this computation "the limits on (both) parties' resources" and the availability of the information from other less burdensome, less expensive, or more convenient sources. Rule 26(b)(1). If a certification is made in violation of the rule, the court "shall" impose monetary or other sanctions on the offending party or the party's attorney. If imposed on the attorney, the sanctions may not be passed on to the client.

Armed with this comparatively recent amendment, some lawyers have become enthusiastic about asking for—and getting—sanctions against other lawyers because somebody believes that the lawyer has done more discovery than necessary. By couching proper discovery in terms of what is "not unreasonable or unduly burdensome or expensive" to the system and to both parties and by tying these considerations to such factors as the needs of a given case, the amount in controversy, and the importance of the legal issues, the drafters of the rules have created a significant hazard for the trial attorney. Should the lawyer try to get as much information as possible, or should the aim be to curtail efforts in the face of possible sanctions against the lawyer or the client?

When the lawyer poses this question with respect to discovery about an expert, the expanded scope of the evidentiary rules heightens the problem. The discovery rules and the evidentiary rules about expert testimony are on a collision course, and the trial lawyer is caught in the middle.

Here is a typical scenario.

You are preparing for a civil trial in which you will represent the defendant. The kind of trial does not really matter, except that it will involve expert witnesses and it will take place in federal court or in the courts of one of the many states that have procedure and evidence rules essentially the same as those that apply in federal courts.

You have made a request under Rule 26 for information about your opponent's experts, and have learned (1) the identity of the plaintiff's expert witness, Harold Jones; (2) that Jones will render an opinion on X at trial; and (3) the basis for this opinion. The entire Rule 26 statement was drafted by opposing counsel. It is somewhat informative, but only barely above minimal compliance with the rule.

Moreover, the Rule 26 notice is ambiguous about whether Jones also might venture an opinion on a matter other than X. The notice contains some general language that could be read to mean that an opinion on Y might be given, and to give a
sketchy basis for such an opinion. Arguably, the information could be seen as complying with the notice rule for Y as well as for X.

Nevertheless, you decide not to depose Jones. First, a deposition would be expensive—more so even than a nonexpert deposition, since the federal rules provide that depositions of opposing experts require a court order and also make it likely that the party taking the deposition will have to pay certain additional costs. Rule 26(b)(4)(A) and (C). Because you have good expert help of your own, you feel that you are able to plan an attack on Jones without a deposition.

Another consideration underlying your decision not to depose Expert Jones is your fear that the judge (who at this stage may not be well-informed of the facts of the case or may see things differently) might apply the new sanctions provision of Rule 26(g). This provision encourages sanctions against lawyers themselves if discovery later is deemed by the judge to have been unnecessary or unduly expensive or burdensome in light of the circumstances of the case.

Moreover, you believe that the opinion on Y probably will not be part of the expert’s trial testimony, especially since Y does not seem central to the case. Indeed, discovery concerning the opinion on Y would be hard to justify to a judge not thoroughly familiar with the case. Such justification would be required to obtain a court order for the deposition, and might also be required to defend against any motion for sanctions for excessive discovery under Rule 26(g).

Finally, you do not want to be forced to disclose your whole case in an attempt to justify a deposition of Jones, but that is exactly what you may be required to do if you litigate the issue. And if Jones testifies about Y at trial, you conclude that you will obtain the basis for his opinion without discovery: Jones will have to disclose the basis during direct examination. Your experts will be sitting at counsel table, and you can consult with them regarding Jones’s testimony. In addition, you may be able to convince the judge not to allow Jones to testify at all on Y, or at least not to allow Jones to give a full basis for his opinion on Y, since the notice was ambiguous and sketchy. Once your decision is settled, you sit back and wait for trial to begin.

The first monkey wrench thrown into your plans is that the plaintiff’s lawyer convinces the judge, pursuant to Rule 615, Fed. R. Evid., that your experts should not be allowed to remain in the courtroom during any of the testimony, including the testimony of the plaintiff’s expert. A portion of the argument at the bench might sound like this:

**Defendant’s lawyer:** Your Honor, the Advisory Committee Notes to Article VII of the Federal Rules of Evidence state time and again that a major purpose of the Article is to provide streamlined alternatives to the cumbersome, lengthy, argumentative, and judicially inefficient institution of the open-court hypothetical question to experts. In particular, Rule 703 provides that the facts used by an expert “may be those perceived by or made known to him at or before the hearing,” and Rule 705 dispenses with “prior disclosure” of the facts that the expert is using, the prior disclosure being the hypothetical question. The Advisory Committee Notes to these rules express the intention to allow the expert to receive the facts in ways other than by the traditional hypothetical question. In particular, the rules contemplate allowing the expert to receive the facts by listening to the fact witnesses at trial.

