Practicum: Qualifying Expert Witnesses

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I. The Trial Judge's Gatekeeper Function

When a trial judge is presented with a *motion in limine* to exclude the presentation of evidence presented by an expert witness to a jury, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) provide rules to help the judge rule on the motion. These cases demonstrate the collective desire on the part of the courts to prevent a lay jury from receiving complex evidence of a scientific or technical nature unless the judge has first determined the reliability of the evidence.

II. Frye Standard

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923): Expert testimony must be based on scientific methods that are sufficiently established and accepted. The court wrote:

> "[W]hile the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

To meet the *Frye* admissibility standard, *scientific* procedures, principles or techniques presented to the court must be "generally accepted" by a meaningful segment of the scientific community.

Frye requires proponents of a *widely disputed scientific issue* to provide experts to speak to the validity of the science behind the issue in question. If the scientific technique is novel, *Frye* requires courts to examine papers, books and judicial precedents regarding the technique to determine reliability and "general acceptance."

As an alternative to the *Frye* standard, the courts have generally adopted Rule 702 of the Federal Rules of Evidence, as the primary rule regarding admissibility of expert testimony and scientific evidence.

States still following *Frye* include: California, District of Columbia, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington.

III. The Daubert Trilogy

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993): The 1923 *Frye* test was superseded by the 1975 Federal Rules of Evidence, specifically Rule 702 governing expert testimony: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or 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." *Daubert* suggested that the following factors be considered when determining whether expert testimony should be admitted:

1. Has the technique been tested in actual field conditions (and not just in a laboratory)?
2. Has the technique been subject to peer review and publication?
3. What is the known or potential rate of error?
4. Do standards exist for the control of the technique's operation?
5. Has the technique been generally accepted within the relevant scientific community?

Daubert explicitly cautioned that the above list should not be regarded by judges as "a definitive checklist or test," yet, in practice, judges utilize it in exactly that way.

General Electric Co. v. Joiner, 522 U.S. 136 (1997): A judge may exclude expert testimony when there are gaps between the evidence relied upon by the expert and the expert's ultimate conclusion.

Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999): The judge's gatekeeping function identified in *Daubert* applies to *all* expert testimony, including testimony which is not scientific:

a. Is the reasoning or methodology underlying the testimony scientifically valid?
b. Can the reasoning or methodology be applied to the facts at issue?

IV. Expert Testimony In Administrative Hearings

What about administrative hearings? Administrative law judges are experienced and legally trained. ALJs are capable of determining the requisite reliability of the evidence presented. In an administrative hearing, there is not the same danger that unreliable evidence will be admitted and given evidentiary weight that there is when a lay jury is hearing the case. For these reasons, the rules of evidence are different, and more relaxed, for administrative hearings. The rules of privilege, exclusionary rules, and the rules regarding the admissibility of hearsay are all less stringent in administrative hearings because the case is not being tried to a lay jury.[1]

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[1] See, for example, 27 CFR § 771.82(a), in pertinent part: Opinion or expert testimony shall be admitted when the administrative law judge is satisfied that the witness is properly qualified as defined by Federal Rules of Evidence 701 or 702.

V. Outline or Checklist of FRE Concerning Expert Witness Testimony for ALJs

Rule 701 Lay Opinion:
If the witness is not an expert, opinion is admissible only when it is
1) rationally based on perceptions, and
2) helpful to the trier of fact.

Rule 702 Testimony by Experts:
Expert opinions may be admissible if
1) the testimony assists the trier of fact, and
2) the witness is qualified as an expert.

Rule 703 Bases of Opinion Testimony by Experts:
Expert opinion may be based on facts or data
1) actually seen or heard by the expert or
2) communicated to him at or before the hearing.
Admissibility of the facts or data is not essential if typically relied on in this field.

Rule 704 Opinion on Ultimate Issue:
An expert may express an opinion which
1) addresses an ultimate issue of fact, but opinions or inferences regarding the mental state of the accused are reserved for the trier of fact, and
2) when the mental state is an element of the crime charged or a defense to that crime.

