Fall 2000

Curtailing the Judicial Certification of Expert Witnesses

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Abstract

In his Article, Professor Kirgis argues that the familiar practice of judicial certification of expert witnesses lacks a foundation in law and common-sense. Professor Kirgis complements his argument with a discussion of several practical considerations that arise when a litigator elects to challenge the judicial qualification of an opponent's expert witness.

Introduction

> [Y]ou say to the judge something like, "Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology." ... And, of course, you've done it, so the judge says, "Yes." How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The *judge's* authority begins to be associated with your expert's authority. And since the judge is the ultimate figure in the courtroom, it's a very nice phenomenon to have working for you.[1]

The ritual of "qualifying" an expert through judicial designation before eliciting the expert's testimony has become an accepted feature of most civil trials and of a growing number of criminal trials.[2] Indeed, the practice is so ingrained that not only do many lawyers expect the judge to bless their own expert witnesses with an express "qualification," but many lawyers also see a miscarriage of justice when the other side's

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A version of this Article was published in the February 2000 edition of the New York State Bar Journal. The Article is republished here with permission.

[1] Irving R. Younger, *A Practical Approach to the Use of Expert Testimony*, 31 CLEV. ST. L. REV. 1, 16 (1982).

[2] *See, e.g.*, United States v. Williams, 81 F.3d 1434, 1441 (7th Cir. 1996) (determining that the trial judge did not abuse his discretion when he designated the prosecution witness an "expert witness").

experts testify without such a blessing.[3] Yet the kind of express expert certifications advocated by Judge Younger and appearing so frequently in trial transcripts are not required. They are, in fact, fundamentally at odds with basic principles regarding the role of the judge in the courtroom. This Article argues that judges should refrain from expressly certifying witnesses as experts and that attorneys should object when an adversary requests such a certification.

The Article first describes the nature of expert testimony and explains the foundation an attorney must lay to establish the relevance of expert testimony. The Article then explains the fundamental problem with a judge's express declaration that a witness is an expert. Finally, the Article discusses some of the practical considerations that the lack of judicial certification of expert witnesses implicates.

I. The Nature of Expert Testimony

Most evidence is relevant because it touches directly on the events giving rise to the litigation. For example, testimony in a car accident case about whether the light was red or green tells the factfinder something about the circumstances surrounding the accident that makes it more or less likely that one of the parties was at fault. By the same token, a written contract tells the factfinder something about the actual agreement between the parties that makes it more or less likely that a breach occurred. These items of evidence are admissible only if they are supported by a foundation that establishes their relevance.[4] For testimony, the foundation is typically testimony by the witness that she has personal knowledge of the subject matter of her testimony; in the car accident example above, the foundation would consist of testimony that the witness was present at the scene of the accident and perceived the color of the light.[5] For physical evidence, the foundation is some form of authen-

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[3] *See, e.g.*, United States v. Bartley, 855 F.2d 547, 551-52 (8th Cir. 1988) (appealing the failure of a trial judge to expressly certify the other party's expert witness).

[4] *See* EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 2 (4th ed. 1998) (stating that "the proponent of an item of evidence must ordinarily lay the foundation before formally offering the item into evidence").

[5] *Id.* at 29.

tication or, in legal parlance, evidence that the thing is what it purports to be; for a contract it is likely to consist of testimony by a witness that the contract offered in court is the one the parties signed.[6]

Expert testimony serves a different function and operates under different foundational rules. Expert testimony typically consists of two aspects that are seldom clearly delineated. First, an expert often acts as a source of background information for the jury. One assumes that jurors have a body of common knowledge that they use to make sense of the data put before them at trial. Sometimes, however, an understanding of the physical evidence introduced at trial requires specialized knowledge not shared by the majority of people in society. An expert can serve as an instructor, giving the jurors needed specialized knowledge so that they can evaluate the evidence. At common law, a witness was allowed to assume that role only when the subject of the testimony was "beyond the ken" of an ordinary juror.[7] The Federal Rules of Evidence lower the bar to expert testimony by providing that a witness qualified as an expert may testify to "scientific, technical, or other specialized knowledge" as long as that testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue."[8]

Expert witnesses rarely stop after explaining the relevant background knowledge. The second aspect of expert testimony typically involves the expert drawing a conclusion about the facts in issue based on the evidence in the case. Rule 702 specifically allows this step by providing that the expert may testify "in the form of an opinion or otherwise."[9] The expert's opinion is admissible for the same reasons that lay opinions are generally admissible: first, it will often be impossible or highly inefficient to convey enough information to the jury to allow them to draw the desired inference;[10] second, experience proves that it is impossible to draw clear

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[6] *Id.* at 41.

