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## Tender Is the Night: Should Your Expert Be?

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# Tender is the Night<sup>1</sup>: Should your expert be?

By Cynthia Ford

The 25<sup>th</sup> Advanced Trial Advocacy School took place in Missoula at the end of May. It is an intense week-long program, combining excellent demonstrations of individual parts of a mock trial by faculty members with actual performances of the same components by the students in small group with individualized critique. The students are both actual law students, who earn academic credit, and practicing lawyers, who earn CLE credits. The faculty are mostly volunteers from Montana, selected for both their prowess in the courtroom and their willingness to give a week of their lives to help improve the quality of trial advocacy in Montana.

This year, we were also fortunate to have a member of the faculty at the National College of District Attorneys, who serves full-time as a state court prosecutor in Memphis, Tennessee. This highly experienced trial lawyer was assigned to demonstrate the direct examination of the expert witness. His direct began with the familiar foundation questions: education, experience, publications, and teaching. These questions, obviously, are meant to show that the witness is indeed an “expert” and therefore should be allowed to give an opinion on a subject of specialized knowledge, to help the jury make its final decision, per Rule 702.

“YOUR HONOR, I TENDER THE WITNESS AS AN EXPERT IN (specific field of specialized knowledge)” Heads snapped around the faculty side of the classroom when our esteemed visitor completed his foundation questions with this request, addressed to the presiding judge. In the ensuing discussion, the Tennessean indicated that in his state’s courts, “tendering the witness” is necessary before you can proceed to the opinion questions. Before the judge grants the request to treat the witness as an expert in the specified field, she gives opposing counsel an opportunity to voir dire the witness and then to object to granting expert status to the witness. The judge will finally decide, either accepting or denying the witness as an expert in the specified field under Rule 702.

In my more than 20 years of coaching the University of Montana Trial Team, travelling to courthouses around the country, we saw several other teams following this model. In almost every one of the mock trials where this occurred, either the judge on the bench or the trial lawyers scoring the round informed the student-lawyers that “tender” of the expert was improper. This was rewarding to the UM coaches who had unequivocally

forbidden our students from formally requesting that the judge certify the expert. Still, the practice lives on, as the Advanced Trial demonstration showed...

I decided to do a more lawyerly job of researching my strongly held belief that trial lawyers do not and should not formally ask the judge to certify a witness as an “expert” in his or her field. This research, laid out below, includes Tennessee state (because that’s what triggered the issue) and Montana state and federal evidence law.

## IS TENDER NECESSARY AS A MATTER OF LAW?

### A. TENNESSEE

#### Tennessee Evidence Rule

Tennessee’s rules of evidence, like Montana’s, appear to be based largely on the F.R.E. Tennessee’s version of Rule 702 (adopted in 1990) is:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

The only difference between this rule and M.R.E. 702 is the addition of the word “substantially” in the Tennessee rule. As in Montana, the rule itself contains no specific requirement that the court certify that the witness is “qualified as an expert” before she shares her opinion with the jury.

#### Tennessee Cases

Two Tennessee appellate cases, one civil and one criminal, indicate that “tender” is not required in that state. *Tire Shredders, Inc. v. ERM-North Central, Inc.*, 15 S.W. 3d 849, 863-864 (Tenn. Ct. of Appeals, 1999); *State v. Williams*, 2011 WL 2306246 (Tennessee Court of Criminal Appeals at Jackson). However, in a 2010 case, the Tennessee Court of Criminal Appeals did affirm a conviction despite the defendant’s allegation that the trial judge committed error in declaring to the jury, both during testimony and in final instructions, that two witnesses were experts in their fields. The Court agreed with the prosecution’s position that the federal disapproval of this procedure did not govern the state courts:

*State v. Barlow*, W200801128CCAR3CD, 2010 WL 1687772

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(Tenn. Crim. App. Apr. 26, 2010). Thus, there are both criminal and civil cases in Tennessee which allow experts to give opinions without being “tendered” by counsel and “accepted” by the trial judge as experts per se, and a criminal case which appears to accept the practice without requiring it.

### Tennessee Conclusion

Even in Tennessee, a lawyer need not formally tender and a judge need not formally accept or certify an expert witness.

## B. MONTANA, OUR HOME

### Montana Evidence Rule 702

Montana’s version of Rule 702 has not been changed since its adoption in 1978, and is identical to the original federal version.

Rule 702. Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Like Tennessee’s rule and the federal version, nothing in M.R.E. 702 deals with the process of getting the expert’s testimony into evidence. There simply is no rule-based requirement to “tender” or “proffer” the witness prior to asking her for her opinion.

### Montana Cases

There are many Montana Supreme Court cases dealing with various expert witness issues. None of them overtly discuss the process of “tendering” an expert, either approving or disapproving of that process. Most importantly, there is no Montana case which requires a formal proffer and acceptance of the expert witness before she gives her opinion.

The issue of overt tender and acceptance might have been raised and resolved in a 2005 criminal appeal involving the admissibility of testimony from handwriting experts. The trial judge allowed the expert to testify about his comparisons of the handwriting on various threatening documents, using overhead projections and blow-ups of trial exhibits. The trial judge also allowed the expert to give the ultimate opinion that the defendant was the author of the threatening documents. The Montana Supreme Court affirmed on both claims, and then observed:

Although the District Court did not specifically rule that Blanco qualified as an expert, Cheryl did not object to his testimony for lack of qualification. This Court does not address issues raised for the first time in this Court. *State v. White Bear*, 2005 MT 7, ¶ 10, 325 Mont. 337, ¶ 10, 106 P.3d 516, ¶ 10. We decline to address this argument.

*State v. Clifford*, 2005 MT 219, 328 Mont. 300, 308, 121 P.3d 489, 495.

The Court did not indicate further whether a specific ruling that a witness is qualified as an expert is necessary, but my review of other cases did not find any case directly so holding.

