THE USE OF EXPERT TESTIMONY AT TRIAL

Hon. Saliann Scarpulla
Justice, Supreme Court, New York County

A. The Purpose of Expert Testimony

The purpose of expert disclosure is to aid the fact finder in those circumstances when the expert's testimony "would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *De Long v. County of Erie*, 60 N.Y.2d 296, 307 (1983); *see also People v. Williams*, 20 N.Y.3d 579 (2013); *Selkowitz v. County of Nassau*, 45 N.Y.2d 97 (1978).

Expert testimony is unnecessary unless it aids the jury in examining an issue which requires professional or technical knowledge. *People v. Diaz*, 20 N.Y.3d 569 (2013); *Galasso v. 400 Exec. Blvd., LLC*, 101 A.D.3d 677 (2nd Dep't 2012); *Fortunato v. Dover Union Free Sch. Dist.*, 224 A.D.2d 658, 659 (2nd Dep't 1996).

B. A Party's Obligation To Disclose Proposed Expert Testimony

Disclosure of expert testimony to be used at trial is governed by CPLR 3101(d)(1)(I), which provides:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on

> grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

Pursuant to the statute, preclusion is not mandated by the party's failure timely to disclose proposed expert testimony. The trial court has the discretion to fashion an appropriate remedy where the nondisclosure is not willful and the other party is not prejudiced. *See Cruz v. Gusitos*, 51 A.D.3d 963 (2d Dep't 2008); *Marchione v. Greenky*, 5 A.D.3d 1044 (4th Dep't 2004); *St. Hilaire v. White*, 305 A.D.2d 209 (1st Dep't 2003); *Neel v. Mt. Sinai Hosp.*, 196 Misc.2d 343 (App. Term, 1st Dep't 2003). Preclusion of the expert testimony may result if there is not an adequate excuse for the nondisclosure, or the expert changes the theory of the case. *See Lissak v. Cerabona*, 10 A.D.3d 308 (1st Dep't 2004); *Tienken v. Benedictine Hosp.*, 110 A.D.3d 1389 (3rd Dep't 2013); *Vigilant Ins. Co. v. Barnes*, 199 A.D.2d 257 (2nd Dep't 1993).

C. <u>The Proposed Expert Witness's Qualifications</u>

The proposed expert must have the appropriate education, background, and/or experience in the field upon which he or she will opine. "The expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward*, 48 N.Y.2d 455 (1979). However, "an expert may be qualified without

specialized academic training through '[l]ong observation and actual experience.'" *Price v. New York City Housing Auth.*, 92 N.Y.2d 553 (quoting *Meiselman v. Crown Hgts. Hosp.*, 285 N.Y. 389, 398 (1941)); *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114 (1981) (an expert's competency can be derived just as well from "the real world of everyday use" as from a laboratory).

Whether to qualify a witness as an expert and permit the witness to give opinions as to matters at issue is in the discretion of the trial judge. *Tarlowe v. Metro Ski Slopes*, 28 N.Y.2d 410 (1971); *People v. Dorvilier*, 122 A.D.3d 642 (2nd Dep't 2014).

D. <u>Determining Whether Expert Testimony is Admissible</u>

It is also within the discretion of the trial judge whether to permit the proposed expert to give his or her opinion as to an issue in the action. *Meiselman*, 285 N.Y. at 389; *Guzman ex rel. Jones v. 4030 Bronx Blvd. Associates L.L.C.*, 54 A.D.3d 42 (1st Dep't 2008). The trial court's decision will not be overturned unless the trial judge abused his or her discretion. *See Galasso v. 400 Exec. Blvd., LLC*, 101 A.D.3d 677 (not an abuse of discretion to preclude expert testimony); *Rodriguez v. Ford Motor Co.*, 17 A.D.3d 159 (1st Dep't 2005) (not an abuse of discretion to preclude expert testimony); *Vaglica v. Homeyer*, 30 A.D.3d 587 (2d Dep't 2006) (not an abuse of discretion to exclude expert testimony concerning a motor vehicle accident); *Adams v. Hilton Hotels, Inc.*, 13 A.D.3d 175 (1st Dep't 2004) (court properly permitted testimony from plaintiff's

expert); *Wichy v. City of New York*, 304 A.D.2d 755 (2d Dep't 2005) (court abused discretion in precluding a civil engineer from testifying concerning a tripping hazard).

