

USING OBJECTIONS AT DEPOSITIONS
AND
USING OBJECTIONS AGAINST EXPERT WITNESS TESTIMONY

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As many of you know, I have taught Trial Advocacy at the UA law school and coached Trial Advocacy teams for many years. Most of our fact situations call for 2 live witnesses for each side; a lay witness and an expert witness. More often than not, there is an “unavailable” witness whose prior testimony, either in the form of a deposition or sworn statement, will be read into evidence.

Over the years, I have struggled at times in my efforts to teach the students the applicability of the rules governing objections during depositions and the rules governing expert witness testimony. One of the reasons for this struggle, as you will see in this paper, is that there is often “conflicting” case law and disagreement in how these rules are to be applied.

It is my hope that this paper and my presentation will help guide you in your practice and clarify the evidentiary rules that can ensnare you if you are not careful, or provide an advantage if you know how to take advantage of them.

I. Using Objections at Depositions

The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.¹

One important purpose of discovery, especially a deposition, is to refine the case and to prepare it for trial based on a full understanding of the relevant facts. However, on too many occasions at depositions we witness repeated objections, often lengthy and suggestive, which render those depositions anything but fact or issue refining. That is ironic because our discovery rules are to be broadly and liberally construed in order to serve the purpose of discovery, which is to provide the parties with information essential to the litigation of all relevant facts, to eliminate surprise, and to promote settlement.²

How Should We Object at a Deposition?

So, under our existing rules what is the preferred method of objecting at a deposition?

¹ *14 *Hall*, 150 F.R.D. at 528 (footnote omitted); see also *Alexander v. F.B.I.*, 186 F.R.D. 21, 52–53 (D.D.C.1998) (noting that “[i]t is highly inappropriate for counsel for the witness to provide the witness with responses to deposition questions by means of an objection” or to “rephrase or alter the question” asked of the witness); *Panken & Valbrune*, supra, at 16 (“[C]ounsel is not permitted to state on the record an interpretation of questions, because those interpretations are irrelevant and are often suggestive of a particularly desired answer.”).

² *King v. Asset Appraisal Servs, Inc.*, No. 8:05CV27, 2006 U.S. Dist. Lexis 67224, at 3 (D. Neb. September 14, 2006).

Fact Situation:

In a personal injury action you are handling in 2011, your treating chiropractor has informed you that she will be out of town the week your case is scheduled for trial. Being the forward thinking lawyer that you are, you schedule her deposition so you will at least have her testimony to read to the jury about the “treatments” she provided your plaintiff, as well as the total related “medical” costs.

After getting all of her credentials, education, and training into the record, you now want to solicit her opinions as an expert under Ala. R. Evid. 702 in order to “prove up” the treatments, their costs, and their relationship to the wreck that happened the year before.

At the deposition, after agreeing to the “usual stipulations” you ask the following questions and encounter the following objections:

You: “Do you have an opinion, Doctor, based on your background, training, and experience, and based on the history you took from Debbie, and based on your personal examination of Debbie, as to whether or not the conditions for which you commenced treating her were sustained in her wreck that occurred on July 21, 2011?”

Defense counsel: “Objection as to the *form* of the question, also as to the *qualifications of this individual* to render such opinions. She’s a chiropractor; she’s not a medical doctor.”

You: “I’m not asking for a medical opinion. I’m asking her does she have an opinion whether her chiropractic treatment she rendered was treatment for injuries sustained in the wreck.

[No response from Defense counsel]

You: “You just testified to all of the treatment that you personally performed, is that right?”

Chiropractor: “That’s right”.

You: “Do you have an opinion as to whether those things that you just testified about were necessitated by injuries she sustained in the wreck?”

Defense counsel: “Objection to the *form* of the question.”

Likely trial court and appellate ruling?³

Second Fact Situation:

You represent the family of Joe Blow. Joe was killed in a wreck along with his friend, Jack Roe. Both bodies were transported to a local funeral home, Alpha Omega. However, Joe’s family wanted the same funeral home that handled Joe’s grandfather’s funeral to handle Joe’s. So the family made arrangements for Floyd’s Funeral Home to travel to Alpha Omega to retrieve Joe’s body. However, Floyd’s picked up the body of Jack Roe. Jack’s family made arrangements with Alpha Omega to cremate Jack’s body, although it was in fact Joe’s body that was cremated. That night Jack’s body was embalmed.

