EXPERT WITNESSES, THE HEARSAY RULE, AND THE UNIDENTIFIED, OUT-OF-COURT DECLARANT

by Charles B. McFarland

In the rules of evidence and civil procedure, there lies a trap set for the trial lawyer and expert witness: the unidentified, out-of-court declarant. This trap has serious consequences in terms of the possible exclusion of evidence, and yet many lawyers and experts are numb to it. Its origins are found in the hearsay rule and the Supreme Court's adoption of the Federal Rules of Evidence. Thirty years later, lawyers and experts are more than familiar with the wide latitude afforded to experts to offer opinions, including those that are not based on firsthand knowledge or observation, so long as the facts or data are of a type reasonably relied upon by experts in the field of testimony. FED. R. EVID. 702, 703; *see, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc*., 113 S.Ct. 2786, 2797 (U.S. 1993). This relaxation of the usual requirement of firsthand knowledge, however, was premised on an assumption that the expert's opinion would have a reliable basis. As the Supreme Court has noted, and numerous courts and commentators have discussed, the Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony . . . rests on a reliable foundation." *Id*. at 2799. This is the trial court's duty as "gatekeeper," and many of a trial court's most critical rulings in a trial arise out of the exercise of this duty.

Hearsay is among the most common types of otherwise inadmissible data admitted into evidence as "reasonably relied upon by experts" under Rule 703. "Hearsay" is defined in the Rules:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

FED. R. EVID. 801(c). Permitting reliance on hearsay has allowed experts of numerous disciplines to testify to transactions, incidents, accidents, and other events to which they were not a party and that they never personally observed. While there is no doubt that experts in most, if not all, fields customarily rely upon hearsay in forming their opinions, whether this reliance is reasonable must be assessed by the trial court on a case-by-case basis. Under *Daubert* and its progeny, if the reliance is not reasonable, the opinion may not be admitted.

In assessing the reasonableness of an expert's reliance on hearsay, it is important to consider the reasons these statements are deemed to be sufficiently reliable as to form the basis for an expert's opinion. It is clear that the customary reliance by experts in the particular field alone cannot be sufficient to carry this burden; otherwise, the trial court would be left with little basis to contradict an expert's bare assertion that the data meets the Rule 703 standard. Something more is required. The answer may be found in the residual exception to the hearsay rule found in Rule 807 of the Federal Rules of Evidence. FED. R. EVID. 807. Under Rule 807, an out-of-court statement not covered by Rules 803 or 804 may nevertheless be admissible if there are equivalent circumstantial guarantees of trustworthiness. FED. R. EVID. 807. This exception is viewed by many as a last refuge, and indeed it would be risky to place too much reliance on evidence that requires application of Rule 807 for admission. Nevertheless, the last sentence of Rule 807 is instructive on the question of why experts may be permitted to rely on and present evidence that is hearsay:

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> However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing *to provide the adverse party with a fair opportunity to meet it*, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 807 (emphasis added). It is the "fair opportunity" afforded to the adverse party to meet this evidence that makes it reasonable to permit experts to rely on hearsay statements in forming their opinions.

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*(**Expert Witnesses** continued)*

If the statement is not true or not reliable, the adverse party can demonstrate the problems with the expert's reliance on the hearsay, presumably to the detriment of the weight of the expert's opinion. The credibility of the out-of-court declarant may be attacked, and the party against whom a hearsay statement has been admitted may call the declarant as a witness and examine the declarant on the statement as if under cross-examination. FED. R. EVID. 806.

Under Rule 807, the "fair opportunity" to meet hearsay evidence includes providing the name and address of the declarant. FED. R. EVID. 807. While this rule does not govern the admission of expert testimony under Rule 702 or 703, it is clear that the reasonableness of one's reliance on an out-of-court statement would differ greatly between statements attributable to a known declarant versus an unknown declarant. The procedural rules support this concept. In particular, Rule 26 of the Federal Rules of Civil Procedure mandates disclosure of the name, address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses. FED. R. CIV. P. 26(a)(1)(A). The lawyer will have a difficult time reconciling the position that his expert's reliance on the out-of-court statement of a person was reasonable with the position that the same person was not required to be disclosed as having discoverable information. Each of these persons necessarily possessed knowledge of discoverable information. The ability to discover the facts known to these persons is critical to the party opposing the expert's testimony. If the persons upon whom the expert relied are wrong, so too are the opinions of the expert. And yet parties routinely fail to disclose the identity of persons on whom their experts rely. This fails to satisfy the party's discovery obligations and effectively denies the opposing party the opportunity to conduct discovery of these persons prior to trial. This directly prejudices the opposing party's ability to prepare for trial.

Rule 37 provides for the exclusion of any witness or information not so disclosed:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed.

FED. R. CIV. P. 37(c)(1). The salutary purpose of this rule is to require complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush. The language of the rule is mandatory, and its sole sanction—exclusion of evidence—is automatic. Courts have recognized that it is not in the interest of justice to apply the rules of procedure unevenly or inconsistently. Instead, it is both reasonable and just that a party expect that the rules he has attempted to comply with will be enforced equally against his adversary. Furthermore, a party has no duty to remind another to abide by the Rules of Civil Procedure.

The only question remaining for the trial court may be whether to exclude the entirety of the expert's opinion or just the statement by the unidentified, out-of-court declarant on which this opinion was based. This presents a difficult decision for the trial court and an unpalatable position for the expert witness, the lawyer, and his client. Certainly, no one should be surprised by a trial court's determination in its gatekeeper role that a statement by an unidentified, out-of-court declarant is an insufficiently reliable foundation for an expert's opinion under the requirements of *Daubert* and its progeny.

Depending on when the issue arises, a continuance may be viewed as a less harsh solution. However, if granting a continuance becomes a trial court's routine reaction to the problem presented by a party's failure to disclose the identity of these witnesses, not only will parties have no incentive to comply with their discovery obligations in this respect, they will be rewarded for not complying. If the opposing party does not raise the objection, the offering lawyer will have successfully shielded his expert from a potentially devastating critique of his expert's opinion. If the party raises the objection and the trial court grants the offering party a continuance to meet its discovery obligations, the only penalty is having to comply with the rules as it should have done in the first place. This is, a free bite at the apple and not a deterrent to improper conduct. Clearly, a continuance is not an acceptable solution for a court's long-term administration of justice.

Trial courts must be expected to be firm both in their enforcement of the Rules of Civil Procedure and in their role as gatekeeper to ensure that an expert's testimony rests on a reliable foundation. The expert's obligation is to form relevant opinions based on a reliable foundation. Experts are often unaware of the obligations imposed on their testimony by the evidentiary and procedural rules. It is the lawyer's responsibility to ensure that the expert is permitted to offer his opinions under these rules. To avoid the trap of the unidentified, out-of-court declarant, the trial lawyer must be diligent in working with his expert to identify those persons on whom the expert has relied and in the timely disclosure of these persons in discovery.