The Expert Witness: Another Opportunity For College Professors

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ABSTRACT

Trial lawyers are frequently in need of professionals to testify as experts in matters that are in litigation. Juries, as well as judges themselves, are normally not knowledgeable in many technical aspects of civil cases and must, therefore, be educated during the trial process. Many times, attorneys look to their local university for expertise. If you have not already received a call, someday you might be contacted by a lawyer to testify as an expert. Not only can your giving expert testimony look impressive on your vitae, it can also bring large amounts of supplemental income to a professor. Well known experts can receive thousands of dollars a day for giving their opinions on matters involved in litigation. While you might think you are or are not an expert, a brief look at court decisions can help us define the term "expert."

I. QUALIFICATIONS OF AN EXPERT

Courts operate under specific rules on what testimony and evidence can be given at a trial. The federal courts have rules of evidence, which have been adopted, with some modification, by most state courts. Rule 702 of the Federal Rules of Civil Procedure states that an expert's expertise can come from his or her own knowledge, skill, experience, training or education. Generally, if there is some reasonable basis that demonstrates the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony.

Before a person can testify as an expert, however, he or she must be first qualified and accepted by the judge as an expert in a particular field. This is done by the lawyer desiring to have a witness accepted as an expert, first laying a proper foundation. In other words, the judge must be satisfied that this particular individual meets the qualifications of an "expert" as far as the judicial system is concerned. The hopeful expert must testify in detail as to his or her education, training, experience, skill and knowledge. Usually, the witness presenting curriculum *vitae* to the court and opposing counsel is most helpful.

The lawyer calling the expert witness asks the witness numerous questions as to background, professional journal articles and books written, national and international committees served on, certifications held, honors received, etc. All of this is done before the witness is asked any questions about the case at hand.

When this information is presented before the court, the opposing attorney is then given an opportunity to question the witness about his/her professional qualifications. The opposing attorney is not required to ask the witness any questions at that time, but may do so if he desires. When the lawyer calling the witness asks questions of that witness, it is called "direct examination." When the opposing lawyer gets to ask his or her questions of the witness, it is called "cross examination."

After the witness has been examined and cross-examined about his professional qualifications, the lawyer calling him or her asks the judge to accept the witness as an expert in a particular field of study. The judge will ask the opposing lawyer if he or she has any objection to that witness being accepted as an expert. The opposing lawyer then raises his or her objections, if any, and the judge rules on those objections. The judge has broad discretion or

latitude in deciding whether or not to accept the witness as an expert. Once accepted by the judge as an expert, the lawyers (both sides) can now ask the expert witness questions pertinent to the case at hand.

Generally, acceptance or rejection of an expert witness' qualifications is within the sound discretion of the trial judge and the court's ruling will not be overturned unless it is determined by an appeals court to be an abuse of discretion, United States v Dysar, 705 F.2d 1247 (10Cir. 1983). It is also important to note here that if the opposing lawyer does not object to the expert's qualification at the initial questioning, he is generally precluded from doing so later on appeal. See also, United States v. Redmond, 1997 U.S.App. LEXIS 35148 (10 Cir 1997); Brunson v. State, 349 Ark 300, 79 S.W.3d 304 (2002).

Very seldom will two experts have the exact same qualifications and experience. Some experts work in the specific field for years and then switch to another job before returning to the original field or area of expertise. Gaps in the qualifications of an expert witness, or the extent of expert knowledge, go to the weight or importance the expert's testimony is given by the judge or jury, and not to its admissibility. Holt v. Wesley Medical Center, 2004 U.S. Dist. LEXIS 13814 (Kansas)

II. DETERMINING THE AMOUNT OF KNOWLEDGE REQUIRED

In determining whether a witness is qualified to render expert opinion, the trial court must first ascertain whether the proffered expert has the educational background or training in a relevant field, TC Sys, Inc v. Town of Colonie, 213 F.Supp 2d 171 (NDNY 2002). The court should further compare the expert's area of expertise with the particular opinion the expert seeks to offer and permit the expert to testify only if the expert's specific expertise enables the witness to give an opinion that is capable of assisting the trier of fact. In a legal sense, the term "trier of the facts" means the person or body that determines what facts actually occurred. This is the function of the jury. If there is no jury, the judge is the trier of the facts. Weinstein v. Weinstein, 18 Conn. App. 622 (1989)