In a 2003 case, the Court began its analysis with a recap of the general requirements for expert testimony:

¶ 11 We begin our analysis of evidentiary rulings pertaining to expert witness testimony with the recognition that the determination of the qualification of an expert witness is a matter largely within the discretion of the trial judge and such a determination will not be disturbed absent an abuse of discretion. *In re Custody of Arneson–Nelson*, 2001 MT 242, 307 Mont. 60, 36 P.3d 874. Additionally, we note that expert opinion testimony is subject to several caveats. Under Rule 702, M.R.Evid., opinion evidence from a qualified expert is admissible if specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. Such expert testimony requires that a proper foundation be established. Expert testimony must also satisfy the relevancy rules set forth in Article IV of the Montana Rules of Evidence. Moreover, full disclosure during discovery under Rule 26, M.R.Civ.P., is designed “to eliminate surprise and to promote effective cross-examination of expert witnesses.” *Hawkins v. Harney*, 2003 MT 58, ¶ 21, 314 Mont. 384, ¶ 21, 66 P.3d 305, ¶ 21 (citation omitted).

*Christofferson v. City of Great Falls*, 2003 MT 189, 316 Mont. 469, 473, 74 P.3d 1021, 1025.

Turning to the expert testimony at the trial below, the Court observed: “The parties presented the necessary foundation to qualify these medical professionals as experts in their field **and the court accepted both Drs. Knapp and Watson as experts.** ... both parties’ expert witnesses presented extensive testimony and both parties were allowed to fully cross-examine the other party’s expert. Additionally, the District Court instructed the jury that they were not bound by either expert’s opinion and that they were to determine the weight to be given to each expert’s testimony based upon the expert’s qualifications and credibility. Under these circumstances, we cannot conclude that the District Court abused its discretion.” (emphasis added) 2003 MT 189, 316 Mont. 469, 473-74, 74 P.3d 1021, 1025. Notably, the Court did not provide any information about the exact process of this “acceptance,” or indicate whether or not the parties in fact formally “tendered” their experts.

In the *Christofferson* case, in addition to the two medical doctors who were the subjects of above passage, there was an offer of testimony from the two EMTs who responded to the plaintiff’s 911 call about the decedent’s chance of survival at the time they arrived at the home. The trial court had not allowed them to give their opinions; on appeal the Supreme Court affirmed:

We conclude that the opinions Neff and Songer gave as to the likelihood of resuscitability had they arrived earlier could not be based on common knowledge, general experience or scene observation, but rather required extensive specialized training and experience. As a result, their testimony fell within the realm of expert testimony requiring foundation, and preclusion of it as lay opinion was not an abuse of discretion.

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*Christofferson v. City of Great Falls*, 2003 MT 189, 316 Mont. 469, 484, 74 P.3d 1021, 1031.

The opponent moved *in limine* to exclude the witnesses' opinions, so the trial judge was not called upon before the jury to certify—or not—the witnesses' expertise. This is far preferable to the "tender" process because it occurs prior to the seating of the jury.

In another case, decided in 2001, the Court used the term "acceptance" of the expert: "[We conclude the District Court did not abuse its discretion in accepting the qualifications of Dr. Schultz to testify as an expert witness." *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 7, 22 P.3d 1111, 1116. However, the procedural background laid out earlier in the case does not indicate that there was either any specific tender or any specific certification of the witness as an expert. Instead, the State offered a pathologist's testimony, and the defendant asked to voir dire, then objected on the basis of foundation. The Court simply ruled on that objection, overruling it:

¶ 19 During its case-in-chief, the State offered the expert testimony of Dr. Dwayne Schultz. In seeking to establish his qualifications as an expert, Dr. Schultz testified that he was board certified in Pathology and that he had conducted over four hundred autopsies, approximately forty of which involved gunshot wounds. In response to voir dire by defense counsel, Dr. Schultz admitted he was not board certified in Forensic Pathology. Clausell's attorney then asserted the following objection: "I would object to this Doctor's testimony regarding Forensic Pathology which would include discussions about homicide cases...." The District Court overruled the objection and Dr. Schultz testified, among other things, as to the cause of Trotter's death, the presence of soot and powder burns in her skull and brain, the trajectory of the bullet through her skull and brain, and the probable orientation of the gun when it was fired in order for the bullet to achieve its trajectory. Clausell did not object further to any of Dr. Schultz's testimony.

*State v. Clausell*, 2001 MT 62, 305 Mont. 1, 5-6, 22 P.3d 1111, 1115. This is an example of a good objection and voir dire during trial: the qualifications of the witness to give an opinion based on specialized knowledge were fully aired, but neither the lawyers nor the judge used the label "expert."

The Supreme Court discussed a similar trial procedure, without any apparent concern, in 1999:

¶ 15 Arrow also called Lawrence Botkin (Mr. Botkin), a mechanical engineer, to give opinion testimony concerning kingpin design, abuse, and misuse, metallurgy, and accident analysis. Appellants were not satisfied with the foundation laid concerning Mr. Botkin's qualifications as an expert witness and **requested permission to voir dire the witness**. The court granted the request. After conducting voir dire, Appellants **objected to Mr. Botkin's testimony on**

**the basis of lack of foundation. The court overruled the objection**, stating that the jury could determine the weight to be afforded Mr. Botkin's testimony. (Emphasis added.)

*Baldauf v. Arrow Tank & Eng'g Co., Inc.*, 1999 MT 81, 294 Mont. 107, 111-12, 979 P.2d 166, 170.

It does not appear that Arrow "tendered" the engineer, or in any other way asked the trial judge to "certify" him as an expert. The trial judge's comment that the opponent's voir dire went to weight, not admissibility, is a common refrain.

In a much earlier rape case, the Court approved the trial judge's ruling that the proffered prosecution expert could give her opinion, and specifically endorsed the judge's method of doing so:

The appellant claims that the District Court erred in leaving the qualification of the expert to the jury for determination. We disagree. After the appellant had objected that the witness was not qualified the court stated, "Well, the court is going to permit her to testify. If the jury doesn't believe she is qualified—well that will be up to the jury to decide." We find that the District Court made the determination that the witness was qualified when it permitted the witness to testify. The District Court stated afterwards that the jury could determine the degree of the witness's qualification as an expert and weigh the testimony accordingly. **This is proper**. The degree of a witness's qualification affects the weight rather than the admissibility of the testimony. *Little v. Grizzly Mfg.* (Mont.1981), 636 P.2d 839, 843, 38 St.Rep. 1994, 2000. We hold that the District Court did not err in allowing this witness to testify. (Emphasis added).

*State v. Berg*, 215 Mont. 431, 433-34, 697 P.2d 1365, 1367 (1985).