[7] *See* 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 13, at 53-54 (4th ed. 1992) (stating that traditionally "the subject of [the expert's] inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of laymen").

[8] FED. R. EVID. 702.

[9] *Id.*

[10] *See* GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE § 701.2 (3d ed. 1998) (describing the "collective facts" exception to the rule excluding opinion testimony).

and consistent lines between "fact" and "opinion."[11] At common law, experts were precluded from giving opinions touching on the "ultimate issues" in the case.[12] Rule 704 ensures wide latitude for expert opinions by providing that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue."[13]

Because the relevance of expert testimony is different from that of other types of evidence, the foundation for expert testimony is also different. The foundation for expert testimony consists of two interrelated components. First, the expert must have sufficient expertise in the relevant field to provide the needed background knowledge and related opinions. Rule 702 codifies that requirement by providing that the witness must be "qualified as an expert by knowledge, skill, experience, training, or education."[14] Second, the expert's testimony–including both the background knowledge and the methods used to draw any inferences–must pass the reliability standard imposed by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[15] which is now codified in the amended Rule 702.[16]

Although these requirements are more stringent than the general requirements of competency and authenticity required for other types of evidence, they serve exactly the same basic function: They establish the underlying relevance of the testimony. Just as a witness's testimony is relevant only if the witness has personal knowledge, and a document is relevant only if it is authentic, an expert's testimony is relevant–that is, it is helpful to the jury–only if the witness has the requisite expertise and

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[11] *See* FED. R. EVID. 701(b) advisory committee's note (describing "the practical impossibility of determining by rule what is a 'fact'").

[12] *See* WEISSENBERGER, *supra* note 10, § 704.2 (stating that "[c]ase law once provided that a question to any witness was objectionable if it called for his opinion on the precise issue the jury was sworn to determine" (citations omitted)).

[13] FED. R. EVID. 704(a).

[14] FED. R. EVID. 702.

[15] 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *see also* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[16] Rule 702 was amended as of December 1, 2000. It now provides that the expert may testify only if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702.

her methods are sound. An attorney who elicits an expert witness's credentials and methods is simply laying that foundation.

II. The Problem of Expert "Qualification"

A. Expert Certification Is Not Required

Imagine a trial lawyer eliciting that a witness was at the scene of the accident and saw the color of the light and then saying to the judge, "Your honor, we ask at this time that the witness be designated as having personal knowledge." The request seems absurd because, as every trial lawyer knows, a judge has no occasion to make rulings on the admissibility of evidence unless he is first presented with an objection.[17] Once the foundation is laid, absent an objection, the questioning proceeds or the document is admitted.

Testimony on specialized subject matters–that is, expert testimony–should function under the same regime. To say that a witness is "qualified as an expert" in a particular field is to say that she has the requisite knowledge, skill, training, or education to give relevant testimony on the proffered subject. In other words, the word "qualified" in Rule 702 is an adjective; it is something a person either *is* or *is not*, rather than something that *happens* to a person in the form of a judicial designation. Once the required foundation is laid for an expert to testify, absent an objection, the questioning of the expert should proceed. Until an objection is raised, the court simply has nothing to rule on and hence has no reason to declare the witness qualified.

In general, when judges have had occasion to consider this issue head on, they have concluded that the Federal Rules of Evidence do not require an express expert certification.[18] That is an important step, but it does

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[17] *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 5 (3d ed. 1996) ("If, by careless omission or deliberate inaction, a party makes no objection to admissible evidence, the evidence is admitted and becomes part of the material available to the trier of fact.").

[18] *See, e.g.*, Berry v. City of Detroit, 25 F.3d 1342, 1351 (6th Cir. 1994) (stating that, "[a]lthough the practice is different in some state courts, the Federal Rules of Evidence do *not* call for the proffer of an expert after he has stated his general qualifications" (emphasis added)).

not go far enough. Few courts or commentators have recognized the inherent impropriety of a judicial declaration that a witness is an "expert" in the absence of an objection.[19]

B. Expert Certification Is Improper

Imagine another courtroom colloquy: Instead of asking the judge to designate a witness as having personal knowledge, counsel examines a key witness and then, before sitting down, asks the judge to certify the witness as "trustworthy." Opposing counsel would never allow such a request to pass without objection. While judges have inherent authority to comment on the evidence,[20] that authority does not extend to comments on the credibility of witnesses.[21] As the Supreme Court recognized over sixty-five years ago:

> In commenting upon testimony [the judge] may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling."[22]

Recognizing judges' power over juries, most litigators have a keen sensitivity to the impact of comments from the bench. When it comes to expert testimony, however, the lawyer's instinct for self-preservation

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[19] Judge Charles R. Richey of the United States District Court for the District of Columbia is a notable exception. *See generally* Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537 (1994) (arguing that the term "expert" is so prejudicial it should never be used in a jury trial).