A person knowledgeable about a particular subject need not be precisely informed about all details of the issues raised in order to offer an expert opinion. Canino v. HRP, Inc. 105 F. Supp 2d 21 (NCNY, 2000)

Whether or not a witness is sufficiently qualified to testify as an expert depends on if, by virtue of the witness' knowledge, skill, experience, etc., his/her testimony will assist the trier of facts. Lack of extensive practical experience directly on point does not necessarily preclude a witness from testifying as an expert in that field, Valentin v. New York City, 1997 U.S. Dist. LEXIS 24059.

At times, experts who testify in court are referred to as forensic accountants, forensic psychologists, etc. The term "forensic" means that it is associated with the judicial system. A forensic accountant is an accountant who testifies in court. A forensic engineer is an engineer who testifies in court. They testify in court or provide professional and/or technical assistance in the preparation of cases presented to a court.

III. QUALIFICATIONS OF A CANDIDATE TO BE EMPLOYED AS AN EXPERT

Just being a "professional" is usually not enough by itself for a professional to be considered by lawyers as an expert witness. It takes an individual who is (1) knowledgeable on the subject (2) meets the "expert" qualifications, (3) makes a good appearance in court, (4) is able to explain complicated matters so that a jury of lay people can fully understand, and (5) other factors.

(1) Knowledgeable

We have seen above that it is not necessary for the witness to be the world's leading expert on a subject to be able to testify on that subject as an expert. Technically, it is only necessary that the expert know more than the ordinary person would likely know on that subject.

(2) Qualifications

The cases cited above illustrate that the expert qualifications take into consideration knowledge, skill, experience, training, and education. Skill can be demonstrated by awards and professional recognitions the witness has received, as well as past accomplishments and other indications of demonstrated skill. Experience is somewhat nebulous in that there is no set minimum number of years of experience to qualify one as an expert. Clearly, the more years of experience, the more readily recognizable the person will be as an expert. Training generally includes on-the-job training and other informal training settings. Education, in this sense, is usually considered to be formal, traditional education, such as advanced degrees (and in some instances, undergraduate degrees).

(3) Appearance in Court

Although appearance in court may be subjective, it is obvious when a witness does not make a good appearance. Being argumentative, slouching in the witness chair, speaking too softly or loudly, "talking down" to the jury, dressing poorly or slovenly, a poor command of the English language … all of these are examples of making a poor appearance in court.

(4) Communications

Being able to explain a complicated topic to the jury is essential. Teachers often make the best expert witnesses as they are used to explaining new topics to students. The problem here for most people is how to explain something without using the "big" words or "talking down" to the jury.

A good teacher senses when a class is not "with" him/her and can instantly adjust the teaching mode to try anew to achieve students' understanding. The witness must sense the same with a jury and then be able to regroup and approach the topic from a different direction. Students are easier to do this with since the teacher can ask questions and learn from their responses. A witness cannot ask a question of a jury, so it is necessary to be good at reading body language and attentiveness of the individual jurors.

(5) Other factors

These include availability of the expert to be involved in the pre-trail process, being in a close proximity to the lawyers and court, fees charged, and, most importantly, prior experience in testifying as an expert witness, attitude as a witness, etc.

For example, some "experts" are extremely knowledgeable about a subject, but they act superior or aloof when they testify. Some are good witnesses when they testify for the side that called them, but become argumentative or "cocky" towards the opposing counsel. This is not good because it "turns off" the jury and therefore might disregard the important things about which this expert witness testified.