### Montana Conclusion

A Montana lawyer, in state court, need not formally tender and a judge need not formally accept or certify an expert witness. The cases appear to support my own observation that Montana lawyers and judges avoid formal tender and acceptance, so that the Montana practice already conforms to the standards I discuss below. The few changes I suggest below to articulate this practice should not be difficult to implement.

## C. FEDERAL COURTS

### FRE 702

FRE 702 has been amended twice since its initial promulgation in 1975. It now reads<sup>2</sup>:

#### 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

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“expert” and “acceptance” by the trial judge in front of the jury:

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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.

Like the state rules discussed above, the language of F.R.E. 702 discusses the substantive foundation requirements but not the process for demonstrating that these have been met before adducing the expert’s opinion. However, the Advisory Committee Note to the 2000 amendment to Rule 702 specifically identifies the “tender and accept” process as problematic, although it was not outlawed per se by the amendment:

The amendment continues the practice of the original Rule in referring to a qualified witness as an “expert.” This was done to provide continuity and to minimize change. **The use of the term “expert” in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an “expert.”** Indeed, there is much to be said for a practice that **prohibits the use of the term “expert” by both the parties and the court at trial.** Such a practice **“ensures that trial courts do not inadvertently put their stamp of authority” on a witness’ opinion**, and protects against the jury’s being “overwhelmed by the so-called ‘experts.’” Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994) (setting forth limiting instructions and a standing order employed to prohibit the use of the term “expert” in jury trials). (Emphasis added)

The ABA’s Updated Civil Trial Standards (discussed later) quote from this ACN as support for Trial Standard 14, which prohibits the tender/accept process before the jury.

## U.S. SUPREME COURT

There is no direct guidance from the Supreme Court on whether experts must, or may, be tendered before giving their opinion testimony. Both of the two U.S. Supreme Court landmark cases (*Daubert* and *Kumho Tire*; see above) on expert testimony were decided on summary judgment and thus were about the admissibility of affidavits from experts; no “tender” at trial occurred, so the cases do not discuss that process.<sup>3</sup>

## THE COURTS OF APPEALS

The Sixth and Eighth Circuits squarely reject the practice of tender and acceptance of experts. The Sixth Circuit recently considered an appeal from a drug-trafficking conviction where the trial did include an overt tender of the prosecution witness as an

Officer Dews then was permitted to testify as an expert that the activity that he observed constituted drug trafficking:

MR. OAKLEY [AUSA]: And, Your Honor, we would **ask that the witness be identified as an expert in the identification and behavior of street-level narcotics trafficking.**

THE COURT: Mr. Cohen?

MR. COHEN: No objection, Your Honor.

THE COURT: **All right. Officer Dews will be accepted as an expert in the area of street-level narcotics transactions and behaviors that accompany that activity.** (Emphasis added)

*United States v. Johnson*, 488 F.3d 690, 694 (6th Cir. 2007). Because the defendant did not object to this expert testimony at trial, his appeal on this ground was decided under the plain error doctrine. The Court of Appeals affirmed the admission of the expert testimony but took the opportunity to register its disapproval of the tender/acceptance process:

We pause here to comment on the procedure used by the trial judge in declaring before the jury that Officer Dews was to be considered an expert. Other courts have articulated good reasons **disapproving of such practices**, with which we agree. See, e.g., *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir.1988) (noting that “[s]uch 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**”); *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1233 (1996) (observing that “[b]y submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge’s endorsement that the witness is to be considered an expert.... In our view, **the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper**”). When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately **enhances the witness’s stature and detracts from the court’s neutrality and detachment.** “Except in ruling on an objection, the **court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.**” *ABA Civil Trial Practice Standard 17* (Feb.1998); see also Jones, Rosen, Wegner & Jones, Rutter Group Practice Guide: Federal Civil Trials & Evidence § 8:1548.1 (The Rutter Group 2006). Instead, the **proponent of the witness should pose qualifying**

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**and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose *voir dire* questions** to the witness's qualifications if necessary and requested. See *Berry v. McDermid Transp., Inc.*, 2005 WL 2147946, at \*4 (S.D.Ind. Aug.1, 2005) (stating that "counsel for both parties should know before trial that the court does not 'certify' or declare witnesses to be 'experts' when 'tendered' as such at trial. Instead, if there is an objection to an offered opinion, the court will consider the objection. The **court's jury instructions will refer to 'opinion witnesses' rather than 'expert witnesses'**"); see also *Jordan v. Bishop*, 2003 WL 1562747, at \*2 (S.D.Ind. Feb.14, 2003). The court should then rule on the objection, "to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." Fed.R.Evid. 103(c). (Emphasis added).

*United States v. Johnson*, 488 F.3d 690, 697-98 (6th Cir. 2007).

(Three state cases have declined to follow this aspect of the *Johnson* case<sup>4</sup> but the large majority of cases which cite *Johnson* on this point do so with approval.) See, also *U.S. v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987), *aff'd in part and remanded in part*, [487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 \(1988\)](#) ("Although 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. In *Kozminski*, this court counseled against putting some general seal of approval on an expert after he has been qualified but before any questions have been posed to him. The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.")

In *U.S. v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988), the appellant alleged error in the prosecution's failure to proffer as, and the trial court's failure to make a specific finding that the witness was, an "expert." He contended that this process violated both F.R.E. 702 and his Confrontation right. The conviction stood:

Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding 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 acknowledgement of the witnesses' expertise by the Court.** This court, therefore, finds no error in the admission of the testimony of Mr. Wagenhofer and the analytical report and exhibits identifying the presence of cocaine in the substance obtained from Bartley. (Emphasis added).

*United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988).

The Fifth Circuit considered an appeal in which the alleged error was the judge's comment to the jury that the witness was not testifying as an expert. It did not directly decide whether the comment was error, but did cite to *Johnson* in its discussion and held that if there was error, it was not grounds for reversal:

The Government objected to Talley providing expert testimony, arguing that Talley's expertise in accounting was not relevant to whether Sepeda's investigation was adequate. The district court sustained the objection and advised the jury as follows:

"Members of the jury, yesterday right before the break, the government had made an objection to Mr. Talley's testimony concerning certain accounting principles. The court sustains the government's objection. Mr. Talley will be testifying, however, he will not be testifying as an expert based upon the four accounting principles that you heard testified about yesterday."...