Rule 705 Disclosure of Facts or Data Underlying Expert Opinion:
An expert need not provide facts supporting the reason for his opinion unless
1) the court so requires, or
2) asked on cross examination.

Rule 706 Court Appointed Experts:
The court
1) may issue an order to show cause as to why an expert should not be appointed,
2) may request nominations of an expert by parties,
3) may appoint expert whether or not parties agree to that expert, if expert consents.

The witness shall be informed of his duties
1) in writing,
2) a copy of which is filed with the court.

The witness shall communicate his findings to the parties, and
1) may be deposed,
2) may be called to testify,
3) may be cross examined, and
4) shall be paid as the court directs.

V1. Lay Opinion v. Expert Opinion Testimony

Expert testimony cannot be admitted under the guise of lay opinion testimony. The party seeking to admit the testimony as expert testimony must seek to qualify the witness as an expert. Persons testifying based on perceptions and experiences are offering lay testimony which must be rationally based on their perception to determination of a witness testimony or a fact in issue Persons testifying based on scientific, technical, or other specialized knowledge are testifying as experts and must be qualified as same. Testimony beyond the realm of common knowledge of a lay witness can be excluded if the party calling the witness fails to comply with expert witness notice requirements.

A police officer's opinion testimony should be considered lay and not expert if the average person having been in the same position as the witness, could provide the testimony (*e.g.* identification of individual from photo lineup, odor of alcohol, etc.).

VII. Two Types of Expert Witnesses

Consulting Expert

A person who has been hired in anticipation of litigation or preparation for trial but who will not be called as a witness. The opinions of such consultants are work product and are protected by the attorney client privilege.[2]

Testifying Expert

A person who gathers examines and evaluates evidence, forms an opinion as to that evidence, and communicates that opinion under oath as a witness.

VIII. Five General Categories of Witness Expertise

Laypersons: Fact Witness or Expert?

Generally speaking, a lay witness may testify to a matter only if the witness has personal knowledge of the matter (FRE 602). Evidence should be introduced to establish that the witness has personal knowledge of the matter; however, that evidence may consist of the witness's own testimony. But a layperson can be qualified as an expert witness based on the witness's life experience if a *voir dire*[3] of the witness establishes that the witness has acquired proficiency through that life experience. A perfect example of this is demonstrated by the *voir dire* and subsequent testimony of witness Mona Lisa Vito in *My Cousin Vinny*.

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[2] *People v. Adam,* 51 Ill.2d 46, 280 N.E.2d 205, cert. denied 409 U.S. 948 (1972).

[3] *Voir Dire*: from the French meaning "to speak the truth;" today, it means the questioning of a witness or juror by a judge or counsel.

Among the laypersons that *may*[4] be qualified as expert witnesses in the context of administrative hearings are case workers and police officers. However, the witness must have particular expertise in the relevant area and expertise or practical knowledge of the specific question at issue, not simply vague, general knowledge. If questioning of the witness does not establish such expertise, then the witness is not an expert and can only testify regarding matters of which he/she has person knowledge.

Technician/Examiner

This expertise is based on limited but concentrated training and application of known techniques based on that training. The Technician/Examiner may have been taught to use complex instruments but may only have a superficial understanding of what the instrument really does. (Examples: Operator of Breathalyzer/Intoxilyer, Headspace Gas Chromatograph, Drug Recognition Expert, etc.) Technicians and Examiner have often received some sort of certification to verify their training and experience in using the complex instrument.

Practitioner

Practitioners have a combination of education and experience beyond that of a mere technician or examiner which makes them capable of analyzing and interpreting material and information. An example of a practitioner might be the person who services, calibrates or repairs a breathalyzer or intoxilyzer, a NHTSA-certified instructor who teaches Drug Recognition classes, or an authority on traffic accident reconstruction.

