

**Fed.R.Evid. 702 (*Daubert*) Determinations**  
(Effective December 1, 2014)

The determination of foundational objections<sup>1</sup> to expert opinion/testimony<sup>2</sup> shall be made upon a **jointly filed motion** during or following a **hearing conducted pursuant to Fed.R.Evid. 104**.

**Jointly Filed Motion:**

In accordance with any deadline specifically set by Court order, the parties may file a joint motion requesting a Rule 702 hearing. The motion shall:

- 1) **Identify the expert witness and separately state each opinion/testimony to be offered at trial<sup>3</sup>.**
- 2) **Follow each opinion with the specific foundational challenge made to the opinion/testimony.**
- 3) **Specify the time needed for the evidentiary hearing.**

A sample motion follows.

**Hearing<sup>4</sup>:**

Upon filing of the motion, a hearing will be set for the time specified in the motion. If the Court has doubt as to the amount of time needed, or there is some question as to the nature of the

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<sup>1</sup> There are four foundational objections contemplated under Rule 702: (i) the witness' scientific, technical or other specialized knowledge will not help the factfinder understand the evidence or determine a fact in issue; (ii) the opinion/testimony is not based on sufficient facts and data (NOTE: In the Tenth Circuit, this is a quantitative, not qualitative test. See *United States v. Dysart*, 705 F.2d 1247, 1252 (10<sup>th</sup> Cir. 1983); *United States v. Lauder*, 409 F.3d 1254, 1264 n.5 (10<sup>th</sup> Cir. 2005). In essence, it focuses on "how much information the witness considered" rather than "did the witness consider the right information"); (iii) the opinion/testimony is not the product of reliable principles and methods; or (iv) the witness did not reliably apply otherwise reliable principles and methods in formulating the opinion/testimony.

Evidentiary objections as to general relevance or any other ground are deemed reserved, and may be made at the time of trial.

<sup>2</sup> Non-percipient witnesses may offer opinions or other testimony premised on expertise, knowledge or experience only in accordance with Fed.R.Evid. 702.

<sup>3</sup> These should be statements of the specific, opinion/testimony that the witness will **offer at trial**. Please consider reviewing the description of the opinions in the motion with the witness prior to filing the motion to confirm. Summarization of a pre-trial report or disclosure made in compliance with Fed.R.Civ.P. 26(a)(2) is often insufficient and inaccurate.

<sup>4</sup> This hearing is conducted pursuant to Fed.R.Evid. 104 (e.g. the rules of evidence do not apply). The proponent of the opinion/testimony bears the burden of proof to establish adequate foundation under Rule 702. The standard of proof is a preponderance of the evidence. *United States v. Nacchio*, 555 F.3d 1234, 1251 (10<sup>th</sup> Cir. 2009); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10<sup>th</sup> Cir. 2001); *Daubert*, 509 U.S. at 592 n.10; Fed.R.Evid. 702 advisory committee's note. The Court will not be evaluating the merits of the opinion/testimony that is proffered and does not consider whether the witness has offered other opinions in other cases. *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10<sup>th</sup> Cir. 2003). For assistance in anticipating the Court's approach to hearings, please consult *U.S. v. Crabbe*, 556 F.Supp.2d 1217 (D.Colo. 2008).

opinion/testimony to be offered or the objection(s) made<sup>5</sup>, a law and motion hearing may be held prior to setting the evidentiary hearing.

The time for the evidentiary hearing will be divided equally between the parties, who may use such time as they deem appropriate (argument, examination of witnesses). **Absent unavoidable and unanticipatable circumstances, the time set for the hearing will not be enlarged. Unless otherwise ordered, the expert witness whose testimony or opinion is proffered shall be present at the hearing.**

**In lieu of an opening statement, the proponent of the opinion/testimony will identify the witness, then serially state each proffered opinion or describe the witness' testimony. Following each opinion/testimony, the objecting party will state the foundational objection(s).** This recitation should capture any modifications of the opinion/testimony or objections that were stated in the jointly filed Rule 702 motion.

The proponent of the opinion/testimony shall then call the witness **and elicit only the information that is pertinent to the outstanding objection(s)**. For example, if the objection is to the reliability of the principles or methodology used by the witness, the examination should focus on the principles and methods used and why they are reliable. Cross-examination will follow direct examination, and redirect as appropriate. The proponent may call other witnesses with regard to the opinions at issue, but testimony is similarly limited.

Once the proponent has presented all evidence with regard to the foundational challenge, the objecting party may call witnesses, and direct examination can be followed by cross and redirect examination.

In most circumstances, an oral ruling will be issued once all evidence as to a witness' opinion/testimony has been presented.

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<sup>5</sup> Some objections are mutually exclusive. For example, 3 objections relate to the methodology used. If the witness used a reliable methodology and reliably applied it, logically there can be no challenge to the sufficiency of the facts and data considered. Similarly, if the principles or methodology is unreliable, it is immaterial whether the correct quantity of facts and data was considered or whether the principles or methodology was reliably applied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Marcia S. Krieger

Case No. \*\_\*\*-\*(\*)

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Plaintiff(s),

v.

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Defendant(s).

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**PARTIES' JOINT MOTION UNDER FED. R. EVID. 702**

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The parties, through their undersigned counsel, hereby request a determination regarding the admissibility of opinion testimony from Plaintiff's expert Dr. John Smith.

**Opinion 1**

The medical treatment provided by Dr. Jane Jones to Plaintiff was beneath the standard of care because she administered penicillin to Plaintiff without first determining whether Plaintiff was allergic to penicillin.

**Objection to Opinion 1**

Dr. Smith lacks the knowledge skill, experience, training or education to express this opinion.

**Opinion 2**

The medical treatment provided by Dr. Jones to Plaintiff fell beneath the standard of care because when she performed an x-ray on Plaintiff's leg, Dr. Jones failed to use proper techniques resulting in the Plaintiff being overexposed to radiation.

**Objection to Opinion 2**

Dr. Smith lacks the knowledge skill, experience, training or education to express this opinion. Dr. Smith's opinion also is not the product of reliable principles and methods and is based upon insufficient facts and data.

**Time Requested for Hearing**

The parties anticipate that the admissibility of these two opinions can be determined in a 90-minute hearing.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

[Signature Block]