When Joe’s funeral took place at Tharptown Holiness Church, the casket was opened for the first time for viewing by the family. With approximately 400 mourners present Joe’s wife realized for the first time that a mistake had been made and that the body in the casket was not Joe. After calling Alpha Omega and Floyd’s, Joe’s wife learned that Joe’s body had been cremated that afternoon. To make matters worse, Joe’s wife and family believed that because Joe was not buried in a humanly state and only his ashes were left, that he could not be resurrected.

You sue both funeral homes for negligence, wantonness, outrage, breach of contract and abuse of a corpse. During the pendency of the case, you schedule the deposition of Lackie Lowley who is not a physician, psychiatrist, or psychologist. Lackie was, however, a freelance consultant who had a masters and doctorate in health education and an undergraduate degree in sociology. Moreover, Lackie was a certified death educator and was a board certified trauma specialist who had

³ *Knapp v. Wilkins*, 786 So. 2d 457 (Ala. 2000)

counseled families in thirty states with crisis management concerning their grief and trauma.

After agreeing to the usual stipulations, and establishing Lackie's background, training and experience, you ask this:

Q: "What were your clinical findings regarding Joe's wife?"

Before Lackie could answer that Joe's wife suffered from severe post-traumatic stress disorder, the defense attorney objected stating:

"Objection, Mr. Lowley *is not qualified* to make that diagnosis. He is neither a psychiatrist nor psychologist and that question calls for a medical diagnosis."

Next, you ask: "What did you rely on in order to come to your conclusions?"

But before Lackie could answer that he had relied on the Diagnostic and Statistical Manual of Mental Disorders, the defense lawyer said:

"I object to Mr. Lowley attempting to state what he relied on, he *is not qualified to give an opinion*, so anything on which he relied is not relevant."

Next you ask Lackie:

"Is your conclusion that Joe's wife suffers from post-traumatic stress disorder a medical diagnosis?"

Defense lawyer: "Object to *form*."

Lackie: "It's a diagnosis based on the criteria from the Diagnostic Manual and I simply followed the guidelines."

Defense lawyer: "Move to strike as non-responsive."

Does the defense lawyer need to move to strike an *answer* at the deposition, or do our waiver rules only apply to questions?

Should you have changed any of your questions based on the Defense lawyer's objections? The trial court sustained the objections. You appeal. What is

the likely result?⁴ What Alabama and Federal Rules of Evidence and Civil Procedure apply in this situation?

As I was researching case law in preparation for this presentation I was surprised to find divergent “rules,” often polar opposites, about the preferred method of objecting at a deposition. On the one hand, many states in an effort to eliminate “speaking” objections which tend to “coach” the witness, limit lawyers to saying nothing more than “Object to the form,”⁵ or even more concisely, “Objection.”⁶ Some courts limit counsel to one or two extra words besides “form.” For example, by allowing only “Objection, beyond scope,” or “Objection, leading,” etc.⁷ Still other states shift the burden to the proponent once an “objection to form” has been made, requiring them to request the specific ground.⁸ Still other jurisdictions require the specific grounds and hold that merely saying “object to form” is like saying “exception” to hearsay, it does not alert the proponent to what the objecting party finds faulty in the question. Some of those jurisdictions say it forces the proponent to guess the error or transform into a clairvoyant.⁹ Alabama seems to fall in the camp of requiring more than the ubiquitous “object to the form” objection.¹⁰ Then there was the Florida trial court judge who was upheld on appeal after he admonished counsel by stating, “Please no more speaking objections by either side. I want to hear ‘objection’ and both sides be quiet.” Subsequently, even when a party stated the grounds as briefly as, “Objection, hearsay,” the court responded. “Counsel, just about two minutes ago I

⁴ *Atkins Funeral Home, Inc. v. Miller*, 878 So. 2d 267 (Ala. 2003).

⁵ *Applied Telematics v. Sprint Corp.*, No. 94-CV-4603, 1995 U.S. Dist. LEXIS, 2191, at *4, 1995 WL 79237 at *1 (E.D. Pa. Feb. 22, 1995).