In addition, the rule requiring sequestration, like all witness sequestration rules, is intended to guard against a particular danger—namely, that fact witnesses may influence each others’ stories without the fact-finder realizing it. This danger is not present when an expert listens to fact witnesses and frankly states that his opinion is based on the assumption that the facts are as the fact witnesses have testified. The expert makes it clear that he is not testifying that these facts are true, but only that his opinion is based on these facts. It is up to the jury to determine whether or not the facts are true. There is thus no danger of the kind that Rule 615 addresses.

**Judge:** Your arguments are good ones, but I have ruled that sequestration will apply and I will not change my ruling.

**Not a Setback**

The judge’s decision is a setback, but not a major one, you think. Your experts still will be available to discuss the issues between trial sessions, and your familiarity with the technical issues will enable you to relate the testimony to them. But you begin to wonder whether you would have been better off risking sanctions and trying to obtain expert Jones’s deposition.

Expert Jones takes the stand and gives his opinion on X, together with its basis.

The following colloquy then takes place during his direct examination:

Q. Mr. Jones, do you have an opinion on Y?

**Defendant’s lawyer:** Your Honor, I object. I was not properly notified that an opinion on Y would be given. I haven’t had a chance to prepare. This is a surprise to me.

**Plaintiff’s lawyer:** Your Honor, I call your attention to the notice we gave pursuant to Rule 26. It advises of the possibility of an opinion on Y and gives its basis. In
addition, under Rule 403 of the Federal Rules of Evidence, the Advisory Committee expressly notes that it has deleted the notion that surprise can be a ground for exclusion of otherwise admissible evidence.

Judge: The opinion on Y will be admissible. I think plaintiff’s counsel has complied with his obligation to notify you of Y.

Defendant’s lawyer: Then, Your Honor, I ask for a voir dire out of the hearing of the jury to explore this expert’s basis for his opinion on Y.

Judge: As you yourself pointed out, Rule 705 does not require that the basis be given in advance of the expert’s opinion.

Defendant’s lawyer: Your Honor, the information given in the Rule 26 notice from my opponent was hardly sufficient to give me the basis of this expert’s opinion on Y. I don’t know if he personally examined the evidence and formed his opinion, or if he instead got the facts from the lawyer. I don’t know what facts may have been given to him, or what kinds of inadmissible or hearsay materials he may be relying on. He may be relying on third- and fourth-hand information from people who had no personal knowledge or who had an interest in the outcome of this case.

Judge: Your objection is overruled. Rule 703 doesn’t preclude an expert from relying on inadmissible material, as long as it is of the kind that experts in the field reasonably use. You’ll get your chance to show that it isn’t that kind when you cross-examine. Your arguments simply bear on weight, not admissibility.

Defendant’s lawyer: Well, in the alternative, I would like to request a continuance now, or at such time as the witness gives his basis, to prepare to meet this surprise.

Judge: My docket and the number of people waiting to be heard make that absolutely out of the question. Anyway, you had notice. Proceed with the direct examination.

Plaintiff’s lawyer: Mr. Jones, what is your opinion on Y?

Jones: My opinion on Y is... (A damning opinion against the defendant is given in impressive terms. One brief sentence of superficial reasons is given, with no insight whatsoever into the expert’s basis.)

Plaintiff’s lawyer: No further questions.

Your mind races. You cannot possibly decide whether to cross-examine or not, and what to ask or not to ask. What bases or reasons will Jones have? Will your questions trigger helpful or harmful responses? Are there any weaknesses in Jones’s opinion, or is it so strong you should leave it alone? If there are weaknesses, what are they? What are the strong points to leave alone?

Defendant’s lawyer: Your Honor, may we approach the bench? (At the bench:) Your Honor, I’ve been given nothing on which to fashion my cross-examination.

Judge: You should have thought of that in discovery. Rules 703 and 705 provide that the expert need not give you a basis on direct examination. Rule 705 provides that you can get it on cross-examination if you want. The expert has complied with the minimal requirement of Rule 705 that the expert must give a reason for the opinion.

Defendant’s lawyer: No questions of the witness, Your Honor.

Your decisions during pretrial discovery were reasonable. Had you not made them, you may have been sanctioned for unnecessary discovery. Moreover, your legal arguments at trial were sound. So why are you facing a difficult dilemma?

The primary culprit is the tension between two opposing drives—the desire to get as much information as possible about the expert’s opinion and the desire to avoid being punished for what may be viewed as excessive discovery. Indeed, in light of the new standard of Rule 26(g), lawyers must think seriously not only about what is good for their own case and client, but also about the economic and practical impact of discovery on their opponent.