Ollison argues that the district court's instruction "degraded" Talley's testimony by stating that Talley was not an expert. She observes that the district court did not give a similar instruction regarding Sepeda's opinion testimony.

Because the district court was ruling on the Government's objection, we find that **the error, if any, was harmless.** See *United States v. Johnson*, 488 F.3d 690, 697-98 (6th Cir.2007) ("Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.") (citation omitted). ... The district court's instruction did not "degrade" Talley's testimony because both Talley and Sepeda testified as lay witnesses and gave their respective opinions. (Emphasis added)

*United States v. Ollison*, 555 F.3d 152, 163-64 (5th Cir. 2009).

The *Johnson* reference appears to be favorable, but this is at most a lukewarm adoption of the *Johnson* prohibition against labeling witnesses as "experts" (or not); I hesitate to base a categorization of the Fifth Circuit on this issue on this language.

In the Third Circuit, another district court judge refused an ineffective assistance of counsel claim, where the defense counsel did not object to qualifying the witness before the jury. Again, the Court of Appeals recognized the *Johnson* case:

Napoli then contends that his counsel erred by not objecting when the court stated that Schwartz qualified as an expert in narcotics and code language in front of the jury. Napoli contends that Schwartz should have been qualified as an expert outside of the presence of the jury because the court may have appeared to endorse Schwartz by stating in front of the jury that he was permitted to testify as an expert.

At least one court outside of this circuit has disapproved of counsel performing voir dire of an expert witness in the presence of the jury. See *United States v. Johnson*, 488 F.3d 690, 697 (6th Cir.2007). That said, the **cases which Napoli cites from within this circuit do not prohibit a court from qualifying an expert in the presence of the jury.** See *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir.2003); *Bruno v. Merv Griffin's Resorts Int'l Casino Hotel*, 37 F.Supp.2d 395, 398 (E.D.Pa.1999). Moreover, the government offered to conduct the voir dire outside the presence of the jury, but Napoli's counsel stated that voir dire typically occurred in front of a jury and so should in this case. This accordingly appears to have been a strategic decision of counsel. (Emphasis added.)

*United States v. Napoli*, CRIM.A. 07-75-1, 2012 WL 4459584 (E.D. Pa. Sept. 26, 2012).

The Tenth Circuit also obliquely addressed this issue, in an en banc decision affirming the in limine exclusion of a defense expert in the insider trading prosecution of a Qwest executive:

Though Mr. Nacchio's expectation that Professor Fischel's admissibility would be established after he took the stand may have been reasonable, see, e.g., *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir.2000), Mr. Nacchio had **no entitlement to a particular method of gatekeeping by the district court.** Indeed, Mr. Nacchio's purported entitlement is squarely at odds with the directive in *Kumho Tire* that "[t]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." 526 U.S. at 152, 119 S.Ct. 1167. The district court's failure to proceed as Mr. Nacchio anticipated does not by itself constitute an abuse of discretion.<sup>11</sup> See *id.* ("The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."). (Emphasis added).

*United States v. Nacchio*, 555 F.3d 1234, 1244-46 (10th Cir. 2009).

In *Nacchio*, the judge granted a motion in limine to exclude the expert testimony, so there was neither foundational testimony on the stand nor any formal tender in front of the jury.

I have not been able to find any Ninth Circuit decision specifically commenting on the tender/acceptance method of qualifying expert witnesses. However, there is a published decision from the U.S. District Court for Arizona, located in the circuit, on point. The case was a habeas case, decided in 2009. The defendant alleged, inter alia, that the Arizona state court judge's "conferring of expert witness status" violated his right to

due process and a fair trial.

The claim refers to the prosecutor's practice of submitting certain witnesses as experts in their fields; after laying a foundation for the witness's expertise, the prosecutor stated that he "submitted" the witness as an expert. Defense counsel did not object when this occurred, and the court made no comment beyond telling the prosecutor that he "may proceed."

*McKinney v. Ryan*, CV 03-774-PHX-DGC, 2009 WL 2432738 (D. Ariz. Aug. 10, 2009). This same claim had been raised on direct appeal. The Arizona Supreme Court disapproved of the process but, as in *U.S. v. Ollison*, supra, did not find it to be the error to be reversible:

The witnesses' testimony concerned technical and scientific subjects beyond the common experience of people of ordinary education. Thus, we find no abuse of discretion in the judge's admission of the witnesses' opinion testimony.

**We do not recommend, however, the process of submitting a witness as an expert.** The trial judge does not decide whether the witness is actually an expert but only whether the witness is "qualified as an expert by knowledge, skill, experience, training, or education ... [to] testify ... in the form of an opinion or otherwise." Ariz.R.Evid. 702. By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert. The trial judge, of course, does not endorse the witness's status but only determines whether a sufficient foundation has been laid in terms of qualification for the witness to give opinion or technical testimony. See *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir.1988) ("Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party").

In our view, **the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper.** Suppose, as is frequently the case, there are two experts with conflicting opinions. Is the trial judge to endorse them both or only one? In our view, the answer is neither. The trial judge is only to determine whether one or the other or both are qualified to give opinion or technical evidence. "Such an offer and finding [of expert status] by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court." *Id.* Thus, we disapprove of the procedure

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followed in this case. (Emphasis supplied).

*State v. McKinney*, 185 Ariz. 567, 585-86, 917 P.2d 1214, 1232-33 (1996).

The federal district court in the habeas case agreed, holding “the irregularities with which the expert testimony was introduced did not affect the fundamental fairness of Petitioner’s trial. Petitioner does not contest that the witnesses were experts by virtue of their experience and training and that their testimony was admissible.” *McKinney v. Ryan*, CV 03-774-PHX-DGC, 2009 WL 2432738 (D. Ariz. Aug. 10, 2009).

