



Expert Witness Testimony

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Professor
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National Black Law Students Association

- The Plaintiff must call (1) Jaidyn Anderson, P.E. and (2) Dr. Grayson Jackson.
- The Defendant must call (1) Dr. Amani Moore and (2) Sgt. Alex Miller.



Phi Alpha Delta Competition

- Potential Expert Witnesses
 - Dani Ash, Health Inspector
 - Casey Caudelstein
 - Taylor Whiles

FEDERAL RULES OF EVIDENCE

2021 EDITION

Federal Rules of Evidence

- Expert testimony must pass several evidentiary tests, governed by FRE 702-705, before it is properly admissible. These evidentiary tests are, as always, questions of law that the judge must decide under FRE 104(a), where the proponent has the burden of proving its right to admissibility by a preponderance of the evidence.

Daubert Test

- In Daubert the Supreme Court gives the trial judge four specific factors to use when determining whether the technique or methodology used is valid and was properly applied to the facts of the case:
 - (1) whether the theory or technique in question can be and has been tested, and whether standards and controls for the operation of the theory or technique have been used and maintained;
 - (2) whether the technique or theory has been subjected to peer review and publication;
 - (3) the known or potential error rate of the technique or theory when applied, and the existence and maintenance of standards controlling the technique's operation; and
 - (4) whether the technique or theory has been generally accepted in the relevant scientific community.

Kumho Tire

- In Kumho Tire the Supreme Court held the trial judge's gatekeeping obligation "applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." A nonscientific expert is not treated more permissively. He receives the same scrutiny as a scientific expert

Rule 701 Lay Expert Testimony

- Rule 701. Opinion Testimony by Lay Witnesses
- If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
 - (a) rationally based on the witness's perception;
 - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
 - **Typically – lay witness testimony allowed for handwriting, sobriety, age and speed.**

Rule 702 - Testimony by Expert Witnesses

- Rule 702. 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.
- **Key distinction between expert and fact witness is the expert can give opinion and fact witness only can give opinion as allowed under FRE 701.**

Rule 703 Bases of an Expert

- Rule 703. Bases of an Expert's Opinion Testimony. 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.
- “Put another way, the facts and data relied on by the expert do not become substantive evidence simply because he tells the jury about them. **They are admitted on direct examination for a limited purpose—to allow the expert to explain how and why he reached his conclusions.** They are allowed on cross-examination of the expert to test those conclusions.” Mauet, page 295

Rule 704 – Ultimate Issue

- Rule 704. Opinion on an Ultimate Issue
- (a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
- (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.
- **Eliminates an old rule against testifying on the “ultimate issue.”**

Rule 705 Disclosing the Facts or Data Underlying an Expert

- Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.
- Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.
- **Allows creativity in how you present expert testimony, but the more the jury hears about the facts or data supporting the opinion the more they will trust the opinion.**

Organizing Expert Testimony

- Develop Background Slowly and Thoroughly
 - General Background - Education, degrees, licenses and employment history (consider using leading questions over some of this information.)
 - Specific Background – court testimony, special training, publications and particular work experience that directly bear on the situation upon which the witness is giving testimony (avoid leading)
 - Other – teaching, community service, offices in organizations, media appearances, etc. (use resume if it's in evidence.)

Sample Outline

- Name
- Personal background – family, hometown
- Business occupation – what, how long, description of field, company or organization, prior positions, description of positions
- Education – Undergraduate, post-graduate
- Training – formal courses, work with other experts
- Licenses – special certification
- Other court testimony – judge like experts who have testified in other courts. It gives them comfort that the expert is legitimate. But note for cross if always testifies for plaintiffs, prosecutors or defendants.

Specific Experience

- Experience in specialty –
 - Types of examinations or tests done
 - How many years practicing or working in the area
 - Use numbers to support the experts' testimony, but keep it simple
 - Utilize pictures, charts, maps and exhibits
 - Specific knowledge about the situation at issue – car accidents or poisonings.

Eliciting the Opinion in the Case

- Turn to witness's opinion on facts at issue
- Have witness describe what he or she knows about the case
- Take through the evidence – Important in the BLSA problem because few fact witnesses
- Then ask how tested or examined the evidence
- Establish that expert used accepted methods
- Then ask based on this expert's opinion what caused the accident or what caused Karen's death.

▼ Cross-Examining Expert

- Same as a fact witness – bias, interests etc.
- Show not right expert for case i.e. a physician but not a toxicologist.
- Undermine testimony as just common sense – “dogs aren’t people”
- Use literature in the profession
- Get witness to agree with parts of your expert’s testimony and your theory of the case. “Karen had in fact drank a lot of alcohol?”
- Listen for any mistakes or misstatements.
- Try to get them to agree that their methods aren’t 100 percent certain. “It’s possible that Charley just ignored all the warnings.”
- Establish not a fact witness. “You didn’t see Charley’s accident?”

Experts – FREs 701 – 706

- Qualification – is this the right expert for this case.
- Treatise – book accepted within the profession. (ex. Diagnostic and Statistical Manual of Mental Disorders (DSM-5)).
- Opinion itself- use your expert to help ask questions that challenges the expert's conclusion.



“BE IN TROUBLE . . . THE PROSECUTION’S EXPERT WITNESS
“WALLY TELL IF A DEFENDANT’S BEEN GOOD OR BAD!”

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Have experts gone to the dogs?

- **Richard Polsky, who holds a doctorate in animal behavior and has served as an expert witness in K-9 court cases, said the dogs are referred to as “officers” but do not have the ability to make judgment calls like their human counterparts.** They often bite without releasing, even after repeated orders to do so, and sometimes bite the wrong person.
- Their handlers, he said, often cannot manage them.
- “These dogs are already genetically programmed for aggression, and then they put them through attack training,” Polsky said. “They can’t be controlled.”
- <https://www.washingtonpost.com/nation/2020/11/29/these-brutal-police-dog-attacks-were-captured-video-now-some-cities-are-curtailing-k-9-use/?arc404=true>