The passage of the recent amendments to Rule 26 marked a dramatic break with the past. For example, in the 1970 amendments to the Federal Rules of Civil Procedure, the Advisory Committee had stated that in cases presenting "in­tricate and delicate issues as to which expert testimony is likely to be determinative... a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery was created to prevent. Effective cross-examination of an expert witness requires advance preparation."

By contrast, the more recent amendments take an entirely different approach: "Concern about discovery abuse led to widespread recognition that there is a need for more aggressive judicial control and supervision." Discovery of experts was perceived as one part of the problem.

Get It at Trial

The defense attorney in our trial scenario, caught between the objectives of getting information about the opposing expert’s opinions and avoiding the risk of discovery sanctions, thought the answer that would accomplish both objectives was to get the missing information from the expert at trial. The problem with this solution was that, while discovery was being restricted, expert trial testimony was being expanded. In other words, the Federal Rules of Evidence had blocked the doorway to discovery during trial.

The changes in the Federal Rules of Evidence may well have been based on the assumption that information regarding the expert and his or her opinion would be readily available through discovery. The Evidence Advisory Committee, in
Affidavit Evidence

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1 Wigmore On Evidence § 4 (Tillers rev. 1983) contains a valuable discussion of the evidentiary status of affidavits in ex parte proceedings and motion hearings that Wigmore styled "adversary interlocutory proceedings." Professor Wigmore believed that the rules of evidence should not apply in a hearing on a request for preliminary equitable relief. Wigmore, § 4 at 44-45.

Professor Moore goes farther, contending that a court "may properly consider affidavits at the preliminary injunction hearing, which do not measure up to the standards of the summary judgment affidavit." 7 Moore's Federal Practice (Part 2), § 65.04[3] at 65-88. (Summary judgment affidavits, according to Rule 56(e), "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.") Professor Tillers, however, claims the evidence rules do apply. He invokes, among other things, Rule 101(b), Fed. R. Evid., which states that the rules of evidence apply "generally to civil actions and proceedings. ..." Footnote 16 of Wigmore § 4.

A Red-Faced Court


While on the subject of "affidavits," it is worth noting that a somewhat red-faced Ninth Circuit had to withdraw its decision in Zepeda v. United States Immigration & Naturalization Service, 36 Fed. Rules Serv. 2d 906, 911, 708 F.2d 355 (9th Cir. 1983), withdrawn, amended opinion issued 40 Fed. Rules Serv. 2d 1285, 753 F.2d 719 (9th Cir. 1985). The original opinion had trumpeted that unsworn declarations, even if made under penalty of perjury, were not proper "affidavits" within the meaning of Rule 43(e), Fed. R. Civ. P., in support of a preliminary injunction. This gaffe was silently dropped from the amended version.


...in a proceeding for preliminary injunction oral testimony, although permissible, is not absolutely required. The court may receive and consider both affidavits and other documents which are the equivalent of affidavits.

But when the fur begins to fly in the form of conflicting affidavits and counter-affidavits, the appellate courts become restive without more trustworthy evidence in the record. See Fengler v. Numismatic Americana, Inc., 832 F.2d 745 (2d Cir. 1987). See also 11 Wright & Miller, Federal Practice and Procedure: Civil § 2949 at 480. Judge Godbold's decision in Marshall Durham Farms, Inc. v. National Farmers Org., Inc., 446 F.2d 353 (5th Cir. 1971), canvasses these problems. That court set aside a preliminary injunction obtained with the help of a "flood of additional affidavits" (446 F.2d at 353) deluged on opposing counsel at the last minute in violation of Rule 6(d), which the court found applicable to motions for preliminary injunctions (446 F.2d at 358). Some of these offending affidavits were on "information and belief."

In the final analysis, Ko-Ko's evidentiary proposal to Nanki-Poo was superficially in accord with the stricter standard for a summary judgment affidavit a la Rule 56(e), Fed. R. Civ. P. It contemplated the affiant's vivid, eyewitness account of the execution. Nonetheless, it was grossly tainted, as cross-examination or even a prehearing deposition would have revealed:

Ko-Ko: Here are plenty of witnesses—the Lord Chief Justice, Lord High Admiral, Commander-in-Chief, Secretary of State for the Home Department, First Lord of the Treasury, and Chief Commissioner of Police.

Nanki-Poo: But where are they?

Ko-Ko: There they are. They'll all swear to it—won't you? (To Pooh-Bah.)

Pooh-Bah: Am I to understand that all of us high Officers of State are required to perjure ourselves to ensure your safety?

Ko-Ko: Why not? You'll be grossly insulted, as usual.