Another state court in the Ninth Circuit has approved a trial judge’s refusal to state before the jury that a particular witness is an “expert”:

The circuit court denied Plaintiffs’ requests to qualify Dr. Bretan as an expert. The circuit court also denied Plaintiffs’ request to qualify Nurse Carol Best as an expert, stating, “**Inasmuch as this Court does not comment on the evidence and announce whether or not a particular witness is qualified as an expert in a particular field, the Court respectfully denies the request.**” ...it appears that it was the circuit court’s practice to not make findings before the jury as to the qualifications of any expert witnesses. Although the record on appeal does not contain an explanation of that practice, we note that the parties signed a pretrial conference order dated March 14, 2006 which states as follows under “other topics”: “Expert witnesses (no need to qualify).” Also, Defendants did not move the circuit court to qualify any of their witnesses as experts. Moreover, the circuit court ruled in limine that Dr. Bretan was not precluded from giving expert testimony as to cause of death at trial, but that Plaintiffs would need to establish a sufficient foundation for his opinion at that time. Thus, although there is nothing in the record explaining the court’s approach toward qualifying expert witnesses, it does not appear that the court was singling out Plaintiffs in applying its policy or expressing hostility toward them, or their witnesses. Nor can we say from the record before us that the circuit court’s approach to qualifying expert witnesses constituted an abuse of discretion.

In reaching that conclusion, we do not suggest that the circuit court was required to take the approach which it took, but rather that it was not an abuse of discretion for it to do so. While the concerns identified in note 12 *supra* are legitimate, they can also be addressed by other means, such as by giving cautionary instructions to the jury regarding the weight to be given to testimony by expert witnesses. See *United States v. Hawley*, 562 F.Supp.2d 1017, 1036 (N.D.Iowa 2008) (noting, with regard to concerns about a court referring to a witness as an expert, that “such potential prejudice can be avoided

by instructing jurors on the way in which they are to determine what weight to give to a purported ‘expert’s’ opinion”) (citation omitted). Such instructions are consistent with the principle that “[o]nce the basic requisite qualifications are established, the extent of an expert’s knowledge of the subject matter goes to the weight rather than the admissibility of the testimony.” *Larsen*, 64 Haw. at 304, 640 P.2d at 288 (citations omitted); Commentary to *HRE Rule 702* (“The trier of fact may nonetheless consider the qualifications of the witness in determining the weight to be given to the testimony.”) (Citation and footnotes omitted).

*Barbee v. Queen’s Med. Ctr.*, 119 Haw. 136, 154-55, 194 P.3d 1098, 1116-17.

### **Federal Conclusion**

In federal court in some circuits, a lawyer may not formally tender and a judge may not formally accept or certify an expert witness. In other circuits, the practice has not been outlawed but is not required. The Ninth Circuit has not yet definitively ruled on this issue.

## **WHAT IS WRONG WITH TENDERING A WITNESS TO BE FORMALLY ACCEPTED BY THE COURT AS AN EXPERT?**

Many secondary authorities have criticized, the practice of tendering an expert for acceptance or certification by the court at trial, in the presence of the jury. This was one of the subjects of the ABA’s original Civil Trial Practice Standards, adopted in 1998. The ABA website explains the purposes of those standards:

They recommend procedures and otherwise furnish guidance that is not available elsewhere and are designed to foster and ensure a fair trial in both state and federal court.

[http://www.americanbar.org/groups/litigation/policy/civil\\_trial\\_standards.html](http://www.americanbar.org/groups/litigation/policy/civil_trial_standards.html) (accessed June 26, 2013).

Those standards were recently reviewed and revised; the current version, known as the “Updated Civil Trial Standards,” was adopted by the ABA Section in August 2007. The Updated Standards are available in .pdf format at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/litigation/ctps.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/litigation/ctps.authcheckdam.pdf)

The Preface to the Updated Standards states:

These Updated Civil Trial Practice Standards have been developed as guidelines to assist judges and lawyers who try civil cases in state and federal court. The Updated Standards address practical aspects of trial that are not fully addressed by rules of evidence or procedure. They are not intended to be a substitute for existing evidentiary or procedural rules but rather to supplement and operate consistently with those rules. The Updated Standards are predicated on the

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recognition that, in an era of increasingly complicated evidence and litigation, there are methods for enhancing jury comprehension and minimizing jury confusion that merit wider consideration and use. (Emphasis added).

Section 14 of the Updated Civil Trial Standards deals with the process of qualifying expert witnesses:

**PART FOUR: EXPERT AND SCIENTIFIC EVIDENCE**

**14. “Qualifying” Expert Witnesses.** The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.

As with the FRE and the MRE, the drafters of the Updated Standards provided “Comments” to supplement each standard. Although **“The accompanying commentary has not been adopted by the ABA House of Delegates and, as such, should not be construed as representing the policy of the Association”** [original emphasis], they are helpful in understanding the standards. The Comment to Standard 14 states, in part:

It is not uncommon for a proponent of expert testimony to tender an expert witness to the court, following a recitation of the witness’s credentials and before eliciting an opinion, in an effort to secure a ruling that the witness is “qualified” as an expert in a particular field. **The tactical purpose, from the proponent’s perspective, is to obtain a seeming judicial endorsement of the testimony to follow. It is inappropriate for counsel to place the court in that position.**

A judicial ruling that a proffered expert is “qualified” is unnecessary unless an objection is made to the expert’s testimony. If an objection is made to an expert’s qualifications, relevancy of expert testimony, reliability or any other aspect of proffered expert testimony, the court need only sustain or overrule the objection. When the court overrules an objection, there is no need for the court to announce to the jury that it has found that a witness is an expert or that expert testimony will be permitted. **The use of the term “expert” may appear to a jury to be a kind of judicial imprimatur that favors the witness. There is no more reason for the court to explain why an opinion will be permitted or to use the term “expert” than there is for the court to announce that an out-of-court statement is an excited utterance in response to a hearsay objection.** (Emphasis added).

The Comment quotes from both the Advisory Committee Note to the 2000 Amendment to F.R.E. 702 (laid out in the F.R.E. section of this column) and from an article which that Advisory

As United States District Judge Charles R. Richey has observed in a related context, “It may be an inappropriate judicial comment ... for the court to label a witness an ‘expert.’” Hon. 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, 554 (1994). The prejudicial effect of this practice is accentuated in cases in which only one side can afford to, or does, proffer expert testimony.