Specialist

Specialists are devoted to one kind of study or work which has specific characteristics. It is likely that a Specialist will have significant educational background specific to his/her specialty as well as certification or other credentials issued by an organization devoted to that specialty.

Scientists

Scientists conduct original empirical research then experiment to verify the validity of the research findings. Scientists design and create instrumentation and apply complex scientific techniques. Scientists are commonly published in his/her peer field. Scientists are those who advance the field of knowledge in her/her area of expertise.

[4] Courts are split regarding where to draw the line when lay officers are asked to provide opinion testimony about an investigation.

IX. The Expert Witness Qualification Process

A. Qualification as Expert is Precursor to Testimony on Issues

1. Witness must be able to offer assistance on matters not within the common experience of people of ordinary intelligence;

2. Witness must have more knowledge, skill, or information on matter than the judge;

3. Scientific basis for the opinion is reasonable and reliable: facts or data in the case upon which expert bases an opinion must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

4. Witness is qualified to provide an opinion on such matters.

B. Expert Testimony is Admissible If:

1. Opposing party has opportunity offer rebuttal by their expert

2. Relevant (assist fact-finder to determine fact in issue/understand evidence)

3. Not speculative (sufficient factual basis for expert opinion)

   Even if a proposed expert is qualified, the testimony may be rejected for lack of a sufficient factual basis. *People v. Lanari*, 926 P.2d 116, 121-22 (Colo.App. 1996). It is appropriate for a court to strike an expert's testimony if the anticipated testimony has no factual basis, is not reliable, is not expert opinion at all, or is based on speculation. *Allen v. Martin*, 203 P.3d 546 (Colo.App. 2008).

4. Is not unfairly prejudicial: facts or data shall not be considered as evidence unless it's determined their probative value substantially outweighs their prejudicial effect.

5. Involves a matter that the fact-finder is not capable of resolving on his/her own (does not encompass ultimate legal decision fact-finder must make)

C. Factors in Assessing Expert Credibility and/or Assigning Weight to Testimony

1. Voir dire and/or cross-examination

2. Opposing evidence in the record

3. Bias of witness or lack of: Is witness receiving expenses or fees? How much?

4. Applicability of responses to hypothetical questions or lack thereof.
   (a) relevant?
   (b) speculative?

Sample Qualifying Questions for Expert Witness *Voir Dire*

The applicability of each question depends on whether the witness seeks qualification as a Layperson, a Technician/Examiner, a Practitioner, a Specialist or a Scientist.

1. Please state your name, your occupation/profession, and employment.

2. What is your present job title?

3. Briefly describe the position you currently hold.

4. Do you have any specializations within your given field?

5. Please describe briefly the subject matter of your specialty.

6. What academic degrees do you hold? (and where and when obtained)

7. Have you completed any post-graduate studies?

8. Have you completed other specialized degrees or specialized training?

9. In what states have you been licensed in your field?

10. How long have you been practicing in this field?

11. Are you "board-certified" as a specialist in any field?

12. How long have you been board-certified as a specialist?

13. Please list positions you've held and length of time you served in each position.

14. What are the duties and function of your current position?

15. How long have you held your current position?

16. Have you personally conducted examination or testing regarding _____ ?

17. What tests or examinations were conducted by you? (when and where?)

18. Have you done any teaching, training or lecturing in your field?

19. When and where have you lectured or taught?

20. What scholarly papers have you published in this field? (dates and titles)

21. Do you hold membership in professional organizations, associations, societies?

22. What are the requirements for membership in these organizations?

23. Have you held any special positions or offices in those organizations?

24. What were the requirements for advancement in these organizations?

25. Have you received any honors, acknowledgments, or awards in your field?

26. How many times have you testified as an expert witness in your field?

27. In what courts have you been qualified as an expert witness?

28. Have you ever served as a consultant in this field to any party or attorney?

29. Curriculum vitae or resume is entered into evidence.