GETTING THE MOST FROM EXPERT TESTIMONY

by

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More often than not in today's complex litigation, expert testimony may be required. Remembering a few rules can greatly help in getting the greatest benefit from experts, or, conversely, effectively cross-examining an opposing expert. There are three general areas of expert evidence: (1) pure opinion expert evidence, (2) scientific expert evidence, and (3) non-scientific expert evidence.

To achieve maximum benefit from an expert witness, or to be most effective in cross-examination, certain preparatory steps are useful. First, of course, is to determine the standards for the admission of expert testimony in the particular jurisdiction and forum involved. The federal courts are governed by Federal Rules of Evidence 702 and 703, and the *Daubert*,[2] *Joiner*,[3] *Kumho Tire*[4] trilogy. Rule 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[5]

Rule 703 allows the expert witness to be fed facts or data in a particular case either during trial or before. Such facts or data could form the basis for the expert's opinion "[i]f of a type reasonably relied upon by experts in the particular field forming opinions or inferences upon the subject . . ."[6] Moreover, the facts or data "need not be admissible in evidence."[7] The facts or data, however, may be elicited on cross-examination if not otherwise brought out.[8]

State courts, however, may have different standards. Many follow the rule first enunciated in *Frye v. United States*:[9]

The rule is that the opinions of experts or skilled witnesses are admissible

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2 *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

3 *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

4 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

5 Fed. R. Ev. 702.

6 Fed. R. Ev. 703.

7 *Id*.

8 *See* Fed. R. Ev. 705.

9 293 F. 1013 (D.C. Cir. 1923).

> in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.[10]

Some states have created hybrid *Frye* rules to address situations involving new, unique or novel scientific evidence. Nevertheless, the *Frye* rule is still followed by at least seventeen states,[11] while others have adopted evidentiary rules which mirror the federal rules.[12]

The next consideration must be that of the expert's qualifications. Is the expert really an expert in the particular discipline in which the expert testimony will be elicited? That is the first hurdle which the party offering the expert testimony must overcome.[13]

The second hurdle is to establish that the method used by the expert to reach the expert opinion was reliable and in accordance with established principles for the particular field involved. In other words, a party may have a highly qualified expert, but if the methodology employed by the expert in reaching the expert opinion is flawed, the expert testimony will not be permitted.

It is unwise for an expert to rely on works other than his or her own. The operative word is "rely", as opposed to "consider". Where the expert relies on a particular work, he can be cross-examined on the contents of the work, and the work

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[10] *Id. See also Zippo Mfg. Co. v. Rogers Imports, Inc*., 216 F.Supp. 670 (S.D.N.Y. 1963).

[11] For example, California modified the *Frye* rule in *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240 (1976). Alabama, Arizona, Colorado, the District of Columbia, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania and Washington all still follow the *Frye* rule.

[12] *See*, *e.g*., Del. R. Evid. 702;

[13] See *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582 (Del. 2000); *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001) (FBI agent qualified to testify as expert on translations); *United States v. Cross*, 113 F.Supp.2d 1282 (S.D.In. 2000); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn*, 98 F.Supp.2d 729 (W.D. Va. 2000) (expert with degree in geological engineering, but who never published any works on antitrust issues or vermiculite, could not be qualified as an expert in antitrust economics); *Geophysical Systems Corp. v. Seismograph Service Corp*., 738 F.Supp.348 (C.D.Cal. 1990); *Martin v. Reed*, 409 S.E.2d 874 (Ga. App. 1991) (error to admit expert testimony of doctor who acknowledged no personal competency in x-ray analysis); *Noll v. Rahal*, 250 S.E.2d 741 (Va. 1979) (no abuse of discretion in refusing to qualify expert in medical malpractice action against physicians where expert's study and experience was meager in the area where the misdiagnosis occurred).

generally should be admissible in evidence.[14] The expert can "consider" a wide variety of works without being expected to have intimate knowledge of each.