IV. ALLOWING EXPERT OPINION TESTIMONY IN A COURT CASE

The decision to admit expert testimony is left to the broad discretion of the trial judge. US v. Brown, 776 F.2d. 397 (2d Cir, 1985); Blanchard v. Bridgeport, 190 Conn 798, 463 A.2d 553 (1983) In the words of the United States Supreme Court, the trial court is a "gate keeper" to determine what expert testimony is admitted into evidence, considering relevancy and reliability. General Electric Co v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)

Rule 702 of the Federal Rules of Civil Procedure has been adopted by most states as the guideline for allowing people to testify in trials as experts. Specifically, this rule provides that an expert is permitted to testify as to his opinion if the expert's "scientific, technical or other specialized knowledge will assist the trier of fact to

understand the evidence or to determine a fact in issue." Rule 704(a) also provides that the expert can testify as to an ultimate issue to be decided by the trier of fact.

V. TESTIFYING ON THE ULTIMATE ISSUE OF THE TRIAL

Generally, each case has an ultimate issue to be decided by the trial. In a criminal case, for example, it would be "…did the defendant rob the bank on March 13th?" In a traffic accident case, it might be "…was the driver of the red car negligent when he hit the white car?" Whatever the "ultimate" question is to be decided, the courts differ on whether or not an expert witness can testify as to his or her opinion on that ultimate issue of the trial.

In Brunson v. State, 349 Ark 300, 79 S.W.3d 304 (2002), the Supreme Court of Arkansas held that while the trend of authority is to not exclude opinion testimony because it amounts to an opinion on the ultimate issue to be decided by the court, this opinion testimony is admissible in Arkansas, as well as other states, provided that it does not mandate a legal conclusion on the part of the expert. The court said "there is a fine distinction between an admissible opinion that 'touches upon the ultimate issue' and an opinion, not admissible, which 'tells the jury what to do.'"

VI. GIVING OPINIONS THAT DRAW A LEGAL CONCLUSION

There is a difference between law and fact. Fact would be that the traffic light was red when the Ford entered the intersection. Legal conclusion would be that the driver of the Ford was negligent when he entered the intersection on a red light. Sometimes, an expert's opinion of fact can drift into the area of being a legal conclusion.

The law is not quite so clear when that expert opinion involves a conclusion about the law. Examples of legal conclusions include finding of reasonableness and foreseeability of a plaintiff's reliance on someone else's conduct (United States v. Scop, 846 F.2d 135 (2d Cir. 1988), and testifying about legal conclusions construing a contract (Marx & Co v. Diners' Club, 550 F.2d 505 (2d Cir, 1977). In Local 159 v. Nor-Cal Plumbing, 1999 U.S.App.LEXIS 17968 (9th Cir, 1999), the United States Court of Appeals held that an expert was permitted to testify to the legal conclusion that a party should be found personally liable under the "veil-piercing doctrine" of corporate law. Other courts, however, might not go that far in allowing expert testimony.

A mixed question of law and fact exists when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard. Crum & Forster v. Monsanto, 887 S.W.2d 103 (Tex.App. 1994) An expert can give an opinion on a matter that is considered by the courts to be a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts. Birchfield v. Texarkana Memorial Hospital, 747 S.W.2d 361 (Tex. 1987). This can be a difficult area, but the lawyer can work directly with the witness before trial on this type of an issue.

VII. EXPERIMENTS, TESTS, AND SPECIAL PROCEDURES

When the results of an experiment, test, or special procedure are used in testimony presented, the Court of Appeals of Ohio in 2006 added some additional requirements for the admissibility of that expert opinion, citing its own Evidence Rule 702.

The first requirement that Ohio has added is that the theory upon which a procedure, test, or experiment is based that is testified to is objectively verifiable or is validly derived from widely accepted knowledge, facts or principles. Secondly, it is required that the design of the procedure, test, or experiment reliably implements the theory. And lastly, the particular procedure, test or experiment must be conducted in a way that will yield an accurate result. Abrams v. Siegel, 166 Ohio App.3d 230, 2006 Ohio 1728.