⁶ *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311, at *5 (D.Minn. May 24, 2002) (“Objecting counsel shall say simply the word ‘objection’, and no more, to preserve all objections as to form.”).

⁷ Tex. R. Civ. P. 199.5(e)

⁸ *In re: Amendments to Florida Rules of Civil Procedure*, 682 So 2d. 105, 117 (Fla. 1996).

⁹ “Objecting to the ‘form’ is like objecting to ‘improper’ –it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a ground for objection, nor does it preserve any objection.” *Sec. Nat. Bank of Sioux City, Iowa v. Abbott Labs*, 299 F.R.D. 595, 601 (N.D. Iowa 2014)

¹⁰ See *McKelvy v. Darnell*, 587 So. 2d 980, 983 (Ala. 1991).

advised you all an objection is one word. I heard several from you [defense counsel] and I heard several from you [prosecutor]. No more. One word only.”¹¹

In an attempt to avoid waiver, parties generally enter into a stipulation which usually tracks the wording of ARCP and FRCP Rule 32 (A) and (B) with regard to preserving objections other than as to the form of the question. However, it is a gamble to think a stipulation will always save you from stating an objection to something which *could be cured* at the time of the deposition. ¹²

The ABA Litigation Section published its Civil Discovery Standards in 1999. Here is what they provide concerning objections at a deposition:

- a. Form of Objections: Where the court’s rules provide that all deposition objections are preserved for further ruling and the testimony is subject to the objection, an objection ordinarily should be made concisely and in a non-argumentative and non-suggestive manner. In most cases, a short-form objection such as “leading,” “argumentative,” “form,” asked and answered or “non-responsive” will suffice.

1. Breaking down the Important rules governing objections at depositions:

ARCP 32 (d) (3) (A) & (B)

(A) Objections to the competency of a witness or to the competency, **relevancy**, or **materiality** of testimony **are not waived** by failure to make them before or during the taking of the deposition, **unless the ground of the objection is one which might have been obviated or removed if presented at that time.**

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, **in the form of the questions or answers**, in the oath or affirmation, or in the conduct of parties, **and errors of any kind which might be**

¹¹ See *Gonzalez v. State*, 777 So.2d 1068 (Fla. Dist. Ct. App. 2001).

¹² *Id.* at 984. The stipulation excepted only “the form of leading questions,” yet the court sustained objections to the reading of a physician’s deposition testimony at trial for failure to lay the proper predicate saying the stipulation “effectively” incorporated Rule 32 (b).

obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

FRCP 32 (d) (3) (A) & (B) are substantially the same except for stylistic differences.

ARCP 32 (b)

Subject to the provisions of subdivision (d) (3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

FRCP 32 (b) is substantially the same with only stylistic differences.

ARCP 30 (c) Examination and cross-examination of witnesses may proceed as permitted at the trial under the Alabama Rules of Evidence, except that Rule 103 and Rule 615, Ala.R.Evid., which deal with trial procedure, are not applicable to pretrial discovery. . . Evidence objected to shall be taken subject to the objections.

FRCP 30 (c) is different than Alabama’s corresponding rule. FRCP 30 (c) (2) provides that objections “**must** be stated **concisely** in a **non-argumentative** and **non-suggestive** manner.”

As you can see, the determining factor of whether you should object or not at the deposition should be if you think the reviewing court will decide that it *could have been remedied* had you done so. That applies to errors or irregularities in the notice (Rule 32 (d)(1)); the officer’s qualifications before whom the deposition is taken; (Rule 32 (d)(2)); the deponent’s competence, *or to the competence, relevance, or materiality of testimony if the ground for it might have been corrected at the time* (Rule 32 (d)(3)(A)); the manner of taking the deposition, *or other matters that might have been corrected at that time*,¹³ but especially to the *form of a question or answer* (Rule 32 (d)(3)).

¹³ ARCP 32 (d) (3) (B) states “and errors of any kind which might be obviated, removed, or cured if promptly presented...”

2. Important Evidence Rules to know in order to make good decisions about objecting at a deposition:

FRE 103 (a) (1) (A) & (B) Rulings on Evidence

(a) Preserving a Claim of Error. If it affects a substantial right and:

(1) If the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it is apparent from the context.

