An Overview

The world of expert testimony is nothing if not diverse. Consider several situations that might occur in the daily lives of litigators:

**Scenario 1.** An extremely experienced amateur pilot is suddenly killed while flying his small single-engine plane on a perfectly clear day in West Texas. An equipment malfunction is naturally suspected as the cause of the accident. An aeronautical engineer and a mechanical engineer specializing in such matters are retained, and their studies indicate that the plane’s engine showed no signs of operation upon impact. They surmise that the fuel system was defective and that the pilot shut down the engine shortly after he lost power.

**Scenario 2.** A Pennsylvania oil and gas company has been sued for draining valuable reserves off a tract of adjoining land, and potentially millions of dollars are at stake. A petroleum engineer is hired to conduct extensive seismic studies, and they reveal that no drainage occurred.

**Scenario 3.** Several young associates in a Wall Street law firm have received an urgent telephone call that the case they are handling involves the production of at least ten million documents. The client, a large multinational corporation, has failed
to adequately organize its files, and some technical expertise is needed to render the mounds of paperwork electronically retrievable.

**Scenario 4.** A small auto-parts store is forced to go out of business because the distributor supplying it has breached numerous contractual provisions regarding special allowances. The company needs an accounting expert who can prepare profit-margin comparisons between the retailer and the competition to see if an antitrust suit is in order.

**Scenario 5.** A proficient racquetball player, in spite of buying an expensive eye guard, suffers serious injury when a furious cross-court volley hits her in the left eye. An expert will testify that the eye guard failed to protect her as advertised in the company’s extensive advertising campaign. The defendant does not believe that the plaintiff’s expert is qualified and plans to object strenuously to the admission of the expert’s opinion.

These, and a thousand other similar scenarios, are the routine plight of the litigator, and they involve that one common and challenging denominator—finding a credible expert witness. In today’s litigation scene, retaining top-notch experts—those who are professionally well qualified and who, after tenaciously examining the facts of your case, will acquire the specialized knowledge to present it—is more important than ever. Complicated factual issues make it imperative that your experts be effective communicators capable of both educating you and the client before trial, and persuading the judge and jury at trial.

As the world becomes increasingly sophisticated, jurors remain more skeptical than ever of experts who will take whichever position that earns them a healthy fee. Judicial fact finders now have to be strongly convinced of the truth and veracity of your position.

### The Decision to Retain an Expert

The first consideration is whether an expert should even be retained. In some cases it may not be necessary, or even wise,
to hire an expert. For example, in those situations where a layperson could competently provide the same testimony, an expert should not be used. The court would undoubtedly disallow such testimony in any event and therefore leave the jury to their own understanding.

Some aspects of a case may be proven without the need of an expert even if the information is not readily apparent to the jury. For instance, laypeople can in many instances testify to the market value of real property as long as those matters are within their personal knowledge.

And there may be instances where an expert would overly complicate the case, or where the jury would find an expert intimidating or intrusive. Common sense and good judgment about whether to hire an expert should be your guide in each of these instances.

Role of the Expert Witness

In many cases, an expert witness is an absolute necessity in order to legally establish a claim or a defense. Without an expert, the claim or defense will be swiftly dismissed. In other cases, the expert may not be legally required but will serve as an indispensable force of persuasion.

How you as an attorney utilize an expert witness naturally depends to a large extent upon the particular facts of the case before you. That said, the uses of experts in modern-day litigation are myriad.

In Assessing the Case

The undeniable advantages of retaining an effective expert for presentation of a case at trial are well-known, but an expert can also prove helpful in the very early stages of litigation. If you have not yet committed yourself to accept the case—or you are willing to take it on but your client has not yet decided to bring suit—an expert may be extremely useful in assessing the viability of the case.
An expert can, for example, suggest vital areas of inquiry that you should undertake with the client and perhaps other individuals. An expert may also be helpful in locating and reviewing relevant documents that shed further light on the nature of the situation before you.

An expert can also be helpful in evaluating the strength of the opponent’s claims. The ability of an expert to point out inconsistencies in the opposing party’s position, and to make further suggestions for attacking them, is often invaluable. Sometimes, by the very selection of a respected expert that the opposing party recognizes and respects, you may well undermine their case.

**In Discovering Facts**

An expert can dramatically improve the substance of discovery in both propounding and answering interrogatories, requests for admissions, and document requests. Where the opposition has given you a list of potential witnesses, the expert can frequently help select the best individuals for you to depose. The expert may also prove effective in gathering further information about a potential witness’s qualifications, experience, and prior testimony.

If the case involves a large number of documents or a complicated records system, as is often the case, an expert can be indispensable for the purpose of setting up programs where data received from both the client and the adversary can be stored and easily retrieved. It may also be the case that only an expert can tell what should have been produced by the other side but appears to be missing.

The expert can also assist you in responding to requests for documents. No self-respecting lawyer would think of turning over documents without knowing what they contain and how they may affect the case at a later stage. If the expert identifies extremely damaging documents, it may be time to make a settlement offer before the case deteriorates.

**In Drafting Documents**

When you are preparing to draft the necessary motions and other legal documents required in litigation, an expert can be helpful in
shaping legal theories and in identifying the many pitfalls inherent in the field. The expert can also ensure that the appropriate nomenclature is used.