E. <u>The Basis of the Expert's Opinion</u>

An expert may rely upon (1) facts which are in the record or may be fairly inferred from the record, and (2) facts that are personally known to the expert. *Admiral Ins. Co. v. Joy Contractors, Inc.*, 19 N.Y.3d 448 (2012); *Hambsch v. New York City Transit Auth.*, 63 N.Y.2d 723 (1984). In general, an expert may not rely upon hearsay in rendering an opinion.

Exceptions - an expert may rely upon out of court materials (hearsay) if (a) the out of court materials are of the kind generally accepted in the profession as reliable in forming a professional opinion, *see Weinstein v. New York Hosp.*, 280 A.D.2d 333 (1st Dep't 2001); and/or (b) facts that come from a witness subject to cross-examination. *Freitag v. New York Times*, 260 A.D.2d 748 (3rd Dep't 1999).

Also, if the inadmissible hearsay is not the sole basis for the expert's opinion, but only used to confirm an independently reached opinion based on permissible sources, the expert's use of hearsay will not render the opinion inadmissible. *Weinstein*, 280 A.D.2d at 333; *People v. Mana*, 292 A.D.2d 863 (4th Dep't 2002).

F. <u>Expert Opinion Based Upon a Novel Scientific Theory</u>

If an expert's opinion is based upon a recent or novel scientific theory it must satisfy the standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *see People v.*

Wesley, 83 N.Y.2d 417 (1994); *Pullman v. Silverman*, 125 A.D.3d 562 (1st Dep't 2015). The *Frye* standard is known as the "General Acceptance Test," and provides that an expert opinion which is based upon a scientific theory or technique is admissible if the scientific theory or technique is generally accepted as reliable in the appropriate scientific community. The particular testing and procedure need not be unanimously agreed upon in the relevant scientific community, it is enough that the procedure and testing be "generally accepted." *Cornell v. 360 West 51st Street Realty, LLC*, 22 N.Y.3d 762 (2014).

The *Frye* standard for admissibility differs from federal standard for admissibility of novel scientific theories. The federal standard is governed by Federal Rule of Evidence 702 and is not as restrictive as the *Frye "*general acceptance standard." *See Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993).

"An expert should generally be permitted to offer an opinion on a matter involving professional or scientific knowledge not within the range of ordinary training or intelligence, but in order for a particular scientific principle or a particularly novel theory to be considered sufficiently reliable to serve as the basis for an expert's opinion, it must first be shown to have general acceptance in the relevant field." *Rodriguez v. Ford Motor Co.*, 17 A.D.3d 159 (1st Dep't 2005). Whether to hold a *Frye* hearing, and whether to accept the proffered testimony after the *Frye* hearing is in the sound discretion of the trial court. *See Sadek v. Wesley*, 117 A.D.3d 193 (1st Dep't 2014).

The proponent of the testimony must define the relevant scientific community and establish the general acceptance of the theory or technique by showing:

(1) The competence of the individual propounding the theory or technique;

(2) The purpose of the theory or technique;

(3) The procedures for obtaining the results; and

(4) The general acceptance of the methodology used by the individual in the defined scientific community. Justice Helen E. Freedman, *New York Objections* § 16:140 (2008).

An expert's opinion which is based upon the expert's own training and experience is not subject to a *Frye* analysis. *People v. Oddone,* 22 N.Y.3d 369, 376 (2013). In *Oddone* the Court of Appeals noted however that "an opinion based on experience alone is ordinarily less reliable than one based on generally accepted science . . . [b]ut these flaws can be exposed by cross-examination, and by the opinion of opposing experts." *Oddone*, 22 N.Y.3d at 376.

Also, in *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006), the Court of Appeals affirmed that the evidentiary foundation for admitting expert testimony is entirely distinct from the *Frye* standard. While "'the focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial.'" *Parker*, 7 N.Y.3d at 447 (quoting *People v. Wesley*, 83 N.Y.2d at 429). Thus,

even if the proferred expert has relied upon reliable data and has used a generally accepted methodology, the court may nevertheless exclude the proferred expert testimony if the court finds that there is no evidentiary basis connecting the expert's data and methodology to the expert's conclusion. *See Cornell*, 22 N.Y.3d at 762; *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416 (1st Dep't 2008).