

What is an "Expert?"



Rule 702. Testimony by Expert Witnesses

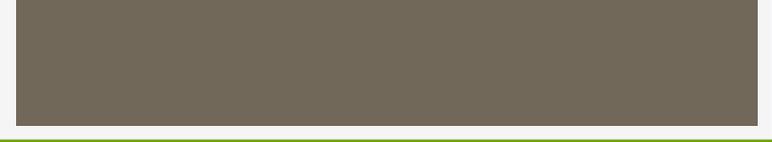
- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

Rule 702. Testimony by Expert Witnesses

- **(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.

"The Gatekeeper"

- Trial judges must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)
- Extended to apply to all expert testimony by US Supreme Ct in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)
- AKA – Trial Court's "gatekeeping" function.



Direct Examination Considerations

Before the Expert Testifies

- Identifying need for expert.
 - Witness with specialized skill or training that would add in some appreciable way to the Jury's understanding.
- Identifying the expert.
 - Experience

Goal of Direct Exam

- Who is the expert?
- Why is the expert here?
- Why should I listen to the expert?
- What does the expert have to say?

How Achieved

- Through non-leading questions.
- Listening to the witness.
 - So you know if the witness has testified to the facts you need to prove a claim.
 - So you can strategize your follow-up.
- Use visual aids.
- Addressing and diffusing weaknesses.
- Preparation is key.

Qualifying the Expert

- Education and training.
- Experience.
- Experience in the area at issue.

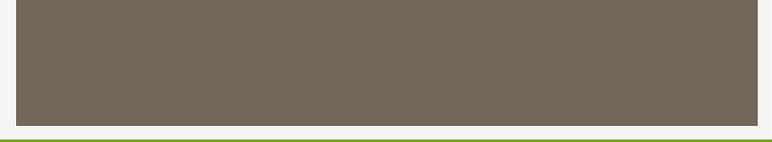
- Consider whether to stipulate to qualifications.

Basis for Opinions

- Describe the facts and data that reviewed and support opinions.

Eliciting Opinions

- Walk through opinions.
 - Consistent framing of questions.
- Keep witness within field.
- Keep it simple, understandable.
 - Choose your words: *Tell; Explain; Teach.*
- Use demonstratives.



Cross Examination Considerations

QUALIFIED?

- Educational Background
- Experience with Subject Matter
- True Expertise?

702(a) Challenges

- 702 (a) requires proposed expert have knowledge, skill, experience, training, or education that can help the trier of fact understand the evidence or determine a fact in issue
- Does proposed expert have what it takes?

Expert or Advocate?

- A party retaining expert witness may not control expert witness; as with all other witnesses, expert witnesses are bound to testify truthfully, and expert should never become one party's advocate, but should be advocate of truth with testimony to help court and jury reach ultimate truth in case, which should be basis of any verdict. (Selvidge v. US, 160 FRD 153 (1995))
- Expert's sole duty is to use his expertise honestly and fairly so that justice may be done.

Tips for 702(b) Challenges

- What is the opinion based on?
- First contact?
- Prior retentions?
- Plaintiff v. Defense?

Tips for 702(b) Challenges

- What information provided?
- Information requested?
- When were opinions formulated?

Tips for 702(b) Challenges

- What was reviewed?
- Timesheets
- How paid? Hourly? Percentage?