

NYIOC TRIAL PRACTICE PROGRAM

EXPERTS OUTLINE¹

TEAM MEMBERS: R. Bhandari, E. Fensterstock, R. Philp, P. Aminolroaya, and J. Spiegel

INTRODUCTION

PART ONE: LEGAL Issues Surrounding Expert Testimony

I. Pre-Trial

A. Timely disclosure under 26(a)(2).

1. Failure to comply can result in exclusion under Rule 37(c)(1) unless the failure was substantially justified or harmless.
2. Note: Rule 26(a)(2) also requires timely disclosure of “non-expert” expert opinions (*e.g.*, the CFO of your client who you’d like to offer expert opinions regarding the Company’s financials).

B. *In Limine* Motions

The question whether to pursue an *in limine* motions is an important tactical decision for defense counsel.

1. To depose or not to depose. In most instances, you’ll want to depose an expert if you want to leave the door open for a pre-trial *in limine* motion. However, there are advantages and disadvantages to consider.

a. Disadvantages to Deposition:

- (i) Giving the expert and your adversary a preview of your cross.
- (ii) Giving the expert the opportunity to supplement his report through testimony on matters outside his report (exception to Rule 37).

b. Advantages to Deposition:

¹ Much of the content contained in this outline was discerned from 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence*, §§702-705 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2012) and cases cited therein.

- (i) Setting up a possible motion *in limine*.
- (ii) The opportunity to develop potentially inconsistent testimony for trial.
- (iii) The opportunity to clarify any ambiguity for attack at trial.
- (iv) The opportunity to pin the expert down on weaknesses.

2. Advantages to *In Limine* Motion

- a. You might actually win.
- b. Discrediting the expert will create settlement leverage.
- c. Even if your motion is not granted, all is not lost. Discrediting the expert by raising questions about his or her methodology, credibility and qualifications will sow the seeds of doubt. This is particularly true with bench trials.

3. Disadvantages to *In Limine* Motion

- a. An unsuccessful challenge can bolster the expert or a theory.
- b. Unlikely to succeed -- if the expert meets a minimum threshold, courts are likely to allow the trier of fact weigh the testimony. Statistically, the number of successful challenges has gone *down* since the *Daubert* decision.
- c. Interim ruling -- depending on how trial unfolds, the court can revisit its decision to bar the testimony.

II. Presumption of admissibility

- A. There is a presumption that expert testimony is admissible, which is rooted in the “liberal thrust” of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 588 (FRE 702 is part of the “liberal thrust” of the Federal Rules of Evidence and their “general approach of relaxing the traditional barriers to ‘opinion’ testimony”; quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)); see, e.g., *U.S. v. Boissoneault*, 926 F.2d 230, 232 (2d Cir. 1991) (allowing expert to testify under liberal rules, expert permitted to suggest inferences that should be drawn from facts); *Canino v. H.R.P., Inc.*, 105 F. Supp 2d 21, 28 (S.D.N.Y. 2000)

(presumption of admissibility of expert testimony in light of liberal thrust of FRE, and determination of usefulness should be resolved in favor of admissibility).

B. Trial court has broad discretion in deciding whether to admit or exclude expert testimony. Standard for reversal on appeal is “abuse of discretion” with respect to decisions regarding admitting and excluding expert testimony. *See, e.g., General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995) (“The decision to admit expert testimony is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous.”).

1. “Clear error of judgment” – 6th and 11th Circuits;
2. “Clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact” – 2nd, 3rd, 4th, and D.C. Circuits;
3. “No reasonable person would adopt the district court’s view” – 3rd (again) and 7th Circuits;
4. “Manifestly erroneous” – 2nd, 3rd, 5th, and 9th Circuits.

C. “Abuse of discretion” standard applies to decisions re:

1. Witness’s qualifications;
2. Helpfulness;
3. Reliability.

III. Personal knowledge not required

- A. Unlike lay witnesses who are obligated to testify based on their personal knowledge, experts may testify without any personal knowledge and may testify to their opinions based on facts perceived or made known to the expert at or before trial. *Daubert*, 509 U.S. at 592 (“[A]n expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”).
- B. In criminal cases, however, experts are precluded from testifying to their opinion or making inferences with respect to the defendant’s mental state where it is an element of the crime charged or defense. *See generally U.S. v. Mulder*, 273 F.3d 91, 101-02 (2d Cir. 2001).

IV. Prerequisites before expert testimony may be admitted

- A. Helpful to trier of fact;
- B. Qualification – witness must be qualified to offer opinions on that topic;
- C. Reliability and fitness – testimony must be reliable from an evidentiary standpoint and must fit the facts of the case. See *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 588 (1993).

