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THE NUTS & BOLTS OF EXPERT TESTIMONY

Hon. Susan Burke           Hon. Kiyo Matsumoto           Hon. Garrett L. Wong
Minnesota Fourth           United States District Court, Superior Court of
Hennepin County            Eastern District of New York    California, County of
                           San Francisco

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What is an Expert Witness?

• Specialized skill, experience, training or education in a subject, beyond the common experience of the ordinary lay person

• Permitted to give expert opinions and answer hypothetical questions despite lack of percipient knowledge of the facts in the case

• Permitted to testify if would assist the trier of fact in determining a factual issue
Examples of Different Expert Fields

- **Technical, Engineering or Scientific**
- **Criminal:** e.g. DNA; blood & alcohol; gangs; competency; sanity
- **Specific Industry Custom & Practice:** e.g. international freight; real estate
- **Forensic:** e.g. failure analysis; fire science; accident reconstruction
- **Medical:** e.g. orthopedists; neurosurgeons
- **Intellectual Property:** e.g. patented technology; trademark surveys
- **Industry Standards:** e.g. safety designs; insurance claims adjusting
- **Economic Damages:** e.g. markets; economists; accountants
- **Unusual Expert Fields:** e.g. gang culture; handwriting; race relations
Beyond a Consultation and a Case Evaluation, Why an Expert for Trial?

• Fact witness that is available to gather and preserve tangible evidence. Analyze a blood sample for blood alcohol or drugs or DNA, record information or take a photograph.

• A witness to teach the trier of fact about something scientific or technical beyond common experience.

• To help explain lay testimony.

• To prove an element of a cause of action.

• To give an opinion based on an evaluation of the evidence admitted at trial.
Problems Presented by Expert Witnesses

• Biased or improperly influenced testimony

• Sometimes try to usurp the function of the trier of fact

• Acting as advocates rather than objective witnesses

• May not know all of the facts

• Sometimes opine in areas outside their expertise
Examples of Problematic Expert Witnesses

• The “Twinkie Defense,” Dan White murder trial

• Dueling Nobel Prize winners in a patent case

• **Campbell v. State Farm, 538 U.S. 408 (2003):**
  Insurance expert who acted more as an advocate than witness

• **Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993):**
  Theory that anti-nausea medicine causes birth defects. A problem of untested scientific opinion
Retaining & Preparing Expert Consultants/Witnesses

• When should I start looking for an expert?

• Cost considerations?

• What makes a good expert consultant/witness?

• Pitfalls to avoid when selecting an expert?

• After I retain him, what information should I give the expert witness?
Searching for the Right Expert(s)

• Ask within the firm

• Ask your client

• Ask other counsel that have handled similar cases

• Ask your previous experts (if not in their field)

• Jury Verdicts Weekly, or similar publications

• Trade associations; scientific journals & industry publications

• The Ivory Tower is full of potential experts: Universities

• Expert witness referral companies
Take Advantage of the Dual Role of Expert Consultants/Witnesses

- Expert can help you understand your case & develop a trial strategy
- Expert can guide your efforts to obtain discovery from your opponent
- Expert can help you prepare to cross-examine opposing experts
- Expert can be your most important trial witness
DEPOSITION PREPARATION

• The expert’s opinion is consistent with your theory of the facts of the case.
• Explain deposition procedure.
• Discuss the likely breadth of the examination including fees and scope of retention.
• Review the expert’s testimony in other matters.
• Anticipate documents and discovery to be presented.
• Reiterate work-product privilege.
• Advise the expert to remain neutral and impartial—credibility is as important as expertise.
DEPOSITION OF OPPOSING EXPERTS

• Have your expert help you develop questions to test other expert’s foundation for rendering an opinion: the qualifications, the general theory of the opponent, the facts of the case, the opinion and the explanation of the opinion.

• Questions may include a hypothetical question to determine how the opposing expert has relied on his or her skill, knowledge and experience to draw an inference or give an opinion from the facts set forth in the hypothetical, which includes undisputed material facts.

• Have the expert educate you with other technical/scientific areas that might arise during the deposition.