[20] *See* Supreme Court Standard 107.

[21] *See* United States v. Anton, 597 F.2d 371, 372 (3d Cir. 1979) (holding the defendant's right to have his credibility determined by a jury was violated by the judge's statement that the defendant was "devoid of credibility").

[22] Quercia v. United States, 289 U.S. 466, 470, 53 S. Ct. 698, 699, 77 L. Ed. 1321, 1327 (1933) (quoting Starr v. United States, 153 U.S. 614, 626, 14 S. Ct. 919, 923, 38 L. Ed. 841, 846 (1894)).

seems to evaporate. Most litigators fail to recognize the potentially prejudicial impact of a solemn judicial declaration: that a witness hired by the other side, who may be the key to the case, is an "expert" in his field. Astonishingly, some attorneys go so far as to demand that kind of judicial encomium for their adversaries.[23]

Simply put, no trial lawyer should allow the judge to declare that a witness hired by the other party is an "expert" without objection. Although judges are accustomed to making those certifications, when faced with the issue directly they are likely to see the potential problems. In *United States v. Bartley*, for example, the court held that

> there is no requirement that the court specifically make that finding [that a witness is qualified as an expert] in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses' expertise by the Court.[24]

Few other courts have addressed this precise question, and even *Bartley* stops short of a clear condemnation. But the issue is too important to be ignored, and most judges are likely to see the logic and fairness of the *Bartley* court's opinion.

III. Practical Considerations

The absence of legal attacks on the practice of expert certification probably stems from several sources. One reason many lawyers may hesitate to address the qualification issue is because expert certification is entrenched in litigators' and judges' routine practices. Judges who have grown accustomed to certifying experts may look on an objection to the procedure as a direct challenge. This is a real risk. Probably the best approach, rather than raising the issue directly in open court, is to address it at the pre-trial conference. Alternatively, if the request for "qualification" comes up at trial, counsel should ask for a sidebar. Without the risk of embarrassing the judge, counsel can then gently explain, in nonaccusa-

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[23] *See* United States v. Bartley, 855 F.2d 547, 551-52 (8th Cir. 1988) (appealing the failure of a trial judge to expressly certify the other party's expert witness).

[24] 855 F.2d 547, 552 (8th Cir. 1988).

tory terms, that the express certification of an expert is neither required nor allowed, given the proscription on commenting on the credibility of witnesses.

Another concern may be that, absent an express "certification," it will not be clear who is an expert. This can be an important consideration, since experts are subject to separate discovery rules,[25] and since an expert opinion, unlike a lay opinion, may be based at least in part on inadmissible hearsay.[26] Like the issue of the admissibility of the expert's testimony, however, these issues are important only to the party *opposing* the expert. If at some point that party sees a need to get a judicial ruling on the expert's qualifications, counsel may interpose an objection. The mere possibility of these issues arising does not warrant a preemptive judicial declaration that an expert is qualified.

Since the natural breaking point provided by the proffer of the expert will not occur, a party seeking to voir dire an expert witness will have to take some affirmative steps to secure that opportunity. Again, to avoid confusion, this issue should be discussed at the pretrial hearing. If counsel chooses to object to the expert's testimony on the ground that the expert is not qualified, either with or without voir dire, the judge will have to make a ruling. If the judge finds the expert is not qualified, then the judge simply sustains the objection and the expert does not testify. If the judge finds the expert is qualified, the judge must, at a minimum, overrule the objection. Many judges may also be inclined to declare the expert qualified at that point. While an express certification under those circumstances seems less prejudicial than such a declaration made without a prior objection, the better practice is to avoid any appearance of commenting on the credibility of the witness by simply overruling the objection and allowing the witness to testify.

Conclusion

Given the importance of expert testimony in modern litigation, litigators should not be as blasé about the judicial certification of experts as they traditionally have been. When entire cases rise or fall on highly

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[25] *See* FED. R. CIV. P. 26(a)(2) & (b)(4).

[26] *See* FED. R. EVID. 703.

technical, sophisticated testimony, a simple declaration by a judge that a witness is an "expert" can have a profound impact. But few lawyers even recognize the danger, much less take steps to protect themselves and their clients. Established practices can be difficult to dislodge, but courts generally have perceived the problem when faced with it directly. With a little foresight and tact, the savvy litigator can remove at least this one arrow from his opponent's quiver.