ARE 103 (a) (1) is similar, but ARE 103, along with ARE 615, is specifically excluded from application to pretrial discovery. See ARCP 30 (c).

ARE/FRE 403 provide that relevant testimony is excluded if the danger of undue prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence, substantially outweighs the probative value of the evidence.

ARE/FRE 602 provide that a witness needs first-hand knowledge in order to testify.

ARE/FRE 611 (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness, except when justice requires that they be allowed. Leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

FRE 611 (c) is similar except it adds that leading is permitted to develop the testimony.

FORM OF THE QUESTION OBJECTIONS:

1. Confusing, Ambiguous, Vague, Unintelligible
2. Argumentative
3. Asked and Answered
4. Assuming Facts Not in Evidence
5. Compound or Complex
6. Cumulative
7. Harassing or Embarrassing the Witness*
8. Lack of Foundation
9. Misleading
10. Misquoting Witness (Testimony)
11. Misquoting Facts
12. Narrative (Calls for a Narrative); Overly Broad or General
13. Repetitious
14. Speculative (Calls for Speculation)

FORM OF THE ANSWER OBJECTIONS (MOVE TO STRIKE):

1. Argumentative (Unnecessarily argumentative)
2. Assuming Facts Not in Evidence
3. Non Responsive
4. Speculation
5. Volunteered (or Beyond the Question's Scope)

FORM OF THE PROCEEDINGS

1. Speaking and Coaching Objections
2. Witness Not Allowed to Finish Answer

OBJECTIONS PRESERVED FOR TRIAL (* Well, probably):

1. Assumes Facts Not in Evidence*
2. Hearsay
3. Inadmissible Lay Opinion*
4. Irrelevant

5. Foundation Lacking*
6. Lack of Personal Knowledge*
7. Legal Conclusion*
8. Privileged
9. Speculative*
10. 403 Excluding evidence for prejudice; confusion; waste of time or other reasons. “Unfair prejudice”; “Confusing the issues”; “Misleading the jury”; “Undue delay”; “Wasting time”; “Merely presenting cumulative evidence”

*Disputed; it also appears in other lists.

II. Using Objections Against Expert Witness Testimony

It has been my experience that our rules of evidence pertaining to expert witnesses are some of the most difficult to understand and apply.

When trying a case in Alabama state court, it used to be the lawyer questioned an expert who had no personal knowledge of the facts by using hypothetical questions. Plus, the facts and data on which the expert based his or her opinion had to be admitted into evidence. Hypothetical questions were fertile territory for a cascade of objections. For example, invariably an objection would be interposed that “an important fact(s) was omitted” during the recitation of the facts assumed, which was usually accompanied by a speaking objection that recited many of that lawyer’s favorable facts.

The watershed case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁴ along with *Kumho Tire Co., Ltd. v. Carmichael*¹⁵ changed that. Today we are operating under a “new” set of expert witness rules. The requirements as set out in FRE 702 apply to *all* experts and in Alabama state court when anything *scientific* is involved. In time hopefully Alabama will fall in line with the Federal Rules of Evidence and make Rule 702 applicable to non-science related subjects also.¹⁶

As Rule 702 sets out, the expert’s opinion relates to *science* when it is the product of a scientific theory, principle, method, or procedure. Fortunately, Alabama has a fifty year history of case law from which to draw in deciding what is, or is not, “scientific.”¹⁷

Whether facts and data are *reasonably relied* on by other experts requires two considerations. First, whether other experts “normally and customarily” rely

¹⁴ 509 U.S. 579, 113 S. Ct. 2786 (1993).

¹⁵ 526 U.S. 137, 119 S. Ct. 1167 (1999).

¹⁶ Alabama currently maintains the “generally accepted” in the relevant scientific community test for novel scientific principles or techniques found in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). However, *see Thompson v. State*, 153 So. 3d 84 (Ala. Crim. App. 2012). If the technique is not novel, the expert would merely be applying his/her specialized knowledge. *See* C. Gamble, *Gamble’s Ala. Rules of Evid.*, p.388 (3rd ed).