Professor Stephen Saltzburg, who was a member of both the ABA original and updated Task Forces on Civil Trial Standards, published an article in *Criminal Justice* magazine in 2010, in which he addressed just this issue. Prof. Saltzburg hits the nail on the head so I simply replicate his language here:

Long ago, I wrote in *Criminal Justice* magazine about the problems when judges anoint experts and explained why it is unnecessary and unwise for jurors to be told that the judge has “qualified” a witness as an “expert.” (*Testimony from an Opinion Witness: Avoid Using the Word “Expert” at Trial*, 9 Crim. Just. 35-38 (Summer, 1994).) The American Bar Association’s Civil Trial Standards agree:

14. “Qualifying” Expert Witnesses. The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so....

If judges simply rule on objections to testimony by sustaining or overruling them and permitting lay witnesses to offer permissible opinions under [Fed. R. Evid. 701](#), expert witnesses to offer permissible opinions under [Fed. R. Evid. 702](#), and dual witnesses to offer both lay and expert opinions, **there is no reason for a trial judge to qualify a witness as an expert and no reason for the judge to instruct the jury on the dual roles that a witness plays.** If the jury is not told that a witness is an “expert,” it can judge the totality of the witness’s testimony for what it is worth....

The reality is that the process of tendering a witness and an expert and having the court find the witness to be an expert is problematic in all cases... (Emphasis added). 25-Fall Crim. Just. 32, 34-35.

My particular favorite secondary source on federal trial practice is Wright and Miller. Here is what they say about the procedure to be employed in presenting expert testimony:

Rule 702 does not require that courts employ any specific procedure for receiving evidence concerning expert qualifications. Normally a trial court will hear qualification evidence before permitting the witness to give opinion testimony. That hearing may take

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place either in the presence or absence of the jury, at the discretion of the court. Before the court rules on whether a witness is qualified to testify as an expert, the opposing party should be afforded an opportunity to conduct a voir dire examination of the witness concerning the witness's qualifications.

**In some jurisdictions the practice is to proffer the witness as an expert after eliciting evidence as to his credentials. This proffer precipitates a ruling from the court as to whether the witness is qualified to testify as an expert. This procedure is not mandated by Rule 702. The trial court need not and often should not make a finding before the jury that a witness is qualified to testify as an expert since such a finding might induce the jury to give too much weight to the witness's testimony.** In addition, it is often premature for a court to find a witness qualified to testify as an expert even after that witness's credentials have been fully presented. This is because, until specific questions are posed to the witness, the court cannot know if the witness is qualified as an expert in the area of inquiry.

Even after a judge has permitted a witness to testify as an expert, cross-examination concerning the witness's qualifications should be allowed so that the jury may properly weigh the witness's testimony. (Footnotes omitted; emphasis added)

§ 6265 General Rule—"Qualified as an Expert", 29 Fed. Prac. & Proc. Evid. § 6265 (1st ed.)

All of these authorities agree: as a matter of policy, both lawyers and judges should refrain from using the term "expert" when referring either to a witness or her testimony. Instead, the recitation of the witness' qualifications, and voir dire and cross-examination by the opponent, should suffice to help the jury assign the proper weight to be given to the witness' opinions.

## **ANOTHER ISSUE TO CONSIDER: SHOULD LAWYERS BE ALLOWED TO ASK AN EXPERT WHETHER SHE HAS EVER BEEN QUALIFIED TO TESTIFY IN ANOTHER COURT PROCEEDING?**

This issue is tangential to the main subject of this article, but worth considering as well. I agree with the conclusion of the authors of an article in the *Review of Litigation*, which discusses this question in depth:

A prior witness's knowledge, proficiency, and experience should be assessed when considering whether he or she is qualified to testify as an expert. **Evidence that judges in other cases deemed the witness to be an expert, however, is inadmissible hearsay and opinion evidence.** The presentation of this evidence is simply an effort to support the witness in a way that is often unduly prejudicial....

accordingly, the questionable **questions regarding an expert's prior qualification and/or disqualification simply should be forbidden.** (Emphasis added).

Irving Prager & Kevin S. Marshall, Examination of Prior Expert Qualification and/or Disqualification- (Questionable Questions Under the Rules of Evidence), 24 Rev. Litig. 559, 579 (2005).

## **WHAT SHOULD MONTANANS DO?**

Montana should follow the preferred practice of omitting any "expert" stamp on a particular witness or testimony in a jury trial. Because most Montana lawyers and judges already do so, this recommendation should not cause any great difficulty. However, because lawyers from other jurisdictions do appear here pro hac vice, or move here permanently, Montana should affirmatively and clearly voice its agreement with ABA Updated Civil Trial Standard 14.

The Comment to the ABA Updated Civil Trial Standard 14 ends with some practical advice which instructs both advocates and judges on how to comply:

This Standard suggests that the court should not use the term "expert" and that the proponent of the evidence should not ask the court to do so. The party objecting to evidence also has a role to play in assuring that the court does not appear to be anointing a witness as an "expert." A party objecting that a witness is not qualified to render an opinion or that a subject matter not the proper subject of expert testimony should avoid using the word "expert" in the presence of the jury. Any objection in the presence of the jury should be "to the admissibility of the witness' opinion." If the objecting party objects that testimony is inadmissible "expert" testimony and the court overrules the objection, it may appear that the judge has implicitly found the witness to be an "expert." When an objection is made, if the proponent wishes to argue the matter, it should be outside the hearing of the jury. *See* Fed. R. Evid. 103 (c) (providing that inadmissible evidence should not be heard by the jury).

### **The Montana Supreme Court**

The Montana Supreme Court should clearly adopt Standard 14 of the ABA Updated Civil Trial Standards for all state trials. The best way to do that is to amend the Uniform District Court Rules<sup>5</sup> by adding a new rule entitled "Procedure for Qualifying Experts." Additionally, UDCR 5, "Pre-trial Order and Pre-trial Conference" should be amended to add a similar provision into the required form for the Pre-trial Order. The Comment to the ABA Updated Standard 14 contains helpful suggestions.

Based on those, I suggest that a new UDCR read as follows:

Procedure for Qualifying Experts. In a jury trial, neither the court nor the lawyers should, in the hearing of the jury, use the term "expert" in referring to any witness, testimony, or opinion. The proponent of such evidence should not ask the court to do so,

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for instance by “tendering” the witness as an “expert” or asking the court to “accept” or “certify” the witness as an expert. The party objecting to evidence on the basis that the witness is not qualified to render an opinion or that a subject matter not the proper subject of expert testimony should not use the word “expert” in the presence of the jury. Any objection in the presence of the jury should be “to foundation” or “to the admissibility of the witness’ opinion.” The lawyers and judge may use the term “Rule 702” in argument and ruling before the jury, but not the title of that rule nor any language from it which refers to “experts.”