Expert testimony which is not scientific in nature, in order to be admissible, must be shown to the judge to be reliable and that the witness is qualified to be accepted as an expert on that specific topic. Gammill v. Jack Williams Chevrolet, 972 S.W.2d 713 (Tex. 1998).

VIII. CREDIBILITY OF THE EXPERT AND EXAMPLES OF COURT CASES INVOLVING EXPERTS

Generally speaking, juries (or the judge if the trial is to the judge alone) are to determine the credibility of witnesses, assign the weight afforded their testimony, and resolve inconsistencies within or conflicts among the witnesses' testimony Golden Eagle Archery v. Jackson, 116 S.W.3d757 Tex. 2003).

(1) Examples of expert opinions on topics that are determinative of the issue include the following

+ Determining the legal validity of exculpatory provisions of a written contract. In re Estate of Sanders, 261 Kan 176, 929 P.2d 153 (1996)

+ An expert could testify that the purpose of a sawed-off shotgun is to conceal the weapon. The court said that such testimony implied that the defendant changed the shotgun because he was conscious of his guilt or that he intended to use the shotgun in the future. Commonwealth v. Woods, 419 Mass 366, 645 N.E.2edd 1153 (1995)

+ When there is a disagreement in the opinions of expert witnesses, this creates a genuine issue of a material fact for the jury to decide. Mangosoft, Inc. v. Oracle Corporation, 2006 District New Hampshire 30, 421 F. Supp 2d 392

+ Witnesses who had, on an ongoing basis, reviewed and updated information on people involved in certain investments, kept up-to-date with developments in that particular industry, read relevant trade journals and publications, and were acquainted with that industry in general could testify as experts on the related subjects. In re Unisys Savings Plan, et al v. Unisys Corporation, et al. 173 F.3d 145, (3rd Cir 1999)

(2) Examples where trial courts have properly upheld experts with less than admirable credentials

+ The court in Pereira v. Cogan, 281 B.R. 194 (SDNY 2002) allowed an expert to testify on good corporate practice when he had 30 years of experience in corporate governance.

+ Employers Reinsurance Corp v. Mid-Continent Casualty Co, 202 F. Supp 2d 1212 (D. Kan 2002) allowed an expert to testify about industry custom when he had forty years of insurance background and work experience

+ Cary Oil Co v. MG Refining & Marketing, Inc., 2003, US Dist. LEXIS 6150 held that a witness who worked for over 30 years in various aspects of petroleum marketing, supply and distribution business for one of the world's largest oil companies could testify as an expert about industry customs regarding fuel storage alternatives.

(3) Examples where trial courts have not permitted witnesses to testify as experts

+ A social worker who did not work with assistance from or under the supervision of any physician could not testify as an expert on a diagnosis of post-traumatic stress disorder, even though she could testify as to what she saw in a psychotherapy session she observed involving the same patient. Vallinoto v. DiSandro, 688 A.2d 830 (Rhode Island 1997)

+ As it relates to "hard" or quantitative sciences, the U.S. Supreme Court listed four questions for the trial court to consider in deciding whether or not to permit a witness to testify as an expert: (1) whether a theory or technique can be and has been tested? (2) what are the known error rates? (3) has there been any peer review and publication? and (4) is there general acceptance in the field involved? Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2ds 469 (1993)

+ To determine reliability, a trial court considers whether the reasoning or methodology underlying the testimony of the expert is valid. Daubert, supra. This is, as opposed to, trying to determine whether the conclusions themselves are correct or credible. State v. Nemeth (1998), 82 Ohio St.3d 202. 694 N.E.2d 1332.

IX. CHALLENGING AN EXPERT'S OPINION

The admissibility of an expert's opinion can be challenged in court in several ways. The lawyer for the opposing side can (1) make a motion *in limine* (to limit or exclude) the testimony before the trial starts, (2) make a motion to limit or disallow the expert's testimony after the witness has been offered in court as an expert, or (3) object and make a motion to strike (exclude) the expert's testimony during trial after the expert has already testified, and/or (4) attack the expert's testimony on cross-examination as to the weight (degree of credibility) the trier of fact should give it. Examples of the latter would include suggesting the expert's opinion is based on speculation, not founded on logical calculations, inferences or observations, and/or is founded on evidence of questionable reliability.