Pooh-Bah: Will the insult be cash down, or at a date?

Ko-Ko: It will be a ready-money transaction.

Collision

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drafting the expert testimony provisions of the Federal Rules of Evidence, expressly predicated their work on the liberal availability of discovery:

(Article VII) assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. ... Rule 26(b)(4) of the (Federal) Rules of Civil Procedure (as then constituted) 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 experts.

The drafters' intentions may have been noble, but the drafters did not foresee the future. They did not predict the change of heart about discovery in civil cases. They did not anticipate the 1983 amendments to the Federal Rules of Civil Procedure, which made discovery, including discovery of experts, more difficult and even perilous. (And they seem to have overlooked altogether the situation of restricted discovery that has always existed in criminal cases.)

The Federal Rules of Civil Procedure and the Federal Rules of Evidence are on
a collision course. Each assumes that the other body of rules will make available the information necessary to expose false prophets masquerading as experts. Both are mistaken.

Several steps can be taken to avoid the dilemma faced by the trial lawyer in our example.

**Learn About the Expert**

(1) First, and most obviously, the attorney might seek more exhaustive pretrial disclosure. In arguing that pretrial discovery of an expert’s opinion is not excessive, the attorney should point out that Rules 703 and 705 may prevent disclosure at trial of the information underlying the expert’s opinion. Consequently, pretrial discovery may be the only way to determine the basis of your opponent’s expert testimony.

(2) If expert disclosure is inadequate for whatever reason, the lawyer should consider filing a motion to exclude all or part of the expert’s testimony. Rule 403 of the Federal Rules of Evidence codifies the trial judge’s discretionary power to exclude any otherwise admissible evidence because it is prejudicial, time consuming, misleading, or cumulative.

Surprise, a permissible ground for exclusion under prior law, is conspicuously absent from the list in Rule 403. But it may be there in some other language. In arguing for the exclusion of some or all of an expert’s testimony, the attorney should use words that are in the rule to express the same thought. Thus, the attorney should argue that there is a danger of “prejudice” or of “misleading the jury”—that evidence the lawyer was not able to study, evaluate, and prepare for may appear to be stronger than it really is, since the weaknesses will not be shown.

This is particularly true with expert testimony, which has an extraordinary effect on the jury and which the jury cannot effectively evaluate without help. Further, the attorney should argue that the Federal Rules of Evidence Advisory Committee expressly predicated deletion of “surprise” on the grounds that there will no longer be surprise, because of discovery and continuances—neither of which occurred in our trial scenario. Remember, though, that the discovery rules in the Federal Rules of Civil Procedure do allow exclusion of “surprise” evidence if the surprise is due to failure of the introduction, cross-examination probably will not be attempted—not because the opinion is sound, but because of uncertainty about what the witness will say.

(b) Rule 705 does not, in so many words, expressly prohibit *voir dire*. That is only an inference from its provision that the opinion may be given “without prior disclosure” of basis, “unless the judge requires otherwise.” Argue that *voir dire* should be allowed to enable you to learn the basis of the expert’s opinion.

(c) While Rule 705 dispenses with the requirement of prior disclosure of basis, that is, before the opinion is given, the rule does not address disclosure during the direct exam but after the opinion is given. Disclosing basis at that time still may be required. Again, argue that disclosure by way of *voir dire* may solve the problems created by the tension between discovery and evidentiary rules. Although not an ideal solution for the attorney opposing the expert, it is better than leaving matters until cross-examination. The disclosure of basis may take place out of the jury’s hearing, and could result in the opinion being stricken (or at least weakened) immediately.

(d) Rule 705 provides that “[t]he expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise.” “Reasons” could and perhaps should be read to embrace much more of what the expert uses to reach his conclusion than was given in our trial scenario.

(e) Important policy considerations favor allowing prior discovery of expert information: As a result of not getting the information about basis in advance of cross-examination, the lawyer may decide to forego cross or may conduct an inadequate cross. Either of these alternatives serves the system badly. An unexplored or inadequately explored (and thus perhaps faulty) opinion may get to the jury. In the absence of good exploration, this opinion may appear deceptively forceful.

(4) Finally, as a last resort, cite the practice of a number of federal district judges who prohibit testimony that is substantially greater than the statement furnished pursuant to pretrial discovery.

The dilemma of the trial attorney may not be completely solved by broadening the scope of pretrial discovery relating to expert witnesses. But finding ways to obtain the expert’s opinion and basis beforehand will go a long way toward giving the lawyer the tools essential to turning the battle with the expert witness into a fair fight.

In the words of our opening allegory, it may give the lawyer a full-length sword.