What Experts Can Say About Inadmissible Facts During Trial

Jason McDonell

Law360, New York (March 27, 2015, 10:26 AM ET) -- Federal court litigation can be like navigating rough seas. You delight, however, in the flexibility you have in working with experts. You sail past those pesky rules of evidence because you know that experts may rely on facts or data — admissible or not — in forming their opinions, as long as it is the type of information experts in that field reasonably rely on in forming opinions on that subject. But what may experts say on the stand about those facts? Particularly when experts rely — as they frequently do — on hearsay such as witness statements or all manner of documents? Without careful planning, the answer may be: "Shiver me timbers — not much."

Federal Rules of Evidence 703 and 705 provide the framework:

Rule 703. Bases of an Expert's Testimony.

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 705. Disclosing the Facts of Data Underlying an Expert's Opinion.

> Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Prior to the 2000 amendments to Rule 703, courts had reached inconsistent conclusions about the admissibility of evidence relied upon by experts, and counsel often used expert reliance materials as a tactic for getting otherwise inadmissible evidence before juries. The 2000 amendments made clear that inadmissible evidence does not become admissible simply because the expert's opinion is admitted. (The advisory committee notes for the 2000 amendments contain a concise discussion of how the rules play out in the examination of experts at trial and are essential reading for counsel preparing expert testimony.)

So what does this mean as a practical matter?

Because experts need only state their ultimate opinions, you could stop there on direct examination. (Rule 705.) But you likely wish to show the jury that your expert relied on an ocean of persuasive evidence. If the reliance material is helpful to your case, try to get it admitted before the expert takes the stand and thereby allow the expert to discuss the details and more effectively argue your case.

For otherwise inadmissible evidence, you can try to meet the burden under the balancing test to establish that its probative value substantially outweighs the prejudicial effect. That, however, is a difficult burden, and assuming that you will carry it is akin to walking the plank, you might survive, but don't bet on it.

Even if you do carry it, the evidence should be admitted with an instruction limiting its use to evaluation of the expert's opinion and not as substantive evidence (e.g., hearsay evidence will not suddenly become admissible for the truth of the matters asserted). Many experienced sea dogs of the courtroom suppose that jurors cannot distinguish between substantive evidence and evidence offered for a limited purpose, so they work hard to get evidence before a jury even if it can only be done with a limiting instruction. Thus you should construct your direct examination to avoid running afoul of the limiting instruction while maximizing the impact of the testimony concerning the reliance material.

For reliance material that is not admitted, consider bolstering the testimony by having the expert describe the evidence generally, but in a way that signals to the jury that the expert has a strong foundation of supporting facts and data. While the expert may not be able to disclose the details of a hearsay statement learned from an out-of-court interview, the expert typically may testify as to what she did and how she did it. This could include general but still persuasive descriptions of the reliance material — for example, "I personally talked to several key employees about this matter, including EVP of sales Smith and Regional Sales Manager Jones, and based upon those interviews, it is my opinion that X, Y and Z."

If done well, such testimony can convince the jury that the foundation is solid, even if not described in detail, and could also bait a cross-examiner into wading into the details of the hearsay and opening the door to admitting the evidence.

Nothing in Rule 705 restricts the presentation of underlying expert facts or data when offered by the adverse party. Thus, the cross-examiner can ask about any of the underlying facts or data relied upon in forming the opinions. For example, if an expert relies on hearsay, the cross-examiner may elicit the details of the hearsay statements. Here again, such evidence should be accompanied by the limiting instruction.

Cross-examination can "open the door" to rebuttal with information that was relied upon by the expert, even if that information would not have been discloseable initially under the balancing test. See advisory committee notes for the 2000 amendments. In other words, the cross-examination becomes an element of a further balancing analysis by the court.

To recap, keep in mind the following rules of thumb:

On direct examination, expert witnesses:

- May state their opinions and the reasons for them, including opinions on the ultimate issue (Rule 704), without first testifying to the underlying facts or data (Rule 705);

- May explain what they did and how they did it including a general description of the

matters relied upon in forming their opinions;

- May discuss the substance of supporting evidence that has been admitted into evidence; and

- May rely on inadmissible evidence, but may not disclose the details of that evidence unless the proponent first establishes that the benefit "substantially outweighs" the prejudice.

On cross-examination:

- Any data relied on by an expert may be admitted even if it is ordinarily inadmissible.

Re-direct examination:

- But, if the cross-examiner asks about a particular piece of evidence or challenges the expert's basis on a particular topic it may fling open the door for the opponent to offer other otherwise inadmissible evidence relied upon by their expert for that topic.

Keep your eyes on these issues and you should have calm seas and smooth sailing with your federal court experts!

—By Jason McDonell and Heather Fugitt, Jones Day

Jason McDonell is a partner in the San Francisco office of Jones Day. His practice focuses on complex commercial and intellectual property litigation.

Heather Fugitt is an associate in the Silicon Valley office of Jones Day. Her practice focuses on intellectual property litigation, including substantial experience in the computer software, semiconductor and telecommunications spaces.