While this issue might be considered as purely "legal" and not involving the expert, it does help the potential expert to understand some of the court's procedures. It should be noted that a lawyer's failure to challenge the expert's qualifications before he testifies, as well as failing to ask the expert to state the basis for his opinion, will normally waive (or give up) the right to appeal from the admission of the testimony!

X. DETERMINING THE BASIS OR FOUNDATION FOR AN EXPERT'S OPINION

Expert opinion is usually used where the finder of facts (either the jury or judge, if no jury) is not expected to have sufficient knowledge or experience on the subject and would therefore have to speculate without an expert's testimony to help. Kelly v. Berlin, 300 N.J.Super 256, 692 A.2d 552 (1997)

A very good case on the subject is Home Security of America v. Wellman, 222 Wis.2d 623, 587 N.W.2d 456, decided in Wisconsin in 1998, involving a lawsuit by Home Security against former employees who quit and went to work for a competing firm. The issue in this case centered on what damages Home Security had suffered as a result of the former employees' breaching their fiduciary responsibilities.

The expert testified that the wrongful employee conduct cost Home Security about $900,000 in lost profits, believing the damages to be the same, regardless of whether the former employees were found to have engaged in theft of trade secrets, breach of non-compete agreements, fraudulent inducement of a settlement agreement, or any of the other nine claims against them by Home Security.

This expert calculated the total damages by adding up income that would have gone to Home Security from these ex-employees wrongfully taking customers to their new competing employer. Then, he added what he calculated as other losses in the normal course of business. These amounts were determined by examining Home Security's income statements for various years and talking with other Home Security employees. Rather than looking at each "lost customer's" file individually, the expert looked at profit and loss trends of Home Security over time, as well as other factors.

The losing party, Wellman, objected on appeal to the Wisconsin Court of Appeals that the expert's conclusions were based on inadequate foundation and therefore should have been excluded by the trial judge. The Wisconsin court noted that the expert testified in detail as to how he had arrived at his loss estimate and concluded that it was Wellman's duty to have brought forth all of these objections at the trial by cross examining the expert at the trial. Since Wellman had that opportunity at the trial and failed to pursue it then, the Court of Appeals denied Wellman's objection and let the expert's testimony stand.

One court has created an eight-part test of factors to be considered in reviewing the weight to be given expert testimony, see State v. Mattison, 23 Ohio App.3d 10, 490 N.E.2d 926 (1985). These factors are presented in "Exhibit One" (*Factors to be Considered in Reviewing the Weight to be Given Expert Testimony*).

Exhibit One **Factors to be Considered in Reviewing the Weight to be Given Expert Testimony**
1. That a reviewing court is not required to accept as true the incredible
2. Whether evidence is uncontradicted
3. Whether a witness was impeached (proven to be inaccurate in his/her testimony)
4. What was not proved
5. The certainty of the evidence
6. The reliability of the evidence
7. Whether a witness' testimony is self-serving
8. Whether the evidence is vague, uncertain, conflicting or fragmentary.

XI. THE EXPERT DOES NOT HAVE TO KNOW ALL THE FACTS HIMSELF

No one can know everything about anything! The courts realize this and permit an expert to rely upon the research and work of other people. Specifically, Rule 703 of the Federal Rules of Civil Procedure permits this reliance. This rule is in apparent direct conflict with Rule 602 which provides that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The courts, however, believe that even though the expert has considered research done by other experts, the expert will testify as to his or her own opinion objectively arrived at and not influenced by other people. Therefore, the expert is not held to Rule 602.