V. Rule 702. Testimony by Expert Witness

- A. “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.

VI. Rule 703. Bases of an Expert’s Opinion Testimony

- A. “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.”

VII. Rule 704. Opinion on an Ultimate Issue

- A. “**(a) In General — Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue.
- B. **(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.”

VIII. Testimony must be helpful.

- A. Evidence based on scientific, technical, or other specialized knowledge must be useful to the trier of fact in understanding the evidence or in making factual determinations necessary to decide the ultimate issue of fact.
- B. History: differs from common-law as c/l required expert testimony to be “necessary” rather than simply “helpful.”
- C. Testimony admissible on subjects beyond lay knowledge
 - 1. Testimony required in certain instances where the matters are so technical or specialized in nature. *See, e.g., Conopco, Inc. v. Cosmair, Inc.*, 49 F. Supp 2d 242, 252 (S.D.N.Y. 1999) (requiring in trade mark case expert evidence of statistical likelihood of confusion).
 - 2. Helpfulness akin to relevance requirement of FRE 401. *Daubert* at 591.
- D. Testimony generally inadmissible on matters within lay knowledge. (“Common sense” testimony story where judge excuses “expert” for saying “it’s common sense” on the stand.)
 - 1. Testimony within lay experience is not helpful
 - a. Triers of fact are capable of understanding issues that are within the knowledge and experience of ordinary lay people through use of its common knowledge and common sense.
 - 2. Expert guidance not helpful on matters within common knowledge
 - a. 2nd, 3rd, 8th, and 10th Circuits take position that “doubts about whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.” *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 279 (3d Cir. 1983), *rev’d on other grounds sub nom, Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (citing Weinstein’s); *U.S. v. Jakobetz*, 955 F.2d 786, 796 (2d Cir. 1992) (citing Weinstein’s).
 - 3. Courts balance preference for admission against potential prejudice
 - a. Generally, expert testimony is freely admissible if it in any way helps the trier of fact. But, misleading expert testimony can have a powerful effect and courts will exclude testimony where there is a likelihood of waste of time, confusion, and prejudice (similar to

403 test – also grounds for exclusion). *See U.S. v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978).

E. Testimony generally inadmissible on matters committed exclusively to jury or court. Experts cannot testify re:

1. Telling the jury what conclusion the jury should reach;
2. Contract interpretation. But, experts may testify to the meaning of contract terms with specialized meaning;
3. Credibility of witnesses;
4. Negligence of a party in a tort case;
5. State of mind of one of the parties;
6. The law the trier of fact will be instructed to apply;
7. Drawing legal conclusions based on exact language of law. Can suggest drawing inferences though based on close approach of the law.

IX. Witness must be qualified

A. Bases for qualification: “knowledge, skill, experience, training or education.” FRE 702.

1. Liberally construed
2. Qualifications must relate to the question(s) at issue
3. Witness can qualify based on just one or more of the five bases (“knowledge, skill, experience, training, or education.”)
4. Typically, proponent lays the foundation by showing one or more of the listed bases, such as academic credentials plus extensive practical experience.
5. The listed bases are equal in weight. Important to note that regardless of how an expert acquired his/her specialized expertise, the issue for the court is to decide whether the expertise provides the witness with the ability to help the fact finder in deciding the pertinent issues.

B. Certain cases require specific expertise. This is the exception, not the rule:

1. Testifying to dangerousness of car when parked when expert had no engineering degree, never professionally designed automotive components, and had no formal training in manufacturing cars of their components. *See, e.g., Bogosian v. Mercedes-Benz of North Am., Inc.*, 104 F.3d 472, 476 (1st Cir. 1997).

X. Evidence must be reliable. See 2000 Amendments.

A. *Daubert* – trial judges act as “gatekeeper” in assuring proposed expert scientific testimony meets all FRE 702 requirements.

B. Based on sufficient facts or data;

1. Testimony inadmissible if based on suppositions rather than facts.
2. Courts look at whether experts have developed their opinion naturally through their research or if they have formed opinions solely and expressly for the purpose of testifying.
3. Concerns exist regarding whether witness relied on anecdotal evidence in arriving at opinion. *See U.S. v. Tin Yat Chin*, 371 F.3d 31, 20-41 (2d Cir. 2004).