Cornerstone of Expert Testimony
The cornerstone of expert testimony is Federal Rule of Evidence 702, which has been widely emulated in the state courts. It provides that a qualified expert may offer an opinion that is based on sufficient facts or data, and is the product of reliable principles and methods that have been reliably applied to the facts of the case.

In Taking Depositions
The expert can help you prepare for, take, and defend depositions. You should not depose the other side’s expert without having your own expert present. Even when taking the deposition of fact witnesses, the deposition will be more thorough if you are assisted by an expert.

The expert can also help you prepare your own witnesses for deposition. With your expert’s knowledge and healthy skepticism in the preparation of witnesses, vulnerable areas can be probed and questions anticipated that will challenge the witness. Aware of these problems in advance, your witness will be better prepared and more relaxed in the deposition.

In Planning for Trial
An expert can of course be essential in planning for trial. The expert may, for instance, provide guidance as to the clearest and most dramatic way to present evidence as exhibits. Should other experts prove necessary for trial, an expert can alert you to that need and make useful suggestions. And the expert can be of assistance in preparing for cross-examination of your experts and those of the opposing side.

In Trying the Case
The expert’s role in assisting the trier of fact to understand the evidence and determine factual issues is well appreciated. An
impressive expert lends such credibility to your client’s case that it is difficult to overstate it. Cases are often won or lost simply on the strength of expert testimony.

In complicated cases where your party is an underdog and faces a formidable burden, you will inevitably lose if your expert cannot help the jury understand the case. The instructional skills and courtroom performance of an adept and experienced expert can give you the critical edge needed to overcome the formidable odds at trial.

Consulting and Testifying Experts

For purposes of litigation, and particularly discovery matters, experts are typically separated into two broad camps—those expected to testify at trial and those who are not. When an expert plans to testify, the scrutiny allowed by the opposing party is of course substantial, and they may legitimately inquire into the expert’s background, the subject matters on which the expert will testify, and the substance of the opinions expressed. Obtaining discovery from non-testifying, or so-called consulting, experts is much more difficult. A party wishing to obtain discovery of these experts must plead exceptional circumstances showing that it is impractical to obtain facts or opinions by other means, which is a difficult burden at best.

Expert Qualifications

The initial issue is an obvious one—is the potential expert qualified to give testimony in the case at hand? In federal courts, and most state courts, evidentiary rules provide that expert opinion testimony may be given by any witness who has the “scientific, technical, or other specialized knowledge” to assist the trier of fact in “understanding the evidence or determining a fact in issue.” Therefore, the basic threshold questions of an expert’s qualifications become (1) does the witness possess the requisite scientific,
Admissibility of Testimony

technical, or other specialized knowledge; and (2) will that knowledge be helpful to the judge and jury?

The evidentiary rules regarding experts have been increasingly liberalized over the years, and these standards are intended to be broadly inclusive, permitting expert testimony on a wide range of topics. Experts may be drawn from almost any field of endeavor as long as they can be shown to possess this specialized knowledge, which need not necessarily result from formal education but which in appropriate circumstances may be based exclusively on practical experience.

Expert Challenges

An expert can expect to be challenged by the other party on such issues as:

• Qualifications;
• Knowledge of the case;
• Bias or interest in the case;
• Conflicting expert opinions or previous testimony;
• Fees for services rendered.

Admissibility of Testimony

In most jurisdictions, the judge must make a preliminary assessment of the validity, reasoning, and methodology of an expert’s opinion before that information is presented to the fact finder. The judge in essence acts as a gatekeeper, deciding whether the proposed testimony is reliable enough to be presented to the fact finder.

Under this approach, the judge must initially determine whether an expert’s methodology and conclusions are of sufficient substance to qualify as evidence, or whether they should instead be dismissed as “junk science.” If the opinion of an expert witness is challenged by the other party, the judge typically holds a hearing to determine whether the expert should be allowed to proceed.
Under the older (and now largely abandoned) Frye rule, scientific testimony was admissible only if the witness’s test and procedures had gained general acceptance within the relevant scientific or technical community. Under this approach, innovative procedures could not form the basis of expert testimony until they had been adopted, or at least recognized, by a broader scientific audience. This qualification required prominent substantiation, such as publication in a peer-reviewed journal. This is no longer the case under the federal rules.

Effective Expert Testimony

The value of an effective expert can hardly be overstated, as illustrated by this brief exchange on direct examination:

Q. Could you tell us what the tests show us about any evidence of a heart attack in this case?

A. As I have summarized, a heart attack can be diagnosed by two different means—clinical and pathological. So let’s go through them one by one.

Q. Were there symptoms of a heart attack—history of chest pain, left arm pain, numbness in the chin?

A. From my reading of Mrs. Durrett’s deposition, there was no type of specific symptom which would suggest a myocardial infarction. So I think we can cross that out.

Q. Were there EKG findings of a myocardial infarction?

A. There were not. But, in fairness, the patient was already in ventricular fibrillation, so we didn’t really have a rhythm that could have shown ST segment depression or ST segment elevation or T-wave inversions or a Q wave—some of the EKG findings of a heart attack. So it’s really noninformative. So, I’m only going to put one “X” through that. We don’t have evidence of it, but we don’t have all the material that we would have liked to have had to be able to completely say that the EKG did not show an MI.

Q. What about the enzymes?

A. These were not drawn, so we’ll never know, even to this day. So we have no enzymes in the blood to indicate there was a