¹⁷ Goodwin, Robert J., *Fifty Years of Frye in Alabama: The Continuing Debate Over Adopting the Test Established in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 CUMB. L. REV. 231, 253-66 (2004-2005) (survey of cases). *See also Courtaulds Fibers, Inc., v. Long*, 779 So. 2d 198 (Ala. 2000) (holding that veterinarian’s opinion as to cause of death of horses was not scientific evidence subject to the admissibility requirements of Frye); *Barber v. State*, 952 So. 2d 393, 416 (Ala. Crim. App. 2005) (“The Frye test, however, applies only to the admissibility of novel scientific evidence based on scientific tests or experiments.”); C. Gamble & R. Goodwin, *McElroy’s Alabama Evidence*, § 490.01(1)(b); (2)(c) (6th ed. 2009); *see also Barber v. State*, 952 So. 2d 393, 415-16 (Ala. Crim. App. 2005) (listing several cases where the Frye standard was not applicable and was instead governed only by the prior Ala. R. Evid. 702, which is now located at Ala. R. Evid.. 702(a)); *see also, Barber*, 952 So. 2d at 419 (“[B]ecause print identification involves subjective observations and comparisons based on the expert’s training, skill, or experience, we conclude that it does not constitute scientific evidence and that, therefore Frye does not apply.”); *Simmons v. State*, 797 So. 2d 1134, 1151 (Ala. Crim. App. 2005) (emphasis added); *Ex Parte Perry*, 586 So. 2d. 242 (Ala. 1991); *Miner v. State*, 914 So. 2d. 372 (Ala. Crim. App. 2004); *Hill v. State*, 507 So. 2d. 554 (Ala. Crim. App. 1986).

on such information, and second, whether the otherwise inadmissible facts or data are *trustworthy* enough to make reliance “reasonable.”¹⁸

Here are state and federal Rules 703 as they currently appear. Alabama’s is a verbatim adoption of Federal Rule 703 as it was before the amendment on December 1, 2011 restyled it:

Alabama Rule 703

Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect [Amended 8-15-2013, 3ff. 10-1-2013.]

Federal Rule 703

¹⁸ Ala. R. Evid. 703. Advisory Committee’s notes to Amendment effective October 1, 2013. See *Swanstrom v. Teledyne Continental Motors, Inc.* 43 So. 2d. 3d 564 (Ala. 2009).

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.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

ARE 703 vis-à-vis FRE 703

Until 2013,¹⁹ with few exceptions²⁰ Alabama followed the common law rule that information, facts, or data on which an expert relied in formulating an opinion, must be admitted into evidence. This was so even though our Federal Rule 703 counterpart had long before abandoned that necessity in favor of allowing “otherwise inadmissible” facts or data to support an expert’s opinion so long as the

¹⁹ The Alabama Legislature signed into law on June 9, 2011 a new standard for expert witnesses. Then, by Order of the Alabama Supreme Court dated November 29, 2011, Rule 702 was amended to adopt with some exceptions, the standard for scientific expert testimony established in *Daubert*. Again subject to some exceptions, until the October 1, 2013 amendment to Rule 703, experts without firsthand knowledge generally could not base opinions on facts or data that had not been admitted into evidence.

²⁰ See *Ex Parte Wesley*, 575 So. 2d 127, 129 (Ala. 1990) (acknowledging such exceptions). *Sidwell v. Wooten*, 473 So 2d. 1036 (Ala. 1985) (expert allowed to give opinion as to value based at least in part upon hearsay); *Jackson v. State*, 412 So. 2d 302 (Ala. Crim. App. 1982) (permitting coroner to base opinion as to cause of death at least partially upon unadmitted toxicologist’s autopsy report).

facts and data were of the type 1) other experts in that particular field normally and customarily 2) reasonably relied.²¹ Of course, that *only* allowed the expert's *opinion* to be communicated to the jury, *not* the *inadmissible facts or data* on which it was based.

However, the "otherwise inadmissible" facts or data can now be communicated to the jury *by the proponent* if the court determines two things: 1) it would assist the jury in determining how much weight to give the *expert's opinion*; and 2) the otherwise inadmissible information meets a *reverse* Ala. or Fed. R. Evid. 403 test. That being, when the jury decides how much weight to give the expert's opinion, the inadmissible evidence's probative value will *substantially* outweigh the danger of undue prejudice.