An expert's opinion must be based on his or her own observations and examinations, or on matters made known to him/her at or before the hearing, whether or not such matters are admissible, so long as such matters are of a type that may reasonably be relied upon by experts in forming opinions on the particular subject (unless the expert is precluded by law from relying on such matters as a basis for his or her opinion). This rule is encapsulated in Rule 801(b) of the California Evidentiary Code and generally by case law in other states.

XII. SPECULATIVE CONCLUSIONS BY EXPERT WITNESSES

The United States Court of Appeals for the 7th Circuit case of Target Market Publishing v. Advo, 136 F.3d 1139, involved an accountant and business appraiser who testified as to the value of a business. The issue raised in this case involved complaints by the losing party that the valuation of the business was speculative in nature. The Court said that whether a particular expert's testimony was or was not speculative is a question for the jury. However, if the trial court found the testimony "too" speculative, the judge could properly exclude it as a matter of law. The United States Supreme Court held in General Electric Co. v. Joiner, 118 S.Ct. 512, that a trial judge could exclude expert testimony where it "did not rise above 'subjective belief or unsupported speculation.'" For other cases where the courts did not permit speculative opinions based on mere conjecture or speculation, see Minasian v. Standard Chartered Bank, PLC, 109 F.3d 1212 (7th Cir 1997) and Lester v. Resolution Trust Corp, 994 F.2d 1247 (7th Cir 1993).

In a lawsuit involving marina managers claiming that their insurance broker had breached its fiduciary duty, the trial court refused to let an expert testify regarding future profits expected to be lost in a boat insurance program. The judge required "reliable statistical information and data to analyze the market" and decided that the proffered testimony did not meet that standard. Holding that future anticipated profits are different from past historical proven profits, the California Court of Appeals upheld the trial judge's exclusion of the expert's opinion. Westrec Marina Management v. Jardine Insurance Brokers, 85 Cal App 4th 1042, 102 Cal Rptr. 2d 6723 (2000)

However, in a different case, the California Court of Appeals allowed testimony on future damages stating "if such substantial evidence be found, it is of no consequence that the trier of fact believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion. Substantial evidence refers to such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (citing Kasparian v. County of Los Angeles, 38 Cal App.4th 242 (1995)). The court then went on to say that "the testimony of a single credible witness will suffice, even if that witness is a party to the action." In fact, the court said "so long as the witness' testimony is substantial, it does not matter that it is contradicted by other testimony or evidence." Sandy Veith v. MCA, CB090339, 1997 Cal. App. Unpub. LEXIS 1 (1997). See also, Bowers v. Bernards, 150 Cal. App. 3d 870 (1984)

A trial court must decide if a qualified expert's testimony rests on a reliable foundation, or is simply "based on subjective belief or unsupported speculation." Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 125 L.Ed. 2d 469, 113 S.Ct. 2786 (1993)

The fact that a witness' qualifications are not unassailable does not mean the witness is incompetent to testify, but rather it is for the jury, with the assistance of vigorous cross-examination, to measure the worth of the opinions. Valentin v. New York City, 1997 U.S. Dist LEXIS 24059

The less certain the scientific community is about information, the less willing courts should be to receive it. Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it can be considered by the courts. Bragdon v. Abbott, (1998) 524 U.S. 624, 118 S.Ct. 2195, 141 L.Ed.2d 540. The same reasoning should apply to accounting matters.

XIII. SUMMARY AND CONCLUSIONS

Being an expert can be financially rewarding to a person who meets the qualifications of an expert. The hopeful forensic expert should hone his/her speaking skills and practice explaining complicated matters in easy to understand terms.

With more experience comes the ability to charge more per day for the expert forensic work. A person meeting the expert qualifications can begin to "inch" into the forensic field by contacting local and regional trial lawyers with his/her *vitae* and résumé. Although it may be difficult to get the first "job" as an expert witness, assuming that is a pleasant and rewarding experience for the trial lawyers, once an expert gets a few testimonies under his/her "belt," the work opportunities should start to flow. Web sites can help, as many trial lawyers will do a web search to see who is available as an expert. A word of caution, however: giving too many personal details over the Internet makes this information available to identify thieves.