This rule does not apply to motions, hearings, or rulings outside the hearing of the jury.

UDCR 5(c) should also be amended to add a section to the Pre-Trial<sup>6</sup> Order, so that every litigant is informed of the correct procedure prior to trial and knows she may be subject to sanctions for violation of a court order for non-compliance:

Treatment of Expert Witnesses. No party shall, in the presence of the jury, request that a witness be declared, certified, accepted or otherwise recognized as “an expert.” No party shall, in the presence of the jury, refer to any testimony as “expert.” Such witnesses and testimony may be called “opinion witnesses” and “opinion testimony.”

Alternatively, the Court could indicate in its next case involving expert testimony that henceforth Montana will follow the ABA Updated Trial Standard 14.

### **Montana Pattern Jury Instructions**

The benefits of the practice of not labeling particular witnesses or testimony as “expert” will be lost if the jury instructions themselves do not comply. As Professor Saltzburg et al observed:

The utility of the Standard can be undermined if the court is not careful to excise the term “expert” from the instructions it gives to the jury before it deliberates. Juries can be fully instructed on their role in assessing credibility without any mention of the term. The following instruction is illustrative:

Some witnesses who testify claim to have special knowledge, skill, training, experience or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience or education does not require you to believe the witness, to give such a witness’s testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what

weight to give the testimony of a witness, including any opinions or inferences of the witness.

6 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual 144 ((8th ed. 2002) .

The current (2009) version of the Montana Criminal Jury Instructions do use the term “expert.”

INSTRUCTION NO. [1-113]

[Expert Witness]

A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state an opinion as to a matter in which the witness is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

This could be easily amended by simply removing the word “expert” and substituting in the first sentence “has gained specialized knowledge.” (While we are at it, shouldn’t it be “by education OR experience?” See M.R.E. 702). The second sentence is even easier: just omit “expert” and retain “opinion.”

Similarly, the Montana Civil Pattern Jury Instructions need tweaking to excise the term “expert.” Civil Pattern Instruction 1.12 now reads:

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his/her opinion as an expert as to any matter in which he/she is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his/her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

This instruction could be fixed easily by simply deleting the first bolded phrase, and for the second bolded phrase substituting “the witness” for “the expert.”

Civil Pattern Instruction 3.06 is entitled “Professional Negligence—Expert Testimony—When Not Required.” It instructs:

The testimony of an expert is ordinarily required to establish the appropriate standard of care owed by a doctor to his/her patient. However, the law permits an exception where you, as lay persons, are able to say as a matter of common knowledge and observation that it is plain and obvious that the injury the patient has establish could not have been sustained if due care had been exercised.

I do not think this pattern instruction needs to be amended globally, because it is sets forth the substantive requirement for

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expert testimony, rather than describes a particular witness as an expert. Further, this instruction normally is used in the absence of an expert, rather than where one has testified. However, courts and counsel should consider changing the language if the circumstances of the individual case mean that the instruction might be construed to violate Updated Civil Trial Standard 14.

### Montana District Courts

The Montana District Courts should include in their Local Rules provisions which mirror the suggested UDCR amendments above, at least until such time as the UDCR are amended (and afterwards, if the UDCR truly do govern only civil cases). Additionally, each trial judge should include in all his or her Pre-Trial Orders similar language so that the parties are aware of the trial judge's adherence to this practice in his or her courtroom. The court should forbid the tender of expert witnesses in front of the jury, and should refuse to accept or certify any witness as an "expert." Thus, the judge's role is to assess and rule on any foundation objections raised when the expert with specialized knowledge is asked for his or her opinion.

Lastly, the court should ensure that its jury instructions do not undo the good obtained by the trial process. The quotation from Professor Saltzburg et al, set forth in the earlier discussion about Pattern Jury Instructions, should be implemented immediately, even before the Pattern Instructions are amended. This is the language they suggest:

Some witnesses who testify claim to have special knowledge, skill, training, experience or education that enable them to offer opinions or inferences concerning issues in dispute. The fact that a witness has knowledge, skill, training, experience or education does not require you to believe the witness, to give such a witness's testimony any more weight than that of any other witness, or to give it any weight at all. It is important for you to keep in mind that the witness is not the trier of fact. You are the trier of fact. It is for you to decide whether the testimony of a witness, including any opinions or inferences of the witness, assists you in finding the facts and deciding the issues that are in dispute. And, it is for you to decide what weight to give the testimony of a witness, including any opinions or inferences of the witness.

6 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual 144 ((8th ed. 2002).

### Montana Lawyers

#### A. Motion in Limine to Exclude a Listed Expert

Montana lawyers, in both state and federal court, should attempt to resolve disputes about the admissibility of expert testimony under Rule 702 before trial, through motions in limine, if at all possible. This process does not require the caution necessary when arguing this issue before the jury at trial, and has the even more important benefit of giving the court and parties enough time to carefully consider the question raised.

#### B. Objection at Trial

If, however, the motion in limine procedure is not used, then at trial neither the lawyers nor the judge should use the label "expert" at any point before the jury. The proponent of the testimony should simply ask the witness the opinion question.<sup>7</sup> The proponent should **not** say to the judge "I tender/offer this witness as an expert in (specified field)."

The opponent should simply object: "Objection. Foundation, Rule 702" and add a request: "May I voir dire?" The voir dire is a mini cross-examination, the only purpose of which is to show the court that this witness in fact does not meet the requirements of Rule 702 and thus should not be allowed to give his or her opinion. Here is an example:

Q: It is not really "Dr.," is it, Mr. Jones?

