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WHO's YOUR EXPERT

When a Court Goes too Far

By Hillary A. Frommer

In federal court, there are three rules which principally govern the scope and role of an expert witness: Rule 26(a)(2) of the Federal Rules of Civil Procedure, which pertains to the pre-trial disclosure of expert witnesses; and Rules 702 and 703 of the Federal Rules of Evidence, which address expert witness testimony at trial. Rule 26(a)(2)(A), like its state-court counterpart, CPLR § 3101(d), requires a party to disclose the identity of any expert it seeks to call at trial. However, expert disclosure under Rule 26(a)(2)(B) is far more comprehensive than that under the CPLR. The federal rule mandates that, unless otherwise stipulated or ordered by the court, a party must provide a report from its expert witness which includes the following: (1) a complete statement of all opinions the expert will offer and the bases therefore; (2) the facts or data the expert considered in forming the opinions; (3) exhibits that will be used to support or summarize the opinions; (4) the expert's qualifications and publications for the previous 10 years; (5) a list of others cases in the previous four years in which the expert testified as such at trial or in a deposition; and (6) a statement of the compensation paid to the expert.

Rule 702 sets forth the requirements for an expert's testimony to be admissible at trial. And Rule 703 provides that the testifying expert may base his opinion on facts or data that is reasonably relied on by experts in that particular field, even if the data or facts are otherwise inadmissible, such as hearsay.[1] Some examples of "hearsay" data experts frequently rely upon include, guidelines issued by government agencies[2] and independent studies conduct by others.[3]


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Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence require that the party submit to the court (or to the opposing party) the actual source materials on which the expert relied which are cited in the expert report. In a recent decision in December 2013, the Court of Appeals for the Second Circuit blocked one court's attempt to such a requirement.

In *Indradjaja v Holder*,[4] the petitioner sought political asylum in the United States on the grounds that she feared persecution in her home country of Indonesia because she was Chinese and a practicing Christian. In response to the petition, the United States initiated deportation proceedings because the petitioner had overstayed her non-immigrant visitor's visa.[5] The immigration judge denied the asylum application and the petitioner's request for reconsideration, and granted the government's application for removal/deportation.

The petitioner timely moved to reopen her removal proceedings before the Board of Immigration Appeals in order to provide new and previously unavailable evidence, which consisted primarily of a 26-page affidavit from an expert on human rights in Indonesia. That expert based his opinion on his "comprehensive general knowledge of the politics and society in Indonesia" as well as "his review of political science materials, human rights reports [and] media reports in both English and Indonesian relating to recent events in Indonesia."[7] A single member of the BIA denied the motion to reopen in part, because the petitioner failed to provide the primary source materials which her expert relied on in his affidavit. According to the opinion, because the BIA lacked those materials, it could not "independently assess [the expert's] statements and conclusions," and, thus, gave very little weight, if any, to the expert affidavit.

On appeal to the Second Circuit, the petitioner argued that the BIA abused its discretion by essentially ignoring the expert affidavit simply because it did not include copies of the expert's source materials. The Court of Appeals agreed. It found that the BIA's treatment of the expert affidavit was "inconsistent with the way that expert testimony is generally treated." The court specifically turned Rule 703 of the Federal Rules of Evidence, which allows an expert to base his or her opinion on certain data or facts "without regard to the admissibility of the underlying material and without requiring that such material be submitted."[7] The court concluded that the BIA *sua sponte* imposition of a new expert requirement on the petitioner amounted to an abuse of discretion because the petitioner was not given notice or the opportunity to respond to such a rule. In fact, the court noted that there was no precedent to support the BIA's rule. Finally, the court determined that by improperly discounting the expert's affidavit, due solely to the fact that the expert did not supply copies of the materials, the BIA undermined its own rationale for denying the motion to reopen, and so it remanded the case to the BIA for further consideration.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

1. *See Strauss v Credit Lyonnais, S.A.*, 06 CV 702 (DLI)(MGD) [EDNY Feb 25, 2013]; *Gil v Arab Bank, PLC*, 983 FSupp2d 523 [EDNY 2012].
2. *See Park West Radiology v CareCore Nat., LLC*, 675 FSupp2d 314 [SDNY 2009] [expert's opinion and analysis was based on guidelines issued jointly by the Department of Justice and the Federal Trade Commission]; *BF Goodrich v Betkoski*, 99 F2d 505 [2d Cir 1996] [expert relied on EPA reports].
3. *See Rondout Valley Cent. School Dist. v Coneco Corp.*, 321 FSupp2d 469 [NDNY 2004]; *Zuchowicz v United States*, 870 FSupp 15 [D Conn 1994].
4. 2013 WL 6410991 [2d Cir Dec 9, 2013].
5. *Id*. at *2.
6. *Id*. at *6.
7. *Id*; *citing Iacobelli Constr., Inc. v County of Monroe*, 32 F3d 19, 25 [2d Cir 1994].