Disclosure of the expert under Fed.R.Civ.P. 26 is straightforward. The Rule provides the precise method for disclosure. Failure to comply with Fed.R.Civ.P. 26(a) can result in the exclusion of the expert. For example, in a recent unpublished case, the Third Circuit affirmed the district court's exclusion of an expert where the profferring party failed to file the expert's report as required under Rule 26(a) until after discovery cut-off date, and the expert's report did not provide the necessary information required under Rule 26(a).[15]

Depositions of experts in federal cases requires leave of court with good cause established.[16] In state courts, the situation may be quite different.[17] Experts are frequently deposed at length prior to trial. Draft documents prepared by experts are also discoverable.[18] It is incumbent on counsel proffering expert testimony to go over the hypothetical questions to be asked of the expert, as well as variations thereof. It is almost a certainty that the cross-examining attorney will vary the hypotheticals in an effort to undermine the effectiveness of the expert's testimony.

It is incumbent upon proffering counsel to thoroughly prepare the expert by discussing all possible variants on hypotheticals which the expert may be asked during deposition or cross-examination. In rare cases, courts may allow an expert consulted by one side to be used as an expert by the opposing side.[19] Where an expert contradicts what he or she has previously stated, the testimony may be excluded or disregarded.[20]

Like everything else in litigation, there is no substitute for thorough and complete

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14 *See*, *e.g.*, *Papuchis v. Commonwealth*, 422 S.E.2d 419 (Va. App. 1992); *Chooseco LLC v. Lean Forward Media LLC*, File No. 1:07-CV-159, D. Vt., January 13, 2009, 2009 U.S. Dist. LEXIS 2522; *People v. Wernick*, 89 N.Y.2d 111, 674 N.E.2d 322 (1996); *Rubanick v. Witco Chem. Corp.*, 542 A.2d 975 (N.J. Super. 1988); *Liquid Dynamics Corp. v. Vaughan Co.*, No. 01 C 6934 , N.D. Ill., September 30, 2004, 2004 U.S. Dist. LEXIS 29992; *In re Omeprazole Patent Litig.*, MDL Docket No. 1291, S.D.N.Y., February 26, 2002, 2002 U.S. Dist. LEXIS 3225; *Freshwater v. Scheidt*, 714 N.E.2d 891 (Ohio 1999); *McDaniel v. Nat'l-Oil Well, Inc.*, Case No. 05-CV-1091, W.D. Ark., April 12, 2007, 2007 U.S. Dist. LEXIS 27304; *Linville v. Lindbom*, Case No. 05-4058 , C.D. Ill., November 6, 2006, 2006 U.S. Dist. LEXIS 80972.

15 See *Brooks v. Price*, 121 Fed. Appx. 961 (3d Cir. 2005); *Mansfield v. Stanley*, No. 4:07CV1408 FRB, D. Mo., Eastern Div., June 5, 2009, 2009 U.S. Dist. LEXIS 47327; *Samson Tug and Barge Co., Inc. vs. United States*, No. 3:03-cv-00006 JWS, D. As., August 6, 2008, 2008 U.S. Dist. LEXIS 62750; *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625 (D. Hi. 2008).

16 See *Holmes v. Merck & Co., Inc.*, Case No. 2:04-cv-00608-BES(GWF), D. Nev., June 21, 2006, 2006 U.S. Dist. LEXIS 42370.

17 See *Mckinnon v. Smock*, 264 Ga. 375, 445 S.E.2d 526 (1994).

18 See *Adler v. Shelton*, 343 N.J. Super. 511, 778 A.2d 1181 (2001); *cf.*, *Crowe Countryside Realty Assocs. Co., LLC v. Novare Eng'Rs, Inc.*, 891 A.2d 838 (R.I. 2006).

19 See *Graham v. Gielchinsky*, 126 N.J. 361, 599 A.2d 149 (1991).

20 See *Yahnke v. Carson*, 236 Wis. 2d 257, 613 N.W.2d 102 (2000).

preparation of expert witnesses.