In other words, the amendment to Rule 703 creates a *presumption against disclosure* to the jury of the underlying facts or data used as a basis of the expert's opinion. Of course, no such presumption against its admissibility exists if the information can serve a substantive purpose, now or later.²²

Because the information is being allowed for the *limited purpose* of assisting the jury to evaluate the amount of weight it gives the expert's opinion, a limiting instruction under Alabama and Federal Rule 105 is appropriate.

²¹ FRE 703 was amended to provide for that in 2000.

²² The balancing test provided in this amendment is not applicable to facts or data admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies. Fed. R. Evid. 703 (Advisory Committee Notes, 2000).

Of particular interest is the fact that Rule 703 prohibits the *proponent* from disclosing the underlying information. There is no such prohibition against the adverse attorney from using it on cross.²³ However, as the committee comments to Rule 703 point out, an attack “will often open the door to a proponent’s rebuttal with information that was reasonably relied on by the expert”

To drive the point home, Ala. and Fed. R. Evid. 705²⁴ provide that an expert may testify to his/her opinion and give reasons for it without first testifying to the underlying facts or data, unless the court requires otherwise; but a disclosure may be required on cross-examination.

In defense of my premise that Alabama and Federal Rules of Evidence 702-05 are difficult to apply, please consider this scenario:

You are in trial when your adversary calls as a witness a police lieutenant as an expert in accident reconstruction to the stand. After qualifying him as an expert he is asked if he reviewed the materials the attorney sent him, to which he answered he did. Next, without any follow up questions, he is asked if he was able to form an opinion about your client’s speed at the point of impact, to which he answers “yes.” Then he is asked these questions:

²³ *Infra*. See ARE 705 and FRE 705.

²⁴ FRE 705 was amended in 2011 with only stylistic changes.

“Okay, what is your opinion, to a reasonable degree of accident reconstruction certainty, of Mr. (your client) speed at impact?”

As you have seen other lawyers do, you object “to the form of that question.”

You are overruled on that ground, so he answers “fifteen miles per hour over the posted speed limit of 35 mph, so fifty mph.”

Next your opponent asks, “On what are you basing that?” He answers, “My background, training, experience, visit to the scene, and *the eye-witness statements I reviewed.*”

Next he is asked, “Do you know any other accident reconstructionist that rely on eye-witness statements? He answers “Everyone I know does.”

Then he is asked, “What did the eye-witnesses say?” He answers that both of them estimated your client’s speed to be fifty mph just before impact.

Your objections to lack of foundation, hearsay, lack of first-hand knowledge, and violates ARE 403 to each of those questions and answers are overruled.

Concerning those questions and objections, what are your strongest grounds on appeal?

Alabama’s amendment to Rule 703 is new enough that there are few, if any, cases interpreting it. However, Alabama has long held federal decisions to be instructive.²⁵

Second Fact Situation

You are defending against the usual “basket” of charges levied by the government, including conspiracy to commit murder, because allegedly members of a street gang (the “Avenues”) in which your client was a member, ordered and carried out a murder on an African American witness against them.

At trial the government calls a police department lieutenant as an expert on street gangs. You are satisfied that his background and training probably qualifies him as an expert on street gangs, so you are prepared to allow him to testify *generally* about street gangs when this occurs:

Q: “When you talk about the Avenues’ attitude towards black people in the neighborhood, are you offering an opinion about whether any of the defendants acted with racial intent?”

You object under Rules 702 and 703.

Suppose the court sustains your objection and reminds the prosecutor that this witness was qualified as an expert on street gangs in general terms only.

²⁵ *Jackson v. Wicks*, 139 So. 3d 813 (2013). “It is well settled that federal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure. *Borders v. City of Huntsville*, 875 So. 2d 1168, 1176, n. 2 (Ala. 2003).”

Next, the prosecutor asks: “Did you have conversations with any of the Avenues gang members and the officers assigned to the investigation, that led you to conclude that certain of the Avenues had clout over the others?”

“Yes.”

Q: “Who said what, to make you think that?”