• Ask the expert for material in the form of reliable treatises, studies, or authority for impeachment or to eliminate technical/scientific matters not in dispute.
Cross-Examining Opposing Experts

- Effective use of motions in limine and hearings
- Attacking qualifications and impartiality
- Challenging factual underpinnings of expert opinion
- Committing the expert to his own opinion, then defeating the opinion later with facts or other experts
- Direct challenges based on reasoning & consensus
Preparing Your Expert for Trial

- Clearly & precisely define the expert’s role to him
- Make sure you know what is in his file
- Anticipate attacks on his credibility & opinions
- Show your expert the opposing expert’s reports
- Sequentially outline the questions you will ask your expert.
What Judges Want
What Judges Want

- Judges want to keep the proceedings fair
- Judges want to limit confusion for jurors
- Judge cannot lose control over the courtroom
- Judges need to keep their court reporters happy and make sure only one person talks at a time
- Joint statements from the lawyers as to whether there will be a formal challenge to the experts, giving the judge time to discuss scheduling a hearing
What They Don’t Want: Not Highlighting Relevant Qualifications

"Your resume looks good. However, I'd limit it from 17,000 pages to three from now on."
Not Highlighting Relevant Qualifications

• Do not allow the expert to ramble on about every residency, professional association, honor, and peer reviewed article

• Focus on relevant experience

• Include memorable experience if possible

• Goal is to concisely show the jury that your experts are so knowledgeable about the area in which they are offering opinions that they cannot be wrong about their opinions
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A COMEDY OF TRIAL AND ERROR
Not Using Plain Language
Not Using Plain Language

• Ask the experts to define technical terms

• Use real life images to which jurors can relate

• Have the experts clearly explain the reasons for their opinions
Not Addressing Bias

• The experts should be prepared to disclose what they are being paid

• They should know what percentage of their income is from expert witness work

• They should know what percentage of the time they testify for plaintiffs and defendants
Arguing During Cross Examination
Arguing During Cross Examination

• The experts should try to explain if opposing counsel lets them
• If opposing counsel does not allow that, wait for redirect
• The experts should wait for opposing counsel to finish asking the question before they answer
The Format for Trial

• Discuss with expert jury instructions and questions for a special verdict form

• Review your jurisdiction’s requirements for admitting expert evidence.

• **State standard for admission of experts** might be drawn from *Frye v. U.S.* 293 F. 1013 (D.C. Cir. 1923) which has three considerations.
  1) The technique or method is sufficiently established to have gained general acceptance in its field
  2) Testimony with respect to the technique and its application is offered by a properly qualified expert; and
  3) Correct scientific procedures were used in the case.
Rules 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

• Trial judge acts as the “Gatekeeper” to determine whether expert testimony is sufficiently reliable to be admitted into evidence
• Whether the expert is proposing to testify to: (A) scientific knowledge that (B) will assist the trier of fact to understand or determine a fact in issue

4 Factors to Test Reliability of Scientific Opinion:

1) **Key Question**: whether it can be (and has been) **tested**. “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry;”

2) Whether the theory or technique has been subjected to **peer review** and publication;

3) The known or **potential rate of error**; and

4) Whether the theory or method has “**general acceptance**” within...”**a relevant scientific community** and an express determination of a particular degree of acceptance within that community.”
Daubert Standard is Flexible & Subject to Other Applicable Rules of Evidence

• “The inquiry envisioned by Rule 702 is, we emphasize, a flexible one;”

• Throughout, “a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules.”

• Rule 703 ides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”
Safeguard: Exclude Prejudicial or Misleading Evidence

• Rule 403 permits the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…”

• Judge Weinstein has explained: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” 138 F.R.D., at 632.
Question: Does the Daubert test of the admissibility of scientific expert opinion testimony also apply to non-scientific expert testimony?

Yes:

“This case requires us to decide how Daubert applies to the testimony of engineers and other experts who are not scientists. We conclude that Daubert’s general holding—setting forth the trial judge’s general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.”
THANK YOU
and
GOOD LUCK!