A. I don't know what you mean.

Q. Well, you never attended any medical school in the U.S., did you?

A. No.

Q. And you never attended any medical school outside the U.S., did you?

A. No.

Q. You do not actually have an M.D. degree, do you?

A. Not yet.

Q. And you failed the First Aid training class in Cub Scouts, didn't you?

A. Well, that was a long time ago, but yes.

Q. You haven't passed any First Aid training class since then, have you?

A. No.

Q. You have never been licensed as a physician in any state in the U.S.?

A. No.

Q. You have never been licensed as a physician in any country in the world, have you?

A. No.

Q. You have never worked in any capacity in an Emergency Room anywhere in the U.S.?

A. No.

Q. Nor in the world?

A. No.

Q. You have never once, anywhere, cared for a patient as an emergency room doctor, have you?

A. No.

Q. And you bought your scrubs on EBay?

A. Some, and some from the hospital thrift shop.

Q. Isn't it true that the only thing which you know about emergency medicine is what you have learned from watching the TV show "ER"?

A. No. I also watched "Doogie Howser."

"Your honor, I renew my objection to this witness giving any opinion under Rule 702."

Now the judge simply rules on the objection. In this

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example, it is obvious that the witness does not meet even the relaxed Daubert standard reflected in Rule 702, so the objection would be sustained and the witness prohibited from giving any opinion on the basis that he does not have the specialized knowledge that would be helpful to the jury. The judge only has to say “Sustained” without using the word “expert.”

If the example were less clear, so that although the witness did not graduate from Harvard Medical School, she did obtain an M.D. from the University of Mississippi and has practiced in an ER for a few years, the judge might let her give her opinion. To do so, the judge should only say “Overruled. She may give her opinion” and should not go on to say “I find that she is an expert.”

#### C. Recommended Motion in Limine to Preclude Use of “Expert” Label at Trial

As the authorities discussed above recognize, there is a strong temptation to have the judge state, before the jury, that your witness is an expert. “The tactical purpose, from the proponent’s perspective, is to obtain a seeming judicial endorsement of the testimony to follow.” Comment to A.B.A. Updated Civil Trial Standard 14. If one lawyer does this, her opponent naturally will want to follow suit to make sure that the jury considers the other expert in the same light. Mutual disarmament is the solution, and a procedural motion in limine is the way to do it.

A recent federal district court opinion shows how a good advocate can ensure compliance with the Johnson and ABA Guidelines by using a motion in limine:

Defendant requests that the Court issue a pretrial evidentiary ruling barring the Government from requesting in the presence of the jury that one or more of its witnesses be declared an expert. Defendant also requests that no witness be referred to as an expert or their testimony referenced as an expert opinion. Defendant asserts that such references would improperly invade the province of the jury to evaluate

## ENDNOTES

- 1 This is the title of F. Scott Fitzgerald’s fourth and last novel, originally published in 1934. Fitzgerald took the title from a line in a poem by Keats entitled “Ode to a Nightingale.” See, being an English major has been helpful...
- 2 The extra language in the federal version which is not in the MRE results from an attempt to codify the holdings of the U.S. Supreme Court on the requirements for admission of expert testimony. “Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999).” Advisory Committee Note to 2000 Amendment of F.R.E. 702.
- 3 In Daubert, each side submitted affidavits from experts, opining on the causal relationship between prenatal Bendectin and birth defects. The trial judge excluded the plaintiffs’ affidavits, finding that the methodology used by the plaintiffs’ experts did not meet the “general acceptance” standard of reliability. (The Supreme Court’s decision imposed a new and different standard, and remanded the case).

In Kumho Tire, the Court extended its Daubert analysis to engineering and other technical but non-scientific specialized knowledge. The plaintiffs opposed the defense motion for summary judgment with deposition testimony from an expert in tire failure analysis, who concluded that a manufacturing defect in the tire had caused the blowout which injured the plaintiffs. The trial judge concluded that the plaintiffs’ expert’s methodol-

ogy fell short of the Daubert standard, excluded the affidavit and granted summary judgment for the defense. The Supreme Court held that the trial court had employed the correct standard, and did not abuse its discretion in excluding the affidavit as based on insufficiently reliable methodology.

*United States v. Cobb*, CR-2-07-0236, 2008 WL 2120845 (S.D. Ohio May 19, 2008). Your brief in support of your motion should cite the A.B.A. Updated Civil Trial Standard 14 as well as the cases I have discussed above, particularly *U.S. v. Johnson*.

Because I think that a good motion always includes a proposed order, I suggest that you use the following language from the *Cobb* case as a template:

Therefore, in accordance with the A.B.A. Updated Civil Trial Standard 14 and the Sixth Circuit’s holding in *United States v. Johnson*, Defendant’s Motion is GRANTED. The Court will act in accordance with the instruction as set forth in detail in the A.B.A. Updated Civil Trial Standard 14 and *Johnson*. Further, the Court will instruct the jury in accordance with *Johnson* and the A.B.A. Updated Civil Trial Standard 14.

See, *United States v. Cobb*, CR-2-07-0236, 2008 WL 2120845 (S.D. Ohio May 19, 2008). (I have added the Civil Trial Standard language; the *Cobb* case referred only to *Johnson*.)

## CONCLUSION

I hope your nights are tender, especially these great Montana summer evenings, but not your witness. Montana courts and lawyers can take the high road, comply with A.B.A. Updated Civil Trial Standard 14, and let juries assess the testimony of a Rule 702 witness without being blinded by the gleam of a special designation

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- 4 See, Kihiga v. State, 392 S.W.3d 828 (Tex.App., 2013); In re Commitment of Simmons, 2012 IL App (1st) 112375-U, Ill.App. 1 Dist.; State v. Barlow, 2010 WL 1687772, \*12+, Tenn.Crim.App. (2010).
- 5 I myself am unclear about whether the Uniform District Court Rules apply to all, or only civil, cases in Montana District Courts. There is nothing in the UDCR themselves which addresses this issue, but they are located in the MCA Title 26, which is entitled “Civil Procedure.” My intent is that the expert witness process be the same in both civil and criminal trials.
- 6 While we are at it, why is Pretrial hyphenated as Pre-Trial in this rule?
- 7 Under Article VII of the M.R.E., the proponent can lay out the witness’ qualifications and then ask the opinion question, or simply ask the opinion question right up front and then back it up with the witness’ qualifications and reasoning. “The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.” M.R.E. 705.

The first method is the more traditional, and leaves your opponent room to object on foundation grounds. The middle, and my own personal, choice is to do the qualification part, then ask for the opinion, then ask for the reasons the witness came to that opinion, and then conclude with the opinion again (technically this last question is redundant under Rule 403, but if it’s quick, it usually works).