You object as this being a back-door attempt to solicit inadmissible hearsay in violation of Rule 703. Likely result? ²⁶

Third Fact Situation

You are tasked with defending a man who has been indicted for being a felon in possession of a firearm. The Defendant presented himself at the V.A. Hospital reception desk acting “strange”. He used three different surnames in an attempt to obtain treatment or medication. The clerk called security after noticing a bulge under his coat which she suspected was a gun. After a high speed chase your client was arrested and arraigned, at which time you entered an insanity defense and asked for a psychiatric evaluation.

At trial the state called as a rebuttal witness to your psychiatric testimony, a clinical psychologist Ph.D. who had examined the Defendant. During her direct examination she was asked these questions:

²⁶ See *U.S. v. Cazares*, 788 F. 3d 956, 978 (9th Cir. 2015) where the court said this was error, but when considered with other evidence it was harmless error.

Prosecution: “In regards to your diagnosis of malingering, what criteria did you use in reaching that conclusion?”

Having recently attended an evidence seminar, you say: “Objection, Your Honor, this violates Rule of Evidence 703.”

First, can the judge properly rule on your objection without knowing what the proffered testimony is?

Assume she is prepared to say “I relied on his records, my observations of him and other information available to me from other people, and then I applied that to my experience and training.”

Assume your objection is overruled, next the prosecution asks: “What information from other people did you rely on?”

Suppose the proffered testimony is that she relied on information she obtained from a couple of inmates who spoke with your client when he was incarcerated awaiting trial. However, they did not relay the conversations directly to this expert, but rather to the on-site psychologist who then reported their conversations to this witness.

After hearing that, you add to your objection, “Besides, that is not something that should be considered for a psychological evaluation, and it’s hearsay.”

After a discussion with the Judge, you ask to take the expert on *voir dire* outside the jury’s hearing in order to flesh out this hearsay. During your

examination she states: “It’s actually a standard to gather information from other sources and other people. You have to weigh the validity of all the circumstances. The statements from the two inmates were that your client asked them to assist him by saying he looked and acted crazy. But, that was only one piece of information that I had. I did not generally rely on it. In situations where it is one of several pieces of information, it becomes more reliable.”

You renew your objection to the disclosure of this information. You assert these reasons: 1) it was not established that this is the type of information generally relied on by other experts in this field of study; 2) this witness was not in a position to determine if the information from the inmates was trustworthy, therefore it was not reliable; and 3) it fails the “reverse 403 test” since whatever probative value it has does not substantially outweigh its prejudiced effect.

Likely result?²⁷

However, these types of facts and data are not always admitted into evidence, even for a limited purpose. See *U.S. v. Lacascio*, 6 F.3d 924 (2nd Cir., 1993): experts can be assumed to have the ability to evaluate the trustworthiness of the data upon which he or she relies. However, an expert will not be permitted simply to repeat another’s opinion or data without employing his own expertise

²⁷ See *U.S. v. Leeson*, 453 F. 3d 631, 638 (4th Cir. 2006) where the court overruled these grounds on appeal and held that this information (the inmates conversations with the Defendant) “was highly and directly relevant to the jury’s task of evaluating the expert’s opinion.” (Therefore, high in probative value; therefore it met the reverse 403 test).

and judgment. *Dura Automotive Systems of Indiana, Inc v. CTS Corp.*, 285 F. 3d 609 (7th Cir. 2002) (a scientist however well credentialed, is not permitted to be the mouth piece of a scientist in a different specialty). This type of expert has been referred to as the “summary” or “conduit” expert, who serves to introduce the contents of extrajudicial statements or writings. McCormick, Evidence, §§ 15 and 324.3. See, e.g. *Matter of James Wilson Associates*, 965 F. 2d 160 (7th Cir. 1992) (expert cannot be used as vehicle for circumventing the rule against hearsay).

This presentation was not intended to give you the red-letter law or a bright line test to apply; neither of those exists. Instead, my goal was to alert you to a new set of rules which apply to experts and their testimony. At least by knowing the requirements under which an expert can share the underlying facts and data on which he/she relied, hopefully you will be better armed for your next evidence “battle.”

Respectfully submitted,

Robert F. Prince