C. Product of reliable principles and methods – inquiry is “a flexible one” with the ultimate goal of assuring that the proposed testimony is valid, and as a result, relevant and reliable from an evidentiary standpoint. *Daubert.*;

1. Has technique been tested or is it able to be tested? *See, e.g., Wills v. Amerada Hess Corp.*, 379 F.3d 32, 46-47 (2d Cir. 2004).
2. Has the theory or technique been published and subjected to peer review?
3. What is the known or potential rate of error experienced in the application of the particular technique?
4. Are there standards and controls for the application of the particular technique, and did the expert witness apply those standards and controls?
5. Is the theory or technique generally accepted in a definable relevant community of experts?

- D. Expert must have reliably applied the principles and methods to the facts – some issues include:
1. Did the witness's conclusion represent an unfounded extrapolation from the underlying data?
 2. Did the witness use a subjective methodology?
 3. Did the witness sufficiently connect the proffered testimony to the facts of the case?
 4. Did the witness adequately account for alternative explanations?
 5. Was there undue reliance on temporal proximity?

PART TWO: COURTROOM MECHANICS

I. Direct Examination

A. Introduction

1. Name and occupation.
2. Give the jury a short explanation of how the expert fits into the case so that you can give some context to her qualifications.

B. Qualifications

1. You must establish **knowledge, skill, experience, training, and/or education** in the area of expertise. Generally, do not stipulate to the qualifications, the testimony will be more persuasive if the jury hears the qualifications themselves.
2. **Professional positions**
3. **Teaching appointments**
4. Educational history

5. Specialties and/or certifications
6. **Experience**
7. **Noteworthy publications**
8. Noteworthy speaking engagements
9. Awards

C. Proffer The Witness As An Expert

1. "At this time, I proffer [Expert] as an expert in _____."
2. Opposing counsel may (i) object and state grounds; (ii) conduct a voir dire of the witness on her qualifications, or (iii) state that there is no objection to her qualification as an expert.

D. Voir Dire

1. Voir Dire is a cross-examination limited to the witness's qualification as an expert. So counsel may not attack the witnesses opinions, methodology, or integrity during the voir dire. That must wait for regular cross-examination.
2. It is opposing counsel's decision about whether to voir dire a witness in the presence of the jury because the court decides whether the witness can testify as an expert.

E. Compensation

1. The fact that expert's get paid can undermine their credibility in the eyes of some jurors. Defang this attack by asking the expert her reason for testifying and whether she is getting any compensation.

F. Opinion

1. The expert can and should give a brief statement of the opinion BEFORE providing the underlying basis for it. FRE 705 explicitly allows this.
2. Ask the expert point blank: "Do you believe _____?" or "Do you have an opinion about _____? What is that opinion?"

G. Methodology

1. What research did you conduct?
2. What methodology did you use?
3. What data did you analyze?
4. What assumptions did you make?

H. Demeanor And Behavior

1. Keep the jury engaged – don't be condescending.
2. Illustrate key points with charts or diagrams.
3. Make sure to define any specialized terms or jargon.
4. Make sure the examination seems like a conversation.

I. Conclusion

1. Review the expert's key opinions and the most persuasive bases for those opinions so the jury remembers the important testimony from your expert.

II. Cross Examination

A. Goals

1. Cast doubt on expert's credibility
2. Cast doubt on expert's conclusions
3. Piggybacking

B. Challenge Credibility

1. Prior testimony rejected
2. Inconsistent statements

3. Misstatements
4. Errors in calculations
5. General Integrity (e.g., statutory rape)
6. Professional Problems (e.g., fired)
7. Faulty assumptions (e.g., no cardiac condition)
8. Bias because of compensation
9. Bias because of relationship with party or attorney
10. Only testifies for plaintiffs or defendants
11. Offers the same opinion in every case
12. Financial interest in outcome of case

C. Challenge Conclusions

1. Ask whether expert relied or considered information available contained in fundamental treatises.
2. Attack the methodology by casting doubt on whether it is generally accepted in the relevant community.
 - a. Has it been or can it be tested?
 - b. Has it been subject to peer review?
 - c. Is there a known error rate?
 - d. Is the study reproducible?
 - e. Is this methodology used in the real world or only in the courtroom?
 - f. What other explanations did the expert consider? How did she rule them out?

- g. Attack the assumptions.
 - h. Is the data on which the expert relied reliable?
- 3. What did the expert not do?
 - a. Are there facts that the expert did not consider?
 - b. Are there tests the expert did not perform?
 - c. Are there things the experts was not asked to do?

D. Piggybacking

- 1. Use the expert witness to advance your own case.
- 2. For example, in personal injury cases, a defense expert who disputes causation (e.g., your client's injury is minor to cause more significant damage) can often be used to establish that if there was causation